Criminal Justice and Courts Bill
House of Lords, Second Reading, Monday 30 June 2014

The Criminal Justice and Courts Bill is the fourth Ministry of Justice-led criminal justice bill introduced by the Coalition Government. Following the Chief Inspector of Prisons Nick Hardwick's recent warning of a "political and policy failure" in prison policy, it is difficult to understand why the Government is introducing measures which will increase the size of the prison population, raise public costs and add significantly to the work of criminal justice agencies at a time when staff, resources and budgets are already overstretched. The Bill has been allocated only five days in committee despite its complexity and the addition of extra clauses during the House of Commons' committee and report stages. Many of the provisions involve significant transfers of powers to the Secretary of State, limiting the discretion of operational managers and reducing scope for effective Parliamentary scrutiny. Plans for a 300-place secure college, housing boys and girls aged 12-17, along with mandatory prison sentences for knife possession, could drive up the numbers of children in custody following a welcome period of decline both in youth imprisonment and youth crime. This briefing focuses on key aspects of the Bill including:

Part 1

- Dangerous offenders and other offenders of particular concern (Clauses 1-5 and Schedule 1)
- Mandatory electronic monitoring (Clause 6)
- Release test for recalled prisoners (Clauses 7 and 8)
- Offence of remaining unlawfully at large (Clauses 10 and 11)
- Drugs for which prisoners etc may be tested (Clause 14)
- Restrictions on the use of simple cautions (Clauses 15 and 16)
- Term of imprisonment for murder of police or prison officer (Clause 24)
- Possessing an offensive weapon or bladed article in public or on school premises: sentencing for second offences for those aged 16 or over (Clause 25)
- Possession pornographic images of rape and assault by penetration (Clause 28)

Part 2

- Detention of young offenders (Clauses 29 and 30)
- Youth cautions and conditional cautions and referral orders (Clause 32-35)

Part 3

- Costs of criminal courts (Clauses 42 and 43)

Part 4 – Judicial review (Clauses 64-72)

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Part 1

Dangerous offenders and other offenders of particular concern (Clauses 1-5 and Schedule 1)

It is unclear why these additional provisions are necessary or whether the Government has taken proper account of the impact of the proposals on under-resourced criminal justice agencies. There is already provision for courts to impose long determinate and indeterminate sentences on people who commit the most serious offences. Clauses 4 and 5 will extend the oversight of the Parole Board over the release of extended determinate and other long determinate sentenced prisoners. The Prison Reform Trust is concerned that these proposals will increase the size of the prison population and add significantly to the work of the Parole Board at a time when resources and budgets are already overstretched.

The Government has estimated in its Impact Assessment[1] that these proposals (Clauses 1-5 and Schedule 1) will result in an increase in the prison population of around 1,000 places, in the long run, with the full impact reached by 2030, with no increase in this spending review period, an increase of fewer than 10 prison places in the next Spending Round period (ending March 2016), and an increase of around 300 prison places by March 2020. In addition it anticipates an increase of around 1,100 Parole Board hearings per year, in the long run, with the full impact reached by 2030. With no increase in Parole Board hearings in this Spending Review period (ending March 2015), there would be an increase of less than 50 hearings per year in the next Spending Round period (ending March 2016), and an increase of around 400 hearings per year by March 2020.

We are concerned that this current assessment underplays the potential impact of these changes on the Parole Board and would **urge Peers to seek clarification from the Government on the calculation of these figures**. It is worth noting that the introduction of the Indeterminate Sentence for Public Protection (IPP) saw a significant underestimate by the Ministry of Justice of the number of people likely to receive the sentence, and the Parole Board is still dealing with the consequences of this. When the legislation introducing the IPP sentence was debated in Parliament the Government estimated that the sentence would increase the prison population by 900 places. At the end of 31 March 2014 there were 5,206 people serving an IPP sentence in prison with 3,575 held beyond their tariff expiry date.[2]

As the Chair and Chief Executive of the Parole Board, Sir David Calvert-Smith and Claire Bassett, highlighted at a meeting of the All Party Parliamentary Penal Affairs Group, the Parole Board continues to face challenges with decreasing budgets, as do many Government departments. However the Board is also faced with increasing pressures on its workload as it tries to work through its backlog of cases, with IPP sentenced prisoners accounting for a significant proportion of these. As of August 2013 the backlog stood at 1,352, with IPP prisoners accounting for 61% of indeterminate review cases.[3]

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[1] http://www.parliament.uk/documents/impact-assessments/IA14-03A.pdf
[2] Table 1.9, Ministry of Justice (2014) Offender Management Statistics (Quarterly) October to December 2013, London: Ministry of Justice
[3] Hansard HC, 2 September 2013, c182W

The implications of the Osborn, Booth & Reilly Supreme Court judgement mean that the Parole Board is required to hold many more oral hearings, and the effects are already starting to be felt. Prior to the judgment the number of indeterminate review cases progressing to oral hearing following the first paper review was usually around 65% (approx. 298 cases per month). In December this rose to 89% (391 cases), and there was also a rise in determinate recall cases resulting in an additional 90 cases being referred for oral hearing.[4]

The Parole Board has acknowledged that if this trend continues it is likely to see delays of at least three months over and above the usual timeframe for cases waiting to secure an oral hearing date.[5] Claire Bassett, the Parole Board's chief executive, told MPs in evidence to the Justice Committee in December 2013 that the Osborne ruling has "huge" implications and will lead to the number of oral hearings increasing from about 4,500 a year to between 12,000 and 14,000.[6]

This increase in workload comes at a time when Parole Board staff numbers have been reduced by nearly one in five. Many of those staff supported 232 Parole Board members who are paid per hearing and include psychiatrists and psychologists. To cope with the sudden surge of oral hearings, many are now taking place by video link from the Parole Board's Grenadier House headquarters in London to prisons around the country. However, according to recent reports, since the introduction of the video link, problems of reliability have dogged the system.[7]

Given the existing backlog of cases and the demands of meeting the requirements of the Osborn judgment, we are concerned that the Government has not taken account of the potential impact of these proposed provisions on the workload of the Parole Board. Peers will want to seek assurances that these provisions are necessary and that the prison service and Parole Board have sufficient resources to meet the demands placed upon them.

Mandatory electronic monitoring (Clause 6)

Clause 6 introduces a GPS electronic monitoring condition for people released from custody on licence. Whilst electronic monitoring can be an effective tool when used appropriately, particularly when coupled with good quality supervision, we are concerned that subsection 3 gives new powers to the Secretary of State to make monitoring mandatory for certain groups of offenders, either by type of offence or type of sentence, limiting operational discretion. Furthermore, these powers can be exercised by order, limiting the role of Parliament in scrutinising who will be subject to mandatory monitoring.

Whilst there appear to be mechanisms to safeguard against inappropriate use, these are currently vague with only illustrative examples used in the explanatory notes.

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[4] http://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment

[5] http://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment

[6] http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/4733

[7] http://www.independent.co.uk/news/uk/crime/exclusive-parole-system-failing-prisoners-and-close-to-be-overwhelmed-lawyers-warn-9085487.html

"It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag."[8]

The clause provides for a Code of Practice to be issued by the Secretary of State relating to the processing of data gathered in the course of monitoring people under electronic monitoring conditions imposed on offenders following their release on licence. In its legislative scrutiny of the bill, the Joint Committee on Human Rights said that *"detailed safeguards in the Code of Practice will be crucial to ensuring that the processing of data so gathered is carried out in such a way that any interference with the right to respect for private life is necessary and proportionate to the legitimate aims pursued.* ***We recommend that the Bill be amended to make the Code subject to some form of parliamentary procedure in order to ensure that Parliament has as opportunity to scrutinise the adequacy of the relevant safeguards."***[9]

This clause transfers a significant amount of power to the Secretary of State, allowing changes to be made without affording sufficient Parliamentary scrutiny. A blanket approach which limits the discretion of operational managers and practitioners could lead to the inappropriate use of electronic monitoring. Peers will want to ensure that sufficient safeguards are in place.

Release test for recalled prisoners (Clauses 7 and 8)

Clause 7 introduces a new provision which would allow for recalled determinate sentence prisoners to serve the remainder of their sentence in custody (a standard recall), rather than for a fixed period of 28 days with automatic release (a fixed term recall) as currently exists, if it appears to the Secretary of State that the person is highly likely to breach a condition on their licence. It introduces a new statutory re-release test for recalled determinate sentence prisoners to be conducted by the Parole Board. They will make a decision for release based on their risk to the public, and whether there is a likelihood of subsequent breach.

The clause as it currently stands places too much emphasis on the likelihood of breach at the expense of ensuring effective supervision. This could have a disproportionate impact on offenders with learning disabilities and mental health needs who often need greater help and support to comply with licence conditions. **Peers will want to ensure sufficient emphasis on effective supervision is built into the new release test.**

Furthermore, as with clauses 4 and 5, we are concerned about the implications this could have to an already overstretched and under-resourced Parole Board through increased workload, as well as on NOMS with additional prison population pressures. A significant proportion of the Parole Board's workload is taken up with recall cases. According to a report in the Times newspaper on Saturday 21 June, the Government plans to transfer responsibility for administering recall cases from the Parole Board to

[8] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/en/14169en.pdf
[9] Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill - Human Rights Joint Committee

magistrates. Apparently this is to cope with the additional workload on the Parole Board as a result of the Osborn judgment. However, it is unclear whether magistrates have sufficient knowledge or resources to meet the demands of the existing recall caseload, let alone the additional workload that will be created as a result of these proposed changes.

The current Impact Assessment suggests that these changes will have a minimal impact but expectations seem unrealistically low. It estimates that this policy will have an impact on an additional 75 offenders per year and require up to 50 extra prison places at a cost of around £1.5m per annum. We note that the recall population grew rapidly between 1993 and 2012, accounting for 13% of the overall increase in the prison population. This reflected a higher recall rate caused by changes to the law making it easier to recall prisoners, and changes introduced in the Criminal Justice Act 2003 which lengthened the licence period for most offenders.[10]

The Offender Rehabilitation Act 2014 will introduce 12 month mandatory statutory supervision for short sentenced prisoners. The impact assessment of this legislation estimated that the changes will lead to around 13,000 offenders being recalled or committed to custody per year, resulting in a prison place increase of around 600 places. A number of these will be recalled during the licence period and will therefore be subject to the new provisions. However, the impact assessment of the Criminal Justice and Courts Bill assumes no impact from the Offender Rehabilitation Act. **Peers will want to seek clarification on how the combined impact of the Offender Rehabilitation Act and Criminal Justice and Courts Bill is anticipated to affect so few people.**

Clause 8 gives the Secretary of State an additional power to change the release test for recalled prisoners serving determinate sentences, subject to the affirmative resolution procedure. This proposed mechanism affords too much power to the Secretary of State. It is important to ensure sufficient Parliamentary scrutiny and oversight of decisions which affect the fundamental rights of citizens such as depriving them of their liberty. **Primary legislation and not statutory instruments remain the most appropriate mechanism for such measures.**

Offence of remaining unlawfully at large (Clauses 10 and 11)

Clauses 10 and 11 introduce a new statutory offence of remaining unlawfully at large following recall to custody and whilst on release on temporary licence. The offence is triable either way and can be tried in either the magistrates' or Crown courts and could be sentenced to a period of imprisonment of less than two years, a fine, or both in the Crown Court; or a period of less than a year, a fine, or both in the magistrates' court.

There is currently an insufficient distinction between those who wilfully abscond to evade detection, and those who fail to report as they are unaware they have been recalled, either because they have no fixed abode or do not understand due to a learning disability or difficulty**. It would be helpful for this distinction in regard to deliberate intent, or lack of it, to be made within legislation to ensure that people are not prosecuted inappropriately.**

[10] Ministry of Justice (2013) Story of the prison population: 1993-2012 England and Wales, London: Ministry of Justice

This new offence could act as a driver to custody, putting further pressure on a beleaguered prison service. People subject to recall proceedings are already expected to spend an additional period in custody. By prosecuting them for an additional offence it is unclear what the Government is hoping to achieve.

Furthermore, it could lead to people being imprisoned for a considerable period due to technical breach of licence conditions, particularly those with learning disabilities who may not fully understand what is expected of them. Between 20 and 30% of offenders are estimated to have a learning disability or difficulty which interferes with their ability to cope with the criminal justice system.[11] However, provision of services for this group is patchy and people are often let down by a failure to recognise and meet their needs. The Government's commitment to the roll out of a national liaison and diversion service in police stations and courts has been delayed from 2014 to 2017.

While we welcome the Government's commitment in the House of Lords debate on the Offender Rehabilitation Bill to produce easy read version of licence conditions, vulnerable people caught up in the justice system often need greater help and support to meet the conditions of licence requirements which they may not fully understand or know how to comply with. For instance, many offenders with learning disabilities have problems with telling the time. This can lead to their missing appointments and being recalled for technical breach of their licence conditions. **Peers will want to ensure that there are adequate safeguards in place so that vulnerable defendants are not set up to fail.**

Drugs for which prisoners etc may be tested (Clause 14)

Clause 14 enables the Secretary of State to specify in prison rules and rules for other places of detention non-controlled drugs which can then be tested for under the existing MDT programme. The provisions of this clause were originally presented to Parliament in the Prisons (Drug Testing) Bill, a private member's Bill which was introduced in June 2013 and which the Government supported.

The use of illicit drugs in prison, including the misuse of prescription drugs, increases the likelihood of prisoners and prisoners' families being victimised, bullied and threatened. The Prisons Inspectorate has previously reported on the diversion of prescription drugs in high security and vulnerable prisoner populations. Recently the problem has spread to mainstream populations and it has become a major concern. These prescription drugs are not routinely detected under current mandatory drug testing procedures which therefore understate the availability of drugs in prison. Diverted medication is now reported in the majority of prisons inspected, resulting in problems such as drug debts, bullying, unknown interactions with other prescribed drugs and the risk of overdose.

This clause seeks to address the misuse of prescription drugs by extending the types of drugs in prison for which prisoners can be subject to mandatory testing. **We would also emphasise the importance of prisons having safe and supervised areas where prisoners can safely take prescription drugs free from the threat of violence and intimidation by other prisoners. We would also emphasise the need to address the**

[11] Loucks, N (2007) No one knows: Offenders with learning disabilities and difficulties: review of prevalence and associated needs, London: Prison Reform Trust

problem of a small number of corrupt prison staff who are involved in the selling of illicit drugs in prisons.

Restrictions on the use of simple cautions (Clauses 15 and 16)

Clause 15 and 16 introduce new restrictions on the police for the use of simple cautions. This includes limiting their use:

- for indictable only offences unless there are exceptional circumstances as well as approval from the Director of Public Prosecutions;
- in triable either way offences where the offence is specified in an order by the Secretary of State; and
- in summary and non-specified triable either way offences where the person has committed a similar offence in the last two years, unless there are exceptional circumstances.

Exceptional circumstances will be determined by a police officer of a rank to be determined by the Secretary of State.

Reducing the wider discretion of the police and a further transfer of powers to the Secretary of State raises serious concerns. As ACPO lead on out-of-court-disposals, Chief Constable Lynne Owens said in response to the recent Out of Court Disposal review:

"It is important that there is room for officer discretion in any system to ensure the punishment is proportionate to the offence. I'm pleased that the Simple Cautions Review showed that where discretion is being used it is being done so properly, and in my view this is important to maintain."[12]

It is unclear therefore why the Government feels that it needs to restrict the discretion of trained professionals in deciding when a caution would be appropriate. Cautions provide an opportunity for early stage diversion and latest Government figures show that reoffending rates for adults given a caution remains low, with only 18% reoffending within 12 months.[13] There is already national guidance on the use of simple cautions and the focus should be on ensuring that this is properly implemented instead of introducing unnecessary and burdensome statutory restrictions on frontline professionals. Limiting discretion could have the unintended consequence of drawing people further into the criminal justice system unnecessarily. The Government should learn from the experience of the youth reprimands and warnings scheme's inbuilt escalator, which led to minor cases being drawn into more a formal court process.

Whilst this legislative change currently focuses on simple cautions, we anticipate future Government amendments to the Bill may include amendments to the use of other Out of Court Disposals (OOCDs), following the recent consultation.[14] We would be concerned at any moves to further limit police discretion in selecting what they believe to be the most appropriate OOCD. There are many misconceptions surrounding OOCDs. They are often portrayed as a soft option and that people are being 'let off' after committing an

[12] Association of Chief Police Officers website, available at http://www.acpo.presscentre.com/Press-Releases/Out-of-court-disposals-review-27a.aspx
[13] HM Government (2013) Consultation on out of court disposals, London: Ministry of Justice
[14] Ibid.

offence, with political rhetoric and media coverage playing a significant part in fuelling this. However, Ministry of Justice data shows that use of OOCDs has already fallen significantly in recent years, with a 42% decrease between 2007 and 2012, with falls across all disposals and notably the use of cautions for indictable offences.[15]

Term of imprisonment for murder of police or prison officer (Clause 24)

Clause 24 provides that the court should normally start by considering a whole life term when sentencing an offender for the murder of a police or prison officer in the course of his or her duty.

The murder of a police or prison officer is already recognised as an especially serious and heinous crime in law. Currently, the starting point for the murder of a police or prison officer is a minimum term of 30 years. This does not preclude a judge from setting a longer minimum tariff if the circumstances of the case require it. However, the decision should be for the judge to make based on the facts of the individual case as presented in a court of law. **We are concerned that this amendment will limit judicial discretion and could lead to the imposition of a whole life tariff even in cases where there are mitigating factors that need to taken into account.**

The murder of a police or prison officer is a grave offence but it is unclear why the murder of a doctor or teacher is any less serious. It is unwise to legislate to single out particular professions and could lead to other groups calling for similar protection in statute. Currently a whole life tariff is the starting point only in the case of the murder of two or more persons, where each murder involves significant aggravating factors including premeditation, abduction, sexual or sadistic conduct, political, religious or ideological motivation or the offender has a previous murder conviction.[16]

At the present time there are only about 50 people serving a whole life tariff in prisons in England and Wales. Scotland does not have a whole life tariff and whole life tariffs are also not available in many other European countries. This amendment would extend the use of whole life tariffs at a time when their use is subject to scrutiny under human rights law. In its legislative scrutiny of the Bill, the Joint Committee on Human Rights welcomed the Bill as an opportunity to address any remaining legal uncertainty around the use of the whole life tariff and provision for review: *"Although the Court of Appeal in the McLoughlin case has brought welcome clarification of the legal position concerning "whole life orders", we believe that, in view of the legal uncertainty that remains about the availability of a review mechanism for such orders, more specific details need to be provided about this mechanism, including the timetable on which such a review can be sought, the grounds on which it can be sought, who should conduct such a review, and the periodic availability of further such reviews after the first review.* ***The current Bill provides an opportunity for Parliament to remove any legal uncertainty by specifying the details of the review mechanism. We have therefore suggested a probing amendment to the Bill in order to give Parliament the opportunity to debate the desirability of amending the statutory framework to put beyond legal***

[15] Ibid.
[16] Criminal Justice Act 2003, Schedule 21

doubt the availability of this mechanism, in accordance with the principle of subsidiarity."[17]

Possessing an offensive weapon or bladed article in public or on school premises: sentencing for second offences for those aged 16 or over (Clause 25)

Clause 25 puts in place a minimum custodial sentence for a second (or further) conviction for possession of a knife or offensive weapon. A previous conviction for threatening with a knife or offensive weapon also counts as a "first strike". The minimum custodial term set out by this clause is 6 months imprisonment for those aged 18 or over when they commit the second offence, and a four month Detention and Training Order for those aged 16 or over but under 18 when they commit the second offence, unless there are particular circumstances which would make it unjust to impose such a sentence. The clause was introduced at report stage in the House of Commons as a result of amendments to the bill tabled by the Conservative MP Nick De Bois.

The new clause will lead to the inappropriate imprisonment of children and young people. While the Government has yet to provide an impact assessment of the clause, we estimate that it could lead to the imprisonment of around 200 children and 2,000 adults per year. Knife crime is a serious problem in some inner-city communities but the term covers a wide-range of offences from those involving threat or injury to the much less serious offence of possession. Research shows that the majority of children and young people who carry knives do so out of fear and for protection; not to threaten or injure others.[18] The number of possession-related offences has fallen by 34 per cent for children and 23 per cent for adults over the past three years.[19] Over the same period levels of youth crime and the numbers of children in custody have also declined. Courts already have sufficient powers to deal appropriately with repeat offenders and the existing framework is working to deter children and adults from committing further knife possession offences.

The new clause is likely to lead to children and young people being exposed to more serious offenders in prison. It is also likely disproportionately to affect black and ethnic minorities who are already over-represented in the child and adult prison population. This is because a significant proportion of knife possession offences are likely to be detected through stop and search and black people are up to seven times more likely to be stopped and searched than white people.[20]

The Home Affairs Select Committee is currently conducting an inquiry into gangs and youth crime.[21] Its remit includes *"the effectiveness of current law enforcement and legislation, including gang injunctions, knife and gun crime legislation*". In its 2009 report on knife crime, the Committee said "*evidence suggests that the prospect of a custodial*

[17] Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill - Human Rights Joint Committee
[18] Stephen Roe and Jane Ashe, Young People and Crime: findings from the 2006 Offending, Crime and Justice Survey, Home Office Statistical Bulletin (Home Office, July 2008), p.14
[19] Table 2, Knife possession sentencing quarterly brief: January to March 2014
[20] Home Secretary Theresa May gave a statement to Parliament on police stop and search powers https://www.gov.uk/government/speeches/stop-and-search-comprehensive-package-of-reform-for-police-stop-and-search-powers
[21] http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/140327-new-inquiry-gangs/

sentence may not deter young people from carrying knives".[22] It would be premature of Parliament to legislate in this area without the opportunity to take into the account the findings and recommendations of the Committee's new inquiry. **We would urge Peers to seek to remove this new clause from the bill.**

Possession of pornographic images of rape and assault by penetration (Clause 28)

Clause 28 adds a new offence to Part 5 of the Criminal Justice and Immigration Act 2008 to cover depictions of rape and other non-consensual sexual penetration following concerns raised by Rape Crisis South London to the Prime Minister last year. The new offence carries a maximum sentence of three years imprisonment.

We would urge Peers to seek assurances from the Government about the availability of treatment programmes for people convicted of sexual offences both in prison and the community. The I-SOTP (Internet Sex Offender Treatment Programme) does not take place in prison at the moment, despite the increased number of people given custodial sentences for internet based offending. The course is only available in the community and many probation areas run this course as part of community sentences. Provision of accredited sex offender treatment programmes is also very limited and currently under review. These programmes can reduce the risk of further offending and increase understanding of the impact of the offence on the victim.

As of July 2012 Sex Offender Treatment Programme (SOTP) courses were available in 21 prisons although people convicted of sex offences can be held in most prison establishments. This means that someone convicted of a sex offence has a one in six chance of being held in a prison where they can complete a programme. A recent National Audit Office report found shortcomings in the availability of SOTP courses. At HMP Whatton, "a centre of excellence for work with sex offenders", recorded waiting times stood at 14 months. The closure of HMP Shepton Mallet also led to a drop of 34 places, or 3 per cent, in the number of SOTP places across the system. Peers may also wish to note that NOMS has recently reduced its target for the number of completed SOTPs from 1,129 in 2010-11, to 886 in 2013-14.[23]

Not everyone will be eligible for the SOTP and low risk prisoners may be assessed as not needing to do a programme. There are currently no published figures of how many people have been assessed as suitable and are waiting for a place on a course. However, Prison Reform Trust's advice and information service is often contacted by people waiting to be assessed for a course or for a place on a course. It is not uncommon to hear of waiting lists of 18 months for places on SOTP courses. This has been the subject of a number of legal challenges, where prisoners have taken successful cases about the failure of the Prison Service to provide courses and the impact this has had on their indefinite detention.

[22] Home Affairs Committee (2009) Seventh Report: Knife Crime.
[23] National Audit Office (2013) Managing the prison estate, London: The Stationery Office

Part 2

Detention of young offenders (Clauses 29, 30 and Schedule 6)

These clauses build on plans in the recent Government consultation, Transforming Youth Custody, to introduce new secure colleges for boys and girls aged 12-17. The Prison Reform Trust, together with other members of the Standing Committee for Youth Justice, has serious concerns regarding the Government's proposals for secure colleges. These are outlined below:

Cost
Secure colleges are an expensive experiment at a time when youth justice budgets are being stretched. The "pathfinder" secure college will cost £85million. At the same time the MoJ budget has been cut and youth offending teams and other services are being squeezed. No new money has been made available for the "pathfinder" so further cuts will be made to existing services to pay for it. With the number of children in custody at a record low, the money would be better spent on improving provision in existing establishments instead of diverting limited resources to a new and unneeded institution.

Lack of evidence
Secure colleges have little evidence base and no small-scale pilots have been tested. There is a lack of detail in the Bill about exactly what secure colleges will look like – for instance there is no detail on the education to be provided. While education is vital, provision for children must take account of mental health needs, learning disabilities and difficulties, addictions and childhood abuse or neglect. This requires cooperation across Government and not just another criminal justice-led response to tackling entrenched social problems. The Government has already commissioned a contractor to build the pathfinder secure college but has not yet commissioned a provider of the service. There is scant detail in the Bill on how they will be run, who will run them, and how they will ensure standards of teaching, welfare and safeguarding of vulnerable children in their care. Parliament is not being provided with adequate detail and is instead being asked to trust that all of these issues will be dealt with in rules and guidance, rather than spelt out in statute. **The Government has promised to publish the Secure College Rules to assist scrutiny of the Bill. Peers will want to ensure that the Government meets this commitment without delay.**

Size
The proposed size of secure colleges (300 plus) is too large given the needs of, and challenges presented by, children and young people in serious trouble with the law. It also mitigates against the guiding principle of closeness to home and the development of good family contact and links with local authorities for children in care. Small, local, intensively staffed units are safer and more effective than putting hundreds of teenagers together in over-large institutions. Of the 16 deaths of children in custody since 2000, all occurred in young offender institutions (YOIs) and secure training centres (STCs) – the largest types of institution in the secure estate for children. None occurred in secure children's homes (SCHs). In its recent report on the Bill, the Joint Committee on Human Rights said: *"We emphasise the importance of existing international human rights standards to [secure college] provisions: for example, that the State should set up small open facilities where children can be tended to on an individual basis and so avoid the additional negative effects of deprivation of liberty; and that institutions should be*

decentralised to allow for children to continue having access to their families and their communities."[24]

Girls and younger children

Plans for secure colleges to hold such a diverse age group, holding children as young as 12 with 17 year olds, as well as mixing boys and girls together in one large establishment, present serious safeguarding risks. There are a very small number of girls and younger children in custody: in 2012/13, 95% of children in custody were male, 96% were 15-17 years old. This means each secure college will hold a very small number of young children and girls with a large number of older boys. The Government does not seem to have assessed the impact of secure colleges on girls and younger children. The Joint Committee on Human Rights said: "*We note that the Government does not appear to have carried out any equality impact assessments of the proposed secure colleges policy, and we recommend that such assessments should be carried out and made available to Parliament at the earliest opportunity, assessing in particular the impact on girls and younger children of detaining them in large mixed institutions holding up to 320 young people including older children up to the age of 18."*[25]

One of the Government's main arguments against removing young children and girls from secure colleges is that a mix of age ranges and genders are already held together in STCs and SCHs. However, STCs and SCHs are much smaller units than the proposed 300-place secure college, where it is easier to create a sympathetic environment in which children can mix safely and securely. Small local units can provide intensive support, close to a child's home, with well-trained and highly qualified staff and high staff to child ratios. The Government proposes to hold young children in secure colleges in separate units. However, a variable population makes it difficult for staff to meet the specific needs of certain groups. The Youth Justice Board (YJB) has moved away from the use of split sites and young people held on split site young offender institutions (YOIs) consistently reported poorer experiences than in dedicated YOIs.

Restraint and use of force

Schedule 6 sets out the powers available to the Secretary of State in contracting out provision and running of secure colleges. Section 10 authorises staff to use 'reasonable force' to ensure good order and discipline within the establishment. The courts have made clear that restraining a child for 'good order and discipline' is illegal and inquests into the deaths of children have shown that such methods have, in some cases, contributed to their deaths. Primary legislation needs to be clear on where the use of force is permissible; it is too important to be left to Secure College Rules. The Joint Committee on Human Rights has found that: *"it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or secondary legislation, to authorise the use of force on children and young people for the purposes of good order and discipline… we recommend that the relevant provision in Schedule 4 of the Bill should be deleted, and the Bill should be amended to make explicit that secure college rules can only authorise the use of reasonable force on children as a last resort; only for the purposes of preventing harm to the child or others; and that only the minimum force necessary should be used*."[26]

[24] Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill - Human Rights Joint Committee
[25] Ibid.
[26] Ibid.

Youth cautions and conditional cautions: involvement of appropriate adults (Clause 32)

Clause 32 provides greater protection for 17 year olds offered a youth caution or youth conditional caution. It raises the current age limit from 16 where an appropriate adult is required to be present before a caution is given. **We would urge Peers to support this clause.**

Referral orders: breach and further offending (Clauses 33-35)

Clauses 33-35 remove the automatic revocation of youth referral orders follow a breach of conditions or further offending. They allow for courts to consider whether it would be appropriate to continue with the original referral order and enable the restorative justice process to be completed. **We would urge Peers to support these clauses.**

Part 3

Costs of criminal courts (Clauses 42 & 43)

Clause 42 requires courts to impose a charge on all adult offenders who have been convicted of a criminal offence. The level of the charge will be set by the Lord Chancellor. In setting the charge the Lord Chancellor expects to have regard to factors likely to affect the cost of proceedings, such as whether the offender pleaded guilty, whether their case was dealt with in the magistrates' or Crown Court, and the offence type. It will be collected after other financial impositions – compensation, victim surcharge, prosecution costs and fines – have been paid off, at a rate the offender can afford. Offenders will be able to apply to pay by instalments and to vary the rate of payment if they are not able to afford it. Clause 43 requires the Lord Chancellor to carry out a review of the operation of the criminal courts charge after the end of an initial period.

Despite the safeguards built into the provision, we are concerned that many offenders will not be in a position to afford court costs in addition to paying the costs of compensation, victim surcharge, prosecution costs and fines. The provision could lead to injustice as defendants could end up entering a guilty plea rather than face the possible financial penalties of proceeding to trial.

Many offenders are on low incomes, have high levels of debt and rely on benefits for support. The Legal Services Research Centre (LSRC) has highlighted some of the correlations between people who offend and wider social factors. They found that people who had been recently arrested were significantly more likely to report civil law problems concerning, for example, employment (10% v 5%), rented housing (11% v 3%), homelessness (13% v 1%), and money/debt (21% v 6%). They were also more likely to have themselves been victims of crime (38% v 20%).[27]

The Social Exclusion Unit's 2002 report, Reducing Re-offending by Ex-Prisoners, recognised the importance of finance, debt and benefits as one of the nine social factors involved in promoting successful resettlement. Research has shown that 68% of

[27] Pleasance, P. (2009) Criminal Offending, Social and Financial Exclusion and Civil Legal Aid, London: Legal Services Research Centre

prisoners were unemployed in the four weeks prior to custody while just 7.7% of the economically active population are unemployed.[28] 13% of prisoners have never had a job compared to 3.9% of the general population.[29] 15% of prisoners were homeless before custody while just 4% of the general population have been homeless or in temporary accommodation.[30] Research by the Prison Reform Trust and UNLOCK found that people in prison were ten times more likely to have borrowed from a loan shark than the average UK household. A third of people in prison did not have a bank account and that more than half had been rejected for a bank loan.[31]

Peers will want to ensure that the new provision does not increase debt and hardship or distort criminal justice practice. The Joint Committee on Human Rights recommended that "*the Government monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial of the criminal charge against them, and make available to Parliament the results of that monitoring. In the meantime we ask that there be made available to Parliament any other evidence that already exists about the impact of other, existing, charges and fees on criminal defendants' decisions about plea, mode of trial and appeals."*[32]

Part 4 – Judicial review

Concerns about the Government's proposals to limit the use of Judicial Review have been raised by respected Peers, the legal profession, NGOs and MPs. Lord Pannick, an experienced Queen's counsel who has taken judicial review cases on many occasions and defended Governments in such cases, wrote in The Times to highlight his concerns: *"Over the past 40 years, judicial review has helped to prevent abuse of power by Governments of all complexions. It is ironic that judicial review now needs protection from a politician whose reforms would neuter its force by the use of political slogans that have no factual basis and are ignorant of legal and constitutional principle.*"

The Joint Committee on Human Rights has recommended deletion of the key clauses in the Bill. So concerned is the Committee, it concluded that *"the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice … We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice, and of the restructuring of departmental responsibilities between the Home Office and the Ministry of Justice that followed the creation of the new merged office."*

We would urge Peers to remove clauses 64-72 from the Bill

[28] Prison Reform Trust (2013) Bromley Briefings Prison Factfile (Autumn 2013), London: Prison Reform Trust
[29] Ibid.
[30] Ibid.
[31] Bath, C & Edgar, K (2010) Time is Money: financial responsibility after prison, London: Prison Reform Trust
[32] Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill - Human Rights Joint Committee