

LIBERTY80

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Second Reading Briefing on
Parts 1, 2 and 3 of the Criminal Justice
and Courts Bill in the House of Lords**

June 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

Contact

Isabella Sankey
Director of Policy
Direct Line 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Rachel Robinson
Policy Officer
Direct Line: 020 7378 3659
Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie
Policy Officer
Direct Line 020 7378 3654
Email: sarao@liberty-human-rights.org.uk

Introduction

1. The Criminal Justice and Courts Bill comes in five parts. Part 1 is entitled “criminal justice” and makes provision for sentencing, largely in relation to offences connected with terrorism. It also includes proposals to give the Justice Secretary power to mandate electronic monitoring of whole categories of offenders released on licence for the purpose of monitoring their movements. Part 2 of the Bill sets out proposals in relation to young offenders, which include the creation of so-called ‘Secure Colleges’ as an additional custody option for young offenders. Part 3 contains wide-ranging changes to procedures in courts and tribunals. It includes worrying new powers for a default trial by a single magistrate on the papers unless the defendant serves a written notice specifying he or she wants to plead not guilty or wants a trial in open court. Part 3 would also introduce a new mandatory charge to be paid by convicted adult offenders. Liberty has produced a separate briefing on Part 4 which implements radical changes to the availability and operation of judicial review and Part 5 makes consequential provision.

2. In this briefing we focus on the proposals of most concern contained in Parts 1, 2 and 3 of the Bill: the sweeping extension of the “tagging” regime (clause 6); the establishment of ‘Secure Colleges’ to replace current child detention facilities and the power for staff to use force to enforce good order and discipline (clauses 29 and 30, and Schedule 6); trial by a single magistrate on the papers (clauses 36-40); and the mandatory criminal costs order (clause 42).

3. Taken individually, each of these proposals demonstrates muddled and short-sighted thinking. The new regime for mandatory blanket tagging of those on licence for the purpose of surveillance, as opposed to compliance, will cost hundreds of millions of pounds to administer, but is not demonstrably linked to the Government’s purported aims of improving reintegration and lowering recidivism. Conversely, the creation of ‘Secure Colleges’, trial by a single magistrate on the papers and the mandatory criminal costs seem driven by cost-cutting objectives and together threaten child safety and rehabilitation, the right to trial by jury, open justice and the presumption of innocence. Taken together, these proposals reveal a desire on the part of the Government not to adequately fund a fair and functioning criminal justice system and instead divert funds away to the ever burgeoning private surveillance and security sector.

4. Liberty strongly urges parliamentarians to probe the Government on its justifications for the inclusion of these clauses and what evidence there is – if any – to demonstrate either the need for these provisions or the likelihood of achieving the claimed results.

Part 1 – Criminal Justice

Clause 6: Electronic monitoring following release on licence

5. Clause 6 of the Bill is a badly rushed measure that may cost millions of pounds to implement, but which is currently completely lacking in supporting evidence. At both the Second Reading debate in the House of Commons and at Committee stage, the Justice Minister has been unable to provide basic information as to projected costs or even benefits of the scheme.

6. Clause 6 amends provisions in Part 3 of the *Criminal Justice and Court Services Act 2000* which authorise electronic monitoring or “tagging” of those released on licence. It amends the current law in three significant ways. First, it gives the Justice Secretary the power to mandate, by order, the imposition of tags on whole categories of offenders. This will override the present discretionary power that allows judges to impose tagging as a condition of licence on a case-by-case basis. Second, clause 6 further permits (for the first time) tagging of individuals in order to “monitor whereabouts” as opposed to “monitoring compliance with another condition of release” such as a curfew. Finally, it imposes a requirement that where an individual is tagged, a person is made responsible for monitoring an individual subject to tagging and therefore for collecting, storing and processing data on the subject’s movements. This reform is presumably required by the shift from compliance monitoring to surveillance.

7. It is unclear why the Government is seeking to amend the law to replace the discretionary tagging powers already on the statute book with mandatory powers that could see thousands of tags imposed regardless of necessity and the individual circumstances of an offender. Even the Justice Minister himself has acknowledged that the “*vast majority of people who are released on temporary licence commit no crimes and simply want to be reintegrated into society.*”¹ It is also unclear why the Government believes the money should be spent monitoring the general

¹ House of Commons, Second reading debate 24 Feb 2014: Hansard Column 49.

whereabouts of offenders in addition to monitoring compliance with licence conditions.

8. This reform will change the nature of a tag from an enforcement device which monitors adherence to a court sentence to a mechanism of State surveillance for unprescribed purposes. Further, it is difficult to see how blanket monitoring of whole categories of licensees will help with Government's stated aims of improving reintegration and lowering recidivism. Quite the reverse: for those released on long licences extended tagging requirements will likely interfere with re-settlement and rehabilitation.

9. Liberty has further concerns about private security companies being made responsible for State surveillance and the safety and use of the wealth of data that will be generated by the new monitoring regime. This is all despite the appalling track record of private security in this area. On 19 November 2013 private security firm, G4S, admitted overcharging the Ministry of Justice for its tagging services following the Justice Secretary's referral of the company to the Serious Fraud Office. G4S offered the Department a 24 million pound credit note, which it rejected as auditors continued to establish the extent of the overcharging. Similar problems arose in connection with Serco, which charged the Government for the tagging of people who were back in prison, overseas, or even dead, and which agreed to repay £68.5m to the Government for overcharging to tag criminals. The Bill is silent on the identity of "persons" to be made responsible for monitoring and states merely that the Justice Secretary must implement a non-binding Code of Practice in relation to the processing of data gathered via tagging.

10. Against this background we are mystified as to why the Government wants to finance the expansion of a failing and bloated private sector security industry by creating new surveillance powers. Tagging is costly and currently discharged by companies that have been unable to demonstrate basic standards of integrity, record keeping and efficiency. The Government has not produced any evidence as to why it believes the tagging industry should be extended to encompass general surveillance activities, nor provided information as to the further significant costs that will be incurred. The accompanying impact statement sets out the many and varied costs associated with the new regime, including equipment and hardware costs for multi-purpose ankle tags, monitoring, network provision, equipment failure, offender

managers having to deal with breaches, police enforcement, additional prison places resulting from improved detection rates and breaches of licence conditions.

Part 2 – Young Offenders

Clauses 29 and 30, and Schedule 6: Secure Colleges

11. Part 2 of the Bill includes a legislative framework for the creation of Secure Colleges. The Government has made clear that it intends that Secure Colleges will come to completely replace Young Offender Institutions (YOIs) and Secure Training Centres (STCs) in addition to taking some children currently held in Secure Children's Homes (SCHs). Secure Colleges will therefore hold the vast majority of 12-17 year olds in the secure estate. The stated rationale behind the reform is twofold: to reduce the cost of detaining young people and to provide a more holistic and educational environment for young offenders than at present. Secure Colleges are intended to be vastly bigger than YOIs and STCs. The first 'pathfinder' 320-place Secure College is due to be built in the East Midlands in 2015 and to open in 2017 and (based on current detention figures) will hold over a quarter of the child secure estate.

12. The Government's stated ambition for Secure Colleges is a laudable one. It recognises the complex matrix of issues that lead young people to commit offences and commits to prioritising the diverse needs of children in detention. However, the scheme set out in the Bill and accompanying policy documents fails to reflect the stated vision and dangerously sets Secure Colleges up to fail. In particular: the construction of much larger detention facilities to detain mixed ages and sexes; permitting secure college rules to authorise use of force in unnecessary circumstances including to enforce good order and discipline; the option for child detention facilities to continue to be run by private security firms; and vastly reduced spending per head than that currently spent on child detainees in STCs and SCHs.

13. Further, the Government's proposals amount to little more than a legislative framework, lacking vital detail on actual implementation. For example, the Government has not produced any quantifiable evidence in support of its claim that Secure Colleges will reduce reoffending rates, and there is little indication in the Bill how such a reduction will be achieved in practice. The means by which the anticipated improvements in education and training will be realised is similarly vague, as are the standards and qualifications that will be required of Secure College staff,

who will be required to deliver these enhanced outcomes while working with challenging children of differing ages and genders with complex social and emotional needs beyond education. The difficulty in delivering on the Government's aspirations is only enhanced by evidence which shows the average custodial sentence for a young person is less than 80 days, and the lack of detail to support the Government's proposals is worrying.

14. The number of children in custody has fallen considerably in recent years. It has dropped by almost half under the Coalition, from 2,136 children in May 2010 to 1,168 in December 2013. Against this backdrop, the Secure College proposal is even more baffling: rather than experimenting with larger prisons for children, the Government should focus on bringing youth custodial rates down further by, as the Howard League argues –

“addressing in particular the high number of children held on remand, the majority of whom do not go on to receive a custodial sentence and the excessive number of children in prison for non-compliance. For the small fraction of the existing children’s prison population who truly require custody, the network of small, localised Secure Children’s Homes represents the best model for success. These homes put the welfare of the child first and provide an education that offers a wide curriculum...Deploying the money intended for a Secure College on Secure Children’s Homes and crime prevention would produce significantly more effective outcomes for the taxpayer and children.”²

Mixing boys and girls and younger and older children

15. Experts agree that younger children (such as those under 15 years) should not be detained with older children and that girls (who are often the most vulnerable in the child secure estate) should be completely separated from boys. In evidence to the Bill Committee, Sue Berelowitz, the deputy Children’s Commissioner for England, expressed grave concerns about the possibility of girls being housed in Secure Colleges. Describing the vulnerability, past abuse and self-harm of girl children in custody she described them as *“among some of the most troubled youngsters I meet in prison”* and said *“I would be very concerned about girls being put in a large environment with a lot of boys because of issues of sexual violence, sexual abuse,*

² The Howard League for Penal Reform, Criminal Justice and Courts Bill Second Reading Briefing, February 2014.

sexual exploitation and misogyny. You get hyper masculine environments in these places...the power imbalance is huge."³

16. The deputy Children's Commissioner was firm that special measures to keep boys and girls apart would not be sufficient to ensure that girls were appropriately looked after in Secure Colleges and explained that SCHs were the only appropriate detention facilities for girls because *"the size of SCHs means that there are high levels of watchfulness and vigilance, because staff are always around, so it is less likely that girls will come under the power of boys...they are exceptionally vulnerable"*.⁴ All expert evidence on this during Commons Committee was similarly strident leading Andy Slaughter MP to comment *"I was struck by the evidence we heard in relation to boys and girls sharing joint facilities...the evidence was that even with minimal contact and unintended contact, there could still be a degree of abuse and intimidation going on"*.

17. However the Government has refused to provide assurances, let alone a statutory prohibition, on girl-child detention in Secure Colleges. Government has been unforthcoming on the situation as regards younger children. This is despite the small numbers of younger and female children in the secure estate. In 2012-13, 96% of children in custody were 15-17 years old. In 2012-2013, 96% of under 18s in custody were male. The latest figures demonstrate that only 59 girls were in custody in December 2013.

18. The Government says *"We anticipate retaining some specialist custodial provision for the very youngest and most vulnerable people remanded or sentenced to custody by the courts, but our vision is for Secure Colleges to cater for the vast majority of young people in custody."*⁵ And later *"Older and more resilient young people will be accommodated in larger living units, while those who are younger and more vulnerable will be accommodated separately in smaller blocks."*⁶ No detail is provided as to whether those housed separately will mix with older children and those of the opposite sex. During Committee sessions, the Minister maintained *"we have made no decisions yet on who should be accommodated in the pathfinder*

³ Criminal Justice & Courts Public Bill Committee, 11th March 2014, Hansard Column 11, Sue Berelowitz.

⁴ *Ibid.*, Hansard Column 12, Sue Berelowitz.

⁵ Ministry of Justice, *Transforming Youth Custody: Government response to the consultation*, at para. 5.

⁶ *Ibid.*, at para 15.

secure college, much less who should be accommodated in other secure colleges that may follow".⁷

19. While the Government may not have decided which children should be detained in Secure Colleges, and has accepted that "*secure colleges will not be appropriate for 10 and 11-year-olds*",⁸ the statutory framework pursued in this Bill would allow the mixing of children aged 12-17 and boys and girls. Even if separate accommodation units are provided, this would allow mixing for class and recreation and would pose unacceptable risks to more vulnerable children. The Minister's confidence that "*those risks can be managed*"⁹ in Secure Colleges, in the absence of any details on how this will work in practice, provides little reassurance.

20. Liberty urges Peers to ensure that very young children and girls are detained in separate institutions with care plans suited to their different needs.

Maintain provision for Secure Children's Homes

21. In evidence sessions before the Public Bill Committee, there was consensus among expert witnesses that the best way of pursuing the Government's stated aims of rehabilitating child offenders and reducing re-offending is through smaller SCHs that are able to guarantee child security and provide greater staff ratios. Juliet Lyon, Director of the Prison Reform Trust, said that the best policy for rehabilitating young offenders is "*small, local, intensively staffed units with a focus on taking responsibility, making amends to victims, gaining skills for employment*." Frances Crook, chief executive of the Howard League, supported this in her evidence –

"The small, local authority-run secure homes...have a track record of success and provide a model of success for children. They are safe, the children are not restrained in the same number of ways, the re-offending rate is better and the care that the children receive is much better as a whole, looked at in the round – all the services that they need are provided."

⁷ Criminal Justice & Courts Public Bill Committee, 18 March 2014, Hansard Column 239, Jeremy Wright MP.

⁸ Criminal Justice & Courts Bill, Report Stage, 12 May 2014, Hansard Column 536, Jeremy Wright MP.

⁹ Criminal Justice & Courts Bill, Report Stage, 12 May 2014, Hansard Column 537, Jeremy Wright MP.

22. The deputy Children’s Commissioner for England, Sue Berelowitz, who visits children currently held in all three types of child prison, expressed serious concern at the creation of larger institutions that will take children even further from home –

“Being placed in an environment that is impersonal, and where there is not a lot of good quality adult-child contact, is not conducive to children being able to repair the damage that they have suffered in their early childhood, develop a sense of empathy...you need very good staff to child ratios”.

23. The evidence clearly demonstrates that the best outcomes are achieved when child offenders are detained in small units and receive intense support. History teaches that large detention facilities inevitably become more difficult to manage and that security and discipline challenges overtake education and training objectives in these environments. At the same time, the spend will be similar to the spend per head in YOIs (which are currently unable to meet their target of 15 hours education a week) and much less than the spend per head in STCs. The experience of Oakwood, an adult Titan prison which opened in 2012 accompanied by boastful claims that it would be the best prison in the world, provides an instructive example. As with the proposed Secure Colleges, Oakwood is larger in scale and receives less money per inmate than equivalent prisons. It has been mired in violent incidents and critical inspection reports since the outset. In January 2014 G4S played down a serious case of disorder described by one inmate as *“A riot. Simple as that. Cedar block was trashed. And there’ll be worse there unless the government steps in and sorts it out.”*¹⁰

24. The Secure Accommodation Network recently commissioned research into the work and impact of SCHs. It explained that the young people detained in SCHs come from backgrounds characterised by emotional, physical and sexual abuse, neglect, substance misuse and abandonment, and concluded *“SCHs are better able than their competitors to provide a safe environment for the young people in their care...SCHs provide educational outcomes for young people accelerating their literacy and numeracy ability. In fact young people’s educational attainment at an SCH is so significant that they surpass government pupil attainment requirements by,*

¹⁰ “Tales from the inside: drugs and disorder at G4S’s prison of the future” The Guardian, 29th April 2014, available at - <http://www.theguardian.com/society/2014/apr/29/tales-from-inside-oakwood-prison>

on average double the expected points.”¹¹ The report further concluded that SCHs achieve a range of health outcomes (mental health diagnosis; increasing emotional well-being and self-esteem; fostering empathy and remorse; reducing risky behaviour and self harm) “and SCH’s own recorded average rate of reoffending is lower at 43% than the official re-offending rates of the government at 76%.” The report recommended that rather than being left to the responsibility of Local Authorities “SCHs should be recognised as a national resource requiring central coordination. A national strategy on the future of SCHs should be devised.”

25. The Government says it accepts that SCH places will continue to be needed yet recent cutbacks have seen them being curtailed. At Committee Stage, Minister, Jeremy Wright MP, said “...we accept that it is likely that some detained young people – in addition to 10 and 11 year olds, who we do not believe should be placed in secure colleges – will require separate specialist accommodation on the grounds of their acute needs or vulnerability. We are committed to continuing to provide separate specialist accommodation to that small group of young offenders.” However, as Dan Jarvis MP noted at Committee Stage “From 1 April 2014 the Youth Justice Board plans to reduce the 166 secure children’s home places currently contracted to 138 places. That equates to a 17% cut in places across nine homes.”¹²

26. Liberty is concerned that with no obligation to maintain SCHs, they will face further central and local Government cutbacks at huge detriment to the rehabilitation of damaged children in the secure estate. We urge Peers to press for a Government obligation to maintain SCHs on the face of this Bill.

Use of force

27. The Government claims that it wants education to be at the centre of the new mandate for youth custody and to vet and train better those detaining and working with young people in detention. However the legislative scheme specifically allows for use of force to enforce “good order and discipline” if so provided in the secure college rules. Schedule 6, paragraph 8 provides that in relation to detained children a secure college custody officer is under a duty (a) to prevent their escape from lawful custody, (b) to prevent, or detect and report on, their commission or attempted

¹¹ “They helped me, they supported me” *Achieving Outcomes and Value for Money in Secure Children’s Homes*, April 2014.

¹² Public Bill Committee on Criminal Justice and Courts Bill, 18 March 2014, Hansard Column 222, Dan Jarvis MP.

commission of unlawful acts (c) to ensure good order and discipline on their part and (d) to attend to their well-being. Paragraph 10 further provides that a custody officer may “use reasonable force where necessary in carrying out functions in paragraph 8 or 9.” This would allow staff at Secure Colleges to use force against children who, for example, refuse to follow an instruction or break a rule.

28. The use of force against children in detention in circumstances other than the prevention of harm, is contrary to basic human rights standards and notions of decency. In 2009 use of force against children in detention to enforce good order and discipline was found to be unlawful by the Court of Appeal. This followed a 2007 Government amendment to secondary legislation, pursuant to the *Criminal Justice and Public Order Act 1994*, in order explicitly to allow force to be used to enforce good order and discipline (GOAD) in STCs. In *R(C) v Secretary of State for Justice*¹³ the Court of Appeal looked at the amended Rules and the Government’s reasoning for use of force to enforce GOAD and held that the amended rules were unnecessary and in breach of Article 3 of the European Convention on Human Rights as incorporated by the *Human Rights Act 1998*. It follows that primary legislation allowing for such use of force for identical purposes is incompatible with human rights standards and so Liberty is puzzled and concerned that the Government seeks to re-legislate in manner that is clearly unlawful.

29. Since April 2000, sixteen boys have died in youth detention. The tragic consequences of unnecessary use of force against children in detention were made all too clear in at least two of these deaths. In 2004 Gareth Myatt, 15, died in Rainsbrook STC as a direct result of use of force triggered by his refusal to clean a sandwich toaster. He was 4 ft 10 and weighed under seven stone, yet was restrained by three members of staff who ignored his shouts that he was unable to breathe. He died of ‘positional asphyxia’ after he choked on his own vomit. Also in 2004 Adam Rickwood, 14, took his life at Hassockfield STC, a few hours after being restrained for disciplinary purposes. Adam was restrained by staff when he refused, when asked, to move from a communal area to his room. At the second inquest into Adam’s death, the jury found that the use of force against Adam “*more than minimally*” contributed to his decision to take his own life. An internal review of deaths in youth custody published by the Youth Justice Board in 2014 further found that –

¹³ [2009] QB 657.

“When Adam died in 2004, there was confusion at every level within the youth justice system about whether or not restraint for this purpose (maintaining the good order and discipline of the establishment) was lawful. This confusion led to a systemic failure to identify unlawful practice – an issue which was resolved in 2008 when the Court of Appeal ruled that the use of restraint for the purpose of maintaining good order and discipline in STCs was, and always had been, unlawful.”

30. Force should only ever be used where strictly necessary, for example to prevent a child doing harm to themselves or others. Following the deaths of Gareth Myatt and Adam Rickwood the Government commissioned an Independent Review of Restraint in Juvenile Secure Settings, which reported in 2008 and proposed the following six principles for the use of restraint –

1. Force should be used only as a last resort.
2. Force should be used only to prevent the risk of harm.
3. The criteria for using force should be consistent across settings.
4. The minimum force necessary should be used, and this should be proportionate to the identified risk.
5. Only approved restraint techniques should be used.
6. Force should only be used in the context of an overall approach to behaviour management, including de-escalation and debriefing, in which children and young people are actively involved.

31. It is entirely unclear why this valuable learning cannot be reflected in the legislation the Government now seeks to pass. The Minister’s answers on the issue at Committee Stage were evasive and unconvincing. He claimed without justification that *“Rules are the correct place to set out the precise boundaries on the use of force.”* He then went on to say *“I accept that ‘good order and discipline’ is too broad in this context”* but that he did not propose to change the phrase because *“it is a phrase that is found in several pieces of legislation and is familiar to setting outside custody, including schools; and more importantly it should clearly be one of the duties of a custody officer”*. This wholly misses the point. No one is suggesting that maintaining good order and discipline shouldn’t form part of a custody officer’s functions – the complaint is that use of force shouldn’t be used to achieve it. The fact that the phrase is found in other pieces of legislation is completely irrelevant, as is

the Minister's observation that good order and discipline is a notion familiar to non-custodial settings.

32. The Minister then set out when he thought reasonable force was appropriate –

“Our position is that in limited circumstances in which all attempts at resolving a situation without resorting to force have failed and where a young person's behaviour is affecting their own safety and welfare or that of others, as a last resort, some force subject to strict conditions and safeguards may be necessary.”

33. This definition is worryingly vague and non-committal. Reference to “*resolving a situation*” and “*behaviour affecting safety*” is so broad as to allow routine use of force in the large (and therefore likely chaotic) types of child prisons created by this Bill.

34. The present wording is exacerbated by the lack of provision for appropriate people to undertake custodial duties. The Bill sets out no professional standards for those charged with maintaining the facilities and the national newspapers are regularly full of reports of abuses in the private security and care sectors. By way of example of the inexperienced and inappropriate custodial staffing that will likely occur: a G4S officer at Oakwood recently told *The Guardian*, on condition of anonymity that –

"I think it has been a culture shock for many of us who haven't worked in prisons before. It's taken time for me to puzzle out how it all works, how you deal with prisoners. The thing is they know the rules, the form, better than we do. Which puts us at a disadvantage."

Part 3 – Courts and Tribunals

Trial by single magistrate on the papers: clauses 36-40

35. Clauses 36-40 allow a single magistrate to try and sentence individuals for over two thousand summary offences, while sitting alone and in private, in circumstances where a defendant submits a written guilty plea or does not

acknowledge service. Consent to be tried on the papers, by a single magistrate, is to be implied by omission, subject only to the defendant making a statutory declaration that they did not know of the procedure.

36. In the Coalition Agreement, the Government promised to “*protect historic freedoms through the defence of trial by jury.*”¹⁴ This proposal will significantly harm the principle of trial by jury as well as that of open justice – two cornerstones of the British justice system. The Government attempts to justify this proposal by reference to the cost of the current system. It is a fact of life that a decent and functioning legal system will cost a proportion of the public budget. Court buildings cost money to run and maintain, as does staff time. In reality, as a result, of the trial by jury system, the criminal justice system in England and Wales benefits from huge savings. Neither lay magistrates nor jurors are paid (above reasonable expenses incurred) and it is therefore difficult to see how the Government can justify slashing the system on the basis of cost.

Single magistrate cannot form a ‘panel of peers’

37. For centuries, the common law principle that defendants are tried by their peers has allowed justice to be dispensed fairly and in a manner that commands public confidence. The use of lay magistrates, who currently hear less serious criminal cases¹⁵ is justified in accordance with the jury trial tradition on the basis that they are laypersons, neither legally trained nor professional judges, that act as peers. In recognition of this, the *Magistrates’ Courts Act 1980* requires that criminal trial and sentencing are presided over by at least two magistrates. In practice three magistrates generally sit together and a mix in age, gender and ethnicity is sought as far as possible.

38. It is impossible for a single magistrate to form a “panel of peers” and this will offend against the basic premise of trial by jury. Further, perceived flaws in the current lay magistracy system are addressed at least in part by the requirement that

¹⁴ The Coalition: Our Programme for Government, page 11, May 2010, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

¹⁵ Currently, those charged with an indictable offence are sent – or for either way offences can elect to be sent – to the Crown Court to face a jury of 12 men and women drawn from all walks of life, tasked with reaching a fair conclusion on the case. Those charged with a summary offence are sent – or for either way offences can elect to go – to the Magistrates court.

magistrates sit in open court and as a panel. Complaints about the current system include that the lay magistracy are not sufficiently representative of society¹⁶ that magistrates should not be charged with reaching decisions of both fact and law, that there is wide discrepancy in magistrate sentencing, and that they rely too heavily on legal clerks. These complaints will only be exacerbated by the single magistrate process.

Undermines open justice

39. Further, a magistrate deciding cases and sentences while sitting in private fatally undermines the principle of open justice. The erosion of such a bedrock principle risks dangerously undermining public trust and confidence in the criminal justice system over the long-term. In written evidence to the Public Bill Committee, the Magistrates Association recognised this, saying

“The MA is well aware that few members of the public attend to listen to and observe cases where the defendant is absent. However it is a principle of British justice that cases are heard and the results are made known in public and we would be sorry to see this principle abandoned, even for the cases which this Bill deals with. We would be concerned if the general public perception became that these cases were no longer criminal cases handled by magistrates with the same rigour as every other criminal case. MPs might like to consider whether these proposals will trigger an adverse public reaction among those who distrust politicians, are increasingly suspicious of police integrity and who say that the Government is at war with motorists.”¹⁷

40. The implications of this reform should not be underestimated. Magistrates’ panels fulfil a substantial function in our criminal justice system and command significant power. They deal with approximately 97% of criminal cases in England and Wales and sit in Magistrates Courts and Youth Courts. They hear and decide the outcome of cases (including both questions of law and fact) and pass sentence. In addition to their power to impose sentences of up to six months’ imprisonment, they

¹⁶ The majority of magistrates are within the 45-65 age range and overwhelmingly from professional and managerial backgrounds. That said, the gender and ethnicity make-up of the magistracy is largely representative of society and certainly much more so than the professional judiciary.

¹⁷ Written evidence submitted by the Magistrates Association to the Criminal Justice & Courts Public Bill Committee, March 2014, available at - <http://www.publications.parliament.uk/pa/cm201314/cmpublic/criminaljustice/memo/cjc20.htm>.

can impose community penalties and fines of up to £5,000 per offence. While the Bill does not propose that Magistrates should be able to sit alone and in private to determine cases that attract a sentence of imprisonment, it is likely that once this procedure has been established further piecemeal reforms in that direction will be proposed.

Fair trial protections waived by omission

41. The proposal that basic fair trial protections will be waived by omission is also problematic. Think of those who may not read the notice or cannot read the notice either because they lack English language proficiency or have a disability. Defendants will not attend court and so will not have the procedure and its implications explained to them. At the very least, the procedure should only be activated by a defendant explicitly filing notice to the effect that they wish to waive their rights in a manner which sets out in clear terms that they understand the full implications of doing so.

Criminal courts charge: clause 31

42. Clause 31 creates a requirement for all criminal courts to impose a costs order on those it convicts. “Court costs” are defined as “*costs of providing the judiciary and the rest of the system of courts.*” It is proposed that the court charge will be mandatory and no financial limit is fixed in Bill – this is left to regulations to be made by the Lord Chancellor. No discretion is built in to take account of financial circumstances of offenders. The Lord Chancellor has the power to specify cases or classes of cases that are not subject to the charge via regulations, but the only exception on the face of the Bill is for offenders who were under 18 when they committed the offence.

43. There already exists a wide judicial discretion for costs orders in the criminal justice system in addition to a range of sentences¹⁸ and other post-conviction

¹⁸ Fines can be imposed as sentences both in the Magistrates and Crown Court. The former can impose fines of up to £5000 and up to £20,000 for offences under certain regulations, such as a breach of the health and safety in the workplace. In the Crown Court the fines can be limitless. The court will enquire into the financial circumstances of the offender and fix the fine at the level reflecting seriousness of the offence, taking account of the circumstances of the case and the means to pay.

orders¹⁹ that can impose financial liability. However, no such discretion or nuance is part of the proposal in clause 31. Instead it appears that the court charge will be mandatory, irrespective of circumstances of the individual or the nature of the case. This will have an oppressive impact. It will also act as a powerful disincentive to a not guilty plea. Innocent defendants faced with the prospect of a mandatory costs order in addition to higher sentence for a not guilty plea will be forced to weigh up whether they can afford to plead not guilty. This is shameful state of affairs for a criminal justice system with a proud reputation for fairness and integrity.

44. During the Public Bill Committee, expert witnesses were united in opposition to this clause. Nigel Lithman QC, Chairman of the Criminal Bar Association, said –

“At the moment there will be quite a rigorous examination of a defendant’s means ... and means will then be fed into the potential of a custodial or non-custodial sentence ... and there is the will of the judge to punish the defendant, where appropriate, through his pocket. That is where finance should play its part in the judicial process, not, in imposing a cover charge on the defendant. It is inappropriate.”²⁰

45. Martin Westgate QC, of the Constitutional and Administrative Bar Association agreed with Mr Lithman’s analysis and Alison Burt of the PCS Union observed –

“Magistrates have the discretion to use their common sense and not impose charges on people who are not in a position to hand over anything at all – who are not eating and are sleeping rough on the streets – but, even in those cases, the Bill seems to insist on it.”²¹

The Magistrates Association is similarly opposed to the clause and has said –

“The MA advises the Government in the interest of justice to amend the proposals to allow the court discretion in imposing these fees. The court is in

¹⁹ Confiscation orders imposing an obligation to pay a sum of money that reflects the benefit a convicted person received from his criminal conduct are available under the *Proceeds of Crime Act 2002* and courts are now required to impose the victim’s surcharge in respect of offences committed on or after the 1st October 2012.

²⁰ Public Bill Committee on Criminal Justice and Courts Bill, 13th March 2014, Hansard Column 123, Nigel Lithman QC.

²¹ Public Bill Committee on Criminal Justice and Courts Bill, 11th March 2014, Hansard Column 43, Alison Burt.

*the best position to identify in which cases the ordering of payment of court costs would be inappropriate or unreasonable.*²²

In oral evidence magistrate and MA Chairman, Richard Monkhouse, reiterated the Association's concerns and asked for Magistrates to have at least discretion in deciding whether to impose the charge –

*“You talk about young 20-year-olds on jobseekers allowance of 56.25 pounds a week, and you have got these five potential financial penalties that we could be putting on them...we really need to have discretion for the sentence...”*²³

Liberty is wholly opposed to the drastic proposal for a mandatory courts charge to be imposed on all convicted defendants. We believe that is unprincipled and risks doing significant harm to the right to plead not guilty and the presumption of innocence.

Isabella Sankey

²² Criminal Justice and Courts Bill, *Written evidence submitted by the Magistrates' Association to the Public Bill Committee*, rationale for suggested amendment to clause 29.

²³ Public Bill Committee on Criminal Justice and Courts Bill, 11th March 2014, Hansard Column 19, Richard Monkhouse.