

Current Criminal Law



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Legislation progress

Sally Ramage

Police Reform and Social Responsibility Act 2011

The Police Reform and Social Responsibility Act 2011 gained Royal Assent on 15 September 2011. This Act covers five distinct policy areas: (i) police accountability and governance; (ii) alcohol licensing; (iii) regulation of protests around Parliament Square; (iv) misuse of drugs; and (v) the issue of arrest warrants in respect of private prosecutions for universal jurisdiction offences. This statute replaced police authorities with directly elected Police and Crime Commissioners, in order to improve police accountability. It also amends and supplements the Licensing Act 2003 to rebalance it in favour of local authorities, the police and local communities. The Police Reform and Social Responsibility Act 2011 provides a new framework for regulating protests around Parliament Square. Sections of the Serious Organised Crime and Police Act 2005 have been repealed and the police now have new powers to prevent encampments and the use of amplified noise equipment. The Home Secretary can now temporarily ban drugs for up to a year. The Act introduced a new requirement for private prosecutors to obtain the consent of the Director of Public Prosecutions prior to the issue of an arrest warrant for 'universal jurisdiction' offences such as war crimes or torture.

Protection of Freedoms Act 2012

The Protection of Freedoms Act 2012 provides for the destruction, retention, use and other regulation of certain evidential material; imposes consent and other requirements in relation to certain processing of biometric information relating to children; provides for a code of practice about surveillance camera systems and for the appointment and role of the Surveillance Camera Commissioner; provides for judicial approval in relation to certain authorisations and notices under the Regulation of Investigatory Powers Act 2000; provides for the repeal or rewriting of powers of entry and associated powers and for codes of practice and other safeguards in relation to such powers; makes provision about vehicles left on land; provides for a maximum detention period of 14 days for terrorist suspects; replaces certain stop and search powers; provides for a related code of practice; amends the Safeguarding Vulnerable Groups Act 2006; makes provision about criminal records; disregards convictions and cautions for certain abolished offences; makes provision about the release and publication of datasets held by public authorities and to make other provision about freedom of information and the Information Commissioner; and repeals certain enactments.

Legal Aid, Sentencing and Punishment of Offenders Act 2011

This Act reverses the position under the Access to Justice Act 1999, so that civil legal aid is not available for any matter not specifically excluded; it abolished the Legal Services Commission; made various provisions in respect of civil litigation funding and costs; made changes to sentencing provisions, and gives courts an express duty to consider making compensation orders where victims have suffered harm or loss. It reduced the detailed requirements on courts when they give reasons for a sentence; and allows courts to suspend sentences of up to two years rather than 12 months. The Act amended the court's power to suspend a prison sentence; and introduces new powers to allow curfews to be imposed for more hours in the day and for up to 12 months rather than the current six; repeals provisions in the Criminal Justice Act 2003 which would have increased the maximum sentence a magistrates' court could impose from six to 12 months; makes 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; 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; amends provisions relating to the release and recall of prisoners; gives the Secretary of State new powers

to make prison rules about prisoners' employment, pay and deductions from their pay. The intention of these provisions is that prisoners should make payments, which would support victims of crime; introduces a penalty notice with an education option and provision for conditional cautions to be given without the need to refer the case to the relevant prosecutor. This Act creates a new offence of threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm.

A minimum sentence of 6 months' imprisonment would normally be given to persons over 18 found guilty of this offence.

Police corruption

Sally Ramage

The word 'corruption' was defined in Police Guidance on u , published in 2010. Corruption is there defined as including: *'any attempt to pervert the course of justice or other conduct likely to seriously harm the administration of justice, in particular the criminal justice system; payments or other benefits or favours received in connection with the performance or duties amounting to an offence in relation to which a magistrates' court would be likely to decline jurisdiction; corrupt controller, handler or informer relationships; provision of confidential information in return for payment or other benefits or favours where the conduct goes beyond a possible prosecution for an offence under section 55 of the Data Protection Act 1998; extraction and supply of seized controlled drugs, firearms or other material; attempts or conspiracies to do any of the above.'*

In the past year, 2010/2011, over 2,400 referrals, for all types of incidents were received by the IPCC from police forces and other law enforcement agencies. Of those, over 200 were classified as cases of serious corruption.¹ A similar number of corruption referrals were received in both 2009/10 and 2008/9. The current system requires forces and authorities to make a judgment that a case meets the threshold for referral to the IPCC and then make the referral. In addition to this, cases of corruption may also be referred to the IPCC on a covert basis.

During 2010/2011, the IPCC received 44 covert referrals. In 2009/10, 45 referrals were made and in 2008/9 there were 29 covert referrals. The report sets out six specific cases that the IPCC has dealt with which have now come to a conclusion, and details the lessons and recommendations that have been made as a result.

The IPCC found that in several cases, wrong- doing was not detected due to lack of or inappropriate supervision. There had been a failure to identify issues that lead to officers being involved in criminality; In many cases, computer systems had been misused by individuals and the IPCC found that a lack of system safeguards had in some cases, aided the misuse.

Due to not having a robust police, police expenses claimed inappropriately were facilitated.

Corruption in the Police Service: Part 1 can be accessed in full
at:http://www.ipcc.gov.uk/Documents/Corruption_in_the_Police_Service_in_England_Wales.pdf
Community or Custody Report Published

¹ IPCC, (2011) *Corruption in the Police Service: Part One, HMSO.* Part One of the IPCC report on police corruption in the UK is available at http://www.ipcc.gov.uk/Documents/Corruption_in_the_Police_Service_in_England_Wales.pdf.

Community sentences

Sally Ramage

A report has been published following a national enquiry, which looked at whether community sentences are more effective than short prison terms in stopping persistent, low-level offending. 'Community or Custody: which works best?' is the final report of the enquiry commissioned by the group named *Make Justice Work*. It found that community sentences can be cheaper, tougher and more effective than prisons for persistent, low-level offenders, but reoffending can only be reduced if certain standards are met.

The enquiry lasted one year and gathered evidence from victims, offenders, judges, magistrates, police and probation officers, prison governors and voluntary and private sector providers delivering intensive community services across the country. The subsequent report stated that community sentences do have an important role to play in meeting both the expectations of the public and the victim's expectations of

The US/UK 2003 Extradition Treaty

Sally Ramage

The practice of extradition originated in the ancient middle and far-eastern civilisations. The earliest recorded extradition treaty dates to 1280 B.C., between Ramses II, the Pharaoh of Egypt, and King Hattusli III of the Hittites, providing for the mutual return of criminals. The first, similar provision appeared in Western Europe in 1174 A.D., between Henry II of England and William the Lion, King of Scotland.

Treaty of Amity 1794

The 1794 Treaty of Amity, Commerce, and Navigation, or, the Jay Treaty, was the United States' first treaty and it was with Great Britain. The Jay Treaty provided for either UK or US government to deliver persons charged with murder or forgery to the other government '*on requisition*' but only on evidence of criminality that would justify apprehending and trying the defendant in the country where he was located if the offence had been committed there. Unfortunately, the Jay Treaty provided no specific procedure for extradition.

Definition of *extradition*

Today, the United States has extradition treaties with over a hundred countries, including many former British colonies that adopted by state succession, the 1931 Treaty with the United Kingdom, with 'extradition' meaning:

*'The surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.'*²

²*Terlinden v Adams*, 184 U.S. 270, 289 [1902].

An international extradition treaty obligates the host country to surrender to a requesting country a person charged with or convicted of an offence in that country. The willingness of countries to accept limitations on their state sovereignty stems from four purposes which provide the theoretical foundation for international extradition: to obtain reciprocal return of fugitive offenders; to facilitate the punishment of wrongful conduct, and thereby promote justice; to avoid harbouring within their borders those who may commit offences similar to those which they are accused of committing in another jurisdiction; and to avoid international tensions caused by one country's refusal to return a particularly sought-after accused offender.

The US/UK Extradition Treaty 2003

The most recent extradition treaty between the United Kingdom and the United States was signed in Washington on 31 March 2003. David Blunkett signed the 2003 Treaty, as the then Home Secretary, for the Government of the United Kingdom. Parliament was not consulted and the text of the treaty was only made public after it was signed. Even though the 2003 UK/US Extradition Treaty does not differ substantially from the 1972 US–UK³ many believe that it was negotiated and signed in secret and removed the fundamental protection of providing evidence for those in the UK facing extradition requests from the US, and this was the bitter complaint of the ‘three former NatWest bankers’ who later pleaded guilty engaging with fraud with former senior officers of Enron. According to a U.S. Justice Department indictment, the bankers became involved in one of Enron Chief Financial Officer Andy Fastow's many offshore vehicles, which eventual discovery triggered the bankruptcy of the Houston energy-trading giant, Enron.⁴

Another controversial extradition request from the United States was for the extradition of Ian Norris, the former chief executive of Morgan Crucible, who was charged in the US with cartel activity and perverting the course of justice by seeking to frustrate the subsequent criminal investigation in the US.⁵ In 2008, the House of Lords held that Norris could not be extradited to face the price-fixing charges in the US, because the alleged conduct was not criminal under English law at the time it was alleged to have been committed, but that the related charges of obstructing justice meant that Ian Norris must be extradited to the US. Norris' case went to the UK Supreme Court and then to the European Court of Human Rights in Brussels.

In dismissing Norris' appeal, the Supreme Court stated that:

‘It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on the basis of international reciprocity.’

The 2003 Treaty continues to generate controversy with the request for the computer hacker Gary McKinnon posing a problem for the new UK Coalition Government. Nick Clegg had suggested, on 25 May 2011, that it might not be straightforward for the Coalition to prevent Gary McKinnon's extradition, although the UK Government did later announce that it would conduct a comprehensive review of the 2003 Treaty.

³ As supplemented by the 1985 Extradition Treaty.

⁴ *R (on the application of Birmingham) v Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 329.

⁵ *Ian Norris v USA, Secretary of State for the Home Department, Bow Street Magistrates' Court, Goldshield Group Plc; Serious Fraud Office* [2007] EWHC 71 (Admin).

Drugs and road deaths

Sally Ramage

Current Criminal Law March 2012

This article will reveal the potential inadequacies of police equipment; potential corruption; and the consequences of the rule of law. It compares the incidents of drink-and drug-driving in the United States and the United Kingdom.

Drugged drivers

It has been reported by Gil Kerlikowske, Director of National Drug Control Policy, (NDCP) Washington D.C., that statistics reveal that one in three fatally injured drivers tested positive for drugs. 'Traffic fatality analysis' by the police revealed that this high percentage of drivers killed (33%) had drugs in their system, according to blood tests. Worryingly, the percentage of victims who showed positive readings for drugs in their system has increased, even as the total number of road vehicle crashes is decreasing. He drew attention to the alarmingly high percentage of fatalities on United States roadways involving drivers that had drugs in their system and called on communities to act immediately to prevent drug use in light of this new traffic fatality analysis, released by the National Highway Transportation Safety Administration (NHTSA).

U.S. Fatal Accident Reporting System

Note that the U.S. national data, which focuses on the danger of driving under the influence of alcohol, is readily available and often cited, but less is known or discussed about drivers under the influence of other drugs. This is the first analysis of drug involvement from NHTSA's Fatal Accident Reporting System (FARS) census.

Drugs consumed by fatally injured drivers

The detailed result of this first drug-driving census showed that:-

- (i) One in three motor vehicle fatalities with known drug test results tested positive for drugs in 2009.
- (ii) In addition, the involvement of drugs in fatal crashes has increased by five percent over the past five years, even as the overall number of drivers killed in motor vehicle crashes in the United States has declined.

Worsening problem of drivers taking illegal substances and legal medications

Drug-taking drivers is a much bigger public health threat than most people realize and it may be getting worse, said Director Kerlikowske. The director said that communities across the U.S. must address the threat of drugged driving in order to make U.S. roadways safer. This can be achieved by increasing public awareness, employing more targeted enforcement, and developing better tools to detect the presence of drugs among drivers. These new data from the NHTSA census reports that the fatally injured drivers (over the years 2005-2010) had the following drugs in their blood:

Narcotics;
Depressants;
Stimulants;
Cannabinoid (marijuana);
Hallucinogens PCP;
Anabolic steroids; and
Inhalants.

The analysis could not reveal whether legal medications had been misused. Drugs recorded in FARS included:
Alcohol;
Nicotine; and

Aspirin.

Driving under the influence (DUI)

Note that Washington's DUI laws state that 'driving under the influence' is a gross misdemeanour:

'Driving Under the Influence.

A person is guilty of Driving Under the Influence when:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defence against a charge of violating this section.

(3) It is an affirmative defence to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defence unless the defendant notifies the prosecution prior to the omnibus or pre-trial hearing in the case of the defendant's intent to assert the affirmative defence.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

(5) A violation of this section is a gross misdemeanour.'

In the U.S. it is an offence to be in physical control of a vehicle whilst 'under the influence'.

Washington's breath analysers at issue

Added to this issue is the fact that, since 2010, the city's breath testing equipment has been in dispute by defence attorneys after some machine results were found to be inaccurate, resulting in the Medical Examiner of Washington D.C. being unable to verify the accuracy of machine readings from all Intoxilyzer 5000 police equipment. The Intoxilyzer was then replaced by another machine in March 2011: the Intoximeter.

Equipment readings not evidence

Recently, D.C. Attorney General Irvin Nathan was forced to drop the drink and drug driving charges against several suspects. The police procedure in Washington D.C. is that the medical examiner's office must certify the breathalyser program, and it has not done been able to do so this year due to concerns raised by the problems with the previous models of the breathalyser equipment. Police officers are still using the newer equipment, the Intoximeter, but at present, these readings are not being used in evidence in court. Instead, urine sample readings of blood-alcohol levels are used in evidence. Many DIU charges have been quashed to comply with the U.S. 6th Amendment to the Constitution:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.'

Lawsuits against Medical Examiner's Office

There are many lawsuits being brought against the medical examiner by convicted drivers. Analysis has revealed that the majority of drink-driving charges were brought by only two of the city's police officers and this revelation has led to an internal police investigation.

Inevitably, the city's police force has been demoralised because it cannot enforce DUI laws.

Defences to charges of being under the influence of drugs

Drugs, other than alcohol, are metabolised differently to alcohol, and the affects of different drug concentrations in the blood is very hard to predict. The taking of certain sleeping medications has been shown, in research in the United States, to cause amnesia-like symptoms in cases where persons taking these medications engage in activities while asleep and they do not remember when awake. The sleeping medication affects eating or driving a car and therefore one possible defence is that the defendant never formed a conscious intent to drive his or her motor vehicle.

Disclosure

The defence attorney will obtain the calibration results of the machines used. He will obtain the protocol used to test and evaluate the defendant's blood or breath sample. He will demand evidence from the police crime laboratory. This evidence may establish that the machine used was not properly functioning at the time the defendant's test was analysed. He will appoint expert witness evidence of a forensic toxicologist

In the United Kingdom

It has been reported that road deaths in the United Kingdom have decreased. UK government statistics show that there were 2,538 people killed on Britain's roads in 2008, (a 14% reduction on 2007) and that this is the lowest annual total of road deaths since records began in 1926. The decrease in number of deaths on UK roads may be due to the safer built modern British cars despite poor roads. (*EuroNCap* scheme test- crashes all new cars. Findings are that in-car safety has improved dramatically). Department for Transport statistics, based on casualties in accidents reported to police, showed that 28,567 people were killed or seriously injured in the UK in 2011. This number represents some 0.3 percent of the total UK population. It is not known what percentage of deaths to motor vehicles there are in the UK. The UK government reported in 2011 that the UK has the lowest road death rate A total of 36,371 people were killed on Britain's roads between 1999 and 2010, making the UK possess one of the best records in the world for road casualties. In 2010, the UK police recorded 1,850 deaths, 22,660 people seriously injured and 184,138 who received light injuries. The statistics did not differentiate between drivers and others who died. The data is recorded at the scene of the road traffic incident. Detailed information about each crash is recorded by the police at the scene. It is subsequently transferred onto a computer database. This is available to researchers from the Economic and Social Data Service (ESDA).

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Privacy: UK and US

Sally Ramage

On 1 March 2012, the White House today released its long-awaited report outlining a framework for U.S. data protection and privacy policy. As expected, “Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Global Innovation in the Global Digital Economy” articulates a Consumer Privacy Bill of Rights based on the individual’s right to exercise control over what personal data companies collect from the individual and how companies use the data. The Consumer Privacy Bill of Rights, which reflects principles of fair information practices and applies to personal data, sets forth individual rights for consumers and corresponding obligations of companies in connection with personal data. It also provides for the consumer’s right to:

- transparent privacy and data security practices;
- expect that companies will collect, use and disclose data in a manner consistent with the context in which it was collected;
- have their data handled in a secure manner;
- access and correct personal data;
- set reasonable limits on the personal data that companies collect and retain; and
- have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

‘The Administration stated its intention to work with Congress to draft legislation based on the Consumer Privacy Bill of Rights. According to the report, ‘enacting the Consumer Privacy Bill of Rights through Federal legislation would increase legal certainty for companies, strengthen consumer trust, and bolster the United States’ ability to lead consumer data privacy engagements with our international partners. ‘The U.S. Congress will be influenced by this document when considering new legislation. Privacy is a bipartisan issue that everyone can agree on. The report also describes an open forum in which stakeholders will work toward consensus on codes of conduct that would implement the provisions of the Consumer Privacy Bill of Rights. Although their adoption by organizations is voluntary, the codes will be enforceable. The report discusses the critical role of the FTC in privacy enforcement and Congress to provide the FTC and state attorneys general with specific authority to enforce the Consumer Privacy Bill of Rights. The report also underscores the Administration’s goal of global interoperability of privacy protections facilitated by effective enforcement and accountability mechanisms, building on the recommendations of the Department of Commerce Internet Policy Task Force’s Green Paper on privacy.’⁶

⁶ U.S. Administration, ‘Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework’, *US Government*, 1.3.2012. See At <http://www.huntonprivacyblog.com/2012/02/articles/white-house-announces-its-highly-anticipated-consumer-privacy-bill-of-rights/>.

Whitney Houston's death and money matters

Sally Ramage

Money Matters: Upcoming film to be released in August 2012

The upcoming movie *Sparkle* is Whitney Houston's final recorded work. It is a remake of a 1976 movie of the same title. The 2012 film *Sparkle* has Howard Rosenman as its executive producer who said that Whitney Houston's acting in the film is genius. The 1976 Warner Bros film *Sparkle* is a period film set in Harlem, New York during the late 1950s and early 1960s and the story follows the rough lives and careers of singer Sparkle Williams and her family and friends. The film story was loosely inspired by the *Supremes*. In the film, the all-female singing group was called Sisters with the three sisters being Sister, Sparkle and Dolores Williams. The female singing group began to find success eventually, but one of the girls, Sister, had by then become a drug addict and her life spiralled out of control, leading to her early death. The new version of the film *Sparkle* is directed by Salim Akil (known for the television series *The Game*). The new version will follow a similar story line, with Jordyn Sparks as the star character, Sparkle, who must find a way to achieve stardom despite the drama surrounding her family. Whitney Houston played Emma, the sisters' mother (the named changed from Effie to Emma in the 2012 film version). The new film *Sparkle*, in which Whitney Houston plays the mother of the three girls, is planned to be released in August 2012 as scheduled, despite the death of Whitney Houston.

Nearly completed new movie

Whitney Houston was due to complete the remake of the cult film, which is set for an August release. Howard Rosenman, who conceived and produced the original film, talks about how the Motown-inspired flick came to the screen in 1976—and Whitney's 'wonderful' performance in the new version. Whitney Houston had a company, run by Debra Martin Chase and a deal at Warner Bros. from 1995 to 2000. Chase procured the rights to *Sparkle*, and they developed several screenplays, none of which worked. Then the company *Affirm Pictures*, a company owned by Bishop T.D. Jakes, was hired to produce the film. The director of this film was Salim Akil and his wife, Mara Brock Akil, wrote the new screenplay; and the movie is set in 1968 in Detroit. The character of the mother of the three girls, was played by Whitney Houston, and was changed from a housekeeper in the 1976 film to a former R & B singer who gets fed up with the secular life and turns to the church. When her daughters want to leave the bosom of the church and enter the tough world of R & B, she objects. Whitney Houston played her part well in the new movie. In the soon-to-be-released film, Whitney Houston sings a gospel song. The performances and writing were multidimensional and multilayered. Mara and Salim really mined so much conflict, drama, and love among the main characters. The film includes the Curtis Mayfield songs, and R. Kelly wrote several new songs for this film. The re-creation of Detroit in 1968 is inspiring. This film would have been a new surge for Whitney Houston, who was at the height of her powers during the filming. She was said to always arrived on time for rehearsals and knew all the lines. This film would have been a spectacular comeback for Whitney, who was at the height of her powers during the filming.

Potential income from the new movie

Generally today, movies about aspiring singers have had disappointing incomes. For example, in the past two years, films such as *Country Strong*, *Joyful Noise* and *Burlesque* all have underperformed at the box office. Many will want to see the new film *Sparkle* in August 2012, especially because Whitney Houston has died.

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