

**Legal Aid, Sentencing and Punishment of  
Offenders Bill**

**Briefing for Committee Stage  
House of Lords  
Tuesday 20 December 2011**

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### **About the Criminal Justice Alliance**

The Criminal Justice Alliance (CJA) is a coalition of 64 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system.<sup>1</sup> The CJA works to establish a fairer and more effective criminal justice system.

### ***Introduction***

This briefing highlights the main areas of interest for the Criminal Justice Alliance in the *Legal Aid, Sentencing and Punishment of Offenders Bill*. We welcome a number of measures contained within the bill, including: extending the criteria for suspended sentence orders, the removal of barriers to the use of the Mental Health Treatment Requirement, restrictions on the use of remand and the abolition of the indeterminate sentence of imprisonment for public protection (IPP). All of these measures will allow for a more effective and efficient use of resources at a time when this is particularly pressing. Importantly, this package of proposals recognises that the huge overuse of prison over the last 20 years has had damaging consequences for individuals, families and communities, and that more effective options are available.

We have, however, serious concerns regarding the following provisions: extending curfew hours for those serving a community sentence to a new maximum of 16 hours per day; the imposition of conditional cautions by the police without referral to the Crown Prosecution Service; the extension of mandatory sentencing; the introduction of mandatory custodial sentences for 16 and 17 year olds convicted of certain knife crime offences.

There would, in our opinion, be negative consequences as a result of the introduction of all of these measures, and we would advise against them. Our concerns are set out in greater detail below.

## **PART 1 - LEGAL AID**

### ***Clause 12: Advice and assistance for individuals in custody***

The CJA is extremely concerned by the inclusion of Clause 12 of the Bill, which states that the provision of initial legal advice and assistance for those arrested and held in police custody, is available “*if the Director has determined that the individual qualifies for such advice and assistance in accordance with this Part*”.

This removes the current automatic entitlement to free legal advice for all in such circumstances, and allows for the introduction of a future means test. Jonathan Djonogly has stated that the government has no immediate plans to introduce means testing, but stated that “Clause 12 does not require means-testing. Rather it provides for flexibility to make regulations to apply means-testing if it were considered appropriate to do so in future.” (HC Official Report, 8 September 2011, col 436).

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<sup>1</sup> Although the CJA works closely with its members, this briefing should not be seen to represent the views or policy positions of each individual member organisation. For a full list of the CJA’s members, please see <http://www.criminaljusticealliance.org/organisations.htm>

Such a provision could have profoundly damaging consequences for individuals who are arrested, including miscarriages of justice, and is squarely at odds with the principles of a fair, and indeed civilised, criminal justice system. Additionally, we would question just how workable such a provision would be in practice, given, for instance, the tight timescales within which the police operate. The CJA would like to see Clause 12 removed from the Bill.

### **PART 3 - SENTENCING AND PUNISHMENT OF OFFENDERS**

#### ***Clause 60 and 61: Duty to consider a compensation order and to give reasons for and explain the effect of a sentence***

The CJA welcomes the duty, in Clause 60, for courts to consider making a compensation order. However, there is a significant omission in the Bill with regards to restorative justice. The CJA, along with Restorative Justice Council and Prison Reform Trust, recommend the bill be amended to place a duty on criminal justice agencies to offer restorative justice to all victims of crime pre-sentence, whenever an offender pleads guilty and agrees to participate in the process, and where it is safe and appropriate to do so.<sup>2</sup>

Additionally, we welcome the duty, in Clause 61, for courts to give reasons for and explain the effect of a sentence in ordinary language: this is important to aid the understanding of both victims and offenders, and indeed, local communities and the general public. However, we echo the concern raised by JUSTICE, a member of the CJA, in their Briefing for the Public Bill Committee<sup>3</sup> about the order-making power granted to the Lord Chancellor to except cases from this duty, since it is difficult to imagine circumstances in which it would not be appropriate to provide an explanation of the sentence.

We are very concerned about the omission of the current duties on courts to explain their consideration of the thresholds for both custodial and community sentences. The seriousness of a custodial punishment merits appropriate consideration and an explanation of why a high level community order has not been imposed. The current duties are an integral part of ensuring that sentences passed are fair and proportionate, and they should be retained.

#### ***Clause 63: Breach of a community order***

The CJA welcomes, albeit cautiously, the introduction of fines as a possible response to breach of a community order. This will allow sentencers greater flexibility in this area, and so enable them to impose sanctions for breach that are appropriate given the specific circumstances of the breach. However, we would emphasise the need for any fine imposed to be means-tested. A report by Revolving Doors, a member of the CJA, has highlighted the problematic nature of financial penalties that are not linked to an individual's income and ability to pay, observing that "these fines may lead people to resort to crime as a means of getting the money to pay the fine."<sup>4</sup> We would also recommend that, given the low incomes and limited financial means of many offenders, the maximum fine available to sentencers should be reconsidered, and lowered.

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<sup>2</sup>Criminal Justice Alliance (2011) *Restorative Justice: Time for action*.

<sup>3</sup> Available at <http://www.justice.org.uk/data/files/resources/284/LASB-HCCS.pdf>

<sup>4</sup> p.91; Pratt, E. and Jones, S. (2009) *Hand to mouth: The impact of poverty and financial exclusion on adults with multiple needs*, London: Revolving Doors.

### ***Clause 64 & 65: Suspended sentence orders***

The CJA is pleased that the Bill extends the criteria for suspended sentence orders, so that custodial sentences of up to two years may be suspended. However, there must be clear guidance on when a suspended sentence should be given to prevent inappropriate or over-use. Evidence shows that suspended sentences can be used where a community order would have been more appropriate.<sup>5</sup>

We welcome the introduction of flexibility around the imposition of community requirements. This clearly recognises that the threat of custody imposed by a suspended sentence order is a significant punishment in itself, and that adding a community requirement may be an unnecessary addition; it also allows for the possibility that community requirements may not be appropriate in every case, and that this will depend on the individual circumstances.

### ***Clause 67: Curfew requirement***

The CJA has concerns about the extension of the maximum hours of curfew as part of a community order from twelve to sixteen hours per day. We have seen no evidence that this measure would reduce reoffending, and believe it will cause severe disruption to employment opportunities, caring responsibilities and rehabilitation, such as alcohol or drug treatment. It is well established that employment has a significant part to play in reducing reoffending; a seminal report by the Social Exclusion Unit, published in 2002, highlighted that employment reduces the risk of reoffending by between a third and a half.<sup>6</sup> However, as the National Audit Office has reported, curfew orders of up to twelve hours can limit the employment opportunities available to offenders;<sup>7</sup> curfew orders of up to sixteen hours will have an even more constraining effect, and could pose a real barrier to finding work.

Extended curfew hours could also have a severe impact on offenders who have caring responsibilities, and may put them in the position of having to breach their order so that they are able to fulfil their responsibilities. Since many of those who are primary carers, such as lone parents, are women, such a measure could have a disproportionate impact upon female offenders. Additionally, many offenders have multiple and interrelating needs, including drug or alcohol dependency or mental health problems; for such individuals, such an order may actually prove an obstacle to changing their behaviour by preventing them, through its onerous requirements, from engaging with a range of appropriate support. For offenders with such needs, who are likely to have chaotic lifestyles, imposing orders with extended curfew hours may be setting them up to fail. We also believe that the extended maximum hours would represent a severe restriction of an individual's liberty that cannot be appropriate within the context of a community sentence.

### ***Clause 69: Mental health treatment requirement***

The CJA supports the removal, under Clause 69, of the need for a psychiatrist's report for the imposition of a Mental Health Treatment Requirement (MHTR). The MHTR has been woefully underused since its introduction through the Criminal Justice Act 2003; although 40% of offenders on community orders are thought to have a diagnosable mental health

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<sup>5</sup> P.42: Justice Select Committee (2008) *Towards Effective Sentencing: Fifth Report of Session 2007-08*.

<sup>6</sup> Social Exclusion Unit (2002) *Reducing reoffending by ex-prisoners*, London: ODP.

<sup>7</sup> National Audit Office (2006) *The electronic monitoring of adult offenders*, London: The Stationery Office.

problem,<sup>8</sup> in 2009, for instance, just 809 MHTRs commenced out of a total of 231,444 requirements issued with community orders.<sup>9</sup> A report by the Centre for Mental Health, a member of the CJA, has identified the requirement for a full psychiatric report as “the biggest barrier to the creation of an MHTR”<sup>10</sup>, and we therefore welcome a more flexible approach.

### ***Chapter Two: Bail***

We very much welcome the restrictions placed on the use of remand so that remand is not available to sentencers where there is no real prospect that an individual will receive a custodial sentence upon conviction. The use of remand where a custodial sentence is not, finally, imposed, can result in unnecessary disruption, including the loss of employment and housing, which can contribute to further offending behaviour.

The use of remand can have a particularly damaging effect on women, who are often the primary carers of children, as well as lone parents responsible for the maintenance of the family home. The overuse of remand - in 2009, one-third of women offenders remanded in custody did not go on to receive a custodial sentence<sup>11</sup> - results in the needless separation of children from their mothers, and the loss of accommodation. This provision should serve to limit this damaging use of custodial remand for women.

### ***Clause 113: Abolition of indeterminate sentence for public protection***

The CJA welcomes the abolition of ‘certain sentences for dangerous offenders’, including the abolition of the indeterminate sentence of imprisonment for public protection (IPP). The IPP is a flawed and unjust sentence that has been vastly overused, and many IPP prisoners have served sentences well in excess of their tariff; according to a report published by the Prison Reform Trust, a member of the CJA, in June 2010, just 4% of all prisoners who had completed their tariffs had, by this point, been released.<sup>12</sup>

While this abolition is welcome, the government needs to set out a clear and immediate plan of action to help move current IPPs prisoners through the system, ensuring adequate course provision and specific support for prisoners with mental health problems or learning difficulties.

### ***Clause 114: Life sentence for second listed offence***

Current sentencing legislation provides for just one mandatory life sentence, for murder. The extension of mandatory sentencing, as proposed by the Government amendments, would therefore be a significant step. We have two main concerns of principle in relation to the introduction of further mandatory sentences.

Firstly, there is no empirical evidence that this type of sentencing regime reduces crime through deterrence. Indeed, Andrew Ashworth, Professor of Law at Oxford University and

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<sup>8</sup> Khanom, H., Samele, C. and Rutherford, M. (2009) *A missed opportunity? Community sentences and the Mental Health Treatment Requirement*, London: Centre for Mental Health.

<sup>9</sup> Ministry of Justice (2010) *Offender management caseload statistics 2009* - available at <http://www.justice.gov.uk/publications/docs/omcs-2009-complete-210710a.pdf>

<sup>10</sup> p.5: Khanom, H., Samele, C. and Rutherford, M. (2009) *A missed opportunity? Community sentences and the Mental Health Treatment Requirement*, London: Centre for Mental Health.

<sup>11</sup> Ministry of Justice (2010) *Statistics on women and the criminal justice system* - available at <http://www.justice.gov.uk/statistics-women-cjs-2010.pdf>

<sup>12</sup> Hough, M. and Jacobson, J. (2010) *Unjust deserts: Imprisonment for public protection*, London: Prison Reform Trust.

Chairman of the Sentencing Advisory Panel from 2007-9, has said that such sentences “are unworthy of any government that purports to engage in evidence-led policy-making”.<sup>13</sup>

Secondly, sentences of this type remove discretion from sentencers, and impose a ‘one size fits all’ approach that does not allow the specific circumstances of an offence to be fully taken into account. As such, they can lead to the disruption of proportionality and consistency in sentencing. The Sentencing Council, the introduction of which the CJA fully supported, has done much to inject a greater degree of clarity and consistency into sentencing, and we would recommend against any measures that work against these efforts. There are already long, determinate sentences available for serious offences, and judges should, therefore, be allowed the discretion needed to sentence appropriately.

Finally, whilst the Justice Secretary 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, the proposed amendment does not limit the mandatory sentence to these types of crime. The Justice Secretary has said that the sentence would probably apply to “20 or so” people. However, when IPPs were introduced by the Labour Government, the then prisons Minister estimated they would result in an additional 900 in the prison population - a gross underestimation.

#### ***Clause 115: Extended sentences for violent and sexual offences***

The CJA would raise the following issues for parliament to consider in relation to these proposals. Firstly, the list of specified violent and sexual offences, that could mean that an offender is eligible for an extended sentence, is extensive. As such, it is likely that many offenders who currently receive determinate sentences, and are automatically released on licence having served half of their sentence, will be released at the two-thirds point under the new regime. This could have a significant effect on the prison population, as could the introduction of extended licence periods, since many offenders will be eligible to be recalled to prison for much longer periods of time. These measures are also very likely to have an impact on probation resources. Given the current strain on the prison estate (more than 60% of prisons in England and Wales are currently overcrowded<sup>14</sup>) and on offender management in the community, we believe that there is an urgent need for a comprehensive resource assessment that sets out the potential impact of these proposals. This must address the future impact on probation services.

In addition, we are concerned that, for those given extended sentences who are only eligible for release on the approval of the Parole Board, some of the problems that have plagued IPPs will resurface, included a lack of access to Offending Behaviour Programmes and an overstretched Parole Board that is, quite simply, unable to manage the workload expected of it. The Government needs to clearly set out how it intends to deal with such problems.

#### ***Clause 118: Employment in prisons***

We are concerned by the inclusion of a provision that allows for some of a prisoner’s earnings from employment in prison to be paid to him or her before or after release “on fulfilment by the prisoner of prescribed conditions”. We firmly believe that, upon release, prisoners should be able to access money that they have legitimately earned without the

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<sup>13</sup> *Ibid.*, p. 228.

<sup>14</sup> <http://www.justice.gov.uk/downloads/publications/statistics-and-data/hmps/prison-population-monthly-sept-2011.doc>

imposition of any additional conditions; to impose any conditions upon the receipt of these earnings would be unfair and, indeed, exploitative.

### **Clause 122: Conditional cautions**

The CJA does not support the inclusion of Clause, which allows for conditional cautions to be issued without referral to the Crown Prosecution Service. Given that conditional cautions can result in onerous conditions, the oversight of the CPS is appropriate, to ensure that the conditions are proportionate and achievable. In addition, giving the police powers to authorise conditional cautions will increase the bureaucratic burden on the police, at a time when they are trying to reduce costs and bureaucracy.

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

We are extremely concerned about the proposals to introduce a mandatory minimum custodial sentence of four months for 16 and 17 year olds convicted of knife offences under clause 128 of the Bill. The evidence of the deterrent value of such sentences is non-existent.<sup>15</sup> Indeed, it should be remembered that deterrence is not listed as one of the statutory purposes of sentencing for juvenile offenders under the *Criminal Justice Act 2003*.

Additionally, custodial sentences are ineffective in addressing the complex social problems underlying such behaviour, as is clear from the high rates of reoffending for juveniles leaving prison: the most recent figures from the Ministry of Justice show a 71.9% proven reoffending rate for under-18s leaving custody.<sup>16</sup> It is also worth noting that a report published recently by HM Inspectorate of Prisons and the Youth Justice Board, on the experiences of 15-18 year olds in prison, found that 92% of sentenced young men and 93% of sentenced young women said they wanted to stop offending; however, only 47% of young men and 56% of young women said that they had done something, or that something had happened to them while they had been in custody, that would make them less likely to offend in the future.<sup>17</sup>

There has, in recent years, been a significant and welcome decline in the number of children and young people in custody, and we are concerned that the implementation of these proposals could undo the important work that has been done in this area.

## **Additional Issues**

### **17 year olds held in police custody**

The National Appropriate Adult Network, a member of the CJA, has highlighted the anomalous position of 17 year olds held in police custody; under the Police and Criminal Evidence (PACE) they are classed as and treated as adults, meaning that they are not

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<sup>15</sup> Ashworth, A. (2010) *Sentencing and criminal justice*, Cambridge: Cambridge University Press.

<sup>16</sup> Ministry of Justice (2011) *Reoffending of juveniles: Results from the 2009 cohort* - available at <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/juvenile-reoffending-statistics-09.pdf>

<sup>17</sup> HM Inspectorate of Prisons and Youth Justice Board (2011) *Children and young people in custody 2010-11: An analysis of the experiences of 15-18 year olds in prison* - available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/children-young%20people-2010-11.pdf>

entitled to the support of an appropriate adult. We fully support NAANs recommendation that 17 year olds in the police station have the same rights as other children. The Bill should be amended to correct this anomaly.

In addition, there is a requirement under the PACE Codes to have an appropriate adult present for interview, all ID procedures and general support and advice for all 'vulnerable adults' detained in police custody. However there is no corresponding duty on any statutory body to ensure the provision of this service for vulnerable adults. In the case of juveniles (those under 17) The Crime and Disorder Act (1998) gave that statutory responsibility to the local authority (through the Youth Offending Team). The CJA supports NAAN in pressing for an amendment to the LASPO Bill which would extend the LA's existing statutory responsibility for appropriate adult services for juveniles to include responsibility for those services for vulnerable adults as well.

### **Young Adults**

The Criminal Justice Alliance is disappointed that the Bill does not take the opportunity to set out a coherent strategy for young adults in the criminal justice system. The opportunity should be taken to repeal previous legislation that scrapped Detention in a Youth Offender Institute, and further commitments should be made on the supervision and support for ex-prisoners in this age group.

### **Women**

We are very concerned by the lack of provisions in the Bill relating to women offenders. The female prison population has grown from 1,561 in 1993 to over 4,000 today. The authoritative report by Baroness Corston has clearly set out recommendations for change that have received widespread political and justice sector support. The CJA therefore supports proposals for a cross-government strategy on women and a designated minister with responsibility for its delivery across government departments and local authorities.

### **Rehabilitation of Offenders Act**

We welcome the government's commitment to bring forward amendments to the Bill that will reform the *Rehabilitation of Offenders Act 1974*. This Act was previously reviewed in 2002 and the resulting report, *Breaking the Circle*, recommended urgent measures.

### **Restorative Justice**

The CJA, along with Restorative Justice Council and Prison Reform Trust, recommend the bill be amended to place a duty on criminal justice agencies to offer restorative justice to all victims of crime pre-sentence, whenever an offender pleads guilty and agrees to participate in the process, and where it is safe and appropriate to do so.<sup>18</sup>

**Criminal Justice Alliance, December 2011**

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<sup>18</sup>Criminal Justice Alliance (2011) *Restorative Justice: Time for action*.