Legal Aid, Sentencing and Punishment of Offenders Bill

Part 3

Briefing for Public Bill Committee

House of Commons

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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 Part 3 of the Bill. A separate briefing, available from our website, covers the Bill's 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. We offer initial suggested amendments to Part 3 in this Briefing and will suggest further amendments after recess.

3. We strongly welcome the Bill's provisions on the **cautioning and remand of children**. These measures will help to ensure that children are not inappropriately escalated through the youth justice system (which enhances the likelihood of reoffending) and that those accused of minor offences who present no risk to public safety do not await trial in damaging custodial settings.

4. We also welcome the extension of **suspended sentences**, although we believe that the **adult bail provisions** go too far and should be amended to allow remands to custody where this is necessary to avoid interference with witnesses and/or serious harm to the public through further offending.

5. We have serious concerns about some of the other sentencing provisions, in particular, the **extension of curfew requirements** to up to 16 hours a day, and the **presumptive minimum sentence** for the new offences of threatening with a weapon/bladed article. We believe that these elements should be removed from the Bill.

6. We eagerly await the outcome of the review of indeterminate sentencing for public protection announced by the Secretary of State at Second Reading and would welcome clarification of its remit and personnel. We believe that urgent reform to these sentences at the parole and sentencing stages is needed.

PART 3 – SENTENCING AND PUNISHMENT OF OFFENDERS

Clause 54 - Duty to give reasons for and to explain effect of sentence

7. 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).[1]

8. We are, however, concerned about the order-making power granted to the Lord Chancellor by clause 54 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.

Amendments

Page 39, line 19 [*clause 54*], leave out paragraph and insert

"(4) If the offender is not present when sentence is passed:

(a) subsection (3) takes effect as if the words 'to the offender' were omitted, and

(b) in addition, the court must provide a written version of both its statement given under subsection (2) and its explanation given under subsection (3).

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

(c) A copy of both the written statement and explanation made under subsection (4)(b) must be sent to:

(i) the offender at his current place of residence;

(ii) the offender's legal representative."

OR

Page 39, line 19, [*clause 54*], leave out paragraph and insert:

"(4) If the offender is not present when sentence is passed, subsection (3) takes effect as if the words 'to the offender' were omitted.

(4A) The court must provide written versions of any statement given under subsection (2) and any explanation given under subsection (3).

(4B) Copies of the documents mentioned in subsection (4B) above must be given (if the relevant person is in court when sentence is passed) or sent by post (if the relevant person is not in court when sentence is passed) to:

(a) the offender;

(b) the offender's legal representative;

(c) the victim(s) of the offence;

(d) family member(s) and/or representative(s) of the victim(s) of the offence;

(e) the Crown Prosecution Service;

(f) any co-defendant convicted in the case, whether or not at the same trial/hearing;

(g) the legal representative of any person in (vi) above;

(h) the probation service or, if the offender is under 18 years of age, the youth offending team;

(i) If the offender is under 18 years of age, the offender's parent/guardian;

(j) Representatives of the media.

(4C) The duty in subsection (4B) is subject to any reporting restrictions in force in the case.

(4D) Where the offender is aged under 18, no details tending to identify him may be included in the written reasons provided under subsection (4B)(j)."

AND

Page 39, line 22 [Clause 54], leave out "(8)" and insert "(9)"

Page 39, line 42 [Clause 54], leave out paragraph (b)

Page 39, line 43 [Clause 54], at end insert:

> "( ) Where the court imposes a sentence that may only be imposed in the offender's case if the court is of the opinion mentioned in –
>
> (a) section 148(1) of this Act (community sentence), or
>
> (b) section 152(2) of this Act (discretionary custodial sentence),
>
> the court must state why it is of that opinion.

Effect

The first and second amendments above are alternatives. Both would remove the Lord Chancellor's power to prescribe by regulations cases where the duty to give reasons for the sentence imposed and explain its effect in court should not apply. We believe that this duty should apply in all cases. However, we also believe that it is desirable for a written version of the reasons for and explanation of the sentence should be provided. The first amendment provides for the case where the offender is not present in court for sentence (for example, because he has chosen to absent himself). Under this amendment the judge or bench would still have the duty to explain to those in court the reasons for imposing the sentence and its effect but a written version would be provided to the offender. The second amendment would also provide for this but in addition, written versions would be distributed to the victim/victim's family member(s) and/or representative(s) and others with an interest in the case, including media representatives. We hope that this would increase understanding of the reasons for imposing sentences and how they work and encourage more accurate reporting of the same, thus increasing public confidence in the criminal justice system.

The third amendment would ensure that courts remain under specific duties to give reasons why it is of the opinion that an offence is so serious that only a custodial sentence is appropriate, or why it is sufficiently serious that a community sentence should be imposed. This would help to ensure that these considerations remain prominent in the court's thinking and that the sentencing thresholds are not diluted.

Clauses 60 and 67 – curfew requirements

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.[2] 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).

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. 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. The lengthening of curfew is particularly inappropriate in the case of children, not least because of the correlation between children suffering neglect and/or abuse and those who commit offences. It seems that the adult provision in clause 60 has been copied for children in clause 67 without consideration of children's differing characteristics and circumstances, contrary to the UN Convention on the Rights of the Child principle that the youth justice system should be distinct from that for

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

adults.[3] We therefore believe that clauses 60 and 67 should be removed from the Bill.

Amendments

Page 45, clause 60, leave out clause

Page 49, clause 67, leave out clause

Clauses 62 and 68 – mental health treatment requirements

12. In relation to requirements under community orders/youth rehabilitation orders (YROs) and suspended sentences, we are concerned that the abolition of the need for medical evidence before a mental health treatment requirement can be imposed (*clauses 62 and 68*) is driven by the desire make it easier to impose such requirements, but without consideration of possible counter-productive effects. It is in our view wrong in principle to impose such requirements – when they might be medically inappropriate and/or when another disposal under the Mental Health Act 1983 could be warranted (matters which the registered medical practitioner (RMP) is currently required to address). If a shortage of RMPs is leading to low take-up of such requirements then one alternative might be to widen the categories of doctor able to provide evidence in these cases. However, we believe that mental health treatment should not be imposed by the coercive authority of the criminal justice system and should be provided as a health service to those in need and, if necessary, through civil proceedings.

Amendments

Page 45, clause 60, leave out clause

Page 49, clause 67, leave out clause

Clause 66 – Breach of detention and training order

[3] See Article 40(3) UNCRC.

13. 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.

14. 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.

15. The intention behind 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, is understandable – it aims to ensure compliance with supervision requirements. However, the clause 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 or receive fines, 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. This would better comply with Article 40 UN Convention on the Rights of the Child, under which states parties recognise the 'desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

16. 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 or soon after the end date envisaged when sentencing so that there is finality, and that it contains both detention and supervision in the community so that reintegration can take effect. We are therefore considering amendments which would allow the court to order the period of

supervision to continue or to alter the supervision requirements as alternative options following breach of a DTO's supervision requirements, and restricting the use of detention/further supervision periods. We will circulate these amendments following summer recess.

Amendments

Page 49, line 31 [*clause 66*], leave out from "is" to "either" on line 32 and insert

"may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

Effect

This amendment concerns the regulation-making power in relation to the interaction of periods of detention imposed for breach of DTO with other sentences. The Bill provides for such regulations to be made by statutory instrument coming into force by the negative resolution procedure. We believe that if a statutory instrument is made affecting the right to liberty it should be scrutinised by Parliament and therefore that the positive resolution procedure should be employed.

Clause 69 – Youth rehabilitation order: duration

17. We are 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 twelve months, as is currently the case with Youth Conference Orders in Northern Ireland.[4] However, we fear that in the current sentencing framework, shortening YRO duration to twelve months could risk an increase in custodial sentences, and therefore are proposing in our suggested amendments that the maximum order length (subject to a single six month extension) should be two years.

[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.

Amendments

Page 50, line 21 [*clause 69*], at end of line insert "and for "3" substitute "2""

Page 51, line 1 [*clause 69*], leave out "three" and insert "two"

Page 51, line 22 [*clause 69*], leave out "three" and insert "two"

Effect

These amendments would provide that the maximum duration of a YRO would be two years, subject to existing exceptions and the new power in the Bill to extend an order by up to six months.

Clause 70 – Youth rehabilitation order: fine for breach

18. Clause 70 would increase the maximum fine for breach of a YRO for all children to £2,500. Like clause 67 on curfew requirements, this provision pays insufficient regard to the different needs and circumstances of children as opposed to adults. 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.

Amendments

Page 52, line 26 [*clause 70*], leave out from ", for" to end of line and insert "(i), for "14" substitute "16"."

Page 52, line 28 [*clause 70*], leave out from ", for" to end of line and insert "(i), for "14" substitute "16"."

Page 52, line 32 [*clause 70*], leave out from beginning of line to “paragraph” in line 33.

Effect

These amendments would provide that the current £250 limit on fines for breach of a YRO for under-14s would now apply to under-16s. The current limit for 14-17 year olds of £1000 would now apply to 16 and 17 year olds. The final amendment in this group is consequential.

Clause 73 and Schedule 10 - Bail

19. 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.

20. We note that the government’s proposed changes to bail would apply only to adults; the reforms of remand for children would only alter the relationship between remand to local authority accommodation and remand in custody – but would not tighten up the tests for remand as opposed to release on bail. We would welcome explanation of this difference, since it is on first view contrary to expectation that it should be more difficult to remand an adult than a child.

Amendments

Page 165, line 33 [*paragraph 3*], leave out paragraph

Page 166, [*paragraph 5*], leave out line 14

Page 166, [*paragraph 10*], leave out line 42

Page 167, line 7 [*paragraph 10*], leave out “paragraph 2” and insert “sub-paragraphs 2(a) or (b)”

Page 167, line 8 [*paragraph 10*], after “custody” insert “or”

Page 167, line 8 [*paragraph 10*] leave out from “bail” to end of line 9
Page 167, line 28 [*paragraph 12*], leave out from “an associated” to end of line 32 and insert “any person other than the defendant".

Page 168, line 26 [*paragraph 22*], leave out paragraph

Page 168, line 39 [*paragraph 39*], before “Paragraph” insert “In”

Page 168, line 40 [*paragraph 39*], leave out from “is amended” to end of line 4 on page 169 and insert

“in sub-paragraph (a) omit “or” and omit sub-paragraph (b)”.

Page 168, line 10 [*paragraph 25*], leave out paragraph

Page 168, line 14 [*paragraph 26*], leave out paragraph

Page 168, line 27 [*paragraph 27*], leave out from “an associated” to end of line 33 and insert “any person other than the defendant”.

Amendments

These amendments would remove the age criterion from the bail reforms so that they applied to children as well as adults. They would also extend the availability of remand where the government has proposed it only in domestic violence cases to any case where there were substantial grounds for believing that if released the defendant would commit an offence that would be likely to cause physical or mental injury to any other person.

Remands

21. We strongly support the restriction of remands in custody for children in clauses 81 and 82, although we will suggest minor amendments to these clauses following recess. These clauses go some way to ensuring that at least before conviction, custody for children becomes a last resort as is required by Article 37 of the UN Convention on the Rights of the Child. The small minority of children who present a serious risk to members of the public will still be able to be remanded in custody, and

for others remanded to local authority accommodation the local authority has the option of applying for a secure care order to place the child in a secure children's home in the small number of cases where this could be necessary.

22. 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]

23. 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. We will suggest further amendments to address these issues following summer recess.

24. 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 we remain seriously concerned about aspects of children's treatment and the regime in secure training centres and young offenders' institutions. We emphasise the UNCRC requirement that 'every child deprived of liberty shall be treated with humanity and respect for the

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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.

inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.[7]

Out of court disposals

25. 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 18, 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.

26. 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.

27. 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. We will put forward amendments following recess to address our concerns with clauses 106-108.

28. We broadly welcome the reform of youth cautions (clause 109) to remove the 'escalatory principle' which leads children quickly towards prosecution; involvement

[7] Article 37.

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

29. 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.

30. We further question the proposed defence to these offences for a defendant who proves that he had lawful authority or good reason/reasonable excuse for having the weapon/bladed article with him in the relevant public place. This is a valid defence to possession of the weapon/bladed article but we are not convinced that it should be a defence to unlawfully and intentionally threatening another person with it so that there is an immediate risk of serious physical harm to them. We would welcome clarification of the government's thinking in this regard.

31. 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).

32. We will suggest suitable amendments to these clauses following summer recess.

JUSTICE

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