



## **Drugs Bill**

### **Briefing on Second Reading (House of Lords)**

**March 2005**

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1. JUSTICE is an all-party law reform organisation committed to the advance of human rights and the rule of law. It is also the United Kingdom section of the International Commission of Jurists.
2. This briefing concerns the Drugs Bill, as brought from the House of Commons on 23<sup>rd</sup> February 2005.

### **Summary**

3. JUSTICE is concerned about many of the Bill's proposals, in particular:
  - Unnecessary changes to criminal and sentencing law that may have harmful effects
  - The extension of compulsory testing and assessment
  - Police authorisation of X-rays and ultrasound scans, with possible sanctions for failure to consent
  - Compulsory 'intervention orders' for people who have not been convicted of any criminal offence
4. We are generally concerned at the increased use of compulsory powers and the criminal justice system to deal with drug users and drug dependency where the user has not been convicted of any criminal offence. We believe that this might result in disproportionate interferences with the right to privacy, protected by Article 8 of the European Convention. It may also be counterproductive, as it might result in the further criminalization and social exclusion of drug users and their alienation from treatment programmes. We are concerned that the criminal justice system will be used to deal with problems that might be more properly and effectively dealt with by other agencies.

## **Changes to criminal and sentencing law and procedure**

### *Clause 1 – Aggravated supply of controlled drug*

6. This clause is, presumably, intended to require the courts to give visible effect to society's disapproval of people who involve children and young people in the drugs trade, by selling drugs to them, by selling drugs when they are or are likely to be present, or by involving them as couriers in the trade.
7. We support the provision of sentencing guidelines by the Sentencing Guidelines Council, including lists of aggravating and mitigating factors for particular offences, as this helps to achieve fairness and consistency in sentencing. However, we believe that for Parliament to compel the courts to regard one particular factor as aggravating may result in sentencing that is, or that appears to be, unfair.
8. We believe that this provision creates a risk that sentencers will attach particular importance to matters within the clause, while regarding other, equally aggravating, factors as less important. A person falling within the clause may therefore receive a heavier sentence than a person whose conduct is equally culpable due to other aggravating factors.
9. We do not believe that clause 1 is strictly necessary. It is likely that the courts would regard the matters in paragraph 6, above, as aggravating factors in all events. Where a person has sold drugs to children or used a child as a courier, it is inconceivable that the courts would not do so. Further, it is common for sentencers to mention aggravating factors in their sentencing remarks. A properly drafted clause on the subject would therefore have limited legitimate impact.
10. However, we are concerned that the clause has not been drafted so as properly to address the mischief of involving children in the drugs trade. For example, the clause would not apply to cases where children had been employed in the preparation or wrapping of drugs, or where children were being sold drugs on or near premises such as youth clubs or their homes.
11. Furthermore, in its current form the clause could apply to circumstances where there would be no likelihood of children being present or involved. In particular, the phrase 'in the vicinity of school premises' in clause 1(3) is extremely vague and may lead to injustice. Such areas might include private premises to which children have no access, or streets along which the children do not pass when arriving at or leaving school.

*Clause 2 – Proof of intention to supply a controlled drug*

12. This clause creates an evidential presumption as to the element of intention to supply in an offence of possession with intent to supply a controlled substance. Convictions for this offence generally attract considerably higher sentences than equivalent convictions for simple possession, and can also trigger the application of a minimum sentence on third conviction.<sup>1</sup> Proof of an intention to supply therefore has serious consequences for a defendant.
13. JUSTICE believes that evidential presumptions of this type should rarely be used in criminal proceedings, since they can water down the criminal standard of proof. The Court of Appeal of Northern Ireland has said that presumptions should not be used unless, having done so, the court would be left satisfied beyond reasonable doubt of the guilt of the accused.<sup>2</sup> It has been suggested in the House of Lords that a similar approach should be applied in England.<sup>3</sup>
14. Article 6(2) of the Convention provides that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' The European Court of Human Rights has interpreted this article to require that:

When carrying out their duties, the members of the court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should benefit the accused.<sup>4</sup>

Presumptions should therefore be confined 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'<sup>5</sup>
15. The prescribed amounts of drugs that will be required to trigger the presumption will make a considerable difference to the effect that this clause will have. If the amounts are very large, then the clause will be of very limited effect, since the quantity of the drug would be strong evidence of intent to supply in all events. If they are small, the application of the presumption may, we believe, cause miscarriages of justice, since it may water down the standard of proof.
16. Currently, intent to supply may be proved not only by evidence of the quantity of drugs, but also by, *inter alia*, evidence of the circumstances in which the drugs are found, including such matters as division, wrapping, and relevant forensic evidence, of paraphernalia (scales, cash

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<sup>1</sup> Under section 110 of the Powers of Criminal Courts (Sentencing) Act 2000.

<sup>2</sup> *R. v. Killen* [1974] NI 220.

<sup>3</sup> *R. v. DPP, ex p. Kebilene* [1999] 3 WLR 972, 995 *per* Lord Hope.

<sup>4</sup> *Barbera Messegue and Jabardo v. Spain* (1988) 11 EHRR 360 para. 77.

<sup>5</sup> *Salabiaku v. France* (1988) 13 EHRR 379 para. 28.

etc.) seized from relevant premises including relevant forensic evidence, and/or of telephone calls or other contacts with alleged customers, suppliers or associates. We believe that these latter types of evidence are capable of having much greater probative value in relation to establishing intent to supply than the mere quantity of the drugs, unless that quantity is very large.

17. The only way in which the presumption will assist the prosecution, therefore, is by weakening the standard of proof. In these circumstances, having applied the presumption the jury will not be left beyond reasonable doubt of the defendant's intention to supply the drugs. The maintenance of the criminal standard of proof is particularly important when, as here, the presumption relates to one of the essential elements of a serious criminal offence.
18. In most cases where the issue is intent to supply the presumption will be disapplied by evidence from the defence that the defendant may not have had the drugs in his possession with the requisite intent. This could presumably take the form of an assertion on oath by the defendant himself. The presumption will therefore have little legitimate effect, but may allow miscarriages of justice to occur.

## **New police powers**

### *Clauses 5 and 6 – X-ray and ultrasound scans*

19. We are very concerned about these provisions, which we believe may have serious unintended consequences if enacted.
20. We are first concerned that they allow police officers to authorise X-rays or ultrasound scans without taking any medical advice. As currently drafted, the police officer could choose which sort of scan to authorise. Since X-rays and ultrasound scans are medical procedures, we believe that they should be performed on the basis of clinical need. In particular, X-rays administer radiation and should not be carried out unless the medical needs of the patient justify the risk to health incurred. They should particularly be avoided in the case of pregnant women, unless absolutely necessary.
21. A police officer is in no position to assess the risks to the suspect or his or her medical needs; in all events, the officer's decision is made not to protect health but to detect crime. We are concerned that these clauses would allow an officer to authorise a scan that would be medically inappropriate. The suspect might then feel pressurised into consenting to an inappropriate scan because of the adverse inference provisions.

22. Medical staff are under duties to act in the best interests of the patient and not to create unnecessary risks to the patient's health. They are not under any special duties to assist the police in the detection of crime. We would expect medical staff to refuse to perform any scan they thought inappropriate but are concerned that they may feel under pressure to perform a scan that has been authorised by an officer. A suspect who has swallowed Class 'A' drugs may require urgent treatment, because packages can open in the stomach. If, for medical reasons, other forms of medical examination or treatment should take priority over an ultrasound scan or X-ray, then to delay such examination or treatment to carry out an ultrasound or X-ray could have severe implications for the suspect's health.
23. We are also concerned about the impact that these provisions would have upon local medical services. If police bring in suspects valuable time may be spent examining people who are not a clinical priority, while others are left to wait. This may have an impact upon *their* health. Ultrasound scans in particular may be difficult to arrange at short notice.
24. The breaches of medical confidentiality provided for in these clauses may also have a severe impact upon the suspect's health. The clauses assume that results of the scans will be disclosed to police.<sup>6</sup> A suspect who has swallowed drugs may therefore refuse to consent to a scan. However, the scan may be needed for medical purposes. Further, since the confidential relationship between doctor and patient has been compromised, the suspect may be likely to refuse to disclose other information to the doctor or to allow the doctor to examine him, or may even refuse all medical treatment. This could be extremely dangerous in the circumstances.
25. Under Article 2 of the Convention, the state has an obligation 'to take appropriate steps to safeguard life'.<sup>7</sup> In circumstances such as these, the state must do 'all that could have been required of it to prevent...[a person's]...life from being avoidably put at risk.'<sup>8</sup> The State never has greater responsibility for a person's life and health than when they are in state custody. The right to life under the Convention is an unqualified right.
26. We therefore believe that appropriate safeguards must be put in place to prevent the suspect's life from being put at risk. We believe that if an officer does suspect that a person has swallowed Class 'A' drugs, then they should be placed under an obligation to safeguard their right to life by giving them access to immediate confidential medical attention. This safeguard should also apply in relation to Clause 8 of the Bill.

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<sup>6</sup> Clauses 5(8) and 6(8) assume that the police possess the results of the scans.

<sup>7</sup> *Association X v. United Kingdom* (1978) 14 DR 31, 32, EComm HR.

<sup>8</sup> *LCB v. United Kingdom* (1998) 27 EHRR 212, at para. 36.

27. Medical examinations authorised by a police officer, where the results are communicated to the police, clearly engage the right to privacy. Other, less intrusive means are available to obtain evidence that a person has swallowed drugs (for example, the recovery of drug packages that have passed through the body). The disclosure of an X-ray or ultrasound scan is a particularly severe interference with the right to privacy because such a scan can reveal many aspects of a person's medical health (such as pregnancy or disease) other than the presence of drugs. We believe, therefore, that these measures interfere disproportionately with the right to privacy.

*Clause 7 – Testing for presence of Class A drug*

28. The compulsory testing for Class A drugs under clause 7 of the Bill of people who have merely been arrested and who may never be charged with a criminal offence clearly engages the right to privacy, since the results of the test may be disclosed for various purposes under section 63B(7).
29. The extension of the category of persons who may be tested allows police officers considerable discretion in choosing whom to test and therefore creates the risk of arbitrary interference with this right, and arbitrary exposure to obligations with criminal sanctions for non-compliance. We believe that people should not be subject to this compulsory regime of testing and assessment simply by reason of falling within new subsection 63B(1A).
30. We are particularly concerned that under sub-clause (5C) detention of an arrested person may be extended for purposes of compulsory testing when he would otherwise be bailed. We are also concerned that under sub-clause (10) the Secretary of State could provide for different minimum ages for testing to apply to different police areas. This renders the application of the powers even more arbitrary, and results in a 'postcode lottery' for the exercise of powers that have very serious consequences.

**Compulsory treatment and assessment**

*Clauses 9 to 19*

31. JUSTICE is very concerned at the proposal to extend compulsory assessment to people who have not been convicted of any offence. Such assessment clearly engages the right to privacy, particularly since the results of the assessment may be disclosed to a court under clause 17(4).
32. We believe that the provisions allowing the police to require a person to attend for compulsory assessment are capable of being applied in an arbitrary fashion. As recently as October 2004,

the European Court of Human Rights reiterated the necessity of clear rules governing the use of compulsory treatment powers for the sake of 'avoiding arbitrariness'.<sup>9</sup>

33. In addition, we do not believe that this regime is necessary, since compulsory treatment requirements and the lack of medical confidentiality may be counterproductive in effect, alienating people from drug treatment services. They may therefore fail to achieve the reduction in drug-related crime that is hoped for. Other, less invasive, measures might be equally effective, such as extension of the provision of voluntary treatment schemes both on arrest referral and in society more generally.
34. We are also concerned at the granting powers of legal compulsion in clause 13 of the Bill to the assessor. We believe that these powers may be incompatible with the proper relationship between a medical assessor or drug worker and their patient. Combined with the lack of medical confidentiality and the criminal sanction for non-compliance with assessments, this may lead to a lack of disclosure, or false disclosure, by the patient that may be deleterious to their health. It may also lead to reluctance on the part of drug users to engage with treatment services in the future; this will be directly counter-productive to the aims of this legislation.
35. Since drug users often have chaotic lives, they will in many cases fail to comply with the compulsory assessment regime. This will result in drug users being further criminalized, perpetuating their social exclusion and increasing prison overcrowding. We believe that these offences will set many drug users 'up to fail'.

*Clause 20 – Anti-social behaviour orders: intervention orders*

36. Many of the objections levelled at the compulsory assessment powers in Part 3 of the Bill apply *a fortiori* to intervention orders. We are extremely concerned about these provisions, which are part of a series of recent measures using civil orders to impose sanctions and restrictions for preventative purposes.
37. 'Intervention orders', as proposed by the Bill, are modelled upon the anti-social behaviour order, but go further by imposing positive requirements rather than negative ones. At common law, the mandatory injunction (requiring action rather than restraint) is not lightly imposed, as it is seen as a substantial incursion into the liberty of the individual. This principle is not respected by intervention orders, which more closely resemble community sentences passed on conviction (such as community rehabilitation orders or drug treatment and testing orders). The important distinction, of course, is that a person subject to an intervention order will not have been convicted of any criminal offence.

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<sup>9</sup> *HL v. United Kingdom*, Case No. 45508/99.

38. For a community sentence to be passed, the court must be of the opinion ‘that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence.’<sup>10</sup> The requirement of sufficient seriousness inserts an element of proportionality into the sentencing structure. This structure is not present for intervention orders, which can be triggered by behaviour that would not constitute a criminal offence for which a community sentence could be passed.
39. Compulsory treatment engages Article 8 of the Convention. However, we believe there are insufficient safeguards in the legislation to avoid the arbitrary application of an intervention order. Apart from the usual requirements for an anti-social behaviour order, the only additional requirement of substance for the making of an intervention order is that the court is satisfied that it is ‘desirable’ in order to prevent repetition of the anti-social behaviour. We believe that this is a very low standard, and that courts will err on the side of caution by imposing orders.
40. We are also extremely disturbed that the Secretary of State may add ‘other such factors’ under section 1G(1)(b) to those that can be addressed by an intervention order. This could lead to the extension of this legislation to a variety of factors such as mental health problems, truancy, lack of educational attainment, etc. It could result in the widening of the application of intervention orders to all those eligible for anti-social behaviour orders. This could create a parallel justice system where important safeguards present in the criminal justice system were lacking. If such extensions are to be made, we believe that this should be done by Parliament.
41. We are further concerned by the provision in new section 1H(2) that the Secretary of State should be able to provide for cases where the recipient of an intervention order will not have the order explained to him, or where it should be explained in his absence or in written form. It is clear that a defendant in an application of this sort has a constitutional right to a fair hearing. We also believe that proceedings where an intervention order could be imposed should attract the fair trial guarantee of Article 6(1) of the Convention.<sup>11</sup>
42. It is necessary, if this procedure is to comply with Article 6(1) and the domestic constitutional right to a fair hearing, that the defendant has the right to be present at all stages of the hearing

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<sup>10</sup> Powers of Criminal Courts (Sentencing) Act 2000, Section 35(1) (as amended).

<sup>11</sup> See *Clingham v. Royal Borough of Kensington and Chelsea, R. v. Crown Court at Manchester ex parte McCann and Others* [2002] UKHL 39 *per* Lord Steyn at para. 29 and *per* Lord Hope at para. 80. Note that even this case is currently under appeal to the European Court of Human Rights: see e.g. Andrew Ashworth QC, ‘Social Control and ‘Anti-Social Behaviour’: The subversion of Human Rights?’ (2004) 120 LQR 263-291 at 290: ‘In holding that the anti-social behaviour order is not a penalty, the House of Lords in the [McCann] decision attributed much less significance to the possible consequences of breaching the order than the Strasbourg Court might do’.

and to participate in it. In addition, since breach of the order is a criminal offence it is essential that the defendant understands the order and what is required of him under it. Written notification is insufficient because it is quite possible that the defendant will not receive the copy order (since many drug users will not have stable addresses) or that he will not understand its terms.

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24<sup>th</sup> March 2005