Children's Rights Alliance for England

Briefing on the lawfulness of the use of force provisions in the Criminal Justice and Courts Bill

Introduction

The Criminal Justice and Courts Bill (the Bill) legislates for the introduction of secure colleges as a form of youth detention. The Children's Right Alliance or England (CRAE), Howard League for Penal Reform (HL) and Standing Committee for Youth Justice (SCYJ) are opposed to secure colleges. Our concerns have been set out in parliamentary Briefings.

We have particular concerns about those provisions in the Bill which would permit secure college custody officers to use force on children. The Government has used various arguments to defend these provisions. To aid parliamentarians' scrutiny of the Bill, this Briefing contains extracts from legal advice obtained by CRAE, in response to these arguments.

Background

The Bill would allow a secure college custody officer to *"use reasonable force" "to ensure good order and discipline"* (GOAD) *"if authorised to do so by secure college rules."* Using force to maintain GOAD has proved dangerous in the past and led to force being used against children illegally. The use of force for these purposes has been linked to the deaths of two children in the past – including 15 year-old Gareth Myatt in the G4S run Rainsbrook secure training centre and 14 year-old Adam Rickwood in Serco's Hassockfield secure training centre.

In 2008 the Court of Appeal ruled that using force to maintain GOAD in Secure Training Centres was incompatible with the European Convention on Human Rights[1]. This was because it amounted to *"inhuman or degrading treatment"* and the Government had not shown that use of force to maintain GOAD was necessary. Facilities for children in conflict with the law can be run without using force for GOAD – for example, Secure Children's Homes have never used force to make children behave themselves.

In its report on the Bill, the Joint Committee on Human Rights concluded that the provisions in the Bill were incompatible with the Articles 3 and 8 of the European Convention on Human Rights (ECHR) (please see below for more details).

Given CRAE's concerns about the lawfulness of the use of force provisions in the Bill we instructed solicitors at Bindmans LLP[2] to seek independent legal advice from Martin Chamberlain QC and Max Schaefer ("CRAE's legal advice")[3]. They have said they have *"serious concerns about the current version of the Criminal Justice and Courts Bill."*[4] This Briefing contains extracts from that legal advice.

[1] R (on the application of C) (a minor) v Secretary of State for Justice [2008] EWCA Civ 882
[2] CRAE is grateful for the pro bono assistance of Sara Lomri and Charlotte Haworth Hird of Bindmans LLP and Martin Chamberlain QC and Max Schaefer of Brick Court Chambers.
[3] References to provisions of the Bill in this Advice are to the 2 April 2014 version of the Bill, which was the latest available at the time the advice was drafted.
[4] CRAE wrote to the Ministry of Justice on 30 June 2014 to share our concerns and a summary of our legal advice. We are waiting for a response to that letter.

What does the Bill say about use of force?

The Bill sets out the circumstances in which Secure College Rules may authorise a Secure College custody officer to use "*reasonable force"* on children detained in a secure college (Schedule 4, paras 8-10):

> *8 A secure college custody officer performing custodial duties at a contracted-out secure college has the following duties in relation to persons detained there—*
> *to prevent their escape from lawful custody,*
> *to prevent, or detect and report on, the commission or attempted commission by them of other unlawful acts,*
> *to ensure good order and discipline on their part, and*
> *to attend to their well-being.*
>
> *9 (1) A secure college custody officer performing custodial duties at a contracted-out secure college may search the following in accordance with secure college rules—*
> *a person who is detained in the secure college,*
> *any other person who is in the secure college or who is seeking to enter the secure college, and*
> *an article in the possession of a person described in paragraph (b).*
> *…*
>
> *10 If authorised to do so by secure college rules, a secure college custody officer may use reasonable force where necessary in carrying out functions under paragraph 8 or 9.*

Are the Bill's provisions authorising the use of force too broad?

CRAE's legal advice says:
"We have serious concerns about the current version of the Criminal Justice and Courts Bill insofar as it makes provision for secondary legislation to authorise the use of "reasonable force" in Secure Colleges.

The Bill enables subordinate legislation that would authorise the use of force in circumstances going well beyond what is permissible under the European Convention of Human Rights ("ECHR") and other international human rights conventions and makes no reference to important matters such as the need for training and procedural guidelines".

Should secure college custody officers be permitted to use force in order to maintain good order and discipline?

The Government says:
"The Government's position is that there are some situations in which the use of reasonable force to ensure good order and discipline (in limited and clearly defined circumstances) will be necessary, and that the relevant primary legislation should allow for that possibility".[5]

"We recognise the importance of the issue, so I want to be clearer about our intentions ahead of developing the rules. I recognise that "good order and discipline" is too broad in this context. I do not propose to change "good order and discipline" in the Bill—it is a phrase that is found in several pieces of legislation and is familiar to settings outside custody, including schools."[6]

[5] Letter from The Right Honourable Chris Grayling MP (Lord Chancellor and Secretary of State for Justice to Dr Hywel Francis MP (Chair of the Joint Committee on Human Rights) dated 31 March 2014.
[6] Jeremy Wright MP, Committee Stage Debates of the Criminal Justice and Courts Bill (20 March 2014, column 306)

CRAE's legal advice says:
"We know from the case-law of the ECtHR that force can only be used where it is rendered *"strictly necessary by [the child's] conduct."* Thus, force can only be used in response to an action taken by the child. The case law of the ECtHR suggests that it is typically violence, or escape attempts, on the part of the applicant which can render the use of force necessary."

"The problems with the extremely broad and vague phrase "good order and discipline" are already apparent from the pre-Bill case-law. In particular, we are concerned that this provision does not turn on any conduct on the part of the child at all, let alone conduct necessitating the use of force".

Is it unlawful to use force for the purposes of maintaining good order and discipline?

The Government says:
"C v Secretary of State for Justice quashed provisions in the Secure Training Centre Rules 1998 which purported to authorise the use of physical restraint for the purpose of ensuring good order and discipline. This was on the basis of inadequate consultation…" [7]

CRAE's legal advice says:
"The Secretary of State … sought to amend the Rules to include "good order and discipline" as a permitted purpose for the use of force. The Court of Appeal quashed those Amended Rules in R (C) v Secretary of State for Justice. It did so for two reasons. The first reason, irrelevant for our purposes, was a failure to consult (see at [55]). The second reason (see at [88])) was because it found that the rules were in breach of Articles 3 and 8 ECHR."

Does it make any difference that the use of force for good order and discipline is authorized in schools?

The Government says:
"I do not propose to change "good order and discipline" in the Bill—it is a phrase that is found in several pieces of legislation and is familiar to settings outside custody, including schools." [8]

CRAE's legal advice says:
"That the use of force is permitted for the maintenance of good order and discipline in schools9 does not change this analysis. First, regardless of however many contexts in which there is such permission, its absence from Secure Children's Homes remains strong evidence that it is not necessary. Secondly, schools are not a useful comparison point. Children in schools are not – as a group - as vulnerable as those in Secure Colleges. Thirdly, we are in any event not aware of any authority establishing the legality of such use in schools under human rights law".

In what circumstances should it be permissible to use force? What about the other purposes specified in the Bill as a purpose for which the use of force may be authorised?

The Government says:
"let me be clearer about the circumstances in which we think force may be appropriate… Our position is that, in limited circumstances in which all attempts at resolving a situation without resorting to force have failed and where a young person's behaviour is affecting their own safety and welfare or that of others, as a last resort some force, subject to strict conditions and safeguards, may be necessary. Force may only be used in situations where there are clear risks to maintaining a safe and stable environment for young people and where the use of force is a necessary and proportionate response to protect the welfare of the individual or the welfare of others". [10]

[7] Letter from The Right Honourable Chris Grayling MP (Lord Chancellor and Secretary of State for Justice to Dr Hywel Francis MP (Chair of the Joint Committee on Human Rights) dated 31 March 2014.
[8] Jeremy Wright MP, Committee Stage Debates of the Criminal Justice and Courts Bill (20 March 2014, column 307)
[9] Education and Inspections Act 2006, s 93.
[10] Jeremy Wright MP, Committee Stage Debates of the Criminal Justice and Courts Bill (20 March 2014, column 307)

Government says:
"Imminent threat of harm would certainly be a justifiable reason for using force where necessary, but we do not consider it to be the only reason. Other reasons, as set out in the Bill, would be, for example, to prevent an escape from custody or prevent unlawful acts. The amendment would exclude the possibility of force being used for those reasons and thus be too limiting in situations where force may be necessary. I agree that force falls to be used once other options have been exhausted, but that principle is covered by the current wording of the clause that force may only be use "where necessary". [11]

CRAE's legal advice says:
"…The purpose of "[p]reventing, or detecting and reporting on, the commission or attempted commission by the child of unlawful acts" is extremely broad. The only relevant unlawful acts encompass violence toward another person or serious damage to property. In particular, the conferral of a right to use force simply to detect and report on crime, even where there is no imminent prospect of harm, seems to us to be quite unwarranted.

We are concerned that the purpose of attending to the well-being of the child likewise does not turn on any conduct on the part of the child. We are also concerned that it is excessively broad: we consider that only the prospect of imminent or direct harm to the child may warrant the use of force, rather than a more nebulous concern about the child's well-being.

Again, the permissibility of the use of force where necessary to carry out searches is impermissibly broad."

Should the Bill's provisions be tightened, or is it acceptable to leave this to secondary legislation (the secure college rules)?

Government says:
"A custody officer's duties include maintaining good order and discipline, as set out in the Bill, but the provisions will not by themselves allow custody officers to use force for that purpose. That would not be possible unless specific provision were made in secure college rules. Rules are the correct place to set out the precise boundaries on the use of force." [12]

CRAE's legal advice says:
"[In Secure Training Centres in the past] The inconsistency between the purposes authorised in the legislation and the purposes authorised in the Rules led for a period to a highly confused state of affairs in which many custody officers used force for the purposes of good order and discipline, believing that they were entitled to do so by the legislation, even though they were not permitted to do so by the Rules[13]."

"The breadth of the legislation in its current form is unhelpfully unclear. Even assuming that the subordinate legislation will be more narrowly drafted so as to ensure proper compliance with the UK's various obligations, there still appears to us a significant risk that the confusion that ensued under the previous regime in respect of the situations in which force may be used – that is, much wider provisions in primary than in secondary legislation – may recur. For that reason, we consider it desirable that the Bill's current provisions enabling subordinate legislation authorising the use of force are replaced by narrower provisions which better reflect the circumstances in which the force may be used consistently with Article 3".

[11] Jeremy Wright MP, Committee Stage Debates of the Criminal Justice and Courts Bill (20 March 2014, column 306)
[12] Jeremy Wright MP, Committee Stage Debates of the Criminal Justice and Courts Bill (20 March 2014, column 306)
[13] See R (CRAE) v Secretary of State for Justice [2012] EWHC 8 (Admin), [76] (Foskett J).

What else needs to change in the Bill in relation to force?

CRAE's legal advice says:
"A "broad consensus" in international human rights standards can clearly be identified in relation to certain propositions:

- The use of force for disciplinary or punishment purposes is never legitimate.
- Where force is used, its use should always be a last resort, and only when all other means of control, such as de-escalation of the conflict, have been exhausted.
- Where force is used as a last resort, the amount of force used should always be the minimum necessary and be applied for the shortest time necessary.
- Members of staff should be trained in how to use the minimum necessary amount of force.
- There should also be detailed guidelines stipulating the circumstances in which force may be used and procedures which must be followed where it is used, for example keeping a record of each use."

"…*No reference to training and procedural obligations*
We note with concern that the Bill fails to make reference to certain obligations which we consider are owed by the United Kingdom under the ECHR as interpreted in light of the international materials. In particular, the Bill contains no reference to the need for: (i) appropriate training of staff to ensure that the minimum necessary amount of force is used; and (ii) procedures to be put in place to be followed with respect to each individual use of force.

…..Broad language regarding the test of necessity
We are also concerned by the very broad language used in the Bill, which does not reflect the obligations owed by the United Kingdom under the ECHR.
In particular, the very use of the language of "reasonable force where necessary" in para 10 of Schedule 4 to the Bill seems to suggest that once any use of force is necessary, the Secure College custody officer may then simply use such force as is reasonable. That is not a correct statement of the test. The Secure College custody officer must use the minimum necessary amount of force for the minimum necessary period of time.

Again, it is possible that the Secure College Rules will be drafted more narrowly, and of course the Secretary of State is obliged to act compatibly with the ECHR when issuing secondary legislation. However, we consider that the use of "reasonableness" language in the Bill is unnecessarily confusing in light of the fact that an approach based on "reasonableness" is nowhere to be found in the relevant international human rights standards."

What should be done about this?

CRAE's legal advice says:
"We note in particular the judgment of the Court of Appeal in R (C) v Secretary of State for Justice 71]-[78], where Buxton LJ emphasised the special need for clarity and precision in the drawing up of what were then the Secure Training Centre Rules and its accompanying Code of Practice given the very open-ended language of "good order and discipline", the poor track record in this area of compliance with legal and contractual rules (including, it appeared, in the two cases [of Adam Rickwood and Gareth Myatt] in which the use of force had resulted in the death of children)[14], and concerns over the quality of training and guidance made available to staff, creating a significant risk of non-compliance with Article 3.

"The breadth of the legislation in its current form is unhelpfully unclear. Even assuming that the subordinate legislation will be more narrowly drafted so as to ensure proper compliance with the UK's various obligations, there still appears to us a significant risk that the confusion that ensued under the previous regime in respect of the situations in which force may be used – that is, much

[14] We further note in this regard that according to statistics provided to Parliament by the Youth Justice Board in 2013, the use of restraint techniques on children in detention had been followed by serious injuries requiring hospital treatment 48 times in the previous three years: HL Deb, 22 July 2013, col. 176W.

wider provisions in primary than in secondary legislation15 – may recur. For that reason, we consider it desirable that the Bill's current provisions enabling subordinate legislation authorising the use of force are replaced by narrower provisions which better reflect the circumstances in which the force may be used consistently with Article 3".

The JCHR said:

"it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or secondary legislation, to authorise the use of force on children and young people for the purposes of good order and discipline… we recommend that the relevant provision in Schedule 4 of the Bill should be deleted, and the Bill should be amended to make explicit that secure college rules can only authorise the use of reasonable force on children as a last resort; only for the purposes of preventing harm to the child or others; and that only the minimum force necessary should be used".[16]

CRAE's response

- We agree with the JCHR that the provisions on the use of force should be deleted.
- Use of force to maintain good order should be prohibited in the primary legislation, which should set out clearly the circumstances in which force can be used.
- It is clear that permitting force to maintain GOAD would be incompatible with ECHR and we question why this possibility should be left open for secondary legislation. If the government does not intend to allow force for GOAD in secondary legislation it should remove it from the primary legislation. Otherwise, there will be confusion.
- The courts have found that differing messages between primary and secondary legislation on when force can be used led to confusion and the illegal use of restraint in secure training centre. 17 The same could happen in secure colleges if the primary and secondary legislation do not appear to be consistent.
- If the government have specific and limited circumstances in mind in which force can be used, these should be specified in the Bill, as per the JCHR recommendation. "GOAD" allows force to be used in almost any situation.
- If further details were to be contained in secondary legislation this must be subject to Parliamentary scrutiny. The draft rules have not been published. Parliament may not have the opportunity to scrutinise them properly before the Bill becomes law.

We welcome amendments designed to put in place robust criteria to limit the use of force in primary legislation, such amendments 42N and and 46A.[18]

For further briefing on the legality of the use of force provisions please contact:
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[15] R (Children's Rights Alliance for England) v Secretary of State for Justice [2012] EWHC 8 (Admin), [76] (Foskett J).
[16] Joint Committee on Human Rights, 2014, "Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill Fourteenth Report of Session 2013-14." Page 36.
http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/189/189.pdf
[17] R (Children's Rights Alliance for England) v Secretary of State for Justice [2012] EWHC 8 (Admin), [76] (Foskett J).
[18] Any final amendment would need to be carefully drafted to address the requirements of human rights standards.