



Ministry  
of Justice

**RESTRICTED - LEGISLATION**

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Dear Hywel,

**CRIMINAL JUSTICE AND COURTS BILL**

As you may have noticed a number of provisions have been added to the Criminal Justice and Courts Bill since its introduction in February. As such I attach a supplementary memorandum summarising the key Human Rights issues and our analysis of them for the Committee to consider.

I was grateful to receive your report on the Bill on 11 June and will consider the points you have raised carefully. I will provide a response in due course.

With best wishes,

**CHRIS GRAYLING**

**THE CRIMINAL JUSTICE AND COURTS BILL****European Convention on Human Rights****Memorandum prepared by the Ministry of Justice****INTRODUCTION**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to amendments made to the Criminal Justice and Courts Bill prior to its introduction to the House of Lords. The memorandum has been prepared by the Ministry of Justice and supplements the memorandum of 5 February 2014. Lord Faulks has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
2. Only clauses which contain substantive ECHR issues are discussed. Each section briefly sets out what the clause does in order to explore the issues to which that clause gives rise.
3. The Bill is in 5 Parts and contains 11 Schedules:
  - **Part 1 and Schedules 1 to 4** make provision about criminal justice including provision about sentencing and the release and recall of offenders, the electronic monitoring of offenders released on licence, drug testing in prisons and about the giving of cautions. Part 1 also contains provision about certain offences and sentences.
  - **Part 2 and Schedules 5 and 6** make provision about the detention of young offenders, about giving cautions and conditional cautions to youths and about referral orders.

- **Part 3 and Schedules 7 to 10** make provision about courts and tribunals including provisions creating a new procedure for use in criminal proceedings in the magistrates' courts in certain circumstances, provision about the referral of young offenders to the Crown Court for sentence, provision about the recovery of the costs of the criminal courts from offenders, about fundamental dishonesty in personal injury claims, appeals and costs in civil proceedings and about contempt of court and juries.
- **Part 4 and Schedule 11** make provision about the refusal by the High Court and the Upper Tribunal of relief in judicial review proceedings, about funding and costs in relation to such proceedings and about the procedure for certain planning proceedings.
- **Part 5** contains power to make provision consequential and supplementary to the other provisions of the Bill and general provisions including about the commencement of the Bill and its extent.

## CONSIDERATION OF THE BILL

### Part 1 – Criminal Justice

#### Clause 14 - Drugs for which prisoners etc may be tested

4. Clause 14 makes provision for the expansion of the existing Mandatory Drug Testing (“MDT”) programme in prisons. Under the existing MDT programme prisoners can be tested for controlled drugs as defined in the Misuse of Drugs Act 1971 (“the 1971 Act”). The clause will permit the testing of drugs that are not controlled by the 1971 Act (“non-controlled drugs”) such as commonly misused prescription drugs. These non-controlled drugs will be specified in secondary legislation.

Article 8 - right to respect for private and family life

5. The existing MDT programme may interfere with a prisoner’s rights under Article 8 but the Government considers such interference is lawful, necessary and

proportionate (*Peters v The Netherlands*, Application No. 21132/93, 6 April 1994, *X v Austria*, Application No. 8278/78, *Galloway v United Kingdom*, Application No 34199/96, 9 September 1998). Accordingly, the expansion in the range of drugs that can be tested for may also engage Article 8. The MDT is necessary for the prevention of disorder and crime because it:

- provides information on patterns of drugs misuse;
- deters prisoners from misusing drugs;
- identifies those prisoners in need of referral for treatment;
- contributes to a reduction in the supply of drugs; and
- contributes to prisoner safety, violence reduction, order and control.

6. Both controlled drugs and non-controlled drugs cause (or have the potential to cause) disorder and crime in prisons, affect the health of prisoners and affect the rights and freedoms of prisoners (and their families) who wish to stay away from drugs. The basis and conduct of the testing will remain the same (under PSO 3061). The Government considers that any additional interference with Article 8 under this clause is lawful, necessary and proportionate on the same grounds as any interference with Article 8 resulting from the existing MDT programme would be.

7. The testing of non-controlled drugs as a result of the provisions in the Bill will also be subject to existing safeguards under the MDT programme. For example, there is a very clear and detailed procedure for randomly selecting prisoners for drug testing set out in PSO 3601, and which has been found not to constitute a breach of Article 8 (*Tremayne (R v Secretary of State for the Home Department, ex parte Tremayne*, QBD (1996)).

8. The court in *Tremayne* explained in that the prison service document “*deliberately [sought] to balance the interests of the prisoner in not unnecessarily being interfered with on the one hand, against the important need, in the interests of prisoners generally, effectively to address the problem of drug taking within the broad powers conferred on the prison service by section 16A*”.

9. The process of randomly selecting prisoners will apply equally to the testing of non-controlled drugs as it does to controlled drugs and therefore any interference as a

result of the provisions in the Bill will continue to be proportionate. There are also detailed instructions in PSO 3601 regarding carrying out testing on suspicion and it is considered that these are proportionate. It sets out examples of acceptable grounds for testing on reasonable suspicion and requires permission to test to be granted at or above a specified level of management.

10. A further safeguard under the existing MDT programme ensures that prisoners who test positive for drugs that they lawfully have in their possession (such as drugs prescribed to them) are not punished. This safeguard will also apply when testing for non-controlled drugs which will ensure that any interference in a prisoner's rights under Article 8 as a result of the amendments in the Bill will continue to be proportionate.

**Clause 24 – Terms of imprisonment for murder of police or prison officer**

11. The mandatory sentence for murder in the case of an offender aged 21 or over is imprisonment for life, under section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965. When a court imposes a life sentence, section 269 of the Criminal Justice Act 2003 (CJA 2003) requires the sentencing judge either to specify a minimum period to be served before the offender can be considered for release by the Parole Board, or to order that the early release provisions are not to apply and therefore to make a whole life order. In determining the appropriate minimum term, the court makes an assessment of the seriousness of the crime, including specifically aggravating and mitigating factors – but where the court concludes that the case is so serious that a whole life order is merited, it must impose such an order (*McLoughlin and others* [2014] EWCA Crim 188).

12. Section 269(5) CJA 2003 requires the court, when assessing the seriousness of all cases of murder, to have regard to the general principles set out in Schedule 21 to the CJA 2003, in order to determine the appropriate minimum term to be imposed in relation to mandatory life sentences.

13. Paragraph 4 of Schedule 21 deals with the exceptionally serious cases in which the court should normally start by considering a whole life term, and provides a number of examples of cases that should normally fall into this category. Clause 24 puts the murder of a police or prison officer in the course of his or her duty into this

category; previously it was dealt with in paragraph 5 of Schedule 21 as the type of case where the normal starting point would be a minimum term of 30 years.

Article 3 - prohibition on inhuman or degrading treatment

14. This amendment may therefore result in the imposition of an increased number of whole life orders. In *Vinter v UK* (Applications nos. 66069/09, 130/10 and 3896/10) the European Court of Human Rights (ECtHR) found that the imposition of a whole life order without the possibility of an adequate review breached Article 3 at the point of sentence. The imposition of a whole life order was not, of itself, incompatible. However, the ECtHR held there was no clear mechanism for review or release, due to the lack of clarity in domestic law.

15. However in *McLoughlin and others* the Court of Appeal set out the mechanism for considering applications from whole life order prisoners for release in exceptional circumstances, and therefore settled the domestic position. All life prisoners, including those serving whole life terms, may be released by the Secretary of State if exceptional circumstances arise to justify release on compassionate grounds under section 30 of the Crime (Sentences) Act 1997 and the Court of Appeal held that the Secretary of State has a duty to exercise his powers under section 30 compatibly with Article 3 on a case by case basis.

**Clause 45 – Personal injury claims: cases of fundamental dishonesty**

16. This clause will require a court to dismiss in its entirety a claim for damages for personal injury if the court is satisfied that the claimant has been fundamentally dishonest in relation to the claim, or to a related claim. A related claim is a personal injury claim arising out of the same incident or incidents in relation to which the claimant's own claim is made (such as a road traffic accident). Typically, it is expected to apply in cases in which the claimant has deliberately and grossly exaggerated his or her injuries to obtain more compensation, or in a related claim, where the claimant has supported another person's claim by lying about factual matters fundamental to the claim.

17. If satisfied as to the claimant's fundamental dishonesty, the court will be required to dismiss the whole claim, specifically including any element in relation to which the

claimant has genuinely suffered loss. However, the court has a discretion not to dismiss where the claimant would suffer substantial injustice as a result.

18. The Government considers that Article 1 of Protocol 1 (A1P1) to the Convention, and Article 6, are engaged.

A1P1 - protection of property

19. A civil claim for compensation is a right to property to which A1P1 can apply, and more importantly, in this instance the right has crystallised because a court has determined that the claimant is entitled to a certain sum, albeit a much smaller amount than was claimed. The effect of the rule when applied would be to deprive the claimant of property.

20. However, the Government considers that there is a clear public interest policy justification for the deprivation. The rationale is to deter fraudulent behaviour in the making of claims as well as support the process of the court. This level of dishonest behaviour undermines the court process, wastes court time and litigation costs, and has a negative effect on the insurance premium paying public whose premiums increase as a result of fraudulent behaviour by dishonest individuals.

21. The Government also considers that the provision is proportionate to this aim. Clearly, the threshold for the requirement to deprive the claimant of compensation is set very high – fundamental dishonesty (subsection (1)(b)) – clearly requiring both deliberate deceitful behaviour, to an extent that fundamentally affects the claim.

22. Further, the availability of the discretion not to dismiss where that would cause a substantial injustice to the claimant allows the court to deal flexibly with difficult cases.

23. There are a number of other possible responses to this sort of dishonesty available in domestic law. The most significant are committal for contempt, or a criminal prosecution, where these arise out of the same facts and aim to punish for the same (fundamentally dishonest) conduct. If a court is required to deprive the Claimant of

all compensation in these circumstances, there is clearly a risk of the Claimant being “over punished” if, for example, criminal proceedings were also brought and sentencing took place without regard for the earlier sanction.

24. The clause therefore moderates the relationship between the deprivation of compensation by the civil court, and committal or criminal sanction arising out of the same conduct, by requiring a court hearing subsequent committal or criminal proceedings to have regard to the earlier deprivation of compensation when sentencing<sup>1</sup>. The sentencing court will need to consider a proportionate sentence in the light of the earlier deprivation of damages, but the clause does not seek to dictate a particular result – sentence is a matter for the sentencing court only. Should the committal or criminal proceedings take place first in time, the court hearing the personal injury claim will be able to make use of the discretion not to dismiss the civil claim if the overall combination of the criminal sanction (or committal for contempt), taken with dismissal of the claim, would result in substantial injustice to the claimant.

25. Further, the clause also ensures a proportionate relationship between any costs order made against the claimant in the defendant’s favour, and the dismissal of the claim. By subsection (4), the court is required to specifically identify what damages would have been payable to the claimant in relation to the genuine element of the claim had it not been dismissed. Amongst other matters, this enables the court to effectively give the claimant “credit” for the lost damages against any costs order, and ensures that defendants do not receive an undeserved windfall by both receiving the full extent of the costs due and not having to pay damages that their negligence in fact warranted, were it not for the dismissal.

#### Article 6 – right to a fair trial

26. The Clause applies a civil standard of proof (subsection (1)(b)) to the question of whether the Claimant has been fundamentally dishonest. In relation to the

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<sup>1</sup> In *Lomas v Parle* [2004] 1 All ER 1173, the court was considering the approach where the same conduct was dealt with in proceedings for contempt of court (here, for breach of injunction) and in criminal proceedings. This case is part of a line of authority dealing with such a situation, in which it is made clear that the defendant must not be punished twice for the same conduct. In *Lomas*, the court indicated that it is for the second court dealing with that conduct to ensure that the defendant is not twice punished for the same conduct. See §48.

question of whether Article 6 considerations dictate that a criminal standard of proof should be applied, the prior question is whether there is a “quasi criminal” element to this proposal which would lead to a need for enhanced Article 6 protection for a Claimant against whom it was to be applied.

27. On a consideration of the “*Engel*” criteria (*Engel v Netherlands* (1979- 1980) 1 EHRR 647), the Government considers that this proposal falls squarely on the “civil” side of the line. Although there is an intention to deter “fundamentally dishonest” behaviour, and there is a sanction in terms of deprivation of property, the deprivation would occur in the context of civil proceedings in relation to civil compensation. Those proceedings are not instituted by a public authority with statutory powers of enforcement, but by the Claimant, although the burden is on the Defendant to raise the question of dismissal (subsection (1)(b)). No criminal conviction could arise from this process (albeit that the same facts might ultimately found a committal or criminal prosecution, or may have already done so), and crucially there is nothing that could be said to be a criminal *charge* (in the Convention sense of the word).

28. Analogies could be drawn with the approach of the European Court of Human Rights, and domestic courts, to criminal and civil confiscation proceedings under the Proceeds of Crime Act 2002 where the accused’s property is confiscated on the basis of being proceeds of criminal behaviour which he has not, however, been convicted of. In *Serious Organised Crime Agency v Gale* ([2011] UKSC 49) the Supreme Court decided in the light of the Strasbourg decision on criminal confiscation in *Phillips v. UK* ((2011) 11 BHRC 280) and the House of Lords decision in *R v Briggs-Price* ([2009] AC 1026) that, in proceedings where a civil recovery order under Part 5 of POCA 2002 was at issue, Article 6(2) did not apply and the civil standard of proof could be applied to the question of whether property had been obtained by criminal conduct where its holder had not been convicted of a criminal offence in relation to it.

**MINISTRY OF JUSTICE**

**18 June 2014**