



THE GOVERNMENT REPLY TO THE
SECOND REPORT FROM THE
HOME AFFAIRS COMMITTEE
SESSION 2002-2003 HC 83

Criminal Justice Bill

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
March 2003**

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THE GOVERNMENT REPLY TO THE SECOND REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2002-03 HC 83

On 7 October 2002 the Home Affairs Committee (HAC) announced its intention to conduct pre-legislative scrutiny of the forthcoming Criminal Justice and Sentencing Bill, which was to give effect to the Government's proposals in **Justice for All** (Cm 5563, July 2002).

The Committee took two sessions of oral evidence before the Criminal Justice Bill was published on 21 November 2002. Lord Falconer of Thoroton, Home Office Minister of State for Criminal Justice, Sentencing & Law Reform appeared before the Committee on 26 November 2002. The Bill had its Second Reading on 4 December 2002. On 17 December 2002 it was committed to Standing Committee B, which concluded proceedings and reported the Bill back to the House, as amended, on 4 March 2003, after 32 sittings.

The Criminal Justice Bill takes forward in legislation many of the proposals in the Criminal Justice White Paper, *Justice For All*, July 2002, which outlined a coherent, long term strategy to modernise the criminal justice system from end to end – from detection through to rehabilitation of offenders. The White Paper built on the proposals of Sir Robin Auld in his "Review of the Criminal Courts of England and Wales" (8 October 2001) and John Halliday, in his review of the sentencing framework for England and Wales, "Making Punishment Work" (5 July 2001).

The Criminal Justice Bill is central to the Government's pledge to reduce crime and fear of crime in our communities. Through the Bill, the Government aims to create a transparent, joined up system that commands the respect of the public it serves by delivering faster and more effective justice for victims and the wider community while safeguarding the rights of defendants. It also aims to bring sense into sentencing, so that offenders are adequately and appropriately punished and reoffending is reduced.

The Government is grateful to the HAC for its scrutiny of the Bill which has provided a very helpful contribution to the consideration in Standing Committee B. As amended in Committee the Bill consists of 280 Clauses and 29 Schedules.

The Government accepts a number of the HAC recommendations. Briefly, these are that explanatory notes should be published concurrently with any bill; that substantial changes to PACE codes of practice and new codes should be subject to affirmative resolution; that legal aid should be available for suspects wishing to contest pre-charge conditional bail; that the Bill be amended so that, where the prosecution wish to interview a defence witness in advance of trial, they will be required to notify the defence and offer to interview the witness in the presence of the defence, and that any interview be tape-recorded; and that the relevant paragraphs of Schedule 2 to the 1996 Act be repealed to ensure that cross-examination is dispensed with only where necessary.

Response to Specific HAC Recommendations

The HAC's recommendations and conclusions are now addressed in turn, giving the number of the paragraph in the Committee's report. The Committee's recommendations are shown in bold below.

- (a) **In future, we would expect all Government departments to make Explanatory Notes available on the first day that a Bill is published and, at the very least, well in advance of Second Reading (paragraph 9)**

The Government accepts this recommendation, which is already expected practice for Departments. The delay of a week between publication of the Bill and publication of the Explanatory Notes was due to the size of the Bill and the need for the notes to be properly checked and cleared before publication.

Amendments to PACE (Part 1)

- (b) **We welcome the provisions for street bail (Clause 3), for the use of telephones for review of police detention (Clause 4) and repeal of the requirement to record detailed particulars of a detained person's property (Clause 6). These appear to us to be sensible measures to reduce unnecessary police bureaucracy, without impinging on the rights of the accused (paragraph 15).**
- (c) **We do not think that the Home Office has made out a convincing case for extending the detention time limit to 36 hours for non-serious arrestable offences. In our view, there are alternative – and more appropriate – measures in the Bill (such as conditional bail) which will help to alleviate any problems with the existing time constraints. For these reasons, we recommend that Clause 5 be deleted from the Bill (paragraph 23).**

The Government does not accept this recommendation. At the moment the police can only detain suspects without charge for longer than 24 hours for the most serious crimes. This means investigations into other serious matters are failing for lack of time or because they are being rushed. PACE rightly includes many protections for suspects, but allowing for these protections can eat away the time available to the police. For example, there may be delays linked to medical treatment or waiting until the person is fit for interview. In some cases it may take a number of hours to obtain a translator or the support required for a juvenile or someone who is mentally vulnerable. Waiting for solicitors is another common cause of delay and actually giving legal advice can take a very long time, particularly where there are several suspects to be advised by the same solicitor. The process of investigation itself can be lengthy. For example, there may be an identification procedure to arrange and the police may want to complete that before the suspect is bailed.

Our proposal is to allow detention up to 36 hours for any “arrestable” offences. Generally speaking these are still serious offences and most of them will carry at least 5 years’ imprisonment. Extension beyond 24 hours will only be allowed with the authority of a senior officer of at least superintendent rank and anything beyond 36 hours will continue to require the authority of a magistrates’ court. What we are proposing is a limited and strictly controlled extension of the scope to detain without charge. However, its impact on dealing with serious offences such as street robbery could be significant.

- (d) **We strongly recommend that Clause 7 of the Bill be amended to preserve the existing procedures-which include Parliamentary approval by affirmative resolution-in the following circumstances: first, where a Code is being established for the first time and secondly, where revisions of substantial importance or significance are made to the Codes (paragraph 30).**

The Government accepts this recommendation, and will bring forward amendments accordingly.

- (e) **We fully support the proposal to impose a 'treatment' condition on the bail of drug misusers. It is essential that sufficient resources are made available for the provision of treatment. We look forward to hearing from the Minister as to his proposals for making appropriate treatment more widely available for purposes of Clause 16 (paragraph 40).**

The Government welcomes the Committee’s support for this provision. We fully expect the introduction of this and other CJS initiatives to lead to increased demand for treatment. The degree to which this is new demand or people who would otherwise enter treatment via other routes is not yet clear and the Government is conducting a study of likely flows into treatment from the CJS and the resource implications, if any, for future years.

We are already significantly expanding treatment provision for those referred from both the CJS and other sources as part of the national drugs strategy. The target is to "increase the participation of problem drug users in drug treatment programmes by 55% by 2004 and by 100% by 2008 and to increase year on year the proportion of users successfully sustaining or completing treatment programmes" Numbers entering treatment are growing by about 7% a year, on track to achieve the 2008 target for a 100% increase over the 1998 baseline. Additional resources are being made available to fund the expansion of treatment. Treatment funding will rise from £234 million in 2000-01 to £401 million in 2003-04. The National Pooled treatment Budget for 2002-03 was £191 million. In 2003-04 it will increase by 23.48% to £236 million and will continue to rise to £299 million by 2005-06. Locally, Drug Action Teams are reviewing the level of treatment provision in their areas, taking account particularly of the roll-out of enhanced CJS interventions. They are working closely with Government Regional Offices and the National Treatment Agency to identify any shortfall in provision

Bail and charging (Parts 2 and 4)

- (f) **We accept that a power to impose conditions on bail before charge is a necessary and logical part of the move towards charging by the Crown Prosecution Service. However, we would expect this power to be used only where necessary and preferably to avoid detaining a suspect. We recommend that the Association of Chief Police Officers should draft and circulate appropriate guidelines (paragraph 46).**

The Government agrees that the power to impose conditions on bail before charge should be governed by guidance. Schedule 2 of the Bill provides for the DPP to issue guidance for custody officers on whether suspects should be charged or bailed while the case is referred to the CPS. It is intended this guidance will also cover the imposition of conditions on pre-charge bail. Since ACPO are represented on the working group which is considering the guidance, there is no need for separate ACPO guidance.

- (g) **While we welcome the safeguards provided in Schedule 2, in relation to pre-charge conditional bail, we are not convinced that they are sufficient. We therefore considered the following suggestions, which were put to us by our witnesses:**

- **a strict time limit on the length of conditional bail before charge;**
- **a requirement that the decision to impose conditions is taken by a police officer not below the rank of Inspector;**
- **a requirement that the officer has “substantial grounds” for believing that the conditions are necessary for the specified purposes;**
- **a right of appeal with access to public funding (paragraph 48).**

Time Limit

- (h) **As presently drafted, we believe the Bill gives rise to a risk that onerous conditions may be allowed to run indefinitely. For this reason, we would prefer to see a time limit included in the primary legislation, rather than left to the custody sergeant when imposing the conditions. We agree with John Burbeck, of the Association of Chief Police Officers, that four weeks would be a reasonable time limit and recommend that the Bill be amended accordingly (paragraph 51).**

The Government is considering this recommendation. The charging pilots suggest that in most cases a 5 week period should be sufficient to enable charges to be brought. It would be possible so to limit the initial period of pre-charge bail, although it would be necessary to allow bail to be renewed in the minority of cases where more time was needed, e.g. where it was desirable to await the

outcome of inquiries concerning forensic or overseas evidence. It would therefore be sensible to allow for the time-limit to be subject to extension. It is intended that conditions should be attached to pre-charge bail only if the suspect agrees, but as an additional safeguard the suspect would have the right to apply to a magistrates' court to have the conditions varied or discharged.

Police Officer not below the rank of Inspector

- (i) We believe that the custody sergeant is an officer with an appropriate level of experience for the responsibility of imposing bail conditions before charge because, unlike detention, conditional bail requires the consent of the prospective defendant (paragraph 54).**

“Substantial grounds for believing”

- (j) We are not convinced that a stronger requirement (such as “substantial grounds for believing”) would make any significant difference to police bail decisions in practice (paragraph 56).**

Public funding for appeal

- (k) There may, therefore, be a case for extending the provision of public funding to suspects before charge (paragraph 58).**

The Government welcomes recommendations (i) and (j) which support proposals in the Bill, and accepts recommendation (k).

Disclosure (Part 5)

- (l) We welcome the proposal to apply a single and objective test at both stages of prosecution disclosure (paragraph 62).**

The Government welcomes the Committee's support for the introduction of a single test for prosecution disclosure to the defence of unused material.

- (m) We recommend that the Bill be amended so that, where the prosecution wish to interview a defence witness in advance of trial, they should be required to notify the defence and offer to interview the witness in the presence of the defence. We further suggest that any interview be tape-recorded (paragraph 71).**

- (n) We would prefer to see a provision of this nature be included in the Bill, rather than left to codes of practice. Arguably, defence witnesses require extra protection to ensure equality in this context. In contrast to most defendants, the police and prosecution have vast resources at their disposal with which to apply pressure to defence witnesses, if minded to do so (paragraph 72).**

The Government indicated in the course of the Second Reading debate on the Bill in the House of Commons that it accepted these recommendations in principle. This was reaffirmed during the House of Commons Committee Stage of the Bill when an undertaking was given to bring forward proposals at the Report stage.

- (o) **We welcome the Government's decision to narrow its original proposal to require defendants to disclose unused expert reports. Under Clause 30, defendants will only be required to disclose the name and address of experts instructed by him for possible use at trial. We have no difficulty in principle with the revised proposal, as it is less likely to raise issues of privilege (paragraph 74).**
- (p) **While we accept the need for Clause 30, we are not convinced that the measure will work in practice (paragraph 78).**

The Government welcomes the Committee's support for this provision which it is satisfied can be enforced through the appropriate professional codes of conduct.

Trials on indictment without a jury (Part 7)

- (q) **We welcome the Government's decision to retain the defendant's right to elect jury trial in either way cases (paragraph (80)).**
- (r) **We believe that the right to trial by jury should be preserved unless there are cogent reasons for conducting the trial without a jury (paragraph 82).**
- (s) **We accept that there may be cogent reasons for dispensing – in some cases – with a jury in a complex financial case. In particular, the length of these cases can place a significant burden on the jury system which, in turn, may reduce dramatically the pool of available jurors. This (arguably) undermines the principle of random selection on which our jury system is based. However, such cases should not be used to undermine generally the jury system which has served well justice in this country (paragraph 89).**
- (t) **We therefore accept that the prosecution should have a right to apply for a trial without a jury. Furthermore, we are satisfied that the defendant's interests are protected adequately by the provision of a right of appeal (paragraph 90).**
- (u) **We do not see why a defendant, who is tried on indictment, should not have the option to waive his right to a jury trial, subject to the conditions specified in the Bill. In our view, the proposal offers the**

potential for a quicker and cheaper form of trial without affecting adversely the defendant's interests. For these reasons, we welcome the proposal to allow a defendant to apply for a trial without a jury (paragraph 96).

- (v) We accept that there are cogent arguments for dispensing with a jury trial where there is a real and present danger of jury tampering (paragraph 99).**
- (w) We invite the Government to consider the merits of repealing section 8 of the Contempt of Court Act 1981, in order to permit meaningful research into how the jury system operates (paragraph 101).**

This is a difficult issue on which strongly held different views exist. Auld recommended against amending Section 8 in this respect. The Government is considering ways in which meaningful jury research can be carried out and will explore the matter further in consultation with stakeholders.

Double Jeopardy (Part 10)

- (x) We welcome the provisions of Part 10, which are broadly in line with our predecessors' recommendations for reforming the double jeopardy rule (paragraph 107).**

Evidence of bad character (Part 11, Chapter 1)

- (y) We have some difficulty with the proposal to allow the defendant's similar previous convictions to be automatically admitted at trial. In the light of the Oxford Study, we believe that these provisions could lead to miscarriages of justice in some cases. In particular, we are concerned at the prospect of using a defendant's previous record to prop up what might otherwise be a weak case. We are also concerned that this will increase the temptation for the police to pursue the "usual suspects" (paragraph 116).**

The Government does not share this concern. Our approach is designed to make the new rules as straightforward and accessible as possible. Generally speaking, convictions for the same offence or an offence similar to the current charge will have the most probative value in a case and are likely always to have some relevance. In these circumstances, it is desirable to have a straightforward route to admissibility, which will contribute to transparency in the law, as well as consistency in decision making, and reduce the scope for protracted legal arguments. This does not mean, however, that these convictions will always be admitted. It is open to a defendant to make an application for the evidence to be excluded on the basis that the risk of prejudice outweighs the probative value of the evidence.

As far as **weak cases** are concerned, we remain of the view that the exclusionary test will ensure that previous convictions or other evidence of bad character are not used to prop up otherwise weak cases or encourage police to “round up the usual suspects”. Where there is little other prosecution evidence, there is a particularly strong risk of too much weight being given to the bad character evidence in order to secure a conviction. It will therefore be excluded under the test unless it has a particularly strong probative force (for example, where the evidence reveals a signature that clearly identifies the defendant as the offender). As Lord Falconer explained in evidence to the Committee:

“[The application of the test under clause 84(3)] will include specifically the circumstances in which, because there is so little other evidence apart from the previous convictions, it would be unfair to allow the previous convictions to go in.”

- (z) **We agree that the propensity for misconduct should not justify automatic admission of the defendant’s bad character (paragraph 119).**

The Government does not agree with the suggestion that bad character evidence should not be admissible to show propensity. Under the common law there are already circumstances where evidence of previous misconduct is admissible in this respect. For example, an offender might have a propensity to commit a crime in an unusual way or evidence of a propensity might defeat an innocent explanation (for example, evidence demonstrating propensity for indecency would be relevant when considering an explanation that certain conduct was innocently motivated). However, the position of propensity evidence, and in what circumstances it may be adduced, is not clear.

The Law Commission, in their 2001 Report, recommended that evidence of bad character should not be excluded simply because it was evidence of propensity. We agree and our proposals are designed to ensure that evidence showing propensity can be properly taken into account provided that its probative value to the issues in the case exceeds any potential prejudicial effect. This evidence is therefore admissible in principle unless the question of propensity has no bearing on the case (for example, the only issue in the case is causation).

- (aa) **We are concerned at the apparent inequality between the tests for admitting the defendant’s bad character, as compared with a non-defendant’s bad character. At the moment, a lower test of relevance seems to apply to defendants than to non-defendants. In our view, there should be a standard test requiring the bad character evidence to have “substantial probative value” in relation to a matter in issue, which is itself of substantial importance in the context of the case as a whole (paragraph 122).**

The Government does not agree with this recommendation. The scheme tailors the requirements for admissibility to the particular issues raised by the use of such evidence in relation to defendants and non-defendants. In the case of defendants, the critical question is whether the evidence is relevant and, if so, whether the probative value of the evidence is outweighed by its prejudicial effect. This ensures that evidence that will assist the fact finders is capable of being admitted whilst protecting the fairness of the proceedings. Prejudicial evidence of little or no value will be excluded.

The concept of prejudice focuses on the risk of being convicted in circumstances where the evidence does not justify it. It is not therefore apt in the context of witnesses and other non-defendants in the proceedings. It is, however, still important that defendants should not be able to introduce trivial or marginal evidence about a non-defendant's character that may distort the trial process and distract the finders of fact from the key issues in the case. In these circumstances, a test of substantial relevance is warranted. Defendants will still be able to put their case fully, adducing all relevant evidence other than the marginal or trivial. This strikes the right balance between protecting witnesses and others from humiliating attacks that are unnecessarily wide, whilst ensuring that the defendant can properly present his case.

(bb) For the reasons given, we recommend that Clauses 84 to 92, which relate to the admissibility of a defendant's bad character, be deleted from the Bill (paragraph 123).

The Government does not accept this recommendation. We believe that reform of the rules governing the admissibility of bad character evidence, both in respect of defendants and non-defendants, is necessary and that the current position with its complexities and inconsistencies is unsatisfactory. Reform is widely supported and has been the subject of a comprehensive study by the Law Commission (Bad Character Evidence in Criminal Proceedings, Law Com No 273). The Law Commission in their report stated that:

“The present law suffers from a number of defects ... [the current rules] constitute a haphazard mixture of statute and common law rules which produce inconsistent and unpredictable results”.

The reforms proposed in the Bill will see the rules both simplified and put on a more coherent and realistic basis, enabling relevant evidence to be heard more readily. The proposals will enable evidence of a defendant's bad character to be admissible where it is relevant to an issue in the case and include safeguards to ensure fairness in the proceedings.

Hearsay evidence (Part 11, Chapter 2)

- (cc) **In our view, oral testimony given in court is generally the best form of evidence. We therefore welcome the Government's proposal to preserve the general exclusionary rule against hearsay evidence with the modified exceptions provided under chapter 2 of Part 11 (paragraph 127).**
- (dd) **We agree with the Law Commission's view that "cross-examination...should be dispensed with only where it is necessary to do so". We therefore share its concern about the effect on the hearsay rule of Schedule 2 to the Criminal Procedure and Investigations Act 1996. We invite the Government to take this opportunity to repeal the offending paragraphs of Schedule 2 to the 1996 Act, as recommended by the Law Commission, or to explain its reasons for not doing so (paragraph 129).**

An amendment to achieve this purpose has been drafted and will be brought forward at Report.

Magistrates' sentencing powers (clauses 137-138)

- (ee) **We are concerned that the proposed increase in magistrates' sentencing powers will only inflate the prison population unless it is implemented after the Custody Plus scheme is rolled out (paragraph 136).**

The Government does not accept that an increase in the prison population is the natural consequence of the changes to magistrates sentencing powers. There is no evidence to show that the magistrates sentence more severely, as compared to the Crown Court.

And like all courts under the new framework, magistrates will be bound by a set of principles which stipulate that custody must only be imposed when the offence is so serious to merit it, and then only for the shortest time commensurate with the seriousness of the offence.

Final decisions on when the sentencing reforms will be implemented have not yet been made. However, it is likely that we will introduce elements of the sentencing reforms in phases over several years, both to allow the system to absorb the new measures gradually without too much disruption but also to enable the correctional services, in particular the probation service to reach the capacity necessary to implement them successfully.

This is particularly the case for custody plus which creates a large additional caseload for the probation service and which will need to be well planned for, so that it can be delivered in the seamless way (between the correctional services) that is intended.

Furthermore the increase in magistrates' sentencing powers is closely tied in with the changes to allocation of offences between courts set out earlier in the Bill, both of which encourage magistrates to retain more cases. We would want to introduce these at the same time.

Possible additions to the Bill

(ff) If the Government is serious about its commitment to banning the practice of payments to witnesses in active criminal proceedings, we would invite it to seize this opportunity to introduce the necessary legislation (paragraph 142).

Payments to witnesses by the media during active criminal proceedings are objectionable, and particularly so where they are conditional on the outcome of the trial. *The Government remains determined to put an end to the practice.*

Following consultation and discussions with the media, the Government decided in August 2002 to pursue this objective through strengthened self-regulation in the first instance, and asked the media to make proposals.

All the media regulators submitted proposals on 28 February 2003. The Government accepted them on 18 March 2003. The proposals are:

- There should be an absolute ban on payments and offers of payments to witnesses or potential witnesses while proceedings are active;
- Self-regulation should be extended to cover payments before proceedings become active, (where they are likely and foreseeable), to provide that payments should only be made where necessary in the public interest; and
- No payments should be made conditional on the outcome of the trial.

The media has been told that if the strengthened self-regulation is abused then the Government will be quick to legislate.

Related to this, on the issue of pre-trial publicity, the Attorney General has announced that he will be undertaking a short consultation exercise with media organisations with a view to producing guidance for the media on pre-trial publicity.

(gg) We believe that there is a case for extending the reporting restrictions, which preserve the anonymity of victims of sexual offences, to persons accused of those offences. In our view, there are grounds for distinguishing this category of crime from other crime. First, "this is an area where there is a possibility of mistakes being made" and secondly, the damage to those who are never charged, or subsequently acquitted, can be permanent. We invite the Home Office to consider the merits of such a reform by way of amendment to the present Bill (paragraph 145).

The Government appreciates the very great distress that is often experienced by those wrongly accused or charged with a sex offence having been publicly identified. However, the criminal justice system operates on a principle of openness, which is a vital ingredient in maintaining public confidence and encouraging witnesses to come forward. We do not believe there is any justification for those accused of sex offences to be singled out for special protection while other defendants, including those accused of murder, could be identified. We are not therefore minded to change the law. However, we are still prepared to listen to the arguments of those who feel strongly on this matter.

(hh) We invite the Home Office to consider whether further safeguards are needed to deal with the dangers of hearsay evidence of an unrecorded cell confession (paragraph 148).

In relation to the admissibility in criminal proceedings of confessions made to third parties, judges already have discretion to exclude evidence if it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. When considering exercising this discretion the court would have regard for all the circumstances of the case, including the circumstances in which the evidence was obtained. [Ref: Section 78 Police & Criminal Evidence Act 1984 (PACE)].

Judges also have the discretion to exclude evidence where its prejudicial effect would outweigh any probative value. [Ref: Section 82(3) of PACE].

More specifically, where evidence is obtained in circumstances such as confessions made in custody cells, it is also open to the judge to draw the attention of the jury to these circumstances in his summing up.

The Royal Commission on Criminal Procedure considered this issue in 1993 and made no recommendation for change. It was considered again by the Law Commission as part of its review of the hearsay laws in 1997. It concluded that confessions should continue to be admissible against their makers, subject to the discretions in PACE and in common law to exclude them. This view was supported on consultation.

Home Office
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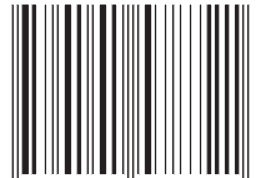
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