Legal Aid, Sentencing and Punishment of Offenders Bill

Sentencing Provisions

Briefing for Second Reading

House of Commons

June 2011

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

2. This briefing is intended to highlight JUSTICE's main concerns regarding the sentencing provisions of the Bill. A separate briefing, available from our website, covers the provisions on legal aid. Where we have not commented upon a certain provision in the Bill, this should not be taken as an endorsement of its contents.

3. We are concerned that some of these sentencing provisions result from policy driven by budget cuts at the Ministry of Justice (23% between 2010-11 and 2014-15)[1] and the need to generate 'tough on crime' headlines rather than a coherent strategy to reduce offending and improve outcomes in the criminal justice system. In particular:

    - **A curfew requirement of up to 16 hours a day (*clauses 60 and 67*) could in some cases constitute a deprivation of liberty for the purposes of the European Convention on Human Rights. Further, such long curfews reduce the opportunity for positive rehabilitative activities such as education or employment and can contain the offender in premises where they can perpetuate or suffer domestic violence, abuse or neglect. They are particularly inappropriate for children.**
    - **Presumptive minimum sentences (*clause 113*) distort the sentencing framework as developed in sentencing guidelines, meaning that the relevant offence can result in a more severe sentence than other, more serious offences. Further, short prison sentences such as those of 6 months (in effect, 3 months in custody) offer no scope for positive change and high rates of reoffending.**

4. However, there are also some positive measures in the Bill; **we welcome its reforms to youth cautions and remand for children and young people, and to suspended sentences.**

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1 Spending Review 2010, Cm 7942, October 2010.

PART 3 – SENTENCING AND PUNISHMENT OF OFFENDERS

Sentencing

4. Chapter 1 of Part 3 contains a number of unrelated and mostly fairly minor changes to the sentencing framework. We welcome the duty in clause 53 to consider the making of a compensation order and the general duty in clause 54 to explain, in ordinary language, the reasons for and effects of the sentence when passing sentence. There is a lack of public understanding of the effect of many sentences – particularly those of imprisonment – in terms of time to be served in custody, release on licence, etc, which compromises confidence in the system. We have also been concerned at prisoners' lack of understanding of indeterminate sentencing (IPP).[2]

5. We are, however, concerned about the order-making power granted to the Lord Chancellor to except cases from this duty and to prescribe that such a duty may be carried out in writing or in the offender's absence. While there are cases where the offender will be absent during sentencing (for example where he has chosen to absent himself) these cases should be specified on the face of the Bill. We are unaware of circumstances where it would be legitimate to provide no explanation whatever of the sentence and would welcome clarification of the government's intentions in this regard. We are also concerned at the omission of the current duties to explain the court's consideration of the thresholds for a community or custodial sentence. While implicit in the general duty, the court's attention to these thresholds must not be diluted. We would welcome amendment of the clause to specify this consideration as part of the general duty.

6. In relation to community orders, while we understand the reasons for wishing to ensure the credibility of sentences containing unpaid work requirements by providing that the order should continue until the work is completed (*clause 55*), there should be provision for the court to release an offender from the remainder of an unpaid work requirement where this is appropriate (for example, in the case of superseding disability) and would welcome clarification of this.

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2 See Prison Reform Trust, *Unjust Deserts: Imprisonment for Public Protection,* 2010.

7. We welcome the Bill's extension of the availability of suspended sentences (*clause 57*) and the ability to impose such a sentence without a community requirement. This will enable the courts appropriately to deal with cases where a custodial sentence is merited but there are pressing reasons not to impose an immediate sentence of custody (for example, in the case of a breastfeeding mother of an infant). We question, however, why the sentence to be suspended must be a minimum of 14 days' imprisonment.

8. In relation to requirements under community orders/youth rehabilitation orders (YROs) and suspended sentences, we are concerned that the abolition of the need for consent of third parties for programme requirements (*clause 59*) and for medical evidence for mental health treatment requirements (*clauses 62 and 68*) is driven by a desire to save time and costs without consideration of its likely effects. In relation to programme requirements, it is important that providers of programmes have consented to the placement of those on community orders with them; general consent could be given, rather than fresh consent being needed in every case. In relation to mental health treatment requirements, it is in our view reckless and wrong in principle to impose such requirements when they may be medically inappropriate and/or when another disposal under the Mental Health Act 1983 would be warranted (matters which the registered medical practitioner is currently required to address).

9. We have serious human rights concerns regarding the extension of curfew requirements in clauses 60 and 67 to a maximum of 16 hours per day for up to 12 months. A curfew for so many hours a day could constitute a deprivation of liberty for the purposes of Article 5 European Convention on Human Rights if other aspects of the sentence were unusually destructive of the life the person would otherwise have been living.[3] In order to be lawful, a deprivation of liberty must fall within one of the categories listed in Article 5. One is 'the lawful detention of a person after conviction by a competent court' (Article 5(1)(a)). The government's somewhat cursory human rights compliance assessment in relation to these clauses states that they will be lawful under Article 5 because they fall within Article 5(1)(a). However, we believe that there is a strong argument to the contrary: if the custody threshold has not been passed (as a matter of domestic law), then the imposition of a curfew constituting a deprivation of liberty would be contrary to domestic law and therefore not 'lawful' for the purposes of Article 5(1)(a).

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3 *Secretary of State for the Home Department v AP* [2010] UKSC 24 & 26.

10. In addition to their potential illegality, we believe that such long curfews are undesirable. They will limit the offender's capacity to carry out positive rehabilitative activities and can contain the offender in premises where they may perpetuate or fall victim to domestic violence, abuse or neglect. They are particularly inappropriate in the case of children, in part because of the correlation between children suffering neglect and/or abuse and those who commit offences. Further, while we believe this change may be driven by the desire to see offenders who would otherwise be sent to custody dealt with by means of a community order/YRO containing a long curfew, 'toughening' up of community sentences is unlikely to achieve this and more likely to result in a 'ratcheting up' effect, with offenders who would otherwise be given a shorter curfew becoming subject to the longer one once it is available.

11. While a foreign travel prohibition requirement (*clause 61*) could be appropriate in a small number of cases where a community sentence is imposed (eg football hooliganism; involvement in transnational organised criminal activity), we believe that there should be strict criteria to ensure that such orders are not routinely made and would welcome clarification of the government's intentions and in what types of cases they believe such a requirement would be appropriate.

12. We welcome the loosening of restrictions upon referral orders for children (clause 65) and hope that guidance can ensure that they become a more restorative process with higher levels of victim involvement than at present. Further, we believe that they should also be extended to cases where a child is convicted after trial, providing that following the conviction they admit their involvement in the offence and agree to abide by the referral order.

13. Clause 66, which allows the court to impose repeated further periods of supervision for breach of a child's detention and training order (DTO), with custody as a sanction for breach, in our view is extremely dangerous as it risks a perpetual cycle of supervision orders and periods of detention. The intention to ensure that the order of the court is complied with is understandable, but its execution in this manner expects perfect compliance from children who, being children sentenced to custody, are likely to have chaotic home lives, and to exhibit high rates of learning disability and mental illness and high levels of welfare need. Those with the highest levels of need are most likely to breach supervision requirements and therefore enter further periods of

supervision, detention, etc, further damaging their prospects. This clause is likely to compound disadvantage. If the intention is to support and rehabilitate children through further periods of supervision this would better be done by welfare services that do not form part of the sentence of the court.

14. Children as young as 12 may receive DTOs; with their youth comes a reduced ability to envisage the long-term consequences of their actions. It is important that a DTO is complied with but also that it ends on the end date envisaged when sentencing so that there is finality. If supervision after release on a DTO is breached then we believe the appropriate responses are to resume the order, fine, or alter the supervision requirements.

15. We are also concerned at clause 69, which would allow a youth rehabilitation order (YRO) to be extended to a maximum period of three and a half years. This is an incredibly long period in the life of a child during which enormous amounts of development take place. We believe that to aid comprehension of YROs by children and compliance by them with their terms and avoid inhibition of development they should last no longer than 12 months, as is currently the case with Youth Conference Orders in Northern Ireland.[4]

16. We are further concerned at clause 70 which increases the fine for breach of a YRO to £2,500. Children under 16 are unlikely to have any form of independent income; fines will normally be paid by parents and in our view, therefore, a fine will rarely be an appropriate disposal since it is not aimed at the offender him/herself. Many 16 and 17 year olds are also in part or whole dependent upon their parent(s)/guardian(s). This is in part recognised in the current provisions which restrict the fine to £250 for children under 14 and £1000 for 14-17 year olds. We therefore believe that if a fine is to be available for children under 16 it should be capped at £250 and that for 16 and 17 year olds the current £1000 limit should remain.

Bail and Remands

[4] See JUSTICE/The Police Foundation, *Time for a New Hearing*, December 2010, which recommends incorporating many of the features of the Northern Ireland youth justice system in England and Wales.

17. We welcome the removal of likelihood of failure to surrender to custody as a criterion for refusing bail in cases where there is no real prospect of a custodial sentence (*clause 73 and Schedule 10*). However, in the small number of cases where there is no real prospect of a custodial sentence but there is serious risk, that cannot be dealt with by conditional bail, that a defendant will commit serious violent or sexual offences while on bail or interfere with witnesses, we believe that a remand in custody should continue to be available.

18. We further welcome the incorporation of 17 year olds in the system for remands of children otherwise than on bail (*clause 74*), as is appropriate under the UN Convention on the Rights of the Child, and application of 'looked after' status to all children remanded to youth detention accommodation (*clause 87*) – although we believe that the application of such status to all children in custody, sentenced or remanded, is an urgently needed reform to the youth justice system that would be likely to result in better treatment of children both during a custodial sentence and upon release.[5]

19. Clause 80, regarding the liability to arrest of children breaching conditions of remand to local authority accommodation, highlights the problem of children being detained in police cells. More than 50,000 children under 16 were held in police cells in 2008 and 2009. 13,000 of them were, incredibly, aged from just nine to 13.[6] In our view no child under 18 should spend the night in a police cell, as such accommodation is utterly inappropriate for children and violates the UN Convention on the Rights of the at all stages. Further, no child under 16 should ever be held in a police cell; alternative age-appropriate accommodation should be provided by local authorities for those children who genuinely require temporary detention, for example at secure children's homes, and a statutory duty should require this.

20. Clause 85 on remand accommodation raises the problem of secure children's home (SCH) provision - failure on the part of the YJB to commission places in SCHs has led to the widespread loss of places including the closure of Orchard Lodge, London's only SCH. In our view SCHs provide the only appropriate custodial accommodation for children of that currently available in England and Wales and remain seriously

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5 See, for example, The Howard League for Penal Reform, *Chaos, neglect and abuse: the duties of local authorities to provide children with suitable acccommodation and support services*, 2006.

6 N Puffett, '50,000 children locked up by police', *Children and Young People Now*, 14 June 2011.

concerned about aspects of children's treatment and the regime in secure training centres and young offenders' institutions.

Out of court disposals

21. We welcome the disapplication of Penalty Notices for Disorder (PNDs) to children (*clause 106*). There are particular due process issues relating to the use of such summary penalties against children and vulnerable adults. Further, the principle and efficacy of financial penalties against children are in themselves questionable (see paragraph 17, above). Children are also particularly vulnerable to 'net-widening' through such penalties in relation to minor acts of misbehaviour that would otherwise not be addressed by the criminal justice system.

22. However, we strongly oppose clause 107 – which would give police the power to issue conditional cautions without reference to a prosecutor. We are already opposed to conditional cautions since a punishment for offending should only be imposed by an independent judicial authority. Those which contain only reparative/rehabilitative conditions are less objectionable than those which contain punitive elements such as unpaid work. As with PNDs, there are particular due process issues around the use of such disposals against children and vulnerable adults. Currently, however, there is at least reference to an agency independent from the police – the CPS. To give the police power to determine conditions requires knowledge of matters in which they have no expertise (prevailing sentencing for equivalent offences, conditions that may be counter-productive, etc) and makes them investigator and judge in the same case. It also leaves room for pressure to be put by police on suspects to accept certain conditions.

23. We are similarly opposed to clause 108, which is clearly driven by the desire to reduce numbers in the system (and possibly, in custody) by allowing foreign nationals to avoid prosecution in return for leaving the UK. This proposal is evidently discriminatory.

24. We broadly welcome the reform of youth cautions (clause 109) to remove the 'escalatory principle' which leads children quickly towards prosecution; involvement with the youth justice system tends to exacerbate reoffending. The clause however does raise the issue that appropriate adults are still not available to 17 year olds at

the police station. We would welcome clarification by the government of when the necessary reforms will be made to enable this.

Knives and offensive weapons

25. While we have no objection in principle to the creation of the offence of threatening with an article with a blade or point or an offensive weapon (*clause 113*), we question whether it is necessary since other offences already exist to address the relevant behaviour; for example, along with offences of having an offensive weapon/bladed article in a public place, offences such as common assault, robbery/attempted robbery (in the context of which such threats will often be made) and offences under section 4 Public Order Act 1986.

26. We are, however, strongly opposed to the clause's presumptive minimum sentence of 6 months. Such minimum sentences distort the sentencing framework – since they can result in other, more serious, offences of a similar nature receiving a lesser sentence. Further, there is much to be admired in the current system whereby the Sentencing Council sets the guidelines to which courts must have regard but from which they can depart where the interests of justice demand it. This ensures a measure of consistency through guidelines created by experts while allowing the sentencer in full position of the facts to do justice in the individual case. The prevailing considerations of culpability and harm by which seriousness is assessed for the purposes of sentencing guidelines are sensible and we believe that Parliament should allow the system to be followed for all new offences rather than setting a presumptive minimum for one offence while other, similar offences are subject to guidelines (for example, the recent definitive guideline on assault offences).

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June 2011