Legal Aid, Sentencing and Punishment of Offenders Bill

Part 3

Briefing for Committee Stage
House of Lords

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Introduction and Summary

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. 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.

3. 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.

4. We also oppose **clause 120**, which would provide for the transit of those imprisoned or detained by foreign courts through the UK to third countries. We believe that this clause would create a serious risk that the UK would allow prisoner transit in breach of its international and Human Rights Act obligations not to send people from the UK to a state where they may be subject to serious human rights violations including torture.

5. We welcome the repeal of **IPPs**. These sentences have proved unworkable and unlawfully detained many prisoners passed the appropriate sentence that they should have served due to an ill thought out regime which was almost impossible to satisfy. However, we have serious concerns about replacing these sentences with **mandatory life sentences**, which has historically been reserved for murder and the unclear position in which prisoners serving IPPs will remain under the proposals.

6. We welcome the recently introduced amendment regarding the **Rehabilitation of Offenders Act** which will offer a greater opportunity to succeed to those attempting to rebuild their lives following a conviction.

Clause 61 – Duty to give reasons for and to explain effect of sentence

Page 43, line 28 [*Clause 61*], substitute "(8)" for

> **"(8) 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."**

7. We welcome the duty in clause 60 to consider the making of a compensation order and the general duty in clause 61 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 that the Bill would remove *current duties* upon sentencers to explain the court's consideration of the *thresholds* for a community or custodial sentence – ie why the relevant threshold has been passed in the particular case. While implicit in the general duty, the court's attention to these thresholds must not be diluted. The amendments above would ensure that courts remain under specific duties to give reasons why they are 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.

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

Clauses 67 and 75 – curfew requirements

Page 50, clause 67, leave out clause

Page 57, clause 75, leave out clause

OR

Page 50, line 21 [*clause 67*], after "hours)" insert "before "A relevant" add "Subject to subsection (2A)"

Page 50, line 21 [*clause 67*], at end insert

> **"( ) After subsection (2) add**
>
> **"(2A) A relevant order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this section, be of the opinion in section 152(2) of this Act."**

Page 57, line 22 [*clause 75*], after "hours)" insert "before "A youth" add "Subject to sub-paragraph (2A)"

Page 57, line 22 [*clause 75*], at end insert

> **"( ) After sub-paragraph (2) add**
>
> **"(2A) A youth rehabilitation order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this paragraph, be of the opinion in section 152(2) of this Act."**

9. We have serious human rights concerns regarding the extension of curfew requirements in clauses 67 and 75 to a maximum of 16 hours per day for up to 12 months. A curfew for so many hours a day could, in some cases, 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, such as employment, family caring obligations (such as taking children to school) and undertaking relevant courses as part of a community sentence.[3] A curfew of 16 hours may lead to frustration with the system and a return to crime. Furthermore, such a sentence could contain the offender in premises where they may perpetuate or fall victim to domestic violence, abuse or neglect. The lengthening of curfew is particularly inappropriate in the case of children for these reasons, 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 67 has been copied for children in clause 75 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 adults and to the Convention's requirement to take into account the desirability of reintegrating children into the community as productive adults.[4] We therefore believe that clauses 67 and 75 should be removed from the Bill.

11. Our first two amendments would leave out clauses 67 and 75. The second two would limit the application of curfews between 12 and 16 hours only to cases where the custody threshold would have been passed but for the availability of curfews between

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

[3] See the Criminal Justice Alliance briefing for HL Committee Stage, December 2011, p4 and research referred to therein available at http://www.criminaljusticealliance.org/docs/CJALASPO_LordsCommitteStage20-12-11FINAL.pdf

[4] See Article 40 UNCRC.

12 – 16 hours. This is intended to encourage sentencers to give effect to the Minister's stated intention 'that the provision will replace sentences where people would otherwise have gone to custody'.[5]

Clause 83 and Schedule 11 – Amendment of enactments relating to bail

Page 196, [*Sched 11, para 12*], leave out lines 31 to 34 and insert:

(a) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or

(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.

Page 197, [*Sched 11, para 23*], leave out line 45. Page 198, *[Sched 11, para 23]* leave out lines 1 to 5 and insert:

"(2) For sub-paragraph (b) substitute:

(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

Page 198, line 28 [*Sched 11, para 27*], leave out from "would" to end of line 36 and insert:

"(i) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or

(ii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

[5] *Hansard*, Committee debate, 14th sitting, House of Commons 15 September, 2011, col 460, Parliamentary Under Secretary of State (Crispin Blunt MP).

12. Schedule 11 to the Bill would subject bail in adult cases[6] where a person has been accused or convicted of an imprisonable offence, or where a person has been released on bail but fails to surrender to custody, to a new test where bail could not be withheld if there were no real prospect that the person would receive a custodial sentence upon conviction, unless he might, if released on bail, commit an offence involving domestic violence. It would also remove the court's power where an adult was accused or convicted of a non-imprisonable offence to remand them in custody on the current available grounds: likelihood of failure to surrender to custody and/or previous arrest for breach of bail, to commit offences or interfere with witnesses/obstruct the course of justice – but would create a new ground for withholding bail on the grounds that he might commit an offence involving domestic violence.

13. Whilst we commend the laudable aim of preventing remand in custody where it is unnecessary and we share the Government's concern as to the draconian impact this has on people's lives, JUSTICE is concerned that the new test leaves no residual discretion to the court to withhold bail even where there is strong evidence that a defendant will commit a violent offence, intimidate witnesses or otherwise interfere with the course of justice on bail. The exceptions in the Bill relating to domestic violence are, we believe, confined to too narrow a class of case, providing no protection for other deserving grounds – for example where there is a substantial risk of violent intimidation of a victim of crime not of the same household as the defendant.

14. We further question the new 'no real prospect' test: first, it may be very difficult for a court at an early stage in criminal proceedings (or even up to the end of a trial/guilty plea) effectively to assess any likely sentence in the case; and secondly, there may be a legitimate expectation created by its conclusion that there is no such real prospect. The sentencing court with full relevant information before it may, however, take a different view of the case and there should be no question of its being influenced or, particularly, bound by the court's earlier view.

15. Our amendments therefore encompass a wider range of grounds for withholding bail whilst recognising that bail should not be withheld on the grounds of likelihood of

[6] Except those to which s25 Criminal Justice and Public Order Act 1994 applies, that is to say, a person charged with or convicted of homicide or rape after a previous conviction for such an offence.

failure to surrender to custody in minor cases. Furthermore, clearer guidance could be given to the courts about when to withhold bail. This would retain their discretion to use their remand powers where the circumstances genuinely require it.

Clause 113 – Abolition of certain sentences for dangerous offenders

16. We welcome the Minister's conclusions that indeterminate sentences have proved unworkable and that these will be repealed. Many people have been detained for far longer periods under sentences of imprisonment for public protection (IPP) than is proportionate to their crime and in ways completely unforeseen when the scheme was initiated. As the Minister has indicated, it was an unmitigated disaster which has left people languishing in prisons with their release date entirely uncertain.[7]

17. We certainly support the repeal of sections 225(3) to (4) and 226(3) to (4) to ensure no further convicted people are sentenced to an IPP. However, what is not clear is how the problem of those currently serving an IPP who should be released will be resolved (see *clause 117*).

Clause 114 – Life Sentence for second listed offence

Page 91 [*clause 114*] leave out clause

18. We are extremely concerned to see that the proposed method of mitigating the anticipated effect of repeal of the IPP is to create new mandatory sentences of life imprisonment.

19. Mandatory life sentences are currently limited to murder. The sentence was applied to murder when the death penalty was repealed.[8] The reasons for this can be gleaned from Sydney Silverman MP who introduced the private member's bill which led to the final repeal of the death penalty for all homicide offences:

[7] The Today Programme, BBC Radio 4, 26th October 2011

[8] Under the Homicide Act 1957 and thereafter the Murder (Abolition of the Death Penalty) Act 1965.

> But what is true, and what I would advise the House not to depart from, is that murder, whether grave, or not so grave, is a crime unique, a crime in its own category, and a crime which society is bound to condemn by enacting a mandatory sentence for it, whatever happens afterwards in the administration of it.[9]

20. The Law Commission recommended in 2006 that homicide should be categorised to limit the mandatory life sentence further to the most serious types of murder.[10] However, the previous Government in a subsequent summary of responses to its consultation paper reiterated:

> The mandatory life sentence reflects the seriousness of killing with an intention to at least cause serious harm and was supported by Parliament during the passage of the Criminal Justice Bill in 2003. The penalty for murder is an essential element in maintaining public confidence in the justice system which this government will maintain.[11]

21. In any event, suggesting that there is a need for a mandatory life sentence ignores the current sentencing framework which already provides for severe penalties for serious crimes. Rape and inflicting grievous bodily harm with intent both already carry maximum life imprisonment sentences by statute; the sentencing guidelines for serious assault and sexual offences already indicate sentences ranging between 9 to 12 years and 6 to 19 years respectively.[12] These guidelines are developed by experts considering carefully and independently the complexities the sentencer has to take into account. The judiciary is best placed when considering *the particular circumstances* of the offence to decide the appropriate custodial term *in their*

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[9] HC Deb 25 June 1965 Vol 714 c2191

[10] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304, November 2006, paras 1.35-1.38

[11] Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law - Summary of responses and Government position*, CP(R) 19/08, 14 January 2009 , para 121. See also Maria Eagle (then Justice Secretary):

> Murder is the most serious crime and it is essential that the law reflects this. The Government remains committed to retaining the mandatory life sentence and the sentencing principles for murder set out in the Criminal Justice Act 2003 (Ministry of Justice Press Release, *Government launches consultation into review of murder law*, 12 December 2007)

[12] Sentencing Council, *Assault Definitive Guideline* (13 June 2011); Sentencing Guidelines Council, *Sexual Offences Act 2003 Definitive Guideline* (2007)

experienced discretion. If the circumstances merit a life sentence, ss225 and 226 of the Criminal Justice Act 2003 already provide this sentence.

22. Notwithstanding our principled concerns to the creep of mandatory sentencing, whilst it is clear that conditions have been thought through in the proposed amendments to limit the impact of this sentence and avoid a repeat of the thousands of IPPs that inadvertently occurred following the introduction of the 2003 Act, the proposed amendment does not sufficiently limit the mandatory sentence either. The Minister has indicated that the mandatory life sentence should be *reserved for the most serious of crimes such as violent rape which without medical advances would have resulted in murder*.[13] Yet schedule 16 includes an extremely wide range of offences to which the seriousness and previous offence conditions proposed in clause 114 can attach. This list must be reduced to reflect the crimes the Minister has intended to be caught by this sentence.

23. 'Seriousness' is defined in new s224A(3) as an offence such as to justify the imposition of a sentence of imprisonment for 10 years or more. There is no further indication of what the appropriate term for the life sentence should be. In contrast schedule 21 of the Criminal Justice Act 2003 sets out in detail how minimum terms for mandatory life sentences for murder should be approached and provides categories from whole life terms down to 12 years. This schedule has been criticised by the present Government as overly prescriptive and in need of reform.[14] Yet with such a wide range of offences attracting a possible mandatory life term under the proposed amendment, there seems to be a distinct lack of clarification about which offences the Government considers need mandatory life sentences and how the judiciary should approach this obligation. This must be rectified in order to avoid inadvertent sentences.

24. We recognise that concerns remain about dangerous offenders being released into the community who may commit further offences. We do consider these to be misguided. It is almost impossible to guarantee this aim without subjecting people to draconian, uncertain and arguably unlawful detention past their judicially imposed tariffs. The Prison Reform Trust's report on IPPs in 2010 acknowledged that the

[13] Today Programme, *supra.*

[14] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, para 170

problem with this type of sentence is that prisoners simply do not leave custody. This is because the Parole Board is overstretched and highly risk averse, the necessary 'offending behaviour programmes' are scarcely available and limited in their scope and effectiveness, and it is inherently difficult to demonstrate reduced dangerousness and pass the high safety threshold for release.[15] These problems will remain with the alternative sentence proposed. The law and traditions of this country dictate that people must be punished only for the crimes they have committed, not what they may potentially commit at some unknown point in the future. Whist the public may have strongly felt concern about the danger posed by serious crime, it is the Government's duty to explain the low nature of this risk. That thousands remain in prison because of a failure to appease public concern through accurate and sober information provision is astounding.

25. The most effective way to ensure prisoners are not released to commit further dangerous offences is to firstly allow the courts to impose a life sentence where the circumstances require it, and to allow the Parole Board to determine in accordance with its existing powers when to release.[16] In order to do so, *effective* offender behaviour programmes must be available and a suitable plan to release that reflects the NOMs seven reducing reoffending pathways,[17] i.e. housing, employment and support, is necessary. In this way, resources can be focussed on the small number of offenders who may genuinely pose a danger and realistically manage that risk.

26. In JUSTICE's view the mandatory life sentence should be reserved for murder. By doing so the punishment underlines the distinctly serious nature of taking another person's life. The existing sentencing provisions for other serious offences are already drawn widely enough to impose lengthy custodial terms and where the circumstances require, life sentences, even with the necessary abolition of the IPP. We do not agree that a case has been demonstrated to support the extension of the mandatory life sentence in the way proposed.

[15] J Jacobson, M Hough, *Unjust Deserts: imprisonment for public protection* (PRT, 2010)

[16] Pursuant to section 28(6)(b) of the Crime (Sentences) Act 1997: the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

[17] National Offender Management Service, *National Reducing Re-offending Delivery Plan* (2005).

Clause 117 - Power to change test for release on licence of certain prisoners

27. Clause 117 will introduce the power to change the test for release on licence of certain prisoners by order. It is not clear what 'conditions specified in the order' will be required to achieve this. These were not indicated in Debate. We do not agree that this should be determined at a later date by way of secondary legislation unless the proposed conditions are indicated. It is unacceptable to leave those sentenced to an IPP in prison past their tariff any longer than is absolutely necessary, particularly given the Government's acknowledgement of the failings of the sentence. Amendment 180 proposes that within 3 months of enactment, the Minister should report to Parliament that plans have been made for the release of all current IPP prisoners. We support this amendment, though it must be limited to those whose tariff has expired/is approaching expiry.

28. We hope that the Minister will be able to reassure the House that sufficient resources have been allocated to ensure that the Ministry and the Parole Board are able to carry out this function swiftly and accurately.

Clause 120 – Transit of prisoners

Page 100, clause 120, leave out clause

29. Clause 120 would allow the transit of prisoners/detainees through the UK (except Scotland) who have been sentenced/detained by foreign criminal courts or by foreign laws similar to the Repatriation of Prisoners Acts and are being sent to third countries. JUSTICE has serious human rights concerns about this provision, which would raise the prospect of the UK detaining and allowing transit through its jurisdiction of a person who may a) have been imprisoned after an unfair process/trial and/or subject to inhuman/degrading treatment or torture; b) may have been removed from the state from which he/she arrived in UK territory illegally and/or contrary to international human rights law/refugee law and/or c) may be on his/her way to a state where he/she may be subject to further human rights violations eg re right to life, prohibition on torture/inhuman or degrading treatment (including by prison conditions), or unfair trial. We note that in Committee the Minister gave an assurance regarding the death penalty, but our concerns regarding other major human rights violations are not allayed.

30. While the Human Rights Act 1998 (HRA) would of course apply in these circumstances, so that the Minister would be in breach of s6 HRA if, for example, a person was transferred out of the UK under this provision to a state where they were at real risk of torture or inhuman or degrading treatment, there is a risk that firstly, violations occurring in the sending state (eg unfair trial) or the likelihood of violations in the receiving state (eg re prison conditions) will not be known to the Minister and further, that the timescale will not allow for these concerns to be properly aired and investigated in a fair process that gives the prisoner/detainee the right to make representations. There is no provision in clause 105 for the detainee to claim asylum in the UK, to appeal against his removal from the UK to the receiving state or to alert the Minister to the likelihood of human rights violations in the receiving state or to those that have occurred in the sending state.

31. Article 3 of the European Convention on Human Rights prohibits the removal of a person to a state where they are at real risk of being subjected to torture or inhuman or degrading treatment or punishment and mandates the state to conduct an independent and effective investigation into allegations of Article 3 ill-treatment. Article 13 ECHR requires a person to be given an effective remedy if their ECHR rights are violated; Article 6 fair trial obligations, including the right to access to a court, may also apply in these circumstances. Further, Article 3 of the UN Convention Against Torture prohibits a state from expelling, returning or extraditing a person to a state where there are substantial grounds for believing that he would be subjected to torture.

32. We therefore oppose the inclusion of this clause in the Bill. If the UK is to be party to 'transit' arrangements, which we do not support due to the inherent risks of human rights violations that are difficult to investigate in the UK but where the UK's responsibility is engaged by the transit, then such orders should be made by the High Court in a transparent, Article 6 compliant judicial process where the prisoner/detainee is present and represented.

Clause 128 – Offences of threatening with article with blade or point or offensive weapon in public or on school premises

Page 110 [*Clause 128*], leave out lines 6 to 16

Page 110 *[Clause 128],* line 117 after 'in considering' leave out from 'whether' until 'sub-section (5)' and insert 'sub-section (4)'

Page 110 *[Clause 128]*, leave out lines 14 to 25

Page 110 *[Clause 128],* line 26 after 'in considering' leave out from 'whether' until 'sub-section (7)' and insert 'sub-section (6)'

33. 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 128*), 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. There are already voluminous offences on the statute books.

34. We are, however, strongly opposed to the clause's presumptive minimum sentences of 6 months' imprisonment for adults and 4 months for children aged 16 or over, for these offences. 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).

35. In particular, extending the mandatory sentence to require young people to serve an automatic term of detention ignores the causes of gang related weapon offences, the vulnerable position many young offenders are in and ultimately will reinforce their criminal activity rather than stemming it.[18] The SCYJ has said in its briefing on this clause:

> Children and young people carrying knives do so for reasons of fear and fashion and have little understanding of the distant consequences of the courtroom and prison cell…. Knife crime is a very serious problem, particularly in some urban areas. However, latest statistics suggest that the problem is lessening and thus that existing sentences and prevention programmes are working.[19]

36. Our suggested amendments would therefore remove the presumptive minimum sentences from this clause. We would retain the duty set out in s44 Children and Young Person's Act 1933 to consider the welfare of the child when sentencing for the new offence.

Rehabilitation of Offenders

After 'End of rehabilitation period for offenders under 18 at date of conviction' in respect of each sentence' substitute:

'Beginning with the day on which the sentence is completed, the end of the period of x months or upon reaching majority, whichever is the soonest'

37. Amendment 185F introduces the reduced periods prior to which an offender is considered rehabilitated for the purposes of declaring a conviction. We welcome the reduced periods reflected in these amendments which will greatly assist previous offenders who are trying to rebuild their lives and move on from their crimes.

[18] SCYJ, *Custody for Children: The Impact* (February 2010) http://www.scyj.org.uk/files/the_impact_of_custody_-_position_paper_FINAL.pdf

[19] Available on the SCYJ website http://www.scyj.org.uk/

38. We are disappointed that the Government has chosen not to draw a line under the criminal acts of children by wiping their slates clean on reaching majority, reflecting the spontaneous and often peer led nature of youth offending which should not blight the attempts of young adults to forge their future careers. Our amendment allows for this to occur.

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