
THE GOVERNMENT REPLY TO
THE THIRD REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2006-07 HL PAPER 39, HC 287

# Legislative Scrutiny: Second Progress Report – Offender Management Bill

**Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty April 2007**

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# THE GOVERNMENT REPLY TO THE THIRD REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-2007

**Offender Management Bill**

**Whether providers are "public authorities"**

**1. Given the fact that the ECHR requires States to protect the rights of detained people, the Government may not contract out of its obligation. Therefore, to the extent that the contracting out of services allows for the sub-contracting to third parties, the Government must ensure full compliance with Convention rights. In our view it is a matter of fundamental importance that any entity, including private or voluntary entities, providing probation services constitutes a public authority for the purposes of the duties and responsibilities imposed by the Human Rights Act. We will be returning to this question shortly in a further report on the meaning of public authority in the HRA (paragraph 3.10).**

The Government maintains its view that probation services commissioned under clause 3(2) will be regarded as "public functions" for the purposes of section 6 of the Human Rights Act 1998 and we have made this clear in the revised Explanatory Notes.

As we have previously stated, we hope that this clear statement will assist the court in the event that they find themselves in any difficulty.

**Information sharing**

**2. In our view, the Bill should be amended to make clear on its face that where the information to be disclosed engages Article 8 the test of necessity must be met. Not to provide this clarification, in our view, risks incompatibility because it appears to authorise disclosure of offender information where it is merely expedient to serve one of the probation purposes or some other purpose connected with offender management (paragraph 3.16).**

As set out in our letter of 17 January 2007 (published in the Joint Committee of Human Rights Third Report of Session 2006-07), Clause 10 in no way undermines the ECHR by authorising the disclosure of information in a way that is incompatible with Article 8. The Government fully accepts that the requirement of necessity in pursuit of a legitimate aim must always be met where a proposed disclosure of information engages Article 8. A potential disclosing party is alerted to that fact by the mention of necessity on the face of the clause.

However, there will be cases where disclosure does not amount to a potential interference with the rights protected by Article 8(1), for example in respect of the disclosure of anonymised research data. In such cases, there is no necessity requirement to be satisfied in law and the test of expediency, if met, will be sufficient to authorise the disclosure in question. The Government's view is that taking a power that enables the lawful disclosure of information that does not engage Article 8 ECHR does not operate to undermine the protection that the ECHR seeks to provide in quite different circumstances.

It is therefore essential that the issue of necessity is approached rigorously on a case-by-case basis. This requirement does not, however, create a need for such instructions to be included on the face of the Bill; it is axiomatic in the approach of the authorities, who will need to approach each case on its merits.

**New powers to strip-search visitors in private prisons**

**3. The only procedural requirement that is prescribed by law is that the search "be carried out in as seemly a manner as is consistent with discovering anything concealed". We have no hesitation in finding that this falls well short of the sort of detailed procedural safeguards and rigorous precautions that are required by Article 8. We therefore conclude that the absence of publicly available procedures regulating the power to strip search visitors to prisons means that the interference with visitors' right to privacy is not "in accordance with the law" and is therefore incompatible with both Article 8 ECHR and the European Prison Rules (paragraph 3.25)**

**4. We therefore recommend that the Government make available to Parliament the relevant parts of Prison Service Order 1000, containing the procedural safeguards on searching, to enable Parliament to assess the proportionality of the proposed power to interfere with the Article 8 rights of visitors to prison, and that the Government also translate those safeguards into a publicly available and binding form which would satisfy the requirement that interferences with the right to respect for privacy and physical integrity be "in accordance with the law." (Paragraph 3.26)**

Whilst we recognise the concerns raised by the Joint Committee, it is necessary to stress from the outset that there are no new powers to strip search per se contained in this Bill. We are only seeking to extend to private prisons the *existing* search powers and techniques that have, historically, been operated in public sector prisons for many years. These powers, techniques and procedures have already been developed and modified in order that searches are carried out in a way that is compatible with the ECHR.

Although the Government is not at all complacent about these matters and fully recognises the Article 8 concerns that may arise when searching visitors or prisoners, it wishes to point out that no subsisting case law casts doubt on the lawfulness under the ECHR of either the powers, techniques or procedures themselves.

Indeed, *Wainwright V UK* (the Strasbourg case which the JCHR cites in support of its finding) expressly found that the existing procedures which we seek to extend to private prisons were compatible with the ECHR. Specifically, that case held that our procedures did not fail to meet the "in accordance with the law" requirement of Article 8 (see paragraph 47 of the Court's judgment).

In the Government's view the requirements of the European Prison Rules do not, add anything further. Those Rules require (as does Article 8, according to *Wainwright*) that there be in place *"detailed procedures which staff have to follow when searching..."*. However, they do not require those procedures to be published in part or in full.

Consequently, the Government respectfully disagrees with the Joint Committee's view that a failure to publish its detailed procedures would involve a breach of Article 8 on the ground that searches conducted under the powers given by the clause could not be "in accordance with the law". It might be the case that a failure to have such procedures in place would amount to such a breach (as *Wainwright* suggests) but that is an entirely different matter. Such procedures are in place, as explained in our earlier response and as set out below.

Having set out above its position on the law, the Government notes the Joint Committee's concern that the detailed procedures to which staff will adhere to ensure the search is conducted in a seemly manner were not made available in our initial response of 17 January 2007 (published in the Joint Committee of Human Rights Third Report of Session 2006-07). As we made clear then the procedures are contained in Prison Service Order (PSO) 1000 – a document that establishes the security procedures with which all prisons are required to comply. This document covers all aspects of security and as such is restricted in its circulation. The wholesale disclosure of its provisions could be potentially prejudicial to the security of prison establishments.

We accept that, as a general rule, guidance to staff on how correctly to carry out a search of a visitor would not impact in this way. In fact, the material is freely available to visitors to prisons so they know what to expect will happen to them upon seeking to enter a prison. Therefore, we attach as an annex to this response the relevant extracts detailing the existing correct public sector searching techniques for male, female, child and disabled visitors from PSO 1000 that we are seeking to extend to private prisons (Annex 1). We trust that the Joint Committee will feel reassured that compliance with these procedures will ensure that searches carried out under the new power will be compatible with Article 8 (as *Wainwright V UK* expressly confirms). We hope that the disclosure also offers adequate assurance that the proposal is consistent with the requirements of European Prison Rules to have detailed procedures for staff to adhere to.

**New power to detain visitors in contracted out prisons**

**5. In our view the ECHR is clearly engaged by the new power to detain a visitor pending the arrival of a constable (paragraph 3.30).**

**6. We do not agree that detention under the new clause would be authorised under Article 5(1)(b) (paragraph 3.31).**

**7. In our view detention of a visitor to a contracted out prison under the new power in the Bill is in principle capable of being a justified deprivation of liberty under Article 5(1)(c) ECHR. Given the requirement that the prisoner custody officer must have reason to believe that the visitor is committing or has committed a criminal offence, we see no distinction in principle between the power to detain pending the arrival of a constable and the power of "citizen's arrest". In our view, however, the power could be more tightly defined, for example by introducing a requirement that certain conditions be satisfied before the power to detain arises, such as that the prisoner custody officer be satisfied that it is not reasonably practicable for a constable to make the arrest, and that there are reasonable grounds to believe that detaining the visitor is necessary to prevent them from making off before a constable arrives. If a person is so detained, s/he should be accompanied by a custody officer of the same sex (paragraph 3.32).**

We note the Joint Committee's concerns in relation to this Clause and the view that that detention under the new power will inevitably engage Article 5 ECHR.

The only clear rule emerging from the case law as to what constitutes a "deprivation of liberty" so as to engage Article 5, is that one must always look at the facts of each case. Because of the way that the clause is drafted and the purpose for which the power will be used, detention for a whole range of different time periods is theoretically permitted by the power in the Clause. A person may be required to wait with a constable only for 5 minutes or for considerably longer, subject to the rule that no single period of detention can be longer than 2 hours. In this context, while Article 5 may be engaged by detention under the clause in some cases, the Government does not agree that this will be the result in each and every case of such detention or, indeed, that this will be a common result.

We note that the Joint Committee takes the view that, if Article 5 is engaged, detention will not be authorised by Article 5(1)(b). With respect the Government disagrees with that assessment for the reasons set out in its previous letter of 17 January 2007 on this subject (published in the Joint Committee of Human Rights Third Report of Session 2006-07).

We note the Joint Committee's view that additional limitations are needed to provide the necessary human rights safeguards. However, we feel that there are already adequate limitations in place of the sort that the Joint Committee has proposed. First, detention can only take place where a Prisoner Custody Officer has reasonable cause to suspect that an offence under the Prison Act 1952 has been committed. Second, the period of detention is limited to such time "as may be necessary" for the arrival of a constable and, in any event, to a maximum of two hours. If there is no reasonable basis for detention as mentioned by the Joint Committee it cannot be "necessary" to detain a person for any length of time, irrespective of the whereabouts of a constable. On this basis, we contend that the test of "necessity" here provides the reassurance that the Joint Committee is seeking.

Providing further definition of the power along the lines suggested would not be beneficial. For example, a requirement that a PCO be satisfied that "it is not reasonably practicable for a constable to make the arrest" would not substantively assist. If a constable were to be available there would be no need for the PCO to exercise the power in the first place; it is because nobody in a private prison has constabulary powers that this Clause is needed. Likewise a PCO would not need to exercise any detention period under these powers in cases where the suspect has indicated they are willing to wait on a voluntary basis for the arrival of a constable.

Consequently, we do not feel that further restrictions are necessary or that the detention powers fail to satisfy Article 5, if it is engaged at all.

**New criminal offence of removing documents from a prison**

**8. We accept that all of the reasons listed by the Government are legitimate aims which are capable in principle of justifying the interference with freedom of expression which results from the existence of such an offence. We also accept that the public interest defence provides an important safeguard for freedom of expression and would protect a genuine whistleblower who might otherwise commit the offence in the course of exposing an abuse taking place inside a prison (paragraph 3.38).**

**9. We remain concerned, however, that making this offence apply to information relating to any matter connected with the operation of the prison, the disclosure of which would or might prejudicially affect the "operation" of the prison, gives the offence a potentially very wide scope. Protecting the security of the prison, and the rights of prisoners and staff, are clearly legitimate aims which can justify the existence of this offence, but protecting the "operation" of the prison is not in our view a purpose which can be brought within any of the legitimate aims for which freedom of expression can be limited in Article 10(2) ECHR. In our view the reference to prejudicially affecting the operation of the prison in the definition of "restricted document" gives the offence too wide a scope and is not necessary in order to achieve the purposes set out by the Government, and we recommend that these references be deleted from the Bill in order to reduce the risk of the new offence leading to unjustified interferences with freedom of expression (paragraph 3.39).**

In relation to the new offence of removing restricted documents from a prison, we do not think that Article 10 of the ECHR will be engaged that often, and whilst we note the helpful comments made by the Joint Committee on Human Rights, we do not agree that the proposed scope of the offence is too wide.

On the occasions where this offence does engage Article 10 we consider that it could be justified under the aim of the prevention of disorder or crime and the protection of health and morals under Article 10(2). We take the view that making this offence apply to information which would or might prejudicially affect the operation of a prison is proportionate and necessary for the good order and running of a prison.

There are a range of activities which could be undermined through the disclosure of restricted information. Examples of information that could prejudicially affect the operation of the prison include:

- Search schedules
- Contingency plans
- Documents relating to moving prisoners in and out of prison including but not limited to Prisoner Escort Records
- Prison staff rotas
- Details of participation in offending behaviour programmes
- Planned construction or repair works

Disclosure of all of these could compromise the ability of a prison to cover its core business, impact on the smooth and effective running of a prison and ultimately could require the adoption of more costly procedures. In our view, these examples are unlikely to be covered by the references in the provisions in the Bill to information that might prejudicially affect the security of the prison or the interests of an identifiable individual.

We need to ensure the effective operation of prisons in order to enable them to carry out their primary function of holding prisoners safely and securely during their period of imprisonment.

**Removal of requirement to appoint medical officer**

**10. Having considered the further information provided by the Government we are satisfied that the removal of the requirement to appoint a medical officer is compatible with the requirements of international standards for the detention of prisoners (paragraph 3.44).**

The Government is grateful to the Committee for their detailed scrutiny of the Bill and pleased it was able to reassure the Committee that the removal of the requirement to appoint a medical officer is compatible with international standards.

**Power to send to prison at 18**

**11. We query whether such guidance would be sufficient to protect this group of offenders who are peculiarly vulnerable because of their age. We also question the appropriateness of introducing such a significant measure on a contingency basis. In our view it is premature to do so until the future of Young Offenders Institutions is known and there can be a proper debate about the measures required to ensure that vulnerable young offenders are not transferred to the adult prison system (paragraph 3.48).**

The law already allows 18 year olds sentenced to Detention in a Young Offender Institution or to imprisonment to be placed in a prison (section 61 of the Criminal Justice and Court Services Act 2000), so this is simply a consequential measure to ensure that the Detention and Training Order legislation is consistent with section 61 (which, we acknowledge, has yet to be commenced). However, the current review of provision for young adults does provide an opportunity to look at all aspects of that issue and we will reflect on the Committee's suggestion about timing.

**Annex 1 – Relevant extracts detailing the existing correct public sector searching techniques for male, female, child and disabled visitors from PSO 1000**

## Searching People with Injuries or Disabilities

The normal routine searching procedure will need to be varied according to the particular injury/disability of the person.

If a person is wearing a pacemaker, they must not be subjected to the metal detector portal or hand held metal detector.

Ask the person if they are in any pain and consider taking advice from a Healthcare professional.

When conducting a routine search, do so in a seemly manner with due regard to the person's disposition.

## Conducting a Full Search

If the person has an artificial limb, bandage, plaster cast, etc, and this impedes the search and/or there is suspicion that it is being used to conceal an unauthorised item, or there are any other health concerns, the searching officers must seek advice from Healthcare staff.

Elderly subjects, or those with relevant disabilities, must be allowed to sit down for as much as possible during the search.

If the person is seriously ill or still recovering from major injury or recent surgery, the procedures must be modified to ensure the least discomfort or intrusion consistent with a reasonable chance of finding anything that might be concealed. They must be offered the chance to sit down during the search, particularly when dressing/undressing. Any part of the procedure that is clinically unacceptable following medical advice must not be carried out. The medical advice must be recorded and be readily available (subject to medical confidentiality).

**The correct procedure to use when conducting a Level A or B Rub Down Search of a Male Wheelchair User is as follows:**

1. Ask him if he is in any pain and consider taking advice if he is.

2. Ask him if he has anything on him that he is not authorised to have.

3. Ask him to remove any overcoat/blanket covering him and search it.

4. Ask him to empty his pockets and remove any jewellery including wrist watch.

5. Search the contents of pockets, jewellery and any other items including bags he is carrying then place them to one side.

6. Ask him to remove any headgear and pass it to you for searching.

7. Level A only: Search his head either by running your fingers through his hair and round the back of his ears or ask him to shake out his hair and run his fingers through it.

8. Level A only: Look around and inside his ears, nose and mouth.

9. Lift his collar, feel behind and around it and across the top of his shoulders (search any tie, removing if necessary).

10. Ask him to raise his arms. His fingers must be apart with palms facing downwards. Search each arm by running your open hands along the upper and lower sides.

11. Check between his fingers and look at the palms and backs of his hands.

12. Check the front half of his body nearest to you from neck to waist. Search the front of the waistband

13. Check the front half of the abdomen nearest to you and then as far around the nearest leg as possible.

14. Level A only: Ask him to remove footwear and search thoroughly. Check the sole of the foot.

15. Repeat the process for the other half of the body.

16. Ask him to lean forward and search the back, waistband and buttocks.

17. Look at the area around him for anything he may have dropped before and during the search.

18. Move the wheelchair to one side to ensure it is not over anything he may have dropped.

19. Search the wheelchair and any attachments, unless a prison issue wheelchair is supplied.

**The correct procedure to use when conducting a Level A or B Rub Down Search of a Female Wheelchair User is as follows:**

1. Ask her if she is in any pain and consider taking advice if she is.

2. Ask her if she has anything on her that she is not authorised to have.

3. Ask her to remove any overcoat/blanket covering her and search it.

4. Ask her to empty her pockets and remove any jewellery including wrist watch.

5. Search the contents of pockets, jewellery and any other items including bags she is carrying then place them to one side.

6. Ask her to remove any headgear and pass it to you for searching.

7. Level A only: Search her head either by running your fingers through her hair and round the back of her ears or ask her to shake out her hair and run her fingers through it.

8. Level A only: Look around and inside her ears, nose and mouth.

9. Lift her collar, feel behind and around it and across the top of her shoulders (search her scarf, tie etc, removing if necessary).

10. Ask her to raise her arms. Her fingers must be apart with palms facing downwards. Search each arm by running your open hands along the upper and lower sides.

11. Check between her fingers and look at the palms and backs of her hands.

12. Check the front half of her body nearest to you from neck to waist. Search the front of the waistband.

13. Check the front half of the abdomen nearest to you and then as far around the nearest leg as possible.

14. Level A only: Ask her to remove footwear and search thoroughly. Check the sole of the foot.

15. Repeat the process for the other half of the body.

16. Ask her to lean forward and search the back, waistband and buttocks.

17. Look at the area around her for anything she may have dropped before and during the search.

18. Move the wheelchair to one side to ensure it is not over anything she may have dropped.

19. Search the wheelchair and any attachments, unless a prison issue wheelchair is supplied.

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