

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's Briefing on the Prisons and Courts Bill for Second Reading in the House of Commons**

**March 2017**

## 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

Bella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: [rachelr@liberty-human-rights.org.uk](mailto:rachelr@liberty-human-rights.org.uk)

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: [sarao@liberty-human-rights.org.uk](mailto:sarao@liberty-human-rights.org.uk)

Silkie Carlo

Policy Officer (Technology & Surveillance)

Direct Line 020 7378 5255

Email: [silkiec@liberty-human-rights.org.uk](mailto:silkiec@liberty-human-rights.org.uk)

Sam Hawke

Policy Assistant

Direct Line 020 7378 5258

Email: [samuelh@liberty-human-rights.org.uk](mailto:samuelh@liberty-human-rights.org.uk)

1. Liberty welcomes the opportunity to brief on the Government's Prisons and Courts Bill, due to have its Second Reading on 20 March 2017. Whilst we support the intention of the Government to require of prisons that they rehabilitate prisoners, the Bill introduces several dangerous innovations which woefully misunderstand the role of the executive in the justice system. Liberty urges Parliamentarians to vote against these poorly-conceived and dangerous proposals.
2. The Bill also hands to telecommunications companies the power not only to block the use of mobile phones but collect and retain data – building on Government powers to use indiscriminate IMSI catcher technology. We urge Parliamentarians to raise concerns with the Government over the expansion of these powers.
3. We are also very concerned that the Bill fails to adequately deal with the serious crises afflicting prisons. As Liberty and many other groups have recently highlighted,<sup>1</sup> prisons are deeply unsafe and severely overcrowded. Prisoners – in particular those of BME backgrounds or transgender status – face unequal treatment and discrimination, whilst those with mental illness or disabilities face neglect and mistreatment. The discredited 'imprisonment for public protection' regime and its indeterminate sentences is yet to be fully reformed. The Bill does little to address these serious problems. We urge Parliamentarians to hold the Government to account.
4. In particular, the Government's goal of directing prisons towards rehabilitation cannot be met if conditions in prisons do not improve. In recent years, the severe problems facing prisons have been all too apparent, and yet prisoners are unable to challenge their conditions for want of legal assistance. Legal aid helps to ensure proper treatment of prisoners, improved conditions in prisons, and better prospects for reform. Liberty urges Parliamentarians to use the crucial opportunity presented by the Prisons and Courts Bill to address the parlous state of access to justice for prisoners, and the dire need for a restoration of legal aid.

### ***Telecommunications companies***

5. Clause 21 of the Bill amends the Prisons (Interference with Wireless Telegraphy) Act 2012 (PIWTA) to create a power to authorise any "public communications provider"

---

<sup>1</sup> See, for example, Liberty's recent submissions to the Justice Committee and the Joint Committee on Human Rights, available here:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-reform/written/43578.pdf>, and here:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/mental-health-and-deaths-in-prison/written/47120.pdf>.

to “interfere with wireless telegraphy”. Authorisations may be given to either “prevent” use of wireless telegraphy in prisons and to “detect” or “investigate” it, and the “retention, use or disclosure” of any data so acquired will also be lawful thereby.

6. As it stands, PIWTA already gives prison governors the authority to interfere with mobile phones in prisons, and to collect data from them – likely using technology known as IMSI<sup>2</sup> catchers which block telephone signal and to collect and read data taken from mobile telephones.<sup>3</sup> Such devices are reportedly already used in three prisons in England and Wales.<sup>4</sup>
7. We already have serious concerns as to IMSI catchers, which are intrusive surveillance tools that are designed to indiscriminately intercept and hack phones within a given radius. With a range of up to 8km, they are able to intercept and hack between 200 and 500 handsets per minute, hoovering up whatever data is being transmitted by the phone. To do so, they falsely cloak users of the tool in the guise of legitimate transmitters, such as mobile towers, allowing them to intercept mobile signals designed to go a network provider. As a result, they can receive the data sent – which includes the content of the individual’s calls and text messages – and thereby search it. They can also be used to block signal from mobiles reaching their intended destinations, rendering mobiles within the radius of the IMSI catcher useless – even though seeking to reach the emergency services. Since they are indiscriminate devices, they block and intercept all communications within a certain radius – even those of members of the public simply living near a prison, for example.
8. Clause 21 gives telecommunications companies the power to interfere with mobile phone usage in other, unspecified ways – potentially through interfering with internet access. But little detail has been provided. As the Commons Briefing Paper on the Bill states, “[the] 2012 Act already allows prison governors to interfere with wireless telegraphy in prisons in order either to block mobile phones or detect their use.

---

<sup>2</sup> International Mobile Subscriber Identity.

<sup>3</sup> Section 1(3) of PIWTA defines the items in respect of which authorisations may be made as “a device capable of transmitting or receiving images, sounds or information by electronic communications (including a mobile telephone)”, “a component part of such a device”, and an article designed or adapted for use with such a device (including any disk, film or other separate article on which images, sounds or information may be recorded)”.

<sup>4</sup> See *The Sun*, ‘Prisoners will have their mobiles cut off as Justice Secretary Liz Truss launches £550m bid to tackle the prison crisis’, 24 November 2016, available here: <https://www.thesun.co.uk/news/2257411/prisoners-will-have-their-mobiles-cut-off-as-justice-secretary-liz-truss-launches-550m-bid-to-tackle-the-prison-crisis/>.

Clause 21 would allow the Secretary of State to authorise telecoms and internet service providers to do this.”<sup>5</sup>

9. The power allows the untargeted interference with telephone usage, and untargeted surveillance of telephone data, with authorisations permitted in respect of “one or more relevant institutions in England and Wales”, “one or more kinds of relevant institution in England and Wales”, and “relevant institutions in England and Wales generally”. In other words, a single authorisation can be issued to allow interference and surveillance in any number of prisons in England and Wales – indeed, just one could be given for all of them.
10. Whilst we do not take a view on mobile phone use in prisons, devices which create a blanket block on all mobile phone usage in an area risk being disproportionate and bringing unintended consequences, such as interfering with and intercepting the data of those living near prisons. It cannot be proportionate to indiscriminately intercept and store private mobile phone data – including the content of phone calls and text messages – of every person who happens to be within a certain radius, including those who happen to live near or work in a prison. Whilst it is unclear just what technology will be deployed by telecommunications providers under this Clause, in addition to the use of IMSI catchers by Government, we continue to worry about the co-optation of private companies for the service of the state.
11. Liberty urges Parliamentarians to use the opportunity to hold the Government to account over its use of IMSI catchers in prisons, and require it to think twice about extending similar powers to private companies.

### ***Online guilty pleas***

12. Clauses 35 and 36 of the Bill would create an unprecedented new procedure which seeks to supplant the independent judiciary and settle criminal proceedings at the behest of the executive. For the first time in UK legal history, individuals may be convicted of crimes by pleading guilty over the internet.
13. The dangers are all-too obvious. Individuals may mistakenly plead guilty for lack of adequate or any legal advice. They may feel pressured to settle the matter quickly online, or wrongly accept guilt after having simply misread their computer screen. No judge will be there to ensure that they understand the charges and the implications of pleading guilty. Vulnerable individuals with mental health problems or disabilities will

---

<sup>5</sup> House of Commons Library, Briefing Paper 7907, ‘The Prisons and Courts Bill’, 15 March 2017, p. 4, available here: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7907>.

have none of the support of a court room, and may face conviction merely for want of support. These are unconscionable risks in any criminal justice system, least of all one whose system for the disclosure of criminal records is as punitive as that of the UK.

14. Liberty has long campaigned for greater proportionality in the disclosure of criminal records, but it remains the case that convictions – even for very minor offences – remain a stain on a person’s record for many years thereafter and in respect of matters for which they are wholly irrelevant. These can have devastating effects on an individual’s life prospects, barring them from their chosen careers and effectively branding them as a criminal for life.
15. Currently, the system proposed in Clauses 35 and 36 covers non-imprisonable offences only. Many of these offences are non-recordable, and so will not appear on a person’s criminal record, but some non-imprisonable offences are nonetheless recordable.<sup>6</sup> There is also considerable confusion over which offences are and are not recordable, leaving individuals in many cases wholly unclear as to whether the offence to which they may plead guilty will remain on their record. Moreover, even where offences are non-recordable, they will often be included on police databases – and which can be revealed by enhanced checking.<sup>7</sup> Such checking is used by many careers, potentially barring individuals from employment. As drafted, the Bill would create a system in which individuals are left to drastically alter the course of their lives by the click of a button.
16. These new proposals only deepen our existing concerns with the so-called ‘Single Justice Procedure’ introduced in 2014.<sup>8</sup> As we argued, the Single Justice Procedure seriously undermines the foundational principle of open justice, allowing individuals to be convicted behind closed doors with the oversight of just one person, and “[t]he slow erosion of this bedrock principle risks dangerously undermining public trust and confidence in the criminal justice system over the long-term.” We also expressed the same concerns that the procedure will severely disadvantage those who need support in navigating the criminal justice system, leaving those who are vulnerable at

---

<sup>6</sup> For details, see Unlock, theInformationHub, ‘Recordable offences’, undated, available here: <http://hub.unlock.org.uk/knowledgebase/recordable-offences-2/>.

<sup>7</sup> The offences for which an online conviction would be available are summary offences not punishable by imprisonment, and these are to be specified by the Secretary of State for Justice.

<sup>8</sup> See Liberty, ‘Liberty’s Report Stage briefing on Parts 1, 2 and 3 of the Criminal Justice and Courts Bill in the House of Commons’, May 2014, available here: [https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20Report%20Stage%20Briefing%20on%20Parts%201%20and%202%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20\(May%202014\).pdf](https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20Report%20Stage%20Briefing%20on%20Parts%201%20and%202%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20(May%202014).pdf).

risk of wrongful conviction – branding them for life for want of help in explaining what was happening to them.

17. Indeed, the very fact that new proposals are being made along the same basis as the Single Justice Procedure amplify our worries of ‘mission creep’. As we said in 2014,

“[Magistrates] deal with approx. 97% of criminal cases in England & 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 can impose community penalties and fines of up to 5,000 pounds 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 will be proposed.”

18. Whilst Clauses 35 and 36 do not cover imprisonable offences, there are serious concerns that Government may in future expand the system to include them.

19. In addition, the proposed system woefully misunderstands the role of the independent judiciary as against the executive. Clause 36 would transfer to the Government the powers to sentence those individuals convicted – removing from the independent judiciary one of their most important functions in the criminal justice system. The fine payable after conviction online is to be specified by order – which may even specify “different circumstances in which a particular offence is committed”.

20. The new system would render the individual liable to pay the prosecution’s costs by default but also would allow the prosecution to itself determine the amount charged. This is a matter for the judge to order where it is “just and reasonable”, taking into account all the circumstances.<sup>9</sup> Similarly, the new system permits the executive not only to specify by order which offences require compensation, but permit the prosecutor to decide how much compensation should be paid – again, eminently judicial tasks which this new system arbitrarily hands to the executive.<sup>10</sup>

21. These changes represent an wholly inappropriate incursion of the executive into the judicial function, allowing a branch of Government to supplant judicial decision-making on the facts and require individuals to pay compensation and costs of an

---

<sup>9</sup> See section 18 of the Prosecution of Offences Act 1985.

<sup>10</sup> See section 130 of the Powers of Criminal Courts (Sentencing) Act 2000.

amount it determines itself. This is despite the Government being one party to the case; these changes allow it, in essence, become a judge in its own cause.

22. Moreover, “any defect in the form or substance of a notice of penalty” will not affect the conviction, fine, penalty, points, compensation, surcharge, or prosecution costs imposed as a result of a person’s online conviction. In view of the informality of the system, it is by no means inconceivable that an individual may be summarily convicted of an offence – and received a substantial penalty, composed of a fine, compensation order, surcharge, and prosecution costs – but receive no or inadequate information as to what they have received. Despite this, they are obliged to pay them – and in failing to do will no doubt accumulate substantial payments in default. Ultimate failure to pay can lead to imprisonment – a very serious concern if a penalty is imposed as a result of an online guilty plea of which a person is not properly notified.
23. Clause 36 includes a power for a single Magistrate or Magistrates’ Court to “set aside a conviction under section 16H if it appears to the court that the conviction is unjust”. But this is not good enough. Individuals need a proper procedure in which they can be told of their rights and make an informed decision from the very beginning. Placing a remedial power at the end of the process, once their rights may have been prejudiced, will fail to safeguard the integrity of the justice system. Decisions made in the absence of a proper process cannot be legitimate.
24. In any event, this additional review should not be needed in the first place. There are serious risks that individuals – including those who are especially vulnerable – will plead guilty on a mistaken basis or without proper legal advice. Any resources saved in having individuals plead guilty at home online than before a Magistrates’ Court will be set against the cost of applications to have convictions overturned, along with the other longer-term costs to individuals in facing conviction at the touch of a button.
25. These proposals come alongside a raft of other changes which again misunderstand the role of the judiciary as against the executive. For example, Clause 62 would hand the executive the power – otherwise the preserve of the judiciary – to determine the level of damages payable in cases of whiplash. These proposals betray a fundamental misunderstanding of the proper role of the executive as against independent judges – and by the holder of the office of state whose very function is to preserve the independence of the judiciary.

26. Liberty urges Parliamentarians to reject these proposals for convictions at the click of a button, and safeguard the integrity of our justice system from misconceived reforms. We also urge Parliamentarians to raise serious concern as to other aspects of the Bill which inappropriately intrude into the role of the independent judiciary.

### ***The crucial importance of legal aid in prisons***

27. The Criminal Legal Aid (General) (Amendment) Regulations 2013 removed from the scope of legal aid all matters relating to a person's treatment in prison, leaving in place provision for a restricted range of issues relating to sentence calculations, disciplinary hearings, and reviews by the Parole Board where it has the power to order a prisoner's release.<sup>11</sup> As Liberty stated at the time, plans to remove prison law from the scope of legal aid undermine rehabilitation and allow the abuses of vulnerable prisoners, including those with serious disabilities, to go unchecked.<sup>12</sup>

28. The Government itself acknowledged that legal aid cuts may have an impact on such individuals, but asserted that the screening carried out by the National Offender Management Service (NOMS) will be sufficient to ensure that reasonable adjustments are made. Even if screening of prisoners is carried out, removal of legal aid has left individuals unable to properly challenge that assessment, or the treatment that is actually provided to them as a result. A failure to make appropriate adjustments for prisoners with learning difficulties or other disabilities, or mental health issues, for example, risks breaching human rights protections, including putting lives at risk.

29. Rehabilitation is profoundly threatened if prisoners are not treated properly. Moreover, many cases will involve issues crucial for a person's successful rehabilitation – such as a person's resettlement licence conditions – and the changes have left individuals unable to properly challenge faulty decision-making in respect of these matters.

30. The need for real legal accountability has become particularly serious in recent years. There is compelling evidence to suggest that England and Wales' prisons are

---

<sup>11</sup> The Regulations are currently under challenge in judicial review proceedings brought by the Howard League for Penal Reform and the Prisoners' Advice Service, after the Court of Appeal gave them leave to do so in 2015. See *R (on the application of the Howard League for Penal Reform, Prisoners' Advice Service) v The Lord Chancellor* [2015] EWCA Civ 819. The case was heard in late January 2017.

<sup>12</sup> Liberty, 'Liberty's Response to the Ministry of Justice Consultation 'Transforming Legal Aid: Next Steps'', November 2013, available here: [https://www.liberty-human-rights.org.uk/sites/default/files/Liberty-s-Response-to-the-Legal-Aid-Next-Steps-Consultation-Nov-2013\\_0.pdf](https://www.liberty-human-rights.org.uk/sites/default/files/Liberty-s-Response-to-the-Legal-Aid-Next-Steps-Consultation-Nov-2013_0.pdf).

unsafe for prisoners and staff – much less for individuals made seriously vulnerable by mental illness or disabilities. Between 2005 and 2015, the proportion of prisoners who have suffered an assault, for example, has more than doubled. Just last year, there were over 20,500 incidents of assault in prisons in England and Wales. The Justice Committee in 2015 published its report into prison planning and policies and found that levels of safety in prisons have significantly diminished when measured against all criteria.<sup>13</sup> Prison violence overall has recently been found by the Prisons and Probation Ombudsman to be at an “wholly unacceptable level”.<sup>14</sup>

31. Across the same period, the proportion of prisoners self-harming has increased by 25% since 2014 – with the proportion of male prisoners harming themselves almost doubling. Overall, the number of individual prisoners self-harming has increased by 62% since 2005.<sup>15</sup>
32. An internal, administrative complaints system is not an adequate substitute for judicial due process. A complaints system and the Ombudsman cannot properly adjudicate on the rights of individuals, nor on the lawfulness of state action. Their recommendations are not binding on parties as a legal judgment, nor do they have the same powers to award damages or, most importantly, to require remedial action. The Ombudsman is not sufficiently independent, and is not required to have legal training nor expertise in dealing with cases involving vulnerable prisoners, who may have mental health problems or learning difficulties requiring special assistance.
33. Moreover, the Prisons Ombudsman was already subject to systemic delays before the legal aid changes were made.<sup>16</sup> In the year following the cuts to prison legal aid, experts in prison law attest to the dire conditions for those seeking to complain about their treatment in prisons or ensure accountability for decisions made by prison authorities. The Howard League and the Prisoners’ Advice Service saw a 45 per cent increase in calls to its advice line, with its legal team “overwhelmed with requests from young people with nowhere else to turn”.<sup>17</sup> This is just as predicted before the

---

<sup>13</sup> House of Commons, Justice Committee, ‘Prisons: planning and policies’, HC 309 2014-15, 4 March 2015, available here:

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/309/309.pdf>.

<sup>14</sup> *The Guardian*, ‘Prison violence at ‘wholly unacceptable’ level, ombudsman finds’, 21 September 2016, available here: <https://www.theguardian.com/society/2016/sep/21/prison-violence-at-wholly-unacceptable-level-ombudsman-finds>.

<sup>15</sup> House of Commons Library, Briefing Paper, ‘Prison Population Statistics’, 4 July 2016, p. 16, available here: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334>.

<sup>16</sup> The Prisons Advisory Service reporting that non-urgent cases were not being allocated for 10 to 12 weeks and decisions not made for up to 8 months.

<sup>17</sup> Howard League for Penal Reform, ‘Court of Appeal allows charities to challenge legal aid cuts for prisoners’, 28 July 2015, available here: <http://howardleague.org/news/legalaidchallenge/>.

Regulations came into force by, for example, the Joint Committee on Human Rights.<sup>18</sup>

34. Legal aid helps to ensure proper treatment of prisoners, improved conditions in prisons, and better prospects for reform. Liberty urges Parliamentarians to use the crucial opportunity presented by the Prisons and Courts Bill to address the parlous state of access to justice for prisoners, and the dire need for a restoration of legal aid.

**Sam Hawke**

---

<sup>18</sup> House of Commons, Joint Committee on Human Rights, 'The implications for access to justice of the Government's proposals to reform legal aid', HC766 2013-14, 11 December 2013, paragraph 168, available here: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>.