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The *Criminal Justice Bill*

Bill 8 of 2002-03

This paper is concerned with the *Criminal Justice Bill*, which is due to be considered on second reading on Wednesday 4 December.

The Bill is to introduce major reforms to the criminal justice system designed to rebalance it in favour of victims, witnesses and communities. Most of the reforms are based on proposals made in two major reviews commissioned by the Government, of the legal framework of sentencing, and of the criminal courts.

This paper provides a general background to the Bill and considers the provisions of the Bill relating to police powers, drug testing requirements, bail and conditional cautions. Other research papers in this series consider the provisions relating to sentencing, double jeopardy, prosecution appeals, disclosure, evidence, mode of trial and juries.

Arabella Thorp and Sally Broadbridge

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Summary of main points

This Paper begins by explaining how the principal reforms in the Bill have been developed, and outlining some of the reactions to them. It also mentions some proposals for reform of the criminal justice system which have not been accepted by the Government, and others which the Government is seeking to implement in other legislation.

The Paper goes on to address some of the substantive reforms which are mostly contained in Parts 1 to 3 of the Bill, and include the following:

- **Police powers:** changes to the *Police and Criminal Evidence Act 1984,* including a proposed new power for the police to impose bail on suspects without taking them to a police station; an increase in the maximum time for detention without charge from 24 to 36 hours; and changes to the way revisions to the Codes of Practice under the 1984 Act are scrutinised. These proposals follow from a Home Office/Cabinet Office review of the 1984 Act.

- **Drug testing requirements:** new drug testing powers for young suspects/offenders both after a charge and after conviction.

- **Bail:** amendments to the categories of people who can be denied bail under the *Bail Act 1976*, in response to a Law Commission report on bail and human rights; a new presumption against bail for alleged offenders who are shown to be drug abusers; and reforms to the system of bail appeals, in line with recommendations from Lord Justice Auld's report into the criminal courts system.

- **Conditional cautions:** a proposed new power to issue cautions to suspects who admit guilt, which require them to comply with certain conditions. This too was recommended by Lord Justice Auld.

Provision of the Bill relating to sentencing, double jeopardy, prosecution appeals, disclosure, evidence, mode of trial and juries are dealt with in four further Library Research Papers.

Most of the provisions of the Bill apply to England and Wales only. Part 5 (disclosure) extends to Northern Ireland.

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I Background

A. The derivation of the reforms

The provisions of the *Criminal Justice Bill* are based for the most part on recommendations made in two major reports commissioned by the Government, and published last summer. These are usually referred to as "The Halliday Report" and "The Auld Report".

1. The Halliday Report

The Halliday Report, *Making Punishments Work*[1], was the result of a fundamental review of the legal framework of sentencing, led by John Halliday formerly Director of Criminal Justice Policy at the Home Office. The terms of reference of the review were:-

> In the light of the Government's objectives to protect the public by reducing crime and re-offending, and to dispense justice fairly and consistently, to consider:
>
> > (i) what principles should guide sentencing decisions; (ii) what types of disposal should be made available to the courts in order to meet the overarching objectives;
> > (iii) the costs of different disposals and their relative effectiveness in reducing re-offending;
> > (iv) what changes therefore need to be made to the current sentencing framework, as established by the Criminal Justice Act 1991, so as more effectively to reduce re-offending, including any transitional and consequential arrangements; and
> > (v) the likely impact of any recommendations in terms of costs and the effects on the prison population.
>
> In particular, the review should bear in mind the desirability of promoting flexibility in the use of custodial and community based approaches.[2]

The Halliday Report was published in July 2001 and contained 55 recommendations. Comments were invited in a consultation period which ended on 31 October 2001. A summary of the 200 responses is available on-line on the Home Office website at http://www.homeoffice.gov.uk/cpg/consrespoverview.pdf.

2. The Auld Report

The Auld Report was the result of Lord Justice Auld's Review of the Criminal Courts begun in January 2000. The terms of reference were:

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[1] Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales: http://www.homeoffice.gov.uk/cpg/chap12punish.pdf

[2] "Home Secretary announces sentencing framework review", 16 May 2000, Home Office Press Notice 129/2000

> A review into the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law. [3]

The Auld Report was published in October 2001, and made 313 recommendations. Comments were invited in a consultation period which ended on 31 January 2001. There were 500 comments which (except for those where contributors requested confidentiality) were posted on the Lord Chancellor's Department website at http://www.lcd.gov.uk/criminal/auldcom/index.htm.

3. The *Way Ahead*

On 19 February 2001, between the commissioning of the two reports and their publication, the Government published its strategy *Criminal Justice: The Way Ahead* [4] On learning of the imminent publication, Lord Justice Auld issued a statement explaining that he had still to reach conclusions on a number of issues central to his review.

> On 8th February 2001 the Prime Minister announced in a speech that the Government would publish "a crime plan" later this month that would "set out root-and-branch reform of every aspect of the Criminal Justice System". There have since been a number of media references to the proposed plan, attributing to Government sources an intention that the plan and anticipated recommendations in the Review Report would form part of its electoral strategy.
>
> Lord Justice Auld has not yet completed his Report or submitted any of it to the Lord Chancellor. He has still to reach conclusions on a number of issues central to the Review. The Lord Chancellor has assured him that, pending receipt and consideration of the Report, the Government does not intend to take final decisions on issues within his terms of reference.
>
> Lord Justice Auld hopes to submit his Report shortly. When it is published he trusts that it will be seen as an objective analysis unassociated with and uninfluenced by current Governmental and political initiatives.[5]

A number of new procedures were contemplated in *The Way Ahead* including -

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3 "Lord Chancellor launches Review of the Criminal Courts", 14 December 1999, LCD Press Notice 386/99

4 Cm 5074

5 CCR Press Notice 01/2001, 19 February 2001

- Simpler, fairer rules of evidence, so that magistrates and juries may have access to all the relevant and reliable material they need to acquit the innocent and convict the guilty
- Better access by witnesses and jurors to written statements and interview transcripts and clearer rules on pre-trial disclosure of evidence by both sides
- A new prosecution right of appeal against a range of judicial rulings, to reduce the number of cases which are dismissed prematurely.
- New laws to tackle offending on bail backed up by better information for courts
- Reform of the criminal law to provide a consolidated, modernised core criminal code covering evidence, procedure, substantive offences and sentencing
- More streamlined and effective court organisation and procedures, including links with the other criminal justice agencies.

although it was said that before decisions were made on those issues, the Government would consider carefully the recommendations of Sir Robin Auld's review of the criminal courts.

4. The White Paper*: Justice for All*

The Government's response to both reports was contained in a relatively short White Paper, *Justice for All*, which was published in July 2002. Some of the topics covered in the *Auld Report* and the White Paper had already been examined by the Law Commission and the background to these can be found in Law Commission Consultation Papers and Reports. Those Reports were:

- "Evidence in criminal proceedings: hearsay and related topics"[6]
- "Double jeopardy and prosecution appeals" [7]
- "Bail and the Human Rights Act 1998"[8]
- "Evidence of bad character in criminal proceedings" [9]

5. Views on the *White Paper*

Views were invited on three specific proposals in the *White Paper*, with comments to be received by 9 October 2002. The proposals were:

- Trial by judge alone for complex and lengthy trials, and where a jury is at serious risk of bribery or intimidation

6 Law Com No 245, June 1997: the Consultation Paper was No 138 (1995)
7 Law Com No 267, March 2001: the Consultation Papers were Nos 156 (1999) and 158 (2000)
8 Law Com No 269, June 2001: the Consultation Paper was No 157 (1999)
9 Law Com No 273, October 2001: the Consultation Paper was No 141 (1995)

- whether Crown Courts should retain the discretion to try 16 and 17 year olds and young people where there are adult co-defendants.
- new measures to tackle domestic violence.

Several organisations including the human rights organisations, Liberty and Justice, The Bar Council and the Law Society, have published responses to the White Paper generally, or particular parts of it, not limited to those specific proposals. They can be accessed on line at
http://www.justice.org.uk/inthenews/index.html
http://www.liberty-human-rights.org.uk/
http://www.lawsoc.org.uk/
http://www.barcouncil.org.uk/document.asp

B. The *Criminal Justice Bill*

The *Criminal Justice Bill* was introduced on 21 November 2002. A press notice which described the Bill as "radical legislation to rebalance the Criminal Justice system in favour of victims, witnesses and communities" focused particularly on proposals to

- Reduce reoffending on bail by giving the police powers to impose conditions on bail before charge; extending prosecution's right to appeal against bail;
- Build strong cases to put before the court by allowing the CPS to determine the charge and improving the disclosure of information by the prosecution and defence;
- Get the case to trial quickly by giving sentence indication to encourage early guilty pleas and increasing magistrates' sentencing powers to 12 months;
- Reduce the chance of the accused 'playing the system' and escaping justice if guilty by allowing the use of reported evidence and improving defence and prosecution disclosure with increased incentives and sanctions to ensure compliance;
- Simplify and modernise our approach to evidence;
- Reduce exemption from jury service so that more people serve;
- Provide for judge alone trial in some difficult to manage fraud trials or with trials involving complex financial information and in cases involving jury intimidation;
- Enable witnesses to give evidence by live TV links;
- Increase sentences for dangerous violent and sex offenders;
- Ensure persistent offenders receive progressively more severe sentences;
- Provide clearer and more rigorous community punishments;
- Focus the sentencing framework on crime reduction through rehabilitation, deterrence and reparation alongside the continuing key aim of public protection and punishment;
- Strengthen the police in their fight against crime through amendments to PACE; and

- Extend drug testing and treatment provision so that even more offenders can tackle their addiction and cut drug related crime.

At the same time, the Home Secretary, the Lord Chancellor and the Attorney General published a summary document outlining the specific measures for victims and witnesses that the Government was committed to introducing.[10] The Home Secretary was reported to have said:-

> The tradition of criminal justice in England and Wales is one of which we are rightly proud. To remain responsive to the communities it serves the system needs to move with changes in society. Crime impacts most on the poorest members of society and reducing it and bringing offenders to justice efficiently and effectively is a matter of social justice.
>
> The Criminal Justice System needs radical reform. Only a fifth of crimes reported to the Police result in a conviction and public confidence in justice being done is at an all time low. We will refocus the system around the needs of victims to bring more offenders to justice, to restore public faith in the Criminal Justice System and reduce the fear of crime in our communities particularly in deprived areas which suffer most from its effects.
>
> When the Criminal Justice System works badly, everyone suffers. At the moment, too many offenders escape justice and cases drop out at every stage of the process, often because of court practices that need modernising or because of tactical manoeuvres designed to disrupt the justice process and secure acquittal of the guilty. The fundamental principle remains that the prosecution must prove its case, but this does not mean that the system should enable a defendant to obstruct justice by inaction or by abuse of the system.
>
> Antiquated rules with arbitrary effects and unpredictable consequences must be reformed. Obstacles to delivering a more effective and efficient system must be swept away to enable the Criminal Justice System to focus on what matters – the search for truth and the conviction of the guilty.
>
> We are not just tinkering at the edges. This legislation is part of a considered long term strategy to achieve end to end reform of the Criminal Justice System. Measures in the Bill have been consulted on publicly and in detail and take forward recommendations by the Law Commission and the independent reviews of Sir Robin Auld and John Halliday to create a system that works in the interest of justice and makes a real difference to people's lives.
> [-]
> "The Bill will put the sense back into sentencing. We will create a more transparent and consistent system with the right punishment to fit the crime. For

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[10] "A better deal for victims and witnesses", November 2002, http://www.cjsonline.org/news/2002/november/better_victims_deal.html

> the first time we will put the purposes of sentencing into law: to protect the public, punish the offender, reduce and deter crime and reform and rehabilitate the offender. We will put on the statute book a range of tough and effective community based sentences that get people off drugs, away from crime and out of chaotic and anti-social lifestyles. We will ensure that prison is used for dangerous violent sexual or persistent offenders and that such offenders are dealt with robustly and consistently. [11]

Explanatory Notes[12] to the Bill to the *Bill* were published on 29 November 2002.

C. Scrutiny by Parliamentary Committees

On 7 October 2002, the Home Affairs Select Committee announced that it would be examining the forthcoming *Criminal Justice Bill*, proceeding on the assumption that the Bill would include the main elements of the White Paper, with a view to publishing a short report before second reading. They said that among the issues in which the Committee were interested were -

- Police power to impose conditions on a suspect's bail before charge
- Reforms to the rules of evidence, including greater disclosure of past criminal convictions
- Advance indication of sentence discounts for early guilty pleas
- Extension of Magistrates' sentencing powers from six months to 12 months
- Removal of right to elect trial by jury in serious and complex fraud trials
- Removal of restrictions on the jury being invited to draw inferences from discrepancies between the pre-trial defence statement and the defence case at trial
- Relaxation of the double-jeopardy rule for serious offences (including manslaughter, rape and robbery) where compelling new evidence comes to light
- Introduction of Custody Minus, Custody Plus and intermittent custody schemes
- Introduction of indeterminate sentence for violent and sexual offences, where the offender has been assessed as dangerous
- Reform of Youth Courts and juvenile sentences
- Reform of the Rehabilitation of Offenders Act 1974
- Proposed changes to the management/structure of the court system and information technology

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[11] "Publication of Criminal Justice Bill & Victims Proposals: Justice for all – putting victims first", 21 November 2002, Home Office 317/2002

[12] Bill 8-EN: Home Office, November 2002, http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/008/en/03008x-d.htm#end

The Human Rights Committee is expected to publish its report on the Bill on 4 December, before Second Reading.

The Joint Committee on Human Rights, which is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom, undertakes scrutiny of Bills before Parliament for compatibility with the Human Rights Act 1998 and other human rights standards. It is virtually inevitable that a Bill making major modifications to the criminal justice system will raise human rights issues, particularly with reference to the right to a fair trial under Article 6 of the *European Convention on Human Rights*. The Committee is likely to publish a report covering the *Criminal Justice Bill* later in December.

D. Other Research Papers

This Paper addresses reforms mostly contained in Parts 1 to 3 of the Bill, including those concerning police powers, drug testing requirements, bail and conditional cautions In addition to this Paper, four Library Research Papers, discussing various aspects of the *Criminal Justice Bill* are available. These deal with the topics of sentencing, double jeopardy and prosecution appeals, disclosure and evidence, and juries and mode of trial. The papers draw on comments which have been made about the *Criminal Justice Bill* reforms at various stages of their development. In some instances the proposals have been developed in detail at a relatively early stage and have undergone little modification since, so that initial comments continue to be pertinent to the provisions of the Bill as introduced. Other provisions in the *Bill* depart quite significantly from earlier proposals on which there had been consultation, or are based on suggestions which have been trailed but on which little detail has been published generally before the *Bill*, so that correspondingly less analytical comment is available.

E. Other reviews and consultations

The Report of the Joint Home Office/Cabinet Office Review of the *Police And Criminal Evidence Act* 1984[13], on which Part 1 reforms are based, was published on 18 November. The Home Office has consulted some of the respondents to consultation on the *Auld Report* on particular issues arising from the White Paper. These consultations are referred to in the discussions on those issues.

F. General Reactions to the White Paper and the Criminal Justice Bill

Many of the criminal justice reforms brought forward, particularly those relating to sentencing, have been widely welcomed. Some of the proposals have been less enthusiastically received: criticisms of particular proposals are included in the discussion

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[13] http://www.policereform.gov.uk/news/pacereview2002.pdf

of the corresponding provisions of the Bill in this series of Research Papers. Some of the more general reactions are described below.

Liberty, the Legal Action Group, the Bar Council, and the Criminal Bar Association issued a joint statement on the Government's criminal justice plans for the Queen's speech , saying: -from 10 November 2002

Balancing criminal justice?

> We are deeply concerned about the government's proposed changes to our criminal justice system. We believe the suggestion that this exercise is about 'rebalancing the system in favour of the victim' is misguided. Dince the celebrated miscarriages of justice of the early 1990s, the majority of changes to the criminal justice system have undermined the rights of suspects and defendants and are likely to increase the numbers of innocent people being convicted.
>
> Whilst we welcome many of the changes which have been introduced to assist the victims of crime, the idea that reducing the rights of defendants benefitrs the victims of crime is fundamentally flawed. This approach is also unhelpful because it detracts from serious debate about improving justice and is likely to undermine – or even wholly remove – vital checks and balances.
>
> Furthermore we see dangers in the politicisation of the debate over criminal justice. We believe that the independence of our criminal justice system must be safeguarded from 'spin' and the desire of politicians to make political capital.
> [-]
> There appears to be an unsatisfactory blurring between the inquisitorial and adversarial systems of criminal justice, with the trend being to move us closer to the former.

Clive Elliott, operations director of the Victims of Crime Trust, expressed general support for the White Paper proposals:

> This is long overdue. It is the first time that any government has acted to reverse the existing imbalance between perpetrators and victims. At the moment the criminal justice system is heaped on the side of criminals, whose lawyers use loopholes on their behalf. They will not have the same monopoly over the criminal justice system which they had previously They use it time and time again to their advantage. It is a biased system and it is out of date. The criminals know the system off by heart and play it to their advantage using legal aid.
>
> All the people I have spoken to who have been victims of crime have come up against the worst side of the system. So it is time for change. We need a criminal justice system that provides justice for victims and not for criminals.
> [-]

> It will be welcomed by those who have been victims and who realise there is very little justice in this country. It will also make criminals think twice. They will not have the same monopoly over the criminal justice system which they had previously. [14]

Mixed reactions were reported in the press. Describing the proposals in the Queen's Speech as the biggest overhaul of the criminal justice system in modern times, the Independent reported comments on them:

> The Government believes the changes - which include dropping the double jeopardy rule and reducing the right to trial by jury - will re-weight the scales of justice and redress an imbalance against victims.
>
> Police officers welcomed the reforms. Rod Dalley, vice-chairman of the Police Federation, said: "The pendulum has swung too far in favour of defendants, with the odds heavily stacked against victims."
>
> John Burbeck, of the Association of Chief Police Officers, suggested that the changes would help restore public confidence in the courts. Mr Burbeck, who accepted that the police had a "responsibility to improve the quality of our investigations", said that "victims and witnesses ... too often in the past have felt badly let down by the system".
>
> But the changes, which overturn some principles enshrined in English law since Magna Carta, set ministers on a collision course with the legal profession and criminal justice organisations.
>
> The crime reduction charity Nacro warned that the Government's plans were a "recipe for injustice". Paul Cavadino, the chief executive, said: "It's a fundamental principle of our criminal justice system that a suspect is tried on the basis of evidence before the court, not on the basis of what they have done in the past."
>
> Some observers believe that many of the measures designed to improve the efficiency of the courts system are linked less to the rights of victims than to meeting the Government's numerical targets on tackling crime.
>
> The editor of the Prisons Handbook and founder of the ex-offenders' charity Unlock, Mark Leech, described the reforms as "dangerous and flawed," adding: "While it is true the system doesn't do enough to help victims of crime, you do not improve their lot by moving the legal goalposts and making convictions easier to obtain."

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[14] "Head to head: legal shake-up" , 17 July 2002, BBC News

> The Conservative home affairs spokesman, Oliver Letwin, sided with liberal critics, saying "we have fundamental concerns about proposals on trial by jury, double jeopardy and the provision of information about previous convictions".
>
> Describing the package as "an empty gesture", Mr Letwin pointed out that Labour had introduced 12 criminal justice acts since coming to power in 1997 and claimed "we still have a criminal justice system in a state of disarray".
>
> The Liberal Democrat home affairs spokesman, Simon Hughes, said that increasing rights of victims and decreasing rights of defendants were "not two sides of the same coin". He said: "Victims do need more support, but this does not mean we raise chances of the innocent going to prison." [15]

Opposition spokesman Oliver Letwin MP was reported in The Observer as saying:

> There is agreement on some of the measures in the Criminal Justice Bill. It is a matter of consensus that we require new codes on criminal offences, on sentencing and on court procedures. It is clear that we need a new working relationship between the police, Crown Prosecution Service and the courts. We need more thoroughgoing protection and support for victims and witnesses. We must explore means of preventing the ludicrous circumstances where people are more frightened to be witnesses or victims in court than to be accused in court.
>
> In rebalancing our criminal justice system, we will not compromise on issues where our historic liberties - the right of the individual to resist the arbitrary power of the state - are under threat. [16]

and according to *The Daily Telegraph*

> Baroness Helena Kennedy, QC, sparked a row in the Labour Party last night by saying that ministers were planning to do something "quite frightening" to civil liberties by "tinkering" with fundamental tenets of the legal system.
>
> The public was being "deluded" into thinking that the changes would help limit crime on the streets when in fact they would disturb delicate balances built into the system, she told GMTV's Sunday Programme. "It is a serious shift and it's a very illiberal set of proposals." The Bill - the centrepiece of last week's Queen's Speech - would reform sentencing arrangements, scrap the "double jeopardy" rule and restrict the right to trial by jury. It would also allow juries to hear details of previous convictions of defenders.
> [-]
>
> Lord Falconer, the Home Office minister, dismissed the criticism, saying the system could not be left as it was for ever and made clear that the Government

[15] 'Anger as crime plan sweeps away safeguards', 14 November 2002, *The Independent*
[16] 'Mr Blunkett and the threat to freedom' 17 November 2002, *The Observer*

> would not be thrown off course. The fight against crime and anti-social behaviour was one of the biggest issues that affected people's lives, especially in deprived areas, he said. "What people are most after is policies that actually make a difference to that, and that's why we think the criminal justice system needs a fundamental reform."
>
> Baroness Kennedy said the Bill was not about shifting the balance in favour of the victim, as ministers claimed. "In fact it's about a shifting of the balance towards the state." She predicted that the Bill would be blocked in the House of Lords. "People in all political parties will find this unacceptable," she said.
>
> "Not just the Liberals, but the Conservatives and quite a number of people on the Labour benches will be very, very troubled by what this is all about. The idea of saying to the public - selling this as a confidence trick as something that is going to deal with crime - is a sleight of hand."
>
> Simon Hughes, Liberal Democrat home affairs spokesman, said: "Baroness Kennedy speaks for many people in all parties by expressing concern about some of the Government's criminal justice proposals.

The Times and *the Guardian* both anticipated problems during the Bill's passage :

> David Blunkett's enormous Criminal Justice Bill is the twelfth of its kind in as many years, but also by far the most ambitious. Its worthy aim is to restore logic to a muddled, outdated system. Yet it has been dogged by complaints that it is an assault on civil liberties. Partly to blame is the Home Secretary's own defiant assertion that he wants to rebalance the law to protect victims (which has provoked counter-claims that the law should be neutral in pursuit of justice, and that Mr Blunkett's reform is in any case more concerned with transferring power to the State than to crime victims). Recent bursts of belligerence from the Home Office towards judges and lawyers have left both sets of potential allies feeling aggrieved. Mr Blunkett has shown his passion for this legislation, and his expectation that it will provoke a furore, by making clear that he will invoke the Parliament Act to force it through the Lords if it runs into trouble. This dramatic show of fury has ensured that the Bill will not be calmly welcomed.
>
> Many of the Bill's provisions are less provocative than the hot air blasting around it might suggest. Several do, undoubtedly, restrict freedoms previously enjoyed: but they are intended to do so as a reflection of advances in science and changes in the tempo of modern life.[17]

and

> Overall, the bill is bedevilled by contradictory goals and inconsistent principles. Labour wants to divert non-violent offenders from prison, but it has six other goals, including rebuilding a sense of public security. This has led to tough talk - particularly from Downing Street - which will in turn encourage courts to impose

17 'Handcuffs and hot air' ,23 November 2002, *The Times*

> tougher sentences. Worse still, are the bill's coercive changes to evidential and court rules - widening exemptions from double jeopardy to 32 offences, more access to previous convictions, more hearsay evidence - all of which must be resisted. Tony Blair talks about creating a victim justice system rather than a criminal justice system. The implication is that the system currently favours offenders. He ought to know better. The founding principles of a criminal justice system must be independence, objectivity and neutrality. A system favouring victims is as unacceptable, dangerous and potentially corrupting, as one favouring offenders. MPs must restore the fundamental principles. [18]

Professor Michael Zander wrote of the White Paper in the New Law Journal:

> Politically this is an astute White Paper. Again and again it emphasises the importance attached to victims and witnesses ("We will put victims and witnesses at the heart of the CJS"). It is robust. ("The system should not become a game where delay and obstruction can be used as a tactic to avoid a rightful conviction ... Relevant evidence, including criminal convictions, should be admissible unless there are good reasons to the contrary.") Community penalties are to be more rigorous. Dangerous offenders will face indefinite incarceration until the Parole Board is "completely satisfied" that it is safe to release them. Just reading the recommendations should make Middle England feel safer.
>
> The White Paper is written in a punchy style with much use of short sharp bullet points. Though most of the proposals are explained tersely with little detail they cover a great range.
>
> The Government has sensibly backed away from some of Lord Justice Auld's more outlandish proposals, such as legislation against perverse jury verdicts or asking the jury to answer a series of questions posed by the judge.
>
> [-]
>
> A great number of the proposals would involve relatively minor tweaking of the system. Some others, though highly controversial, would affect only a tiny number of cases-trial by judge alone for complex and serious fraud cases (whether or not it is extended to other long and complex cases and to cases where the jury face intimidation or bribery) or abolition of the double jeopardy rules are ones in point. One foresees fierce battles and possible Government defeats in the Lords on these proposals.
>
> If one looks for recommendations that might have a major effect, one is the wider admissibility of previous convictions (and acquittal!). … this change should lead to more convictions of guilty persons-as well, unfortunately, as some people who on that occasion were innocent.
>
> Others with significant potential impact, if and when implemented, are the proposals for a new Custody Plus and Custody Minus sentence, respectively, a short term of imprisonment followed by intensive supervision in the community and a short prison sentence suspended for two years whilst a community programme is undertaken. Both should reduce the prison population (though

[18] 'Justice in jeopardy: MP's must fight to improve this bill', 22 November 2002, *The Guardian*

> penalising every breach of the community programme with custody would diminish this effect).
> [-]
> But will even full implementation of this raft of proposals significantly increase the proportion of offences that are solved or reduce the level of crime? It is unlikely. The problems are to a large extent outside the control of Government and certainly of the criminal justice agencies. To pretend otherwise is merely to mislead the public. Would the police, the lawyers, the judges, the media and the public then be agreed that the criminal justice system was basically in the best shape? The answer again is of course not. The battle to achieve these aims is never ending and it will always be a losing battle-which is why the scope for tinkering with the system is also endless. [19]

The editor of the Criminal Justice Review hoped that the fact that his copy of the White Paper literally fell to pieces after a few hours reading was not an omen.[20]

G. Proposals which are not in this Bill

1. Recommendations which were not accepted

A number of the Auld recommendations were not accepted by the Government. As the original recommendations may have attracted more publicity than their rejection did, it may be helpful to draw attention at the outset to the principal recommendations which have no place in the Criminal Justice Bill. Most of the other recommendations which were not accepted related to detailed implementation of principal recommendations which were rejected, and therefore no reference is made to them. The principal recommendations which have not been accepted are shown below, with the Government's comments on rejection:[21]

Recommendation 4: summary jurisdiction

There should be no general change in the level of summary jurisdiction as it is presently defined, of District Judges or magistrates.

Government response

We will legislate to increase magistrates' sentencing powers to 12 months, and to allow us to increase them to a maximum of 18 months, depending on a result of evaluations, and taking account of any necessary additional training requirements.

Recommendation 16: reserve jurors

A system should be introduced for enabling judges in long cases, where they consider it appropriate, to swear alternate or reserve jurors to meet the contingency of a jury

[19] "What to make of Mr Blunkett's package of reforms?" 26 July 2002. NLJ 1141

[20] [2002] CLR 688

[21] A full list of the Auld and Halliday recommendations, with the Government responses to them was published separately from the Justice For All White Paper and is available online at http://www.cjsonline.org/library/pdf/responses_to_Auld.pdf

otherwise being reduced in number by discharge for illness or any other reason of necessity.

Government response

We believe that current procedures, and other changes that are proposed in the White Paper, together are sufficient to ensure that jury trials can be effective without adopting these recommendations.

Recommendation 25: ethnic minority jurors

A scheme should be devised … for cases in which the court considers that race is likely to be relevant to an issue of importance in the case, for the selection of a jury consisting of, say, up to three people form any ethnic minority group.

Government response

We carefully considered this recommendation, but after consultation we have concluded that it would be wrong to interfere with the composition of the jury in these cases.

Recommendation 30: perverse acquittal

The law should be declared, by statute if need be,that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly.

Government response

We have decided not to accept this recommendation.

Recommendation 32: venue and mode of trial

In all ‘either way’ cases, magistrates’ courts, not defendants, should determine venue after representation from the parties.

Government response

We have decided that the right of defendants to elect trial by jury in the Crown Court in ‘triable either way cases’ ought to remain. This decision may be re-examined following evaluation of whether other changes proposed in this paper lead to a significant reduction in abuse of this procedure.

Recommendation 42: panel of experts to sit with judges in complex fraud cases

There should be a panel of experts, established and maintained by the Lord Chancellor in consultation with professional and other bodies, from which lay members may be selected for trials [where the nominated judge has directed trial by himself with lay members, in serious and complex fraud cases].

Government response

We have decided not to accept this recommendation because of the considerable difficulties around identifying and recruiting such people, including the substantial time commitment that would be required of them. Instead we have proposed that such cases could be heard by a judge sitting alone.

Recommendation 84: District Division as an intermediate tier in unified Criminal Court

There should be three levels of jurisdiction within the unified Criminal Court consisting of: the Crown Division to exercise jurisdiction over all indictable-only matters and such

'either-way' cases as are allocated to it; the District Division to exercise jurisdiction over such 'either-way' matters as are allocated to it, and the Magistrates' Division to exercise jurisdiction over all summary-only matters and such 'either-way' cases as are allocated to it.

Government response

We agree with Sir Robin Auld that when a criminal case goes to trial, it should be dealt with at an appropriate level and location, and we want this to be done in a more co-ordinated way. Our view is that the benefits identified from establishing a Unified Criminal Court can be realised through a closer alignment of the magistrates' courts and the Crown Court, without a complete reordering of the court system and without adversely affecting the civil and family jurisdictions. We will therefore legislate to bring the magistrates' courts and the Crown Court closer together and collectively these courts will be known as 'the criminal courts' when exercising criminal jurisdiction. We will not be introducing the separate District division.

Recommendation 249: questions for jury to answer

The judge should devise and put to the jury a series of written factual questions, the answers to which could logically lead only to a verdict of guilty or not guilty; the questions should correspond with those in updated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose; and each question should be tailored to the law as the judge knows it to be and to the issues and evidence in the case.

Government response

We do not feel that universal application of this arrangement would be of benefit. The judge can already put specific questions to the jury where this would be helpful.

Recommendations 302 and 305: appeals

A defendant's right of appeal against conviction and/or sentence in the magistrates' court to the Crown Court by way of re-hearing should be abolished. There should be no right of appeal from the Magistrates' Division (magistrates' courts) to the High Court by an appeal by way of case stated or by claim for judicial review.

Government response

We consider that the existing arrangements work satisfactorily.

Recommendation 314: constitution of the Court of Appeal

The Court of Appeal should be variously constituted according to the nature, legal importance and complexity of its work:1. In cases where there is a point of law of general public importance or of particular complexity or public interest, including sentencing cases calling for guidelines or involving some other point of general principle or very long custodial sentences, the Court should consist of the Lord Chief Justice or the Vice-President or a Lord Justice and two High court Judges; 2. In straightforward appeals against conviction, or in respect of short sentences where the law and procedures are clear and the only issue is whether the trial judge has correctly followed them or where the issue turns on his treatment of the facts, the Court should consist of two High Court Judges or one High court Judge and One Circuit Judge; 3. And consideration should be given to introducing a system under which, in cases of exceptional legal importance and

complexity, a distinguished academic could either be appointed ad-hoc to act as a judge of the court or be invited to submit a written brief to the court on the point(s) in issue.
Government response
We have decided not to accept this recommendation.

2. The *Courts Bill*

The *Courts Bill*[22], which was introduced in the House of Lords on 28 November 2002, and is due for Second Reading on 9 December, will primarily implement those of the key recommendations relating to courts which were contained in the Auld Report and the Government accepted.

II Police powers

A. The *Police and Criminal Evidence Act 1984*: 'PACE'

The *Police and Criminal Evidence Act 1984* ('PACE') has been described as 'the greatest single reform of police powers, certainly during the 20th century',[23] and - almost inevitably - was a hugely contentious piece of legislation. It was introduced following a major report from the Royal Commission on Criminal Procedure (the 'Philips Commission'),[24] which produced a series of proposals intended on the one hand to provide the police with greater powers for solving crimes, and on the other to give additional safeguards to suspects and defendants. The Bill had to be introduced a second time following the 1983 general election, and was substantially amended over its two years of debate. Since coming into force in 1986, PACE and its accompanying Codes of Practice have been subject to a great deal of revision, as well as clarification resulting from judicial decisions.

The provisions of PACE were designed to match up to the principles of **fairness** (for both police and suspect), **openness** and **accountability**. These were three criteria which the Royal Commission on Criminal Procedure had considered to be singularly lacking from many areas of the law relating to suspects' rights and police powers. However, several potential difficulties in the legislation were identified at the time, including:

- the definition of 'serious arrestable offence';
- the circumstances under which evidence would be excluded for being unlawfully obtained; and
- the practical implications of the 'stop and search' powers.[25]

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22 HL Bill 12 of 2002-03
23 *An introduction to policing and police powers* - Leonard Jason-Loyd (2000)
24 Chairman: Sir Cyril Philips - Cmnd 8092, January 1981
25 *Police and Criminal Evidence Act 1984: a practical guide* - Greg Powell and Chris Magrath (1985), ch 23

It has been suggested that the cost of training the country's 120,000 policemen in the basic requirements of PACE was something of the order of £50 million.[26]

B. Reviews of PACE

Following a series of well-publicised miscarriage of justice cases in the late 1980s and early 1990s, the adequacy of the safeguards which PACE and the Codes of Practice provide for suspects was searchingly scrutinised by a further Royal Commission on Criminal Justice.[27]

In May 2002, the Home Secretary announced a fundamental Review of PACE and the Codes, to be conducted jointly by the Home Office and the Cabinet Office. The Review was to focus on the basic requirements of PACE and the Codes that underlie police procedures, with particular emphasis on those aspects that govern detention and the custody process. In particular, the Review team was asked to consider whether the Act and the Codes were still the best way of ensuring that the powers of the police are properly exercised and the rights of suspects are adequately protected.

As well as discussions with criminal justice experts, the review included a series of interviews with frontline staff in the police, Crown Prosecution Service and magistrates' courts, as well as lawyers and judges; and also 'stakeholder workshops' that included wider interest groups. The Review was published in November 2002, and is available online at:
http://www.policereform.gov.uk/news/pacereview2002.pdf

Its general conclusion was that most consultees still see PACE positively, especially in terms of the way it is viewed as having standardised and professionalized police work whilst protecting the individual. However, it suggests that there has also been a recognition that PACE requires updating and reorganizing, particularly in the light of nearly twenty years' accumulation of caselaw and additional legislation.

The following eleven issues constitute the major findings of the team:

> **Revision of the status of the PACE Codes**
> The Review has shown that updating the Codes of Practice is a long and complicated process and has resulted in considerable delays to reflect changes made to primary legislation. The Review suggests that the Home Office revise Section 67 of PACE which sets out the framework for amending secondary legislation.

[26] Foreword by Sir Lawrence Byford, CBE, QPM, LLB, HM Chief Inspector of Constabulary, to the 1986 edition of *PACE: a guide for the practitioner* - Alan Greaves and David Pickover (4th edition, 1996)

[27] Chairman: Viscount Runciman of Doxford – Cm 2263 (1993)

Reworking of the Codes to bring greater clarity
Additionally, the Review has highlighted that the Codes of Practice could benefit from a greater degree of clarity in their structure and content. The Review suggests that once a more straightforward method for revising the Codes has been put in place, they should be reworked into a framework of key principles with the more detailed guidance moving to National Standards.

Search Warrants
While the review has endorsed the value of the warrant system as a judicial control on police action, there is a need to modernise and speed up the operation to reflect changing working procedures and patterns of crime. The review suggests expanding the role for civilians in dealing with search warrants, as well as in slightly longer time, extending their scope to enable multiple entries and considering the scope for focussing warrants on material controlled by specified persons rather than on particular premises.

Alternatives to Detention
The Review has considered different alternatives to arrest and detention, for example Street Bail and restorative justice schemes. Currently these schemes risk breaching the provisions of PACE. The Review recommends that Section 30 of PACE should be amended to qualify the obligation to take the arrested person to a police station immediately. Additionally the Review would recommend consultation on amendments to PACE to allow for interventions at designated locations away from the police station, within limitations.

Classification of Powers of Arrest
Powers of arrest are found throughout different pieces of legislation and a number of commentators have said that these would benefit from clarification. The Review's preferred option is to create a definitive list of arrestable offences and to codify the powers of arrest.

Property
The Review has identified that listing suspects' property causes delays in the Custody Suite. The Review proposes that PACE be amended to facilitate use of a sealable 'possessions bag' with an ID number in which property can be placed without the need to list every item.

Custody Clock
The initial detention period of twenty four hours can provide insufficient time in which to conclude the investigative process and charge a detained person because of delays elsewhere in the custody process, for example: obtaining the services of an appropriate adult; police surgeon; or interpreter; or when a suspect might initially be unfit for interview for reasons of alcohol or drugs intoxication. The Review has looked at several options regarding amending the detention clock, weighing up the practicalities and attendant bureaucracies of each proposal. In addition to the measures to enhance the provision of Appropriate Adults, healthcare professionals and interpreters, the Review recommends that the initial period of detention for which someone may potentially be detained for an arrestable offence be extended from twenty four to thirty six hours, under the authority of a superintendent.

> **Increased use of healthcare professionals within the Custody Suite**
> The use of custody nurses or other healthcare professionals within the Custody Suite would address some of the delays inherent in the current system. This would have a positive impact upon problems relating to the treatment of vulnerable people; people under the influence of alcohol or controlled drugs; and would improve monitoring of those considered ‘at risk’. This change could be effected through an amendment to the codes of practice.
>
> **Appropriate Adults**
> The Review concludes that the present provision of Appropriate Adults within the Custody Suite is chaotic and unstructured and recommends the establishment of a national policy for the scheme and the development and implementation of full national guidance.
>
> **Intimate Searches**
> The Review has also highlighted that the police experience a number of difficulties concerning drugs and intimate searches, in particular, in relation to the refusal of some police surgeons to undertake intimate searches authorised under Section 55 of PACE where the suspect refuses consent. The Review recognises the inherent difficulties in this entire area and that a long-term view is required. Initially, effort should be made to engage with the British Medical Association to resolve the issue of refusal by police surgeons to undertake searches.
>
> **Further use of New Technology for Identification Procedures**
> The Review has highlighted in a number of areas the benefits that can be derived from the increased use of technology. In particular, the increased use of video identification has brought benefits not only to the police, but also to victims and witnesses. The Review would recommend that all police forces are directed to make use of video identification technology for identification procedures and that the Home Office should seek actively to promote the implementation of a standard technology in the remaining thirty three forces outside the Street Crime Initiative.

Some of these recommendations would not require changes to primary legislation, as they could be implemented by changes to the Codes or guidance. Others are already contained in the provisions of the *Police Reform Act 2002* which are due to come into force shortly. There are also matters which the Review felt needed further consultation. Those which it lists in its conclusion as ‘to be included when Parliamentary time allows legislation’ are:

- Revision of the way in which changes are made to the Codes of Practice;
- Extension of police powers to stop and search to include articles intended to be used to cause criminal damage;
- Provision of capacity to allow police to authorise others to accompany and assist in searches;
- Provision to offer immediate bail from the scene of arrest;
- Modify PACE to allow use of sealable property bags;

- Extend time for which someone may be detained from 24 to 36 hours for any arrestable offence;
- Extend circumstances under which inspectors can carry out reviews of detention by telephone.

In a ministerial statement on 18 November 2002, David Blunkett as Home Secretary announced that Government accepted the conclusions of the Review and would take them forward its proposals to amend the PACE legislation and the Codes of Practice as part of its ongoing police reform agenda.[28]

C. The *Criminal Justice Bill* 2002-03

1. Stop and search

Part 1 of PACE introduced a general, comprehensive power to stop and search persons or vehicles without arrest, on the basis of reasonable suspicion. This replaced the previous situation where there was a huge variety in police powers to stop and search in different parts of the country and according to different statutes.

The new power in PACE to detain and search relates only to stolen goods or certain 'prohibited articles' (offensive weapons and articles for use in theft, burglary, obtaining property by deception or taking a motor vehicle). To be in possession of a prohibited article is not in itself an offence under PACE. The offence of having an article with a blade or point in a public place was added to those giving rise to stop and search powers.[29] Other statutory powers to stop and search were not repealed, and there are still dozens of these.[30] However, nearly all powers to detain and search were, for the first time, made subject to a single procedure under PACE.

There has been significant concern about the police use of their stop and search powers under PACE, and as a result a number of efforts made to revise the code of practice on stop and search (PACE Code A) and the way it is used.[31] The latest consultation on another revision of Code A was published in March 2002 and the new code is intended to come into force on 1 April 2003,[32] but this does not touch the substantive provisions of PACE itself.

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[28] HC Deb 18 November 2002, c8-9WS

[29] *Criminal Justice Act 1988, s 140(1)*.

[30] For a summary of nineteen of the main powers of stop and search, see Annex A to the Consultation Draft on PACE Code A: *Police and Criminal Evidence Act 1984 - Code A: Code of Practice for the exercise by police officers of statutory powers of stop and search and recording of police/public encounters: Consultation Draft* (March 2002): http://www.homeoffice.gov.uk/pcrg/pace_consult.pdf

[31] see *PACE* review - Home Office/Cabinet Office (2002) paras 7-8 http://www.policereform.gov.uk/news/pacereview2002.pdf

[32] *Police and Criminal Evidence Act 1984 - Code A: Code of Practice for the exercise by police officers of statutory powers of stop and search and recording of police/public encounters: Consultation Draft* (March 2002): http://www.homeoffice.gov.uk/pcrg/pace_consult.pdf. For one view on this see:

The current *Criminal Justice Bill* does not seek to make any changes to existing stop and search powers beyond adding one category of 'prohibited article'. **Clause 1(2)** would mean that the police could stop and search someone whom they reasonably suspected of having an article intended for use in causing criminal damage. They could then seize such an article if they found it.

The *PACE Review* found 'significant police support' for such a measure, as it would for example allow the police to search for paint spray cans and other items for making graffiti.[33]

2. Entry, search and seizure

According to a 1997 Home Office study, only half of those whose premises are searched are satisfied with the conduct of the search. Where there is dissatisfaction it is caused by officers' failures to identify themselves, provide a copy of the search warrant or state their search powers.[34]

One of the issues identified by the *PACE Review* was a lack of clarity about the role of people accompanying the police on searches. These might be civilians employed to undertake particular search duties, for instance relating to computers or financial records, or representatives from other organisations such as the NHS.

The *Police Reform Act 2002* introduced a new power for civilian police employees to undertake certain search duties independently, and exercise the relevant powers.[35] These provisions are not yet in force.

Clause 2 of the current *Criminal Justice Bill* seeks to add to this by allowing authorised civilians to accompany and actively assist the police in carrying out searches. At present a warrant may authorise persons to accompany any constable who is executing it,[36] but the powers of such persons are not clear: PACE gives only 'constables' (i.e. all police officers) the power to execute search warrants and seize items as a result. The Bill does not give a definition of who these authorised persons might be, or how they would be accountable for their actions, though it does state that they must act under the supervision of a constable.

Search without a warrant would not be affected by this clause.

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http://www.copwatcher.freeserve.co.uk/stopandsearch/Index.htm

33 *PACE* review - Home Office/Cabinet Office (2002) para 10

34 *PACE ten years on: a review of the research* – Home Office Research Study 155 (1997) p.xi

35 see *Police Reform Act* 2002 sections 38-47 and Schedule 4 part 2

36 PACE section 16

3. Street bail

Currently an officer who makes an arrest elsewhere than at a police station must take that person to a police station 'as soon as practicable after the arrest',[37] so that the detention will be recorded and any legal or medical assistance provided. If the person is not arrested they are free to leave, and cannot be detained while an officer conducts checks as to previous offending history, suitability for bail etc. However, arresting someone can keep officers off the beat for an average of three and a half hours according to one recent study,[38] and the government has been looking at ways to change this.

In September 2002 the Policing Bureaucracy Taskforce published a report[39] which included the following 'change proposal':

> **'Street Bail'**
> Introducing the concept of 'street bail' as a front-line initial disposal option for patrolling officers in appropriate cases. (Officers able to require a suspect to attend at a given time and place in the future rather than take into custody immediately.)
>
> **action required**
> Change to primary legislation. Amendment to Section 30 PACE. (Fully explained within submission.) HOWEVER: Strong lead from Home Secretary would be possible alternative, and certainly a welcome interim measure. (See report.)
>
> **benefits**
> Hard to quantify exactly, but if just 10% of arrests were dealt with in this way, there would be potential to save 390,000 patrol officer hours, the equivalent of almost 200 police officer posts. (See further within report.)
>
> Greater willingness among officers to deal positively with minor offences rather than take 'no further action'.
>
> Less inconvenience to suspects and appropriate adults. ('Win / win' situation.)
>
> When linked with restorative justice programmes, likely to impact on future offending behaviour. (See further within report.)
>
> Possible savings in the areas of reduced overtime expenditure; custody suite staffing and siting; public expenditure on solicitors; litigation arising from

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37 PACE section 30(1)

38 *Diary of a police officer* - PA Consulting Group, Police Research Series Paper 149 (November 2001) p vi

39 http://www.policereform.gov.uk/bureaucracy/change_proposal_reports/Defendant_Management/index.html

allegations of wrongful arrest, property handling, alleged mistreatment in custody etc.

stakeholders
Police Forces. General public. Law Society likely to see threat to solicitors' income.

costs
Only the cost of producing a new form, and the cost of servicing the legislative passage of the necessary amendments to PACE.

barriers
Legislation required. Possible opposition from the Law Society. (See 'stakeholders' above.)

implementation issues
Once legislative framework in place, could be left to individual forces to maximise the opportunities and potential benefits. This should be a tool in the workbox, not a panacea for all arrest situations.

evaluation framework
To be determined in the event of progress on this front.

The taskforce report suggested that street bail would **not** be appropriate in the following circumstances:

- Serious criminality
- Immediate evidence-gathering required away from the scene
- Accomplices adrift
- Property adrift
- Risk of immediate re-offending or vulnerable victim
- Offender drunk, intoxicated, or violent
- Vulnerable offender (e.g. mental health problems)
- Previous offending history indicates that bail not suitable
- Offender not likely to surrender for other reasons (e.g. foreign visitor)
- Offender unwilling to engage, preferring arrest and custody
- Offender's identity is unconfirmed

and that in 'street bail' cases there should be no presumption in favour of bail, as happens under the *Bail Act 1976* and PACE for a person in custody.[40]

It also proposed standardised supporting documentation and a new code of procedure for street bail. However, a question mark has in the past been raised over the efficacy of formal rules on police behaviour outside the police station. A Home Office review of the research into PACE suggested that:

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[40] *ibid*

> Police behaviour appears to be more strongly influenced by PACE rules inside the police station than out. The reason for this difference is probably that insufficient account was taken of the strong informal working rules which determine how the police behave on the street.[41]

The street bail provisions would be implemented by new sections 30A to 30D of PACE, inserted by **clause 3(7)** of the Bill. Street bail would not be able to contain any bail conditions, but the person would have to be given a notice in writing stating the reasons why he was arrested and the requirement to attend a police station (the precise station and time may be set later). None of the normal rules relating to bail under the *Bail Act 1976* - eg. sureties, electronic monitoring, the presumption in favour of bail, and reconsidering of decisions - would apply to street bail.

The reference to a designated police station in the proposed new section 30C(2) is to stations designated by the chief officer of police as those to be used for detaining arrested persons within their respective areas.[42]

The Bill does not pick up on the suggestion of the Policing Bureaucracy Taskforce that juvenile offenders could be bailed direct to a Youth Offending Team reprimand/final warning clinic. The *PACE Review*:

> looked at proposals for detaining arrested persons away from the police station in order to assess their suitability for restorative justice schemes. Real and difficult issues remain about reconciling the working of such schemes with the need to maintain reasonable protections for arrested persons. Further consultation would be needed on this issue.[43]

Apparently the Youth Justice Board expressed particular concern that adequate safeguards should be in place if the concept of street bail was applied to juveniles.[44]

Nor does the Bill attempt to extend the range of offences which can be dealt with by fixed penalty notices, as the Taskforce also proposed, though there is a possible overlap here with the proposal for conditional cautions (for which see Part V of this Paper, below).

4. Property of arrested persons

The *PACE Review* states that the police identify the requirement to list a detained person's property in full as 'time-consuming and not always necessary',[45] and suggests

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41 *PACE ten years on: a review of the research* – Home Office Research Study 155 (1997) p.xx
42 PACE section 35
43 *PACE review* - Home Office/Cabinet Office (2002) para 31
44 *ibid*
45 *PACE review* - Home Office/Cabinet Office (2002) para 34

instead a requirement to secure all a detained person's property in his presence and make whatever supporting records he considers necessary. The idea - strongly supported by the Review - is that sealable property bags would then be used for each person detained.[46]

Clause 6 would remove the requirement to record the details of a detained person's property, but does not substitute any other requirement. The government's Explanatory Notes to the Bill suggest, however, that there would still be a practical need to make some sort of record to guard against claims of lost or damaged belongings.[47]

5. Telephone/video reviews of detention

Under PACE, custody officers are required to charge a suspect where there is sufficient evidence to do so; if there is not such evidence, they may authorise detention only where it is necessary to secure or preserve evidence of an offence for which the suspect is under arrest, or to obtain evidence by questioning (section 37). Except in limited circumstances in certain serious cases, an arrested person should not be held for more than 24 hours without being charged. Prior to this, an officer of at least inspector rank, who is not directly involved in the investigation, must review whether detention continues to be necessary. The first review takes place not more than six hours after detention was first authorised, the second not more than nine hours after the first, and any subsequent reviews continue at intervals of no more than nine hours (sections 40 and 41).[2]

PACE now allows for such reviews to be carried out over the telephone where it is not reasonably practicable for the review officer to be present in person or for video conferencing to take place.[48] The *PACE Review* wanted to see greater use of telephone reviews so that they would become a normal alternative to reviews in person. In addition, it welcomed the tests of reviews by video link, planned by the Police Leadership and Powers Unit of the Home Office. However, the Review noted the Youth Justice Board's concerns that reviews of juvenile detention should continue to be carried out in person whenever possible.

Clause 4 of the Bill would allow telephone reviews to take place simply if it is not reasonably practical to use video-conferencing - the requirement that it is not reasonably practical for the review officer to be present would be removed. Section 40A(2) - 'the review may be carried out by an officer of at least the rank of inspector who has access to a means of communication by telephone to persons in the police station where the arrested person is held' - would be deleted, and there is no equivalent reference proposed in clause 4 to 'an officer of at least the rank of inspector'.

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[46] PACE section 40A

[47] Bill 8-EN, para 110

[48] Introduced by section 73 of the *Criminal Justice and Police Act 2001*, and intended to be used sparingly: see the Explanatory Notes to the 2001 Act, para 199: http://www.hmso.gov.uk/acts/en/01en16-c.htm

The rules on using video-conferencing are contained in section 45A of PACE. Again, there is no mention of 'an officer of at least the rank of inspector' in the primary legislation. Instead, it provides that some or all of the detention review functions of a custody officer or an officer of at least the rank of inspector may be performed by 'an officer' who is not at that police station but has access to a video link.[49]

6. Detention 'clock'

A key aim of PACE was to keep detention without charge to a necessary minimum. Before PACE, detention without charge was theoretically open-ended, though there was a duty to bring a charge against a suspect as soon as was reasonable. The report of the Philips Commission[50] stated firmly that in no circumstances should more than 24 hours elapse before a suspect was either taken before a court or visited by an independent person, but PACE respected this principle only in part.

PACE section 41 states that 24 hours should be the normal maximum period for detention. However, exceptions to this are also provided. In particular, section 42 sets out the circumstances in which people suspected of certain serious offences can be detained for up to 36 hours, on the authority of an officer who is a superintendent or above. This extension of the period of detention attracted considerable comment and criticism at the time, in particular the definition of 'serious arrestable offence' which triggers the extension.[51] This includes not only a list of offences which are always classed as serious arrestable offences (such as murder, rape, hijacking and torture), but also a formula for converting arrestable offences into the serious variety. This happens, roughly speaking, where an arrestable offence has led to (or was intended or likely to lead to) serious harm to the security of the State or to public order, or to serious interference with the investigation of an offence, or to the death, serious injury, or substantial financial gain or loss to any person.

In its first years of operation, PACE's rules on detention apparently did not in general create problems for investigating officers.[52] There was evidence to suggest that the average length of detention without charge decreased after the introduction of PACE, although the pattern varied according to the seriousness of the offence. Those arrested for serious offences were apparently being held for shorter periods than before, and although a number of factors (such as waiting for legal advice or the arrival of appropriate adults)

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[49] Section 45A(2)(a) refers to the carrying out of a review by an officer who (a) is not present in the police station where the person is held; but (b) has access to the use of video-conferencing facilities that enable him to communicate with persons in that station

[50] Report of the Royal Commission on Criminal Procedure, Cmnd 8092 (January 1981), paras 5.9 and 3.106-107

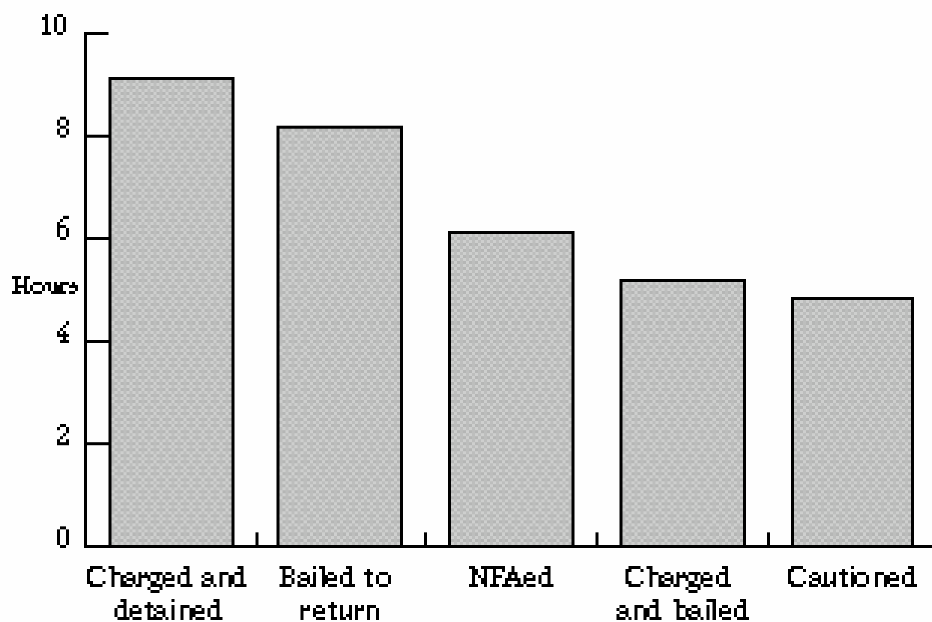
[51] see House of Commons Library Reference Sheets 82/17 (25 November 1982) pp10-12 (which discusses the earlier version of the PACE Bill that fell with the dissolution of Parliament in 1983) and 83/17 (2 November 1983) pp 6-7 (on the Bill that did go on to form PACE itself).

[52] *PACE ten years on: a review of the research* – Home Office Research Study 155 (1997) p.xi

pushed up the length of detention in less serious cases,[53] the vast majority of suspects were released well within the statutory time limits.

A 1998 survey by the Home Office Research, Statistics and Development branch looked into the outcomes of police arrests, including the time spent in detention:[54]

> In the present research, the average time that suspects were held without charge was six hours and 40 minutes. Confirming the findings of previous studies, the average time in custody before charge or release was much longer where the offence was very serious (e.g. murder or rape) and was just short of 22 hours. For moderately serious offences the figure was just over seven hours, while for less serious offences the average was just under four hours.



> Figure 7.1 provides information about the time spent in custody according to case outcome. Suspects who were given an instant caution or NFAed[55] were held for the shortest periods of time. Those charged and bailed were also dealt with relatively quickly. The longest periods in custody were spent by suspects who

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53 see for example *Police powers and police: a study of the work of custody officers* (full final report to the ESRC) – R. Morgan, R. Reiner and I.K. McKenzie (1991); *Changes in custody practice since the introduction of Police and Criminal Evidence Act 1984* – P. Mackay (1988); *Police interrogation: the effects of the Police and Criminal Evidence Act 1984* – B.L Irving and I McKenzie (1989). Cited in *PACE ten years on: a review of the research* – Home Office Research Study 155 (1997) p63

54 *Entry into the criminal justice system: a survey of police arrests and their outcomes* - Home Office Research Study 185 (1998) pp 109-111 http://www.homeoffice.gov.uk/rds/pdfs/hors185.pdf

55 'No Further Action'

> were charged and detained, reflecting the fact that the offences involved were often serious or complex and required lengthier interviewing and investigation.
>
> The time which juveniles spent in custody varied considerably, depending on whether they arrived at the station with an appropriate adult or whether one had to be summoned. The former were held for an average of five hours, but the latter spent, on average, more than seven hours in custody. Mentally disordered suspects, for whom custody officers usually had to obtain a doctor and an appropriate adult, averaged just over five and a half hours in police custody.
>
> In line with previous research, those who obtained legal advice spent longer in custody than those not legally advised: just over nine hours compared with five and a half hours. The longer time which legally advised suspects spent in custody was partly a function of the extra time spent waiting for advice to be provided; but it was also related to the generally higher level of seriousness of their offences.
>
> One important factor in determining the time that suspects were held was the sufficiency of the evidence on arrest. Where arresting officers reported that it was sufficient evidence to charge at that point, the average length of detention was five and a quarter hours. This can be compared with a figure of more than eight and a half hours where there was insufficient evidence to charge the suspect at this point and the police needed more time to gather evidence. Again, these figures cannot be divorced from the seriousness of the case. It was more likely that sufficient evidence to charge would be available on arrest in certain less serious offences (for example, shoplifting), where offenders were often caught in the act, than in more serious ones requiring more complex proof of the act and intent.

However, a 1991 study of burglary investigation had found that most detectives interviewed felt that the PACE time limits did not recognise the realities of police work and factors which pushed detention times up. These included:

- waits for solicitors and appropriate adults
- recovery of stolen property
- the requirement to allow suspects eight hours rest overnight
- difficulties in co-ordinating interviewing where several suspects were arrested
- pressure on interview rooms
- constraints of the police shift system
- reluctance of senior officers to authorise classification of crime as 'serious arrestable offence' for which detention of over 24 hours was justified, as they might have to justify their decisions in court later.[56]

[56] *Investigating burglary: the effects of PACE* – Home Office Research Study 104 (1991)

ACPO (the Association of Chief Police Officers) and other police organisations took the same line in their contributions to the recent Home Office/Cabinet Office *PACE Review*, adding to the above list delays in obtaining the services of an interpreter or police surgeon, and the problem of suspects who are initially unfit for interview because of alcohol or drugs intoxication.[57] ACPO wanted to see the initial maximum period of detention without charge extended from 24 to 36 hours for **any** arrestable offence; and a new power for the courts to extend detention time limits yet further in cases of suspected murder where the suspect could abscond or represents a threat.

Clause 5 of the Bill would implement the first of ACPO's proposals. It seeks to do this by making an apparently very small change to PACE section 42(1): removing the word 'serious' from the provision for extending detention without charge from 24 to 36 hours.

This would not, however, mean that all suspects would now be detained for 36 hours: certain conditions would still have to be fulfilled:

- Firstly, the list of offences for which extended detention would be possible would now be the 'arrestable offences' under PACE. These are listed in PACE section 24(1) as:

(a) offences for which the sentence is fixed by law;[58]
(b) offences for which a person of *21* [18][59] years of age or over may be sentenced to imprisonment for a term of five years;[60] and
(c) the offences listed in Schedule 1A.[61]

Schedule 1A of PACE lists a series of substantive offences which do not, themselves, attract a five-year sentence, but are considered serious enough to be classed as arrestable. This list has changed significantly since it was originally enacted in 1984 (when it was contained in section 24(2) of PACE) and has been subject to some deletions as well as many additions, most recently by virtue of section 48 of the *Police Reform Act 2002*. It now includes offences such as carrying an offensive weapon, kerbcrawling, and touting for car hire services.

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[57] A 1998 Home Office survey found that: sixteen per cent of detainees appeared to be under the influence of alcohol or drugs on arrival, four per cent were injured, ill or acting in a bizarre manner, one per cent were violent and one per cent were very unco-operative. *Entry into the criminal justice system: a survey of police arrests and their outcomes* - Home Office Research Study 185 (1998) p. xiii

[58] Murder is now the only offence for which the sentence is fixed by law.

[59] Number "21" in italics repealed and subsequent number in square brackets substituted by the *Criminal Justice and Court Services Act 2000, s 74*, Sch 7, Pt II, paras 76, 77. Date in force: to be appointed: see the *Criminal Justice and Court Services Act 2000, s 80(1)*

[60] Some examples of offences in this category are: perjury, theft, obtaining property by deception, violent disorder, possession of a Class A or Class B controlled drug.

[61] Attempts or conspiracy to commit any of the listed offences are also included - PACE section 24(3).

Clause 9 of the Bill would add to the list of arrestable offences 'possession of Class C drugs with intent to supply', under the *Misuse of Drugs Act 1971*. The government's reasoning for this proposed amendment is set out in the Explanatory Notes to the Bill.[62]

- Secondly, the officer authorising the extension would still have to have reasonable grounds for believing that the investigation is being conducted diligently and expeditiously, and that the continued detention is necessary to secure or preserve evidence or to obtain such evidence by questioning the suspect.

7. Codes of practice

The PACE Codes of Practice are designed to help with the interpretation and clarification of the relevant provisions of PACE, in addition to providing guidance to those who use its powers. The Codes have been subject to many changes since the first edition took effect on 1 January 1986: subsequent amendments resulted in the publication of new editions in 1991 and, most recently, 1999. The latest edition consists of the following five codes in a single consolidated booklet:[63]

A: stop and search
B: search and seizure
C: detention, treatment and questioning
D: identification
E: tape recording of interviews.

The latest review of the PACE Codes is nearing its completion, with the new Codes due to come into force in February 2003.[64] However, longer-term changes and restructuring of the PACE Codes is envisaged, which could be completed by early 2004.[65]

The Home Office/Cabinet Office review of PACE, which was published in November 2002, identified two immediate issues concerning the Codes:

(i) the complex relationship between the primary legislation and the Codes, and in particular the process by which the Codes are updated;

(ii) a need to made the Codes clearer and easier to use.[66]

The review makes a wide range of suggestions on the second point, which it suggests could be fed into new Codes once the method for revising them has been amended.[67] On revision of the Codes it comments that:

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62 Bill 8-EN, paras 115-116
63 *Police and Criminal Evidence Act 1984 (s60(1)(a) and s 66): Codes of Practice* - Home Office (1999)
64 *PACE review* - Home Office/Cabinet Office (2002) Introduction para 12
65 *PACE review* - Home Office/Cabinet Office (2002) para 6
66 *PACE review* - Home Office/Cabinet Office (2002) para 2

> PACE currently requires that any new Code or any amendments to existing Codes must be subject to broad public consultation and subsequent consideration in Parliament using the affirmative resolution procedure. In practice the regularity and speed with which police procedures and relevant legislation now change means that the Codes need frequent and often detailed amendment. This cannot be achieved using the existing arrangements and the result is that the Codes become out of date and increasingly unhelpful to operational officers.

and sets out its suggestions:

> It is proposed to move to a position where the requirement to consult on new or changing Codes is more limited. The Home Secretary would have to consult those representing chief constables, those representing police authorities and anyone else he thought appropriate. The detailed Parliamentary procedure would be removed and replaced with a straightforward requirement to lay new or changed Codes before Parliament. That is consistent with the procedures for operational codes of practice which were agreed in the Police Reform Act 2002. The simplified procedures would reflect the modern need for more flexible Codes. More stringent processes of consultation and debate were appropriate in the 1980s when the concept of the Codes was new and developing. However, that concept is now well established and new protections for those subject to police procedures are either in place (such as the Human Rights Act) or shortly to be established (such as the Independent Police Complaints Commission.
>
> Even once these more straightforward procedures were introduced, it would be important to retain the power to innovate by trialling limited changes to the Codes in particular areas for specified periods.[68]

Section 77 of the *Criminal Justice and Police Bill 2001* was designed to enable modifications to the Codes for trial purposes to be made under the negative procedure rather than the affirmative procedure. However, where any such trial modifications are to have general application the requirements of section 67 of PACE concerning publication in draft and the use of the affirmative procedure still apply. Liberty was critical of even this limited relaxation of the scrutiny requirements:

> These are not administrative matters but matters relating to the deprivation of freedom of the individual, and their treatment in custody. As such they are matters for full parliamentary debate, not regulations.[69]

Clause 7 of the current Bill seeks to go much further in cutting down the consultation and scrutiny requirements for the Codes**,** by essentially implementing the recommendations of the *PACE Review*. It includes a requirement to consult interested persons[70], but not to

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67 *PACE review* - Home Office/Cabinet Office (2002) para 6

68 *PACE review* - Home Office/Cabinet Office (2002) para 3

69 quoted in Library Research Paper 01/10, *The Criminal Justice and Police Bill* (25 January 2001) p56

70 the definition seems to suggest at least the Association of Police Authorities and the Association of Chief Police Officers

publish a draft code; and instead of being brought into force by order using the affirmative resolution procedure, any new or revised code would simply have to be laid before Parliament.

8. General comment

The 1997 Home Office review of the research into PACE suggested that:

> The lessons to be drawn from the experience of implementing PACE are that the new legal rules can alter existing working practices provided that they are clear; their introduction is accompanied by adequate training; there are effective sanctions and supervision; and the public are aware of their rights and of police powers.[71]

D. Further reform

A large number of the proposals in the recent *PACE Review* are not covered by the current Bill. Some may be included in subsequent revisions of the Codes of Practice or other guidance, but others may be consulted on with a view to further legislative changes. For a full list of the action suggested for each issue, see Chapter 3 of the *PACE Review*.[72]

III Drug testing requirements[73]

A. After a charge

The *Police and Criminal Evidence Act 1984* details the duties of custody officers after an offender has been charged. One of those duties is to release the alleged offender from detention unless certain conditions are met. One of those conditions is that the custody officer believes detention is necessary to enable a sample to be taken to test for the presence of Class A drugs. The *Police and Criminal Evidence Act 1984* however only makes provision for the testing of 'a person who has attained the age of 18'.

Clause 10 (2) of this Bill would extend this ability to retain suspects for the purposes of drug testing to anyone not excluded by virtue of not having reached a set minimum age (currently 18 but will change to 14 under the provisions of this Bill) or through other exclusions outlined in Section 63B of the *Police and Criminal Evidence Act 1984.*

Clause 10(3) of the Bill amends Section 63B of the *Police and Criminal Evidence Act 1984*. The condition requiring a person to be 18 before being subject to testing for Class

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71 *PACE ten years on: a review of the research* – Home Office Research Study 155 (1997) p.xx
72 http://www.policereform.gov.uk/news/pacereview2002.pdf
73 Contributed by Dr Stephen McGinness, Science and Environment Section

A drugs would be changed to a requirement of only 14 years of age; this age would thereafter be subject to change through regulations made by the Secretary of State requiring approval from both Houses of Parliament. The ability to request permission to take a sample, to warn that failure to provide the sample could lead to prosecution and to take samples from those under the age of 17 would all require the presence of an appropriate adult (as defined in Clause 10 (3)(d) of this Bill).

Before any such samples may be taken from suspects under the age of 18 the relevant chief officer would have to be notified by the Secretary of State that arrangements were available for such testing to be carried out within that police area.

B. After conviction

Powers were provided in section 64 of the *Criminal Justice and Court Services Act 2000* to impose drug testing conditions (for specified Class A drugs) on those convicted of a trigger offence and subsequently released subject to conditions (such as on licence). These measures could be applied to offenders aged 18 or over.

Clause 239 of this Bill would extend those provisions to offenders aged 14 or over. Rather than applying to trigger offences these requirements would be placed on anyone that had been sentenced to imprisonment and whom a 'responsible officer' believes is likely to misuse Class A drugs and whose past offences or possible future offences would relate to drugs misuse.

Requirements in the original provisions to provide a sample for the purposes of drug testing would not apply to persons under the age of 16 unless an 'appropriate adult' was available to be present.

Both 'appropriate adult' and 'responsible officer' are defined in a proposed new subsection (6) to section 64 of the *Criminal Justice and Court Services Act 2000*.

Clause 243 of this Bill implements **Schedule 17** of the Bill. The schedule would make changes to Section 70 and Schedule 6 of the *Powers of Criminal Courts (Sentencing) Act 2000* such that drug treatment and testing could be included in requirements made within an action plan order or supervision order under the provisions of that Act. Both action plan orders and supervision orders are available only for offenders under the age of 18.

Action plan or supervision orders would be able to contain drug testing or treatment requirements if the offender was known to be dependent on or likely to misuse drugs and thought to be open to treatment. Requirements in an order would apply over a fixed period, be flexible as to in-patient or out-patient treatment and specify a minimum number of samples supplied in each month for which the order applied. All tests carried out under such an order would be communicated to the responsible officer noted in the order.

The inclusion of drug testing and treatment in these orders would be subject to availability of treatment, the potential of beneficial results and the consent of the offender.

C. Further comment

Further comment on the drug testing provisions of this Bill is available in a Library Standard Note entitled *Criminal Justice Bill: drug testing*.[74]

IV Bail

A. Background

1. History

Sir James Stephen, writing in the 19th century, commented that the right to be bailed "is as old as the law of England itself, and is explicitly recognised by our earliest writers".[75] Corre & Wolchover describe the operation of bail in the early Norman period:

> Sheriffs asserted a discretion of releasing on pledge to sureties, anyone appealed of grave crime, including even homicide, and discretionary release seems to have become the norm. Imprisonment was costly and inconvenient, escape was easy, there were serious consequences for sheriffs in permitting escape, and they preferred to avoid the responsibility of keeping accused persons secure by handing them over to their friends or relatives pending trial.[76]

An exception to the general practice of release on bail in cases of homicide was introduced; however, Corre & Wolchover note that even in the case of crimes where bail was supposedly unavailable, release could be secured by means of various types of Royal writ.[77]

Corre & Wolchover note that until recent times, the only admissible ground for refusing bail was that the defendant would fail to surrender to custody:

> For that reason the requirement of sureties for attendance was the only condition which could be attached to bail. More recently – in the period immediately after the Second World War – the risk that a defendant would commit an offence if released on bail was acknowledged judicially as imposing a duty on courts to refuse bail. With the acceptance of the basis for objection the ground was cleared

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[74] SN/SC/1991

[75] *A History of the Criminal law of England*, 1883, Vol 1, p233. Much of the information which follows is taken from *Bail in Criminal Proceedings* by Neil Corre & David Wolchover [1999].

[76] Op cit, p11

[77] Ibid, p12

for the introduction of conditions apart from surety. Statutory authority for these was given by the *Criminal Justice Act 1967*.[78]

2. Current law

The *Bail Act 1976*, which is still in force, sets out the general law on bail. Section 4 of the Act declares a general right to bail which is usually cited as the **presumption in favour of bail**. A Home Office Working Party, which reported in 1974, recommended that such a presumption should exist, i.e. that the onus should not be on the defendant to apply for bail but that the court should of its own volition consider on each occasion when it remands an accused whether the remand should be on bail or in custody. Corre & Wolchover suggest that the 1976 Act is basically a codification of existing good practice at that time. However, they stress that "good practice" was not universally observed before the Act was passed: the achievement of the Bail Act, they suggest, was "to rationalise the bail decision by distinguishing the exceptions to the right to bail from the reasons for applying those exceptions":

> Section 18(5) of the *Criminal Justice Act 1967* had laid down exceptions for refusing bail when dealing with offences punishable with not more than six months' imprisonment, but otherwise the court had unlimited discretion. Bail would be refused for a number of reasons, such as the fact that the defendant was of no fixed abode, that he had previous convictions, that there were further police inquiries or that the alleged offence was serious.[79]

The automatic right to bail guaranteed by section 4 of the 1976 Act does not apply if one of the **exceptions** specified in Schedule 1 to that Act applies. The principal exceptions include cases where the offence is punishable by imprisonment and:

- there are substantial grounds for believing that the defendant would abscond, commit an offence or interfere with witnesses etc. while on bail; or
- the defendant was on bail at the time of the offence (applies only to indictable or "either way" offences).

In determining whether any of these exceptions apply, the court must have regard to any relevant factors, including:

- the seriousness of the offence;
- the social background of the defendant;
- his or her past bail record; and
- the strength of the evidence.

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[78] Ibid, pp 1-2. See also pp 18-19 for a discussion of the issue of whether to grant bail to persons accused of homicide.

[79] Ibid, p20

Schedule 1 also contains a number of subsidiary exceptions to the right to bail, including cases where the defendant should be kept in custody for his or her own protection (or, in the case of children, their own welfare).

In addition, section 25 of the *Criminal Justice and Public Order Act 1994* places a specific prohibition on the granting of bail where the defendant has a previous conviction for murder, manslaughter or rape. Corre & Wolchover state:

> The measure was enacted in response to concerns arising from a number of cases, the most notorious of which was that of Winston Silcott who was on bail for murder when he was charged with another murder.[80]

This prohibition was watered down by section 56 of the *Crime and Disorder Act 1998*, which enables the court to grant bail in such cases where it considers that there are exceptional circumstances which justify it. The change was made "apparently in order to avoid an adverse judgment at the European Court of Human Rights": Article 5(3) of the European Convention on Human Rights requires that a person charged with an offence must be released pending trial unless the state can show that there are "relevant and sufficient" reasons to justify the continued detention.[81]

3. Reform

In 1999 the Law Commission published a consultation paper identifying three statutory provisions which it provisionally considered might need reform to avoid risk of non-compliance with the *European Convention on Human Rights* (ECHR):[82]

- paragraph 2A of Part I of Schedule 1 to the Bail Act, which permits a court to refuse bail if the offence charged is indictable and the defendant was on bail when he or she is alleged to have committed it;
- paragraph 6 of Part I of Schedule 1, which permits a court to refuse bail if, having been granted bail in the present proceedings for an imprisonable offence, the defendant has been arrested under section 7 of the Act (for example, for breach of a bail condition);[83] and
- section 25 of the Criminal Justice and Public Order Act 1994, which, in the absence of exceptional circumstances, *prohibits* the granting of bail to a defendant who has previously been convicted of an offence of homicide or rape and is now charged with another such offence.

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[80] Ibid, p24

[81] Ibid. See pp 23-25, also Research Paper 98/43, pp 53-55

[82] Law Commission consultation paper 157, *Bail and the Human Rights Act 1998* (1999) http://www.lawcom.gov.uk/files/cp157.pdf

[83] and equally para 5 of Part II of Schedule 1, which applies where the defendant is charged only with non-imprisonable offences.

It also identified three provisions that can be applied in a manner compatible with the Convention but where guidance would be desirable on how they should be applied:

- paragraph 2(b) of Part I of Schedule 1 to the Bail Act, which permits a court to refuse bail where there are substantial grounds for believing that, if granted bail, the defendant would commit an offence;
- paragraph 3 of Part I of Schedule 1, which permits a court to refuse bail on the ground that this is necessary for the defendant's own protection; and
- Part IIA of Schedule 1, which provides that after the second bail hearing a court need not hear arguments which it has heard previously.

However, in its final report, *Bail and the Human Rights Act 1998*,[84] the Commission's view was that the law was generally compliant. The Law Commission did make the point that a general examination with a view to reform/simplification had been beyond its remit, and -

> This does not mean that we have given the law of bail in England and Wales an unequivocal "clean bill of health" in the sense of being incapable of improvement following a general review. Where appropriate, we indicate where such improvement might, in due course, be made.

The subject of bail was also considered in the *Auld Report* on the criminal courts of England and Wales. This report made a number of practical recommendations, including for instance that bail notices should be expressed in plain English, and that all courts should be diligent in adopting the Law Commission proposals that they should record their bail decisions in such a way as to indicate clearly how they have been reached.[85] Recommendations were also made in relation to bail appeals, in the light of the proposals for simplifying the appeals system as a whole. The Report summarised its recommendations in relation to bail as follows:

> **Bail** *(paras 69 - 82)*
>
> 175. Magistrates and judges in all courts should take more time to consider matters of bail.
> 176. Listing practices should reflect the necessity to devote due time to bail applications and allow the flexibility required for all parties to gather sufficient information for the court to make an appropriate decision.
> 177. Courts, the police, prosecutors and defence representatives should be provided with better information for the task than they are at present, in particular, complete and up to date information of the defendant's record held on the Police National Computer, relevant probation or other social service records,

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[84] Law Com No 269, *Bail and the Human Rights Act 1998* (20 June 2001) http://www.lawcom.gov.uk/files/lc269.pdf

[85] *Review of the Criminal Courts of England and Wales*, 2001, p 430 http://www.criminal-courts-review.org.uk/ccr-00.htm

if any, verified information about home living conditions and employment, if any, and sufficient information about the alleged offence and its relationship, if any, to his record so as to indicate whether there is a pattern of offending.
178. Courts and all relevant agencies should be equipped with a common system of information technology, as recommended in Chapter 8, to facilitate the ready availability to all who need it of the above information.
179. There should be appropriate training for magistrates and judges in the making of bail decisions, with Article 5 ECHR and risk assessment particularly in mind, as the Law Commission has proposed.
180. All courts should be provided with an efficient bail information and support scheme.
181. Bail notices should be couched in plain English, printed and given to the defendant as a formal court order when the bail decision is made, so that he understands exactly what is required of him and appreciates the seriousness of the grant of bail and of any attached conditions.
182. All courts should be diligent in adopting the Law Commission's proposals for the recording of bail decisions in such a way as to indicate clearly how they have been reached.

Appeals against bail decisions (paras 83 - 90)
183. The right of application to a High Court Judge for bail after determination by any criminal court exercising its original or appellate jurisdiction should be removed, and there should be substituted therefor a right of appeal from the District Division or Crown Division (Crown Court) on a point of law only.
184. Defendants should have a right of appeal against conditional grants of bail in the Magistrates' Division (magistrates' courts) to the Crown Division (Crown Court) in respect of conditions imposed as to their residence away from home and/or to the provision of a surety or sureties or the giving of security.
185. The prosecution should have a right of appeal to the Crown Division against the grant of bail by the Magistrates' Division (magistrates' courts) in respect of all offences that would, on conviction, be punishable by a custodial, or partly custodial sentence.

B. Part 2 of the Bill

The Bill is intended to amend those provisions of the *Bail Act 1976* that the Law Commission identified as being possibly in conflict with the ECHR, by making various changes to the categories of people who can be denied bail. It also seeks to include a new restriction on bail for drug users. Finally it would give effect to the recommendations of Lord Justice Auld for simplifying the bail appeals system. However, it does not address all the points highlighted by these two reports, and is intended to be seen against the

background that 12% of those bailed to appear at court fail to do so and nearly a quarter of defendants commit at least one offence whilst on bail.[86]

1. Bail for defendant's protection or welfare

Clause 11 subsections (1) (2) and (4) are intended to enable bail conditions to be imposed for a defendant's own protection (or, in the case of children, their own welfare). Currently concerns for a defendant's protection or welfare would have resulted in putting him in custody rather than conditional release,[87] and this option would remain available. The Law Commission's 2001 report had highlighted this issue:[88]

> **9A.25** A court should not detain a person pursuant to an aim which has been recognised by the ECtHR where there is another way to achieve that aim which will interfere with the defendant's liberty to a lesser extent. Thus, a defendant must be released, if need be subject to conditions, unless (i) that would create a risk of a kind which can, in principle, justify pretrial detention, and (ii) that risk cannot, by imposing suitable bail conditions, be averted, or reduced to a level at which it would not justify detention.
>
> **9A.26** The lack of a power in English law for the courts or police to impose a bail condition where this is necessary for the defendant's own protection could thus present difficulty where such a condition, had it been possible to attach one, could have averted the risk, or reduced it to a level at which it would not justify detention. In such cases, unless the defendant can be legitimately detained for another Convention-compatible purpose, or the protective condition can be legitimately imposed for one of the purposes for which English law does permit conditions to be imposed, the court should not refuse the defendant bail.
>
> **Recommendation**
> **9A.27 We recommend that the Bail Act 1976 be amended to empower the police and the courts to impose such conditions as appear necessary for the defendant's own protection, consonant with the exception to the right to bail at paragraph 3 of Part I of Schedule 1 to the Bail Act.**

2. Denial of bail following arrest for absconding or breaking bail conditions

Clause 11 subsections (3) and (5) address the question of refusal of bail where the defendant has been arrested for absconding or breaking bail conditions set in connection with the same imprisonable offence (under section 7 of the *1976 Act*). Under section 6 of

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[86] *Justice for All* White Paper (2002) p24:http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf. Figures taken from Criminal Statistics England and Wales 2000, London: Home Office (2001), and Brown, D. *Offending on Bail and Police Use of Conditional Bail.* Research Findings No.72, London: Home Office (1998)

[87] *Bail Act 1976* Schedule 1 Part 1 para. 3

[88] op cit p72

the *1976 Act* absconding is an imprisonable offence, but breach of a bail condition is not an offence under this Act.

The conclusion and recommendation of the Law Commission on this matter are as follows:

> **7.32** The consultation responses we received suggest that *in practice* the courts do not withhold bail *solely* on the ground that the defendant has been arrested under section 7. According to the Law Society, the Magistrates' Association and the CPS, repeal of paragraphs 6 and 5 would make little or no difference. Furthermore, the dicta of the High Court in the *Havering Magistrates* case make it highly unlikely that either paragraph would be construed or applied in a manner which was incompatible with Convention rights.
>
> **7.33** We conclude that section 7(5) and paragraphs 6 of Part I and 5 of Part II of Schedule 1 to the Bail Act 1976 can be interpreted and applied so that Convention rights are not violated. The courts should not refuse to grant a defendant bail simply because he or she has been arrested under section 7. These provisions can and should be applied so that bail is only refused where this is necessary for a purpose which is capable of justifying detention under Article 5, as interpreted by the ECtHR. The circumstances leading to the defendant being arrested under section 7 may properly be taken into account as a possible reason for concluding that detention is necessary for such a purpose.
>
> **7.34** Although we have noted that paragraph 5 of Part II has a useful role as part of the scheme for dealing with defendants charged with non-imprisonable offences, paragraph 6 of Part I, which applies to defendants charged with imprisonable offences, is superfluous. Paragraph 2 provides courts with the power to detain such persons for all of the purposes for which bail conditions can properly be imposed. Paragraph 9(c) requires that courts taking decisions under paragraph 2 have regard to relevant considerations, including "the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings".
>
> 7.35 **We recommend that**
> **(1) paragraph 6 of Part I of Schedule 1 to the Bail Act 1976 be repealed; and**
> **(2) paragraph 5 of Part II of Schedule 1 to the Bail Act 1976 be amended by adding a requirement that the court must be satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody, commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice.**
> **(Recommendation 2)**
>
> 7.36 The amended statute would then make it plain that the courts should not refuse to grant bail to a defendant charged with an imprisonable offence simply because the defendant has been arrested under section 7. Rather, the circumstances leading to the defendant being arrested under section 7 may properly be taken into account under paragraph 9(c) as a possible reason for

> concluding that one of the Convention-compatible grounds for withholding bail is satisfied. Similarly, the courts should not refuse to grant bail to a defendant charged with a nonimprisonable offence simply because the defendant has been arrested under section 7. Rather, the circumstances leading to the defendant being arrested under section 7 may properly be taken into account as a possible reason for concluding that one of the specified Convention-compatible grounds for withholding bail is satisfied.

These recommendations would be implemented by **Clause 11 subsections (3) and (5)** of the Bill. The former would repeal paragraph 6 of Part 1 of Schedule 1, and the latter maintains the spirit of paragraph 5 of Part 2 of Schedule 1, subject to the new requirement proposed by the Law Commission.

3. Refusal of bail when defendant was on bail at time of alleged offence

The provisions of **clause 12** of the Bill are intended to implement the Law Commission's 2001 recommendation relating to its fear that the existing provision (in paragraph 2A of Part 1 of Schedule 1 to the *Bail Act 1976*) could be seen as contradictory to the ECHR:

> We recommend that the Bail Act 1976 be amended to make it plain that the fact that the defendant was on bail at the time of the alleged offence is not an independent ground for the refusal of bail, as paragraph 2A of Part I of Schedule 1 to the Bail Act may appear to suggest, but is one of the considerations that the court should take into account when considering withholding bail on the ground that there is a real risk that the defendant will commit an offence while on bail.[89]

4. Denial of bail for users of illegal drugs

Clause 16 is designed to provide a presumption against bail for alleged offenders who are shown to be drug abusers. This provision does not appear to follow from either the Law Commission report or the *Auld Report* mentioned above.

The government's explanatory notes to the Bill (29 November 2002), set out the thinking behind this provision:

> Evidence suggests that there is a link between drug addiction and offending. In addition, it is widely accepted that many abusers of drugs fund their misuse through acquisitive crime. There is thus a real concern that if such offenders who have been charged with an imprisonable offence are placed on bail, they will merely re-offend in order to fund their drug use.[90]

There is a variety of evidence on the impact of drug use on crime. For example, DrugScope - which describes itself as 'the UK's leading drugs charity and centre of

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[89] op cit p34
[90] Bill 8-EN, para 128

expertise on drugs' - has a series of FAQs on drugs and crime which includes the following:

> Some research studies have found that a lot of acquisitive crime (stealing) is committed by dependent users of heroin and crack cocaine trying to pay for their drugs. Some show a high proportion of people arrested for a range of offences testing positive for drug use. It has been suggested that one third to over a half of all acquisitive crime is related to illegal drug use
>
> […] researchers from DrugScope estimated that between one and 21 per cent of the total cost of acquisitive crime is associated with people who were dependent on heroin.[91]

The Home Affairs Committee's report on its enquiry into the government's drugs policy (May 2002), to which DrugScope was one of the organisations that submitted evidence, is available on the Parliament website,[92] as is the government's response.[93]

In 1998 a study into looking at the evidence of drug use by those arrested was carried out by the Home Office Research and Statistics directorate.[94] It is online at:

http://www.homeoffice.gov.uk/rds/pdfs/hors183.pdf

In addition, NACRO (the National Association for the Care and Rehabilitation of Offenders) published a report entitled *Drug driven crime: a factual and statistical analysis of the links between problem drug use and crime* in 1999. Its stated aim is to look at how effective are treatment programmes in reducing drug misuse and related criminal activity; and what action is currently being taken by the Government and agencies to tackle drug misuse.[95]

Clause 16 is glossed by the government's Explanatory Notes to the Bill as follows:

> Under this clause, an alleged offender aged 18 or over who has been charged with an imprisonable offence will not be granted bail (unless he demonstrates that there is no significant risk of his committing an offence while on bail), where the three conditions below exist:

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91 http://www.drugscope.org.uk/druginfo/drugsearch/faq_template.asp?file=%5Cwip%5C11%5C1%5C2%5Ccrime.html

92 Home Affairs Committee, Third Report of 2001-02, HC 318 (May 2002): http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/318/31802.htm

93 Cm 5573, July 2002: http://www.official-documents.co.uk/document/cm55/5573/5573.pdf

94 Home Office research study 183 (1998)

95 NACRO, 1999

> (i) there is drug test evidence that the person has a specified Class A drug in his body (by way of a lawful test obtained under section 63B of the Police and Criminal Evidence Act 1984 or clause 145 of the Bill);
>
> (ii) the court is satisfied that there are substantial grounds for believing that the misuse of a specified Class A drug caused or contributed to that offence or provided its motivation; and
>
> (iii) the person does not agree to undergo an assessment as to his dependency upon or propensity to misuse specified Class A drugs or, has undergone such an assessment but does not agree to participate in any follow-up offered.
>
> The assessment will be carried out by a suitably qualified person, who will have received training in the assessment of drug problems. The person will normally be an employee of a recognised drug service provider. If an assessment or follow-up is proposed, it will be a condition of bail that they be accepted. The provision can only apply in areas where appropriate assessment and treatment facilities are in place.[96]

The Bill itself does not contain a definition of the 'suitably qualified person' who would carry out an assessment under this provision.

The effect of **clause 16(3)** is that this provision could not be applied to police bail.

Other matters relating to drug testing of offenders are considered in Part III of this paper, above.

5. Bail appeals

The current law on bail appeals is described as 'a bit of a muddle' by the *Auld Review*:

> A defendant has a right of appeal to the Crown Court from a refusal to grant bail, but not against conditions magistrates have imposed on its grant. There, the chain of appeal ends, though anomalously there is a statutory right in all cases to apply to a High Court Judge against magistrates' refusal of bail or the imposition of conditions in the grant of bail, empowering the judge, save in cases of homicide or rape, to grant bail or vary the conditions. And a High Court Judge, sitting in chambers, also has an inherent and distinct power from that when sitting in the Crown Court, to grant bail before and after a case is committed or sent to the Crown Court. This jurisdiction overlaps the original and appellate jurisdiction of the Crown Court. If nothing else, there are question marks about the right of defendants refused bail by a Crown Court judge in the exercise of his original or appellate jurisdiction, being able to renew the same application to a High Court Judge and, in the case of a conditional grant of leave by magistrates, to challenge

96 Bill 8-EN, paras 129-130

> the imposition of those conditions before a High Court Judge, but not by way of appeal to the Crown Court.[97]

The summary of the conclusions of the *Auld Report* on how to change the bail appeal system is set out in Part IV A 3 above, and **clauses 13, 14 and 15** of the Bill would broadly implement these.

Clause 14 is intended to abolish the jurisdiction of the High Court in respect of bail where it duplicates that of the Crown Court; but to retain that jurisdiction in the other circumstances set out above.

This proposal has attracted some criticism:

> We disagree […] that a defendant's general right to appeal a refusal of bail to a high court judge should be removed. The high court exercises an important 'long-stop' function here. The withholding of bail from an unconnected defendant is an important enough interference with his normal rights to justify retention of a right of appeal to a senior judge.[98]

Clause 13 would complement this proposal by extending the right of appeal to the Crown Court, to cover the imposition by magistrates of certain conditions of bail (relating to residence, sureties, curfews or electronic monitoring). The Crown Court would then have the power to vary these conditions. Under **clause 13(8)** this would be the only appeal allowed on these conditions unless a subsequent application is made to the magistrates' court to vary conditions of bail or add conditions to unconditional bail.

In its response to the *Auld Report*, Victim Support made the following comment:

> If a defendant is to be allowed the right of appeal against conditions of bail in respect of conditions imposed as to their residence away from home (recommendation 184), we believe the courts must take into account the safety of any victim or witness at that home, in considering such an appeal.[99]

Clause 15 would extend to all imprisonable offences the prosecution's right of appeal to the Crown Court against a magistrate's decision to grant bail. The Bar Council welcomed the proposal to this effect in the *Auld Report*;

> […] we also agree that the present high threshold for prosecution appeals should be removed. Under current law, such appeals are limited to cases which attract

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97 *Review of the Criminal Courts of England and Wales*, 2001, para 84 http://www.criminal-courts-review.org.uk/ccr-00.htm

98 *Auld Review - Comments Received from Lawyers' Organisations* - Lord Chancellor's Department: http://www.lcd.gov.uk/criminal/auldcom/lorg/10.htm

99 *Auld Review - Comments Received From Human Rights/Civil Liberties Organisations - 11* - Lord Chancellor's Deprtment: http://www.lcd.gov.uk/criminal/auldcom/hr/hr11.htm

> custodial sentences of five years or more, and only to cases of 'grave concern'. It seems to us that it is not only cases attracting sentences of five years or more which are synonymous with a 'grave concern' criteria. As Auld points out, 'quality of life crimes', which may not be the most serious offences in themselves, can have a powerful impact on a community's sense of security. We, therefore agree that the prosecution should have a right of appeal against a grant of bail by magistrates in all cases which would be punishable by a custodial, or partly custodial sentence.[100]

V Conditional cautions

A. Background

In England and Wales, neither the police nor the Crown Prosecution Service, nor yet other prosecutors, have a general power to issue cautions with conditions as to the offender's future behaviour attached. Instead, a police caution currently amounts to an offender being 'let off' with a warning.

According to the *Auld Review*, around 266,000 cautions were issued in 1999, amounting "to around 25% of all those found guilty or cautioned (i.e. the total number of 'solved' crimes)".[101] *Auld* suggested that:

> Many regard this as unsatisfactory, both in its lack of regard for the injury or insult to victims and in its lack of rigour as a response to criminality. Concern has also been expressed that the police are under pressure to resolve crimes in this way (cautions are recorded as a 'clearance' and are therefore a relatively non-labour intensive method of contributing to one of the key measures of a force's performance).[102]

The Review cites examples of conditional cautioning in other countries, including Scotland and Germany (para 43), but notes that:

> continental prosecutors, in general, have a different role and status from those of the Crown Prosecution Service in this country. They are closer professionally to the judiciary and there is, thus, more ready acceptance of their power to use the 'caution plus' system as a means of deciding the outcome of certain cases.

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[100] *Auld Review - Comments Received from Lawyers' Organisations* - Lord Chancellor's Department: http://www.lcd.gov.uk/criminal/auldcom/lorg/10.htm

[101] The total for 2000 is 239,000, or 23% of those found guilty or cautioned (excluding findings of guilt for summary motoring offences. Source: Criminal Statistics England and Wales 2000, Cm 5312, Table 5.8

[102] ibid para 42

The *Auld Review* recommended the introduction of a new **conditional caution** in England and Wales:

> - consideration should be given to the introduction of a conditional cautioning scheme over a wide range of minor offences, enabling the prosecutor with the consent of the offender and, where appropriate, with the approval of the court:
> (a) to caution him subject to his compliance with specified conditions; and
> (b) to bring the conditionally cautioned offender before the court in the event of his failure to comply with the conditions; and
>
> - in considering the introduction of such a scheme, regard should be had to its place alongside existing provisions for avoiding or modifying the criminal process and future developments in the form of 'restorative justice', with a view to over-all rationalisation into a single scheme.[103]

Its view was that the approval of the court would be a vital 'stamp of approval:

> Without the protection of the court's approval, its use could be used or perceived as a 'cop-out' by the prosecution to avoid prosecuting cases that should be prosecuted, or of innocent criminals being at risk of pressure to accept onerous compromises to avoid prosecution, or of the rich being able to buy their way out of prosecutions when the poor could not.

The Runciman Commission (Royal Commission on Criminal Justice) had made a similar proposal for conditional cautions in its 1993 report.[104]

Lord Justice Auld's suggestion was generally given a cautious welcome, for example by the 'Penal Affairs Consortium' formed to respond to the *Auld Review*:

> The Consortium recognises the value of conditional cautions and caution plus schemes but with the proviso that these are used in place of custodial sentencing, not in place of other non-custodial disposals.[105]

and by ACPO (the Association of Chief Police Officers):

> The simple caution in the hands of the police is an efficient and effective way of dealing with many offences and offenders. "Caution plus" would be vested in the CPS and subject to the court's approval. As suggested in paragraph 47, the whole cautioning system would have to be re-examined and the advantages of the

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[103] ibid para 47
[104] Royal Commission on Criminal Justice, Cm 2263 (1993), pp 82-83
[105] http://www.lcd.gov.uk/criminal/auldcom/hr/hr8.htm

> present system must not be overlooked. The roles of the police and prosecutor would need clarification as would the relationship with the issue of charging. Care is needed to avoid unwarranted compromising of proceedings to victims' detriment by ensuring that the appropriate decisions are made pre-charge following dialogue between the police and CPS, and that there is no administrative burden on the police in preparing cases for caution. There would also be an impact on record keeping and clarification as to the status of various types of caution.[106]

Part 3 of the Bill would allow conditional cautions to be given to adult offenders by a constable, a civilian investigating officer or a person authorised by the Director of Public Prosecutions. Its use would not be restricted to prosecutors (though the Crown Prosecution Service would have to give its consent), nor would the court's approval be required, as Auld recommended.

Under **clause 20** it is proposed that breach of the caution conditions would allow proceedings to be instigated for the offence; but breach of the conditions would not be an offence in its own right.

The government's Explanatory Notes summarise the level of scrutiny required for the Code of Practice on conditional cautions envisaged by **clause 21**.[107] It is proposed that such a Code would contain all the practical arrangements for the issuing of conditional cautions, and this may therefore address the issue of how such cautions would fit in with other measures designed to divert offenders from the main criminal justice system.

[106] Association of Chief Police Officers, *Response to the report by the Right Honourable Lord Justice Auld following his Review of the Criminal Courts of England and Wales* (January 2002): http://www.lcd.gov.uk/criminal/auldcom/cja/cja13.htm#top

[107] Bill 8-EN, paras 134-5