NPIA
National Policing Improvement Agency

Digest

June 2012

A digest of police law, operational policing practice and criminal justice

The NPIA Digest is a journal produced each month by the Legal Services Team of the Chief Executive Officer Directorate. The Digest is a primarily legal environmental scanning publication intended to capture and consolidate topical and key issues, both current and future, impacting on all areas of policing. During the production of the Digest, information is included from Governmental bodies, criminal justice organisations and research bodies. As such, the Digest should prove an invaluable guide to those responsible for strategic decision making, operational planning and police training.

The NPIA aims to provide fair access to learning and development for all. To support this commitment, the Digest is available in alternative formats upon request. Please email digest@npia.pnn.police.uk or telephone +44 (0)1480 334566.

Digest Editor: Telephone +44 (0)1480 334566

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Legal Services

Chief Executive Officer Directorate

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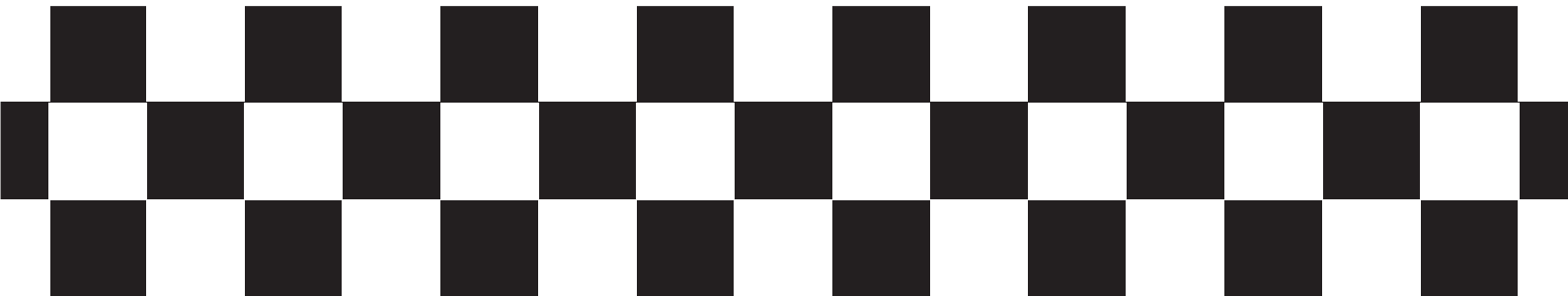

NPIA Digest June 2012

This month's edition of the Digest contains a summary of issues relating to police law, operational policing practice and criminal justice.

There are reports of cases considering human rights and protests in Parliament Square, and the offence of voyeurism in cases involving autistic offenders who are unfit to stand trial.

We look at Government Bills announced in the Queen's Speech, in particular the Crime and Courts Bill which provides for the establishment of the National Crime Agency. We also look at the provisions in the Protection of Freedoms Act and the Legal Aid, Sentencing and Punishment of Offenders Act, both of which received Royal Assent on 1 May 2012.

Statistical bulletins are covered including the Audit Commission's National Fraud Initiative report, ACPO's National Problem Profile on the commercial cultivation of Cannabis, and the Ministry of Justice's Proven Reoffending statistics.

There are also articles on a new Home Office Circular dealing with the changes to drug and alcohol testing provisions for police officers, the Criminal Records Bureau's new identity checking guidelines, and the new offences of stalking and harassment in the Protection of Freedoms Act 2012.

The progress of proposed new legislation through Parliament is examined and statutory instruments published this month summarised.

Contents

Bills Before Parliament 2012/13 - Progress Report

On 9 May 2012, the Queens Speech unveiled the legislative programme for the 2012-2013 Parliamentary session. The Bills introduced so far in the 2012/13 session include the Crime and Courts Bill.

- Crime and Courts Bill - The Bill:
  - Provides for the establishment of the National Crime Agency (NCA) to prevent and investigate serious, organised and complex crime, enhance border security, and tackle the sexual abuse and exploitation of children, and cyber crime;
  - Makes provision for the appointment of a Director General as the operationally independent head of the NCA; makes provision for the governance of the NCA; and provides a framework for the NCA and other law enforcement agencies to collaborate in order to assist each other in the discharge of their functions;
  - Sets out the powers of the Director General and other NCA officers, including by making provision to enable the Director General to give designated NCA officers some or all of the powers of a constable, a customs officer or an immigration officer; and provides for a duty on the Director General to publish certain information and for the disclosure of information by and to the NCA and for the use of information by the Agency;
  - Provides for the NCA to be inspected by Her Majesty's Inspectors of Constabulary, and for regulations to make provision for oversight by the Independent Police Complaints Commission. The Bill places restrictions on certain NCA officers taking industrial action and make provision for the determination of such NCA officers' pay and allowances;
  - Provides for the abolition of the Serious Organised Crime Agency (SOCA) and the National Policing Improvement Agency (NPIA). The Bill includes provision for the Secretary of State to make, and lay before Parliament, staff or property transfer schemes. A staff transfer scheme may provide for a designated member of staff of SOCA or the NPIA, a designated constable or member of civilian staff in an England and Wales police force and a designated member of personnel or staff in any other body to become NCA officers, and employed in the civil service of the state. A property transfer scheme may provide for the transfer to the NCA of designated

property, rights or liabilities from SOCA, NPIA, the chief officer of, or the policing body for an England & Wales police force or any other person;

- Contains provisions to modernise the courts and tribunals including establishment of a Single County Court system and Single Family Court to allow greater flexibility for the handling of cases to increase efficiency of the civil and family court systems in England and Wales;
- Increases the efficiency of fines collection by providing incentives for early payment and compliance, so that, in the event of a default, the offender will be charged the cost incurred for collecting their fine not the taxpayer;
- Makes provisions to reform the judicial appointments process to introduce greater transparency in the judicial appointments process and improve judicial diversity; and provides for the filming and broadcasting of judicial proceedings in specified circumstances;
- Makes provisions about border control and the powers of immigration officers;
- Creates a new offence of driving or being in charge of a motor vehicle with a specified controlled drug in the blood or urine in excess of the specified limit for that drug. Makes further provision for the taking of preliminary tests to determine the level of drugs in a person's blood or urine so as to allow up to three preliminary tests of saliva or sweat to be taken when testing for drugs.

The Crime and Courts Bill was introduced in the House of Lords at its first reading stage on 10 May 2012. Second reading, the general debate on all aspects of the Bill, took place on 28 May 2012. Committee stage, the detailed line by line examination of each clause in the Bill, will commence on 18 June 2012.

The progress of Bills in the 2012/13 parliamentary session can be found at:
http://services.parliament.uk/bills/

Fitness for Trial: Voyeurism Offences

Regina v MB [2012] EWCA Crim 770

Background

This was an appeal by the defendant, MB, from a decision of the Crown Court in respect of charges of voyeurism contrary to Section 67(1) of the Sexual Offences Act 2003 (the SOA). MB had a learning disability and autistic spectrum disorder. He was 23 years old at the time of the offence and of previous good character.

In the Crown Court, the judge ruled that MB was unfit to be tried by reason of disability pursuant to section 4(5) and (6) of the Criminal Procedure (Insanity) Act 1964 (the 1964 Act). The jury determined that MB had committed "the act…charged against him as the offence" (section 4A (2) of the 1964 Act) in respect of one of the two counts of voyeurism.

As a result of the jury's decision, the judge imposed on MB a two year supervision order and a Sexual Offences Prevention Order (SOPO). MB also had to register on the Sex Offenders' Register for five years.

This appeal was against the finding by the jury that MB had committed the act charged against him and challenged the imposition of both the SOPO and the registration order. In this appeal, the Court of Appeal considered in particular the interpretation of section 4A (2) of the 1964 Act as to what constitutes "…the act…charged against him as the offence".

The Law

Section 4A of the Criminal Procedure (Insanity) Act 1964 provides as follows:

4A Finding that the accused did the act or made the omission charged against him.

(1) This section applies where in accordance with section 4(5) above it is determined by a court that the accused is under a disability.

(2) The trial shall not proceed or further proceed but it shall be determined by a jury:

(a) on the evidence (if any) already given in the trial; and

(b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence,

whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being

tried, that he did the act or made the omission charged against him as the offence.

(3) If as respects that count or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.

(4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.

(5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried.

Section 67 of the Sexual Offences Act 2003 provides as follows:

67 Voyeurism

(1) A person commits an offence if:

(a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and

(b) he knows that the other person does not consent to being observed for his sexual gratification.

The Facts

On 20 April 2010, two young mothers, with their six year old sons, were at the Hemel Hempstead Sports Centre to take their sons for a swimming lesson. They used the family changing rooms, which have cubicles and the panels separating them have a gap between the bottom of the panels and the floor. In each case the mother alleged that whilst their son was changing into his swimming trunks MB's head appeared in the gap and looked up at their son who was naked at the time. Officials were alerted and MB was arrested and interviewed by the police. MB said that he was lying on his back in the adjoining cubicle because his back hurt.

MB was charged with two counts of voyeurism contrary to section 67(1) of the SOA. The particulars of offence followed the same form in each count. They stated that the appellant, on 20 April 2010, "for the purpose of sexual gratification, observed [X or Y as the case might be] doing a private act, knowing that [X or Y] did not consent to being observed for [the appellant's] sexual gratification".

The Trial

At the Plea and Case Management Hearing in the Crown Court at St Albans on 6 September 2010, it became clear that MB had a learning disability and autistic spectrum disorder so that there would be an issue as to whether he was fit to be tried. On 6 July 2011, after considering the medical evidence, the trial judge ruled that pursuant to section 4(5) and (6) of the 1964 Act, MB was not fit to plead or to stand his trial.

After his ruling, the judge invited counsel to make submissions on the scope of the exercise which the jury would have to undertake pursuant to section 4A (2) of the 1964 Act. In particular, counsel were asked to make submissions about what matters the jury would have to consider in order to decide whether they were satisfied that, in respect of each of the counts that MB "did the act…charged against him as the offence".

Counsel for MB submitted that in order to fulfil their function according to section 4A (2) of the 1964 Act, the jury would have to decide whether MB observed each of the two young boys doing a private act "for the purpose of sexual gratification". Counsel also said that it would be anomalous if MB had to register on the Sex Offenders' Register if all the jury had decided was that he had observed the boys doing a private act, that is, undressing and changing into swimming trunks in a closed cubicle, and the jury had not had to determine the purpose of his observation. Counsel particularly emphasised the serious consequences of a finding against MB.

Counsel for the prosecution, submitted that the jury would only have to decide whether MB had observed each of the two young boys doing a private act.

The judge gave his ruling on the issue as follows:

'It seems to me…that all that is required for the prosecution to prove in this case is that [the appellant] on 20 April 2010 observed the relevant boy doing a private act. It seems to me that the Crown does not need to prove either that it was for the purpose of sexual gratification or that it was necessarily done knowing that the victim did not consent to being observed for sexual gratification. Those are elements which would be appropriate in any case bar a case where a particular defendant is found to be suffering from a disability which makes him unfit to plead….the Act of Parliament is, in my judgment clear that the jury's finding is a finding in relation to the act which constitutes or would constitute the offence, not the mental elements that are attached to it'.

In his summing up, the judge reminded the jury that they were not concerned to decide what was going on in the appellant's

head at the time he did whatever they found that he was engaged in doing. The judge said:

"You are not concerned to decide whether his motive was or was not a sexual one or whether he knew that what he was doing was wrong or knew that it was inappropriate or that it would be regarded by other people as wrong or inappropriate, that is not the issue you are here to decide…. the mental element of what was happening so far as [MB] is concerned is not your concern… and for this reason you are not concerned with whether [MB] may have been making noises, whether they were groaning noises or any other sort of noises at the relevant time and if so why he might have been doing that of course unless you take the view, which the defence might invite you, that if he was making noises they were likely to be because he was suffering from back pain at the time…you are not concerned with his motive, his intention - you are concerned with what he actually did".

The jury determined that the appellant had observed the boy doing a private act with regard to what had been count 2, but acquitted him in relation to the count 1 charge.

In sentencing MB, the judge emphasised that he was not finding MB to be "some sort of sex maniac who is a danger to the public; I don't think that for one second". The judge accepted that MB was not to be characterised as "predatory" but rather as "… simply someone who takes an interest in matters sexual it seems to me, whether the object of your intention be adult or child".

The judge imposed a supervision order for 2 years pursuant to section 5(1) (a) and 5(2) (b) of the 1964 Act. The judge also stated that, as a result of the determination of the jury and the supervision order, MB must register on the Sex Offenders Register for a period of 5 years.

In considering whether to make a SOPO, the judge said:

"…… I am convinced that this is a case where the public need protection from your inquisitiveness in establishments where there are changing facilities, and although it may be a kind of inquisitiveness that does not always have a sexual connotation, nevertheless it seems to me that public deserve to be protected from people who behave as if they were voyeurs, and certainly your behaviour in relation to count 2 filled that particular description".

The judge therefore made a SOPO for a period of 5 years which prohibited MB from attending the changing rooms of either any leisure establishments or of any shop, unless accompanied by a member of his family. The appellant was also prohibited from engaging in any work or organised leisure where any child under the age of 16 was likely to come in contact with him.

The Appeal

The case on the appeal against the determination of the jury was that the judge was wrong to limit the scope of the jury's investigation to the issue of whether the appellant observed either boy doing a private act. Counsel submitted that the jury were obliged to determine whether MB was observing the boys doing a private act for the purpose of sexual gratification.

There were two grounds of appeal against the finding of the jury and one ground against sentence.

The first ground against the finding of the jury was that the jury should have been instructed to consider the element of "for the purpose of sexual gratification" as a part of their consideration of whether the appellant had done the "act charged as the offence" of voyeurism, contrary to section 67(1) of the SOA.

Counsel for MB argued that this element was a part of the "act" of the offence of which he had been charged and could not be divorced as being an independent mental element. Counsel for the respondent submitted that the ruling and direction of the judge to the jury were correct and that the only issue for the determination of the jury was whether the appellant was observing the boy doing that private act.

The second ground of appeal was that the jury did not have the full expert evidence of the prosecution and defence psychiatrists to consider in assessing whether MB, in acting in the way he did in the cubicle, was deliberately observing each of the two boys doing the private act. Counsel for MB said that, given the disability of MB, they needed to have this expert evidence before they could properly determine the nature of the act done by MB and whether he had deliberately observed the boys. Counsel for the respondent, however, said that the issue of whether MB had deliberately observed the boys was one of fact and one for the jury to determine on the evidence and did not need any expert evidence.

The third ground of appeal was that the judge should not have imposed a SOPO. Counsel argued that the judge did not have evidence before him which would entitle him to conclude that MB's behaviour was such that it was necessary to make a SOPO, for the purpose of protecting the public or any particular member of the public from serious sexual harm from MB (as is required by section 104(1) (a) of the SOA).

The Judgment

The Court of Appeal judges concluded that "the link between deliberate observation and the purpose of sexual gratification of the observer is central to the statutory offence of voyeurism……it is that purpose which turns the deliberate

observation of another doing an intimate act (such as undressing) in private into an injurious act…… the deliberate observation must be done simultaneously with the specific, albeit subjective, purpose of obtaining sexual gratification."

Accordingly, the judges said that in the case of an offence of voyeurism under section 67(1) of the SOA, the relevant "act… charged as the offence" for the purposes of section 4A(2) is that of deliberate observation of another doing a private act where the observer does so for the specific purpose of the observer obtaining sexual gratification.

The Court of Appeal, therefore, found that the judge's ruling that the jury need only determine whether MB deliberately observed each of the two boys undressing in their private cubicle was wrong as a matter of law. So, too, was his direction to the jury to the same effect. Accordingly the determination of the jury on what had been count two was based on a wrong direction of law and the determination must be unsafe. The appeal was allowed on ground one alone. In light of this decision, the court was not required to consider the other two grounds but went on to give their views on them.

On the second ground, the court doubted that expert evidence would be useful for the jury but did not make a ruling on this issue and left the issue open for argument in the future.

On the third ground, the court found that there was no proper basis for making a SOPO at all in this case and said it would have allowed the appeal on ground 3 even if it had not already allowed it on ground 1. In particular, the judges said that to make a SOPO there has to be a finding by the judge that it is "necessary" to protect the public not simply from "inquisitiveness in establishments where there are changing facilities" but from future "serious sexual physical or psychological harm". In this case the judge made no such finding.

The appeal against the finding that the appellant did the "act… charged against him" in respect of what had been count 2 was allowed and that finding was quashed. The court directed a verdict of acquittal of the appellant be recorded in respect of that matter.

The judgment can be accessed in full at:
http://www.bailii.org/ew/cases/EWCA/Crim/2012/770.html

Protests in Parliament Square

R (on the application of Maria Gallastegui) v Westminster City Council, the Metropolitan Police Commissioner, and the Secretary of State for the Home Department [2012] EWHC 1123 (Admin)

This was a judicial review claim brought by Maria Gallastegui, a peace campaigner who had been conducting a protest from a specific site on the East pavement of Parliament Square in London since 2006. Ms Gallastegui challenged the decision of Westminster Council which requested her to cease her protest at the site.

The Facts

Ms Gallastegui, who held genuine anti-war beliefs, had campaigned peacefully in a position facing the Houses of Parliament in St Margaret's Street which is used as a pedestrian footway. Since 2007, she had specific authorisation from the Commissioner for the Metropolis for her permanent campaign under section 134 of the Serious Organised Crime and Police Act SOCPA 2005 (SOCPA), which regulates demonstrations outside Parliament.

Part 3 of the Police Reform and Social Responsibility Act 2011 (the Act) came into force in December 2011. The Act gives powers to stop a 'prohibited activity', which includes the erection and use in Parliament Square Gardens or on the pavements surrounding it of 'tents' or 'other structures that are designed, or adapted… for the purpose of facilitating, sleeping or staying in a place for any period' (s143(1) and (2)). Constables, who are under the control of the Commissioner of the Metropolitan Police (the Commissioner) and authorised officers of the Greater London Authority (GLA) and Westminster City Council (Westminster) have the power to issue directions to a person to cease carrying out that activity (s143(1)). A person who without 'reasonable excuse' fails to comply with such a direction commits an offence (s143 (8)). The police and authorised officers are also given the power to seize and retain any items including tents or other structures and sleeping equipment (s145).

On 19 December 2011, Westminster decided to enforce Part 3 of the Act. Westminster informed her of their intention and invited her to cease all prohibited activities and remove any prohibited items.

Ms Gallastegui did not remove her tent and continued to sleep in Parliament Square. She claimed that the enforcement of Part 3 of the Act would compel her to end her protest because she could not afford to travel to Parliament Square from her home

in Eastbourne every day to conduct her protest. She therefore needed to sleep at the authorised site. She also claimed an entitlement to continue her protest, because under Section 134 of SOCPA, she had been granted permission on a number of occasions by the Commissioner to conduct a protest from a specified site of the East pavement of Parliament Square since 2006. She said that she was entitled under that authorisation to conduct a 24 hour vigil within an authorised site of 3m x 3m x 1m (but not within a specific site) within which she was required to contain her structure until April 2015. She claimed that the authorisation meant that she could still keep and use a tent in her site in Parliament Square for sleeping in even though section 141 of the Act had repealed sections 132-138 of SOCPA with effect from 31 March 2012.

The Challenge

Ms Gallastegui claimed that the provisions in Part 3 of the Act infringed her rights under Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly and Association) of the ECHR as well as potentially those arising under Article 6 (Right to a Fair Trial) and Article 1 of Protocol 1 (Right to Peaceful Enjoyment of Property).

There were three grounds to the challenge which were:

(a) **Ground 1:** that the decision of Westminster dated 19 December 2011 to enforce Part 3 of the Act so as to direct Ms Gallastegui to cease all the 'prohibited activities' and remove 'any prohibited items' (which comprise a structure that is designed or adapted for the purpose of facilitating, sleeping or staying at a place for any period) was unlawful and unreasonable. It was claimed that her protest was authorised under section 134 of the SOCPA and remained authorised until April 2015 for the purpose of conducting a 24 hour vigil.

(b) **Ground 2:** that Ms Gallastegui was entitled to a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 (HRA) on the grounds that the prohibitions contained in section 143 (2) (b)-(d) of the Act constituted a breach of her rights to freedom of expression and assembly under Articles 10 and 11;and the prohibition in section 143 and the power of seizure in section 145 of the Act infringed her right under Article 6 to have a dispute as to civil rights determined by a court because her rights are 'civil rights'.

(c) **Ground 3:** that Westminster's decision to enforce the provisions of Part 3 of the Act against Ms Gallastegui in December 2011 was in breach of her right to freedom of expression and protest under Articles 10 and 11 as well as Article 6 of the ECHR.

The Court's Decision

Ground 1

Counsel for Ms Gallastegui argued that the decision to use the provisions in Part 3 of the Police Reform and Social Responsibility Act was unlawful. Counsel submitted that it was contrary to the authorisations granted to her under section 134 of SOCPA to use the authorised site, including for her structures and tent until at the earliest April 2015 for the purpose of conducting a 24-hour vigil.

The case for Westminster was that neither the authorisations from the Commissioner nor anything in Part IV of SOCPA either expressly or impliedly authorised Ms Gallastegui to set up house in Parliament Square or to sleep there, whether in a tent or in any other structure. Its case was that the existing authorisations granted to her under section 134 of SOCPA did not prevent her being directed under section 143 of the Act not to use or erect her tent in Parliament Square.

The judge rejected the challenge on Ground 1 on the basis that the provisions in sections 132 to 138 of SOCPA 'neither purport to authorise nor indeed do they actually authorise the placing on the footway of a tent or of any other obstruction of the highway. The reason for this is that the control of such activities has been, and indeed remains, a matter for Westminster as the highway authority with responsibility for the appropriate area in Parliament Square.' The judge said that there was no inconsistency between the provisions in Part 3 of the Act and the authorisations granted under section 134 of SOCPA.

Ground 2

The case for Ms Gallastegui was that section 143 of the Act constitutes in practice an 'absolute prohibition' on any form of long term protest in Parliament Square.

Counsel for the Secretary of State argued that Part 3 of the Act does not contain a prohibition, but confers a power on a Constable and an officer authorised by Westminster, in the exercise of which account must be taken of the Convention rights of protesters including those rights set out in Articles 10 and 11. Counsel submitted that the claimant's rights under Articles 10 and 11 had not been infringed by the fact that she cannot put up and sleep in a tent in Parliament Square, bearing in mind that she and anybody else can protest for 24 hours in Parliament Square.

Counsel for Ms Gallastegui also argued that section 143 of the Act infringed the positive obligation imposed on the State to ensure that citizens can protest and express their views. In response, Counsel for the Secretary of State argued that the positive duty imposed on the State does not extend that far and that any duty on the State would have been satisfied by the

existing rights to protest, even after taking account of sections 143 and 145 of the Act. Counsel also argued that even if there had been infringements of her rights as specified in Articles 10(1) and 11(1), there have been no actual breaches committed as the terms of sections 143 and 145 of the Act can be justified.

The judge accepted the submissions made by Counsel on behalf of the Secretary of State and accepted that section 143 did not constitute an absolute prohibition. Although sections 143 and 145 referred to 'prohibited activity' and 'prohibited item', it was clear from the wording that these activities and items only became 'prohibited' if and when the constable or authorised officer decided to exercise the power to make a direction in the case of section 143 or a seizure in the case of section 145.

The judge concluded that the provisions in Section 143 and 145 of the Act did not prevent the effective exercise of Article 10 and 11 rights as they did not impede or prevent any form of demonstration or protest in Parliament Square at any time of day or night. The judge also concluded that the making of a direction under section 143 did not amount to 'determination of a civil right' and, therefore, Ms Gallastegui was not entitled to a declaration of incompatibility on the Article 6 ground.

Accordingly, the judge ruled that there had been no infringement of Ms Gallastegui's rights under Articles 6, 10 and 11 of the ECHR. The provisions in the Act did not destroy her right to her freedom of expression as they were limited and proportionate. Her claim on Ground 2 was dismissed.

Ground 3

Counsel for Ms Gallastegui argued that Westminster's decision to enforce the provisions of Part 3 of the Act infringed her rights to freedom of expression and protest under Articles 10 and 11.

Westminster Council said that Ms Gallastegui was, in effect, seeking that an obligation should be imposed on Westminster to permit her to occupy, on a permanent basis, a plot of publicly owned land intended for use by the public at large at which she could take up residence in order to carry out her protest in the manner she wished to for as long as she wished. Westminster's case was that by taking action against Ms Gallastegui under Part 3 of the Act it had tried to reach a balance between her right to protest on the one hand and on the other the general enjoyment of Parliament Square by others.

The judge concluded that it was plainly open to Westminster to conclude on the facts of this case that it was entitled to exercise its powers under Part 3. Accordingly, the judge rejected Ground 3 of Ms Gallastegui's claim as well.

The full judgment can be accessed at:
http://www.bailii.org/ew/cases/EWHC/Admin/2012/1123.html

SI 2012/1129 The Police Reform and Social Responsibility Act 2011 (Commencement No. 5) Order 2012

This Order brought into force on **25 April 2012** the following provisions of the Act:

- Section 28(1) and (10) (police and crime panels outside London);
- Chapter 6 of Part 1, to the extent not already in force (police and crime commissioners: elections and vacancies);
- Section 77 (the strategic policing requirement);
- Chapter 1 of Part 2, to the extent not already in force (amendments of the Licensing Act 2003), with the exception of sections 119 and 121;
- Schedule 6 (police and crime panels);
- Schedule 9 (supplementary vote system);
- Schedule 10 (elections of police and crime commissioners: Consequential amendments), with the exception of paragraph 12.

SI 2012/1205 The Protection of Freedoms Act 2012 (Commencement No. 1) Order 2012

This Order provides for the coming into force of various provisions in the Protection of Freedoms Act 2012.

Article 2 of the Order brings into force section 62 of the Protection of Freedoms Act 2012 (the 2012 Act) on **9 May 2012** which enables the code of practice on counter-terrorism stop and search powers to be laid before Parliament.

Article 3 commences a number of provisions of the 2012 Act on **1 July 2012**. These include Chapter 1 of Part 2 which regulates CCTV and other surveillance camera systems, Chapter 1 of Part 3 which makes provision relating to powers of entry, including the power to repeal powers of entry and the issuing of a code of practice for non-police agencies to govern the exercise of powers of entry, section 85 of the 2012 Act which provides a statutory basis for the recording of cautions and section 104 of the 2012 Act which extends freedom of information provisions to Northern Ireland bodies.

Article 4 commences substantive counter-terrorism stop and search provisions and provisions relating to pre-charge detention of terrorist suspects on **10 July 2012**.

SI 2012/1204 The Police (Complaints and Misconduct) Regulations 2012

These Regulations come into force on **22 November 2012**. The Regulations consolidate the Police (Complaints and Misconduct) Regulations 2004 (the 2004 Regulations) and the various Regulations that have amended the 2004 Regulations. They also make modifications to the provisions of the 2004 Regulations in order to reflect amendments made to the Police Reform Act 2002 by the Police Reform and Social Responsibility Act 2011. They further modify the provisions of the 2004 Regulations in order to make improvements to the efficiency and effectiveness of the police complaints system.

SI 2012/1311 The Misuse of Drugs (Amendment No. 3) (England, Wales and Scotland) Regulations 2012

These Regulations come into force on **13 June 2012**.

Regulation 3, adds desoxypipradrol and other pipradrol related compounds to Schedule 1 to the Misuse of Drugs Regulations 2001 (the 2001 Regulations). Regulation 4 adds 7 bromo 5 (2 chlorophenyl)-1, 3-dihydro-2H-1, 4-benzodiazepin-2-one (commonly known as phenazepam) to Schedule 3 of the 2001 Regulations. Regulation 5 adds any ester or ether of pipradrol, or any stereoisomeric form or salt or preparation or other product of such an ester or ether, to Schedule 3 to the 2001 Regulations.

The schedule in which a controlled drug is placed primarily affects the extent to which the drug can be lawfully imported, exported, produced, supplied or possessed and dictates the record keeping, labelling and destruction requirements in relation to that drug.

SI 2012/1320 Criminal Justice Act 2003 (Commencement No. 28 and Saving Provisions)

This Order brings into force Schedule 3 to the Criminal Justice Act 2003 (the 2003 Act) which changes the procedure by which defendants in criminal proceedings reach the Crown Court from a magistrates' court.

Schedule 3 will be brought into force in relation to twelve local justice areas and the Crown Court for certain purposes on **18 June 2012**. Schedule 3 to the 2003 Act sets out detailed procedural provisions concerning allocation of either way offences, sending, a procedure (to replace committal proceedings) by which either-way offences reach the Crown Court from a magistrates' court where it is decided that they should be tried there, and committals for sentence.

SI 2012/1344 Prosecution of Offences (Custody Time Limits) (Amendment) Regulations 2012

These Regulations come into force on **18 June 2012**. The Regulations amend the provisions of the Prosecution of Offences (Custody Time Limits) Regulations 1987 (the 1987 Regulations), which limit the time for which defendants may be remanded in custody pending trial. The 1987 Regulations apply where someone is sent for trial under section 51 of the Crime and Disorder Act 1988 (the 1998 Act).

These amendments are in consequence of the coming into force in certain areas of Schedule 3 to the Criminal Justice Act 2003 (the 2003 Act). Schedule 3, in particular, amends the 1998 Act to expand the circumstances in which a person is to be sent by a magistrates' court to the Crown Court for trial for an offence. The 1987 Regulations are amended so that they apply where a person is sent for trial under the 1998 Act, whether under the 1998 Act as amended by Schedule 3 to the 2003 Act or not.

UK National Problem Profile: Commercial Cultivation of Cannabis 2012

The Association of Chief Police Officers (ACPO) has published its third national problem profile on the commercial cultivation of cannabis. The problem profile provides a detailed analysis of the current threat from commercial cultivation of cannabis and the work undertaken by law enforcement agencies to combat the threat. The problem profile shows that an increasing number of cannabis farms are being detected by the police.

Key findings from the report include:

- An increasing number of farms being detected, 7,865 projected for 2011/12 compared with 6,866 in 2009/10;
- Over 1.1 million plants with an estimated street value of £207 million recovered during the two year survey period;
- The number of cannabis production offences continued to rise with 16,464 offences projected for 2011/12 up from 14,982 offences recorded in 2010/11;
- There is a shift back to smaller residential or domestic premises as opposed to large scale commercial and industrial property;
- There is an emergence of the multiple site model whereby a large number of people are employed to manage small scale factories across multiple residential areas;
- Cannabis remains the most commonly used illegal drug in the UK and is the most prevalent drug seized by law enforcement agencies;
- Intelligence suggests that the purchase of seeds and equipment from local hydroponics and head shops is on the increase. This may result in an increase in small scale cultivations feeding social supply;
- The five forces which recorded the highest number of commercial factories were West Yorkshire, South Yorkshire, West Midlands, the Metropolitan Police and Avon and Somerset.

The full report can be accessed at:
http://www.acpo.police.uk/documents/crime/2012/20120430CBACCofCPP.pdf

Home Office Circular 011/2012: Testing Police Officers for Substance Abuse

This Home Office Circular provides guidance on changes to the provisions governing drug and alcohol testing of police officers and candidates for appointment as police officers.

The Home Secretary has approved a recommendation from the Police Advisory Board for England and Wales (PABEW) that amendments should be made to substance misuse testing determinations and protocol.

The 2003 Police Regulations have been amended and the Police (Amendment No 2) Regulations 2012 came into force on 1 April 2012.

Regulation 19(1) (d) of the 2003 Regulations has been amended so that any serving police officer selected in accordance with a regime of routine random testing may be required to provide a sample. This replaces the existing provision for the Secretary of State to specify categories of officers who may be tested.

Where testing is carried out because the Chief Officer has reasonable cause to suspect, on the basis of intelligence, that the officer has used a controlled drug, the determination now allows testing to cover one other controlled drug or drug group in addition to the five categories of controlled drugs currently set out in the determinations.

Further amendments are made in regulations 10, 19 and 19A of the 2003 Regulations to replace references to 'saliva' with references to 'oral fluid'. This is a technical change, made at the recommendation of the PABEW. A copy of the determination is attached at annex A to the Circular. A copy of the amended 'Substance misuse testing: protocols for testing procedures' are attached at annex B to the Circular.

Home Office Circular 011/2012 can be accessed in full at: http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2012/011-2012/

New Offences of Stalking

The Protection of Freedoms Act 2012 (the Act), which received Royal Assent on 1 May 2012 creates two new offences of stalking. The new offences are not yet in force and will be brought into force on the making of a commencement order by the Home Secretary.

The new offences are set out in Section 111 of the Act, which inserts new provisions in to the Protection from Harassment Act 1997.

The first new offence of stalking will be committed when a person pursues a course of conduct in breach of the prohibition on harassment in section 1(1) of the Protection from Harassment Act 1997 where the course of conduct amounts to stalking. This offence will be inserted by the Act as new Section 2A in the Protection from Harassment Act 1997.

The Act clarifies that a course of conduct will amount to stalking if it amounts to harassment, the acts or omissions involved are ones associated with stalking and the person knows or ought to know that the course of conduct amounts to harassment of the other person. The Act provides a non-exhaustive list of examples of behaviour that are associated with stalking, such as 'following a person' and 'watching or spying on a person'.

The new offence will be a summary only offence with a maximum penalty of six months imprisonment or a fine not exceeding level 5 on the standard scale, or both.

The second new offence will be an offence of stalking involving fear of violence or serious alarm or distress. A person would be guilty of the new offence where that person pursues a course of conduct amounting to stalking which causes another:

- Either to fear, on at least two occasions, that violence will be used against them **or**
- It causes the victim serious alarm or distress that has a substantial adverse effect on their usual day-to-day activities **and**
- The person knows or ought to know that his/her course of conduct will have such an effect on the victim.

This offence will be inserted by the Act as new section 4A in the Protection from Harassment Act 1997.

The Act specifies that a person ought to know that his or her conduct will cause the other person to fear that violence will be used against them, or will cause the other person serious alarm or distress, if a reasonable person in possession of the same information would think it so. Section 4A (4) provides defences

including, for example, if the person can show that his or her conduct was for the purpose of preventing or detecting crime.

The offence will be an either way offence with a maximum penalty of five years imprisonment or an unlimited fine, or both, if tried in the Crown Court. If tried in the magistrates' court, the penalty will be a fine up to £5000 or a term of imprisonment up to six months, or both.

Additional police powers are set out in Section 112 of the Act. Police officers will have a power of entry in relation to the new offence of stalking in Section 2A of the Protection from Harassment Act 1997. The power of entry is exercisable by warrant and will allow the police to enter and search premises if there are reasonable grounds for believing that an offence under new section 2A has been or is being committed. A constable may also seize and retain anything for which the search has been authorised. These new powers will be inserted by the Act as new Section 2B in the Protection from Harassment Act.

Full details of the new offences can be found in Part 7 of the Protection of Freedoms Act 2012 at:
http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted

Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Bill was introduced in to the House of Commons on 21 June 2011 and received Royal Assent on 1 May 2012.

The Act covers a wide range of issues, including provisions on legal aid, funding of legal services, and on sentencing and punishment of offenders. The Act creates new offences of threatening with a weapon in public or on school premises, of causing serious injury by dangerous driving, and a new offence relating to squatting. The Act also introduces increased penalties for offences relating to scrap metal dealing and creates a new offence relating to payment for scrap metal. The Act amends section 76 of the Criminal Justice and Immigration Act 2008 relating to the law on self defence.

Key Provisions of the Act

Part 1 and Part 2

Part 1 of the Act abolishes the Legal Services Commission and places a duty on the Lord Chancellor to secure the availability of civil and criminal legal aid. An executive agency within the Ministry of Justice will be put in place to administer the delivery of legal aid services in England and Wales. The Act requires the Lord Chancellor to designate a civil servant to be the Director of Legal Aid Casework who will have statutory responsibility for taking decisions on legal aid in individual cases.

Part 2 makes various provisions in respect of civil litigation funding and costs, taking forward the recommendations of the Jackson Review and the Government's response to that review.

Part 3

Part 3 sets out changes to the current sentencing framework in the Criminal Justice Act 2003, provisions for out of court disposals and contains details of new offences.

Particular changes to sentencing include:

- A duty on courts to consider imposing compensation orders for certain types of offence;
- The inclusion of transgender identity as a statutory aggravating factor in sentencing where any offence is motivated by hostility to the victim on this basis. It also provides for a starting point of 30 years for the minimum term for a life sentence for murder aggravated on the grounds of the victim's disability or transgender identity;
- Amendments to certain requirements that may be imposed as part of community orders and suspended sentence orders, in particular curfew requirements and mental health, drug rehabilitation and alcohol treatment requirements. It also creates new powers to prohibit foreign travel and to impose alcohol abstinence and monitoring requirements as part of an order;
- A new youth remand and sentencing structure, which gives more flexibility to courts to decide on appropriate disposals;
- An increase in the maximum period in any day for which the court may impose a curfew requirement from twelve to sixteen hours. An increase in the maximum period for which a curfew requirement may be imposed from six to twelve months from the date on which the community order is made;
- Changes to the court's power to suspend a prison sentence by increasing the length of sentences that can be suspended;
- Offences currently punishable by the magistrates' court on summary conviction with a maximum fine of £5,000 to be punishable by an unlimited fine instead;
- Changes to the law on bail and remand, aimed at reducing the number of those who are unnecessarily remanded into custody. Under the new "no real prospect" test, people would be released on bail if they would be unlikely to receive a custodial sentence if convicted. However, a court would still be able to remand in custody for the defendant's own protection, or where there was a risk of further offending involving domestic violence;

- Makes provision to ensure that, where a person aged under 18 has to be remanded into custody, in most cases they would be remanded into local authority accommodation;
- Amendments to the provisions about the release and recall of prisoners;
- Changes to the Rehabilitation of Offenders Act 1974 (the ROA) to amend the scope of the Act and its rehabilitation periods. The amendments extend the scope of the ROA so that custodial sentences of up to and including 4 years in length can become 'spent'. The times at which different convictions become 'spent' are also amended, and in most cases the rehabilitation periods are reduced. Where a caution or conviction has become spent, the offender is treated as rehabilitated in respect of that offence and is not obliged to declare it for most purposes, for example, when applying for employment or insurance (section 139).

Out of Court Disposals: Penalty Notices for Disorder and Cautions

Part 3 of the Act contains amendments to the legislation under which police constables may issue a penalty notice for disorder (PND) and authorised persons may give conditional cautions.

Penalty Notices for Disorder

The Criminal Justice and Police Act 2001 is amended to include the introduction of a PND with an education option. A new power is conferred on chief officers of police to set up, within their area, a scheme which will allow police officers, where appropriate, to issue penalty notices with an education option. This gives recipients the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing an educational course related to the offence for which the notice was given. An educational course might, for example, seek to make individuals aware of the social and health implications of their conduct and would be designed to reduce the likelihood of further offending.

The provisions also specify that a PND may not be given to a person under the age of 18; removes the requirement that a police officer issuing a PND to an individual other than at a police station must be in uniform; and removes the requirement that police officers in a police station may not give a PND unless they are 'authorised constables' (section 132 and schedule 23).

Conditional Cautions

Sections 22 to 25 of the Criminal Justice Act 2003 are amended to enable the authorised person (usually a police officer) to make a decision to offer a conditional caution by removing the requirement that the authorised person must refer the matter to

the relevant prosecutor. The section also enables the authorised person to vary conditions in the conditional caution without reference to the relevant prosecutor. It is intended that a Code of Practice issued under section 25 of the Criminal Justice Act 2003 Act will specify those matters that should still be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions (section 133).

The amendments also allow new types of conditions to be attached to a conditional caution given to a foreign offender who does not have leave to enter or remain in the United Kingdom. The object of these conditions is to bring about the departure of the foreign offender from the UK and ensure that they do not return to the UK for a period. If the foreign offender does not comply with these conditions he or she may be prosecuted for the original offence (section 134).

Youth Cautions

The system of reprimands and warnings known as the Final Warning Scheme contained in section 65 and 66 of the Crime and Disorder Act 1998 is to be abolished by the Act. A new kind of youth caution is to be created and there are amendments to youth conditional cautions, intended to make them more flexible (Section 135 and Schedule 24).

New Offences

Chapter 9 of Part 3 creates the following new offences:

- Threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm. The offence must be committed in a public place or on school premises and will carry a maximum penalty of 4 years imprisonment. The new offence will be added as new section 1A in the Prevention of Crime Act 1953 and new section 139AA in the Criminal Justice Act 1988 (Section 142);
- Causing serious injury by dangerous driving. The offence will be committed when a person causes serious physical injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place. The offence will be added as new section 1A in the Road Traffic Act 1998 (Section 143);
- Squatting in a residential building. The offence will be committed when a person is in a residential building as a trespasser having entered it as such, the person knows or ought to know that they are a trespasser, and the person is living in the building or intends to live there for any period. Section 17 of the Police and Criminal Evidence Act 1984 will

be amended to give uniformed police officers the power to enter and search premises for the purpose of arresting a person for the offence of squatting in a residential building (Section 144);

- Buying scrap metal for cash. The new offence will be added to the Scrap Metal Dealers Act 1964 and will prohibit scrap metal dealers paying for scrap metal other than by cheque or by electronic transfer (Section 146).

Self Defence

Part 3 also contains amendments to Section 76 of the Criminal Justice and Immigration Act 2008, which relates to the common law of self defence and the defences provided by section 3(1) of the Criminal Law Act 1967 and section 3(1) of the Criminal Law Act (Northern Ireland) 1967.

These amendments expand section 76 so that the law relating to self defence and related defences is set out clearly in one place. The list of defences in section 76(2) of the 2008 Act is expanded to include the common law defence of defence of property. The changes also clarify the existing legal position that a person is not under a duty to retreat but the possibility that they could have retreated is an element in the consideration of whether the degree of force used by that person was reasonable in all the circumstances (section 148).

Commencement

Sections 77 (piloting of alcohol abstinence and monitoring requirements) and 119 (removal of prisoners from the United Kingdom) and Part 4 (Final Provisions) of the Act came into force on 1 May 2012. The remainder of the Act will be commenced by order made by the Lord Chancellor or the Secretary of State.

The Act can be accessed in full at:
http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted

National Fraud Initiative Report

The Audit Commission has published the 2010/11 report of the National Fraud Initiative (NFI) showing its success in fighting fraud.

The National Fraud Initiative has been run by the Audit Commission since 1996 and is a data matching exercise. NFI data matching is carried out continuously, and the Audit Commission reports results every two years. The NFI compares information held by and between around 1,300 organisations including councils, the police, hospitals and 77 private companies which helps to identify potentially fraudulent claims,

errors and overpayments, all hosted on a secure website. When there is a match, there may be something that warrants investigation and it will for the relevant body to investigate and, if appropriate, to take further action.

Since the initiative's start in 1996, the programme has helped identify £939 million in fraud or error. The NFI 2010/11 in England has identified almost £229 million of fraud, overpayments and errors. This is made up of £139 million for 2010/11 plus £90 million of outcomes not previously reported from earlier exercises. Over the same time period, £47 million of fraud, overpayments and error were identified in Scotland, Wales and Northern Ireland, bringing total outcomes for the UK since the last report to £275 million traced. According to the report, the highest value categories identified in England were:

- Pensions- £98 million;
- Council tax single person discount - £50 million;
- Housing benefit - £31 million.

The report also shows:

- 164 employees were identified as having no right to work in the UK;
- 321 false applications were removed from housing waiting lists following a pilot with London borough councils;
- 731 people were prosecuted, 636 of them for housing benefit fraud;
- 31,937 blue badges and 51,548 concessionary travel passes were cancelled.

The report also gives details of the increasingly wide range of frauds signposted by NFI data matching, and then investigated by the participating bodies. These included:

- Immigration fraud work with the UK Border Agency to detect refused and expired visas;
- 398 prevented or detected cases of council payments made to private residential care homes after the residents' deaths, worth £3 million;
- Social landlords recovering 235 properties since 2010 that were unlawfully occupied, and reallocating them to genuine tenants who would otherwise be placed in expensive temporary accommodation;
- NFI working with the Serious Organised Crime Agency to identify 'virtual addresses' used as a front for unlawful activity or scams;

- NFI working with the Metropolitan Police to spot large scale identity theft. A pilot using the Amberhill police database of known fraudsters generated over 200 matches.

Recommendations

The report recommends:

- All audited bodies should ensure that they maximise the benefits in the NFI by using the tools within the web application to help identify high priority matches linked to local risks and follow up the matches before using alternative matching services;
- The government should require all central government departments to take part in the NFI, as only the Department for Communities and Local Government and the Highways Agency have joined so far;
- The government should exercise its Order making powers to extend the Commission's data-matching powers to non-fraud purposes, including the prevention and detection of crime other than fraud, the apprehension and prosecution of offenders, and the recovery of debt owing to public bodies.

The National Fraud initiative 2010/2011 can be accessed in full at:
http://www.audit-commission.gov.uk/fraud/nfi/reports/Pages/default.aspx

Ministry of Justice Re-Offending Statistics Published

The Ministry of Justice has published statistics on proven re-offending in England and Wales for the period between July 2009 and June 2010.

The report gives proven re-offending figures for offenders who were released from custody, received a non-custodial conviction at court, received a caution, reprimand, warning or tested positive for opiates or cocaine. The report shows the proportion of offenders who re-offend (proven re-offending rate) as well as the number of proven re-offences those offenders commit by age group, gender, ethnicity, criminal history and offence type.

The statistics show that:

- Around 670,000 offenders were cautioned, convicted (excluding immediate custodial sentences) or released from custody;
- Around 180,000 of these offenders committed a proven re-offence within a year. This gives a one-year proven re-offending rate of 26.4 per cent, which represents a fall of 0.2 per cent compared to the previous 12 months and a fall of 1.5 per cent since 2000;
- These re-offenders committed an average of 2.82 offences each. In total, this represents around 500,000 offences of which 79.6 per cent were committed by adults and 20.4 per cent were committed by juveniles;
- 53.8 per cent of these offences were committed by re-offenders with 25 or more previous offences. 0.6 per cent (around 3,200) were serious violent/sexual proven re-offences;
- 5.4 per cent (around 27,000) were committed by re-offenders on the Prolific and other Priority Offender Programme.

Key trends in re-offending

- Around 560,000 adult offenders were cautioned, convicted or released from custody and just over 140,000 of them committed a re-offence. This gives a re-offending rate of 24.9 per cent, which represents a fall of 0.3 percentage points compared to the previous 12 months and a fall of 1.2 percentage points since 2000;
- The re-offending rate for those released from custody was 47.3 per cent, a fall of 0.5 percentage points compared to the previous 12 months and a fall of 2.1 percentage points since 2000. The average number of re-offences committed

per re-offender for this group was 4.06, a fall of 1.1 per cent compared to the previous 12 months and down 13.2 per cent since 2000;

- The re-offending rate for those starting a court order (Community Order or Suspended Sentence Order) was 34.0 per cent, down 1.1 percentage points compared to the previous 12 months and down 3.9 percentage points since 2000. The average number of re-offences per offender was 3.13, down 0.5 per cent compared to the previous 12 months and down 19.1 per cent since 2000;
- The re-offending rate for drug-misusing offenders (all offenders who are given drug orders as part of their sentence or test positive for opiates upon arrest) was 56.4 per cent, up 1.1 percentage points compared to the previous 12 months;
- Around 110,000 juvenile offenders were cautioned, convicted or released from custody and just under 36,000 of them committed a re-offence. This gives a re-offending rate of 34.1 per cent which represents a rise of 1.5 percentage points compared to the previous 12 months and a rise of 0.4 percentage points since 2000. The average number of re-offences per re-offender was 2.82, a fall of 2.7 per cent compared to the previous 12 months and down 15.1 per cent since 2000.

The biggest falls in re-offending were in the following groups:

- Adult females (a fall of 2.5%);
- 21 to 24 year olds (a fall of 3.2%);
- Adults with 25 or more previous offences (a fall of 3.3%);
- Juveniles with 3 to 9 previous offences (a fall of 4.9%);
- Adults who received Court Orders (a fall 3.9%);
- Adults who received custodial sentences of 1 to 4 years (a fall of 7.3%);
- Juveniles who received a custodial sentence (a fall of 7.5%).

The biggest increases in re-offending were in the following groups:

- 40 to 44 year olds (a rise of 3.9%);
- Adults who received custodial sentences of less than 12 months (a rise of 2.6%);
- Juveniles who received a community penalty (a rise of 5.5%).

The statistical bulletin 'Proven re-offending quarterly - July 2009 to June 2010' can be accessed in full at: http://www.justice.gov.uk/statistics/reoffending/proven-re-offending

New Criminal Records Bureau Identity Checking Guidelines Published

The Criminal Records Bureau's identity checking guidelines will be strengthened with effect from 28 May 2012 in order to improve public protection.

The changes will make it more difficult for individuals to conceal previous criminal records by changing their identity. They are designed to enhance the good working practices adopted by many organisations when verifying and validating the identity of those that they intend to recruit, appoint or licence.

Under the new guidelines, applicants will be asked to produce documents that they would have acquired through undergoing stringent identity verification with the document issuer, such as the Identity and Passport Service or the DVLA.

The new identity checking process will have three routes, and includes an option to use a new external identity validation check, which can be used by organisations for applicants who cannot provide the required documentation. In order to assist organisations comply with the new guidelines both the new and existing guidelines will run in parallel from 28 May until 31 August 2012, when the existing guidelines will cease to apply.

Full details about the changes to the CRB identity checking guidance can be found at: http://www.homeoffice.gov.uk/agencies-public-bodies/crb/crb-press-releases/id-changes-docs/id-changes-guidance

Protection of Freedoms Act 2012

The Protection of Freedoms Act received Royal Assent on 1 May 2012. The Act has seven main parts covering:

- Regulation of biometric data;
- Regulation of surveillance;
- Protection of property from disproportionate enforcement action;
- Counter-terrorism powers;
- Safeguarding of vulnerable groups and disclosure of criminal convictions;
- Freedom of information and data protection; and
- Other miscellaneous and general provisions introducing changes to existing criminal offences on human trafficking, the introduction of two new offences on stalking and the repeal of provisions (never brought into force) to allow trial without a jury in complex fraud cases.

The main provisions in Parts 1, 2, 3 and 4 of the Act are summarised below. The provisions contained in Parts 5, 6 and 7 will be covered in the July edition of the *Digest*.

Part 1 Regulation of Biometric Data

Part 1 provides for the retention and destruction of fingerprints, footwear impressions and DNA samples and profiles taken in the course of a criminal investigation. The provisions will replace the existing framework, set out in Part 5 of the Police and Criminal Evidence Act 1984, whereby fingerprints and DNA profiles taken from a person arrested for, charged with or convicted of a recordable offence may be retained indefinitely. The new scheme provides:

- Fingerprints and DNA profiles taken from persons arrested for or charged with a minor offence will be destroyed following either a decision not to charge or following acquittal;
- In the case of persons charged with, but not convicted of, a serious offence, fingerprints and DNA profiles may be retained for three years, with a single two-year extension available on application by a chief officer of police to a District Judge (Magistrates' Courts);
- The police will be able to seek permission from the new independent Commissioner for the Retention and Use of Biometric Material to retain material for the same period (three plus two years) in cases where a person has been

arrested for a qualifying offence but not charged. The concept of a qualifying offence is used to distinguish between serious and less serious offences for the purposes of the retention regime. A list of qualifying offences is contained in section 65A (2) of PACE (as inserted by section 7 of the Crime and Security Act 2010) and the list broadly covers serious violent, sexual and terrorist offences;

- However, where a person who is arrested for or charged but not convicted of, a qualifying offence has **previously been convicted of a recordable offence that** is not an 'excluded offence', his or her fingerprints and DNA profile may be retained indefinitely. A recordable offence is defined in section 118 of PACE. In practice, all offences which are punishable with imprisonment are recordable offences, as are around 60 other non-imprisonable offences which are specified in regulations made under section 27 of PACE. An excluded offence for these purposes is defined in new section 63F (11) of PACE as a conviction for a minor (that is, non-qualifying) offence, committed when the person was under the age of 18, for which a sentence of less than five years imprisonment (or equivalent) was imposed;
- Where an adult is convicted of a recordable offence, his or her fingerprints and DNA profile may be retained indefinitely (as now). Where a person under the age of 18 is convicted of a recordable offence, if that offence is a qualifying offence his or her fingerprints and DNA profile may also be retained indefinitely (as now);
- The retention periods for fingerprints and DNA profiles in the case of persons under 18 convicted of a minor offence will be determined by the length and nature of the sentence for that minor offence. Where a person is given a penalty notice under section 2 of the Criminal Justice and Police Act 2001, his or her fingerprints and DNA profile may be retained for two years from the date the material was taken;
- Material may be retained for up to two years where the responsible chief officer of police determines that it is necessary to retain it for the purposes of national security (a 'national security determination'). A responsible chief officer may renew a national security determination in respect of the same material, further extending the retention period by up to two years at a time;
- For the destruction of DNA samples as soon as a DNA profile has been satisfactorily derived from the sample and, in any event, within six months of the taking of the sample. Any other sample, such as a blood or urine sample taken to test for alcohol or drugs, must similarly be destroyed within six months of it having been taken;

- Power for a chief officer of police to apply to a District Judge (Magistrates' Court) to extend the permissible retention period for DNA samples in relation to serious offences in cases where it is necessary to ensure that key evidence (in the form of DNA samples) remains available for disclosure to the defendant or to respond to an evidential challenge by the defendant. A District Judge may authorise retention of the material for 12 months, which may be extended (on one or more occasions) following a further application by the chief officer.

Part 1 also contains provisions imposing a requirement on schools and further education colleges to obtain the consent of parents of children under 18 years of age attending the school or college, before the school or college can process a child's biometric information.

Part 2 Regulation of Surveillance

Part 2 of the Act makes provision for:

- The further regulation of Closed Circuit Television, Automatic Number Plate Recognition and other surveillance camera technology operated by the police and local authorities. The Secretary of State is required to publish a code of practice in respect of the development and use of surveillance camera systems. The code must include guidance on the use of such systems or the images resulting from them (for example, the retention, storage and subsequent use of such images);
- The appointment of a Surveillance Camera Commissioner. The Commissioner will have responsibility for promoting and encouraging compliance with the surveillance camera code of practice amongst users; reviewing how the code is working; and providing advice about the code (which may include, for example, advice to users of surveillance systems, members of the public, and ministers, as necessary). The Commissioner will be required to report annually on the operation of the code of practice;
- Amends the Regulation of Investigatory Powers Act 2000 so as to require local authorities to obtain judicial approval for the use of any one of the three covert investigatory techniques available to them under the Act, namely the acquisition and disclosure of communications data, the use of directed surveillance and the use of covert human intelligence sources.

Part 3 Protection of Property from Disproportionate Enforcement Action

Part 3 makes provision in respect of powers to enter land or other premises. These include the powers of entry for police officers, local authority trading standards officers, or the enforcement staff of a regulatory body to enter into a private dwelling, business premises, land or vehicles for defined purposes (for example, to search for and seize evidence as part of an investigation, or to inspect the premises to ascertain whether regulatory requirements have been complied with). There are around 1300 separate powers of entry contained in both primary and secondary legislation.

The provisions in this Part enable a Minister of the Crown (or the Welsh Ministers) to repeal unnecessary powers of entry, to add safeguards in respect of the exercise of such powers, or to replace such powers with new powers subject to additional safeguards. Provision is also made for the exercise of powers of entry to be subject to the provisions of a code of practice. Provision is made for the relevant Minister to consult before exercising the power to modify powers of entry. In the case of powers of entry exercised by the police, the Home Secretary would normally consult the Association of Chief Police Officers.

Part 3 also makes provisions in respect of parking enforcement including:

- Making it a criminal offence to immobilise a vehicle, move a vehicle or restrict the movement of a vehicle without lawful authority;
- Extending the power to make regulations for the police and others to remove vehicles that are illegally, dangerously or obstructively parked;
- Making the keeper (or in some circumstances the hirer) of a vehicle liable for unpaid parking charges where the identity of the driver is not known.

Part 4 Counter-Terrorism Powers

Part 4 makes provision in respect of counter-terrorism powers including:

- Reducing the maximum period of pre-charge detention for terrorist suspects from 28 to 14 days. There is a power for the Secretary of State to increase the limit to 28 days for a period of three months in circumstances where Parliament is dissolved or in the period before the first Queen's Speech of the new Parliament (Sections 57 and 58);
- The powers to stop and search persons and vehicles without reasonable suspicion in sections 44 to 47 of the Terrorism

Act 2000 (the 2000 Act) are repealed and are replaced with a power that is exercisable in more restricted circumstances (section 59);

- A new stop and search power in respect of vehicles is provided by inserting new section 43A into the Terrorism Act 2000. New section 43A provides a power for police to stop and search a vehicle, including its driver, any passengers and anything in or on the vehicle, if a constable reasonably suspects the vehicle is being used for the purposes of terrorism. Anything discovered during a search which the officer reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism, may be seized and retained (section 60(3));
- New section 47A is inserted into the 2000 Act and replaces, in part, the powers in sections 44 to 46 of the 2000 Act repealed by section 59. The new powers allow a senior police officer to give an authorisation to allow the stop and search of vehicles (including drivers of vehicles, passengers and anything found in or on a vehicle) and pedestrians (including anything carried by a pedestrian), to search for anything that may constitute evidence that a person is a terrorist, or the vehicle is being used for the purposes of terrorism. An authorisation can only be given if the senior police officer reasonably suspects that an act of terrorism will take place; and where the powers are considered necessary to prevent such an act. The extent and duration of the authorisation must be no greater than is necessary (section 61);
- Provision for a code of practice for terrorism stop and search powers to be made by the Secretary of State.

Commencement

The following provisions of the Act came into force on 1 May 2012:

- Sections 88 to 91 which make provision for the transfer of functions, property, rights, or liabilities from the Independent Safeguarding Authority (ISA) and the CRB to the Disclosure and Barring Service;
- Section 113 (and associated provisions in Part 12 of Schedule 9 and Part 10 of Schedule 10) which repeals section 43 of the Criminal Justice Act 2003 which makes provision for certain fraud trials to be conducted without a jury; and
- In Part 7, sections 115(3) to (7) and 116 to 121 (consequential amendments, transitional provisions, etc.).

The following provisions of the Act come into force on 1 July 2012:

- Section 39(2) and Schedule 2 (and associated provisions in Part 2 of Schedule 10) which repeal a number of powers of entry.

The Protection of Freedoms Act 2012 (Commencement No. 1) Order 2012 provides for the coming into force of the following provisions:

- Section 62 comes into force on 9 May. This enables the code of practice on counter-terrorism stop and search powers to be laid before Parliament;
- Counter-terrorism stop and search provisions and provisions relating to pre-charge detention of terrorist suspects come into force on 10 July 2012;
- Chapter 1 of Part 2 which regulates CCTV and other surveillance camera systems comes into force on 1 July 2012;
- Chapter 1 of Part 3 which makes provision relating to powers of entry, including the power to repeal powers of entry and the issuing of a code of practice for non-police agencies to govern the exercise of powers of entry comes into force on 1 July 2012;
- Section 85 of the Act which provides a statutory basis for the recording of cautions comes into force on 1 July 2012 and;
- Section 104 of the 2012 Act which extends freedom of information provisions to Northern Ireland bodies comes into force on 1 July 2012.

All other provisions will be brought into force by means of commencement orders made by the Secretary of State or, in the case of certain provisions relating to Wales in Part 1 (protection of biometric information of children in schools); Part 3 (powers of entry); and section 56 and Schedule 4 (keeper liability for certain parking charges), by the Welsh Ministers.

The Act can be accessed in full at:
http://www.legislation.gov.uk/ukpga/2012/9/introduction/enacted

Bills Announced in the Queen's Speech 2012

On 9 May 2012, the Queen's Speech unveiled the Government's planned legislative programme for the 2012-2013 Parliamentary session.

As well as the Crime and Courts Bill, which was introduced in Parliament on 10 May 2012, other Bills announced in the Queen's Speech included the Justice and Security Bill and a Draft Communications Bill.

Justice and Security Bill

The purpose of the Bill is to respond to the challenge of using sensitive information in civil proceedings where the Government is party, without risking disclosure contrary to the public interest, and is also intended to enhance the current oversight regimes for the Security and Intelligence Agencies.

The Justice and Security Bill would:

- Allow Courts to consider all material relating to a case, even where national security prevents that information from being made public;
- Ensure that where an individual challenges an action taken by the Government, that such claims can be properly investigated and scrutinized by the courts;
- Enable the courts to access all information relevant to the civil case, in a manner which does not risk harm to national security, and ultimately the Government's ability to protect the general public;
- Enable the courts to fully consider all relevant information in civil claims made against the Government, preventing the situation of the Government being forced to settle cases which it believes have no merit;
- Modernise Parliamentary oversight of the Security and Intelligence Agencies.

Draft Communications Data Bill

The purpose of this draft Bill is to protect the public by ensuring that law enforcement agencies and others continue to have access to communications data so that they can bring offenders to justice.

Communications data is information about a communication, not the communication itself. Communication data is not the content of any communication, the text of an email, or conversation on a telephone but includes the time and duration of the communication, the telephone number or email address which has been contacted and sometimes the location of the originator of the communication.

The main benefits of the draft Bill would be to enable the police and intelligence agencies to continue to access communications data which is vital in supporting their work in protecting the public. The Bill will also provide for an updated framework for the collection, retention and acquisition of communications data which enables a flexible response to technological change.

The Draft Communications Data Bill would:

- Establish an updated framework for the collection and retention of communications data by communication service providers (CSPs) to ensure communications data remains available to law enforcement and other authorised public authorities;
- Establish an updated framework to facilitate the lawful, efficient and effective obtaining of communications data by authorised public authorities including law enforcement and intelligence agencies;
- Establish strict safeguards including a 12 month limit on the length of time for which communications data may be retained by CSPs and measures to protect the data from unauthorised access or disclosure. The Information Commissioner will continue to have the role of keeping under review the operation of the provisions relating to the security of retained communications data and their destruction at the end of the 12 month retention period;
- Provide for appropriate independent oversight including: extending the role of the Interception of Communications Commissioner to oversee the collection of communications data by communications service providers; providing a CSP with the ability to consult an independent Government/ Industry body (the Technical Advisory Board) to consider the impact of obligations placed upon them; and extending the role of the independent Investigatory Powers Tribunal to ensure that individuals have a proper avenue of complaint and independent investigation if they think the powers have been used unlawfully;
- Remove other statutory powers with weaker safeguards to acquire communications data.

The full list of Bills announced in the Queens Speech can be accessed at:
http://www.cabinetoffice.gov.uk/queens-speech-2012

Notes

NPIA

National Policing
Improvement Agency

Legal Services
Chief Executive Officer Directorate

www.npia.police.uk