



Legal Aid, Sentencing & Punishment of Offenders Bill House of Lords, Second Reading - 21 November 2011

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The *Breaking the Cycle* Green Paper presented a coherent programme of legislative reform to reduce unnecessary use of imprisonment. Such reform is designed to make better use of scarce public funds and ameliorate the damaging effects of populist criminal justice legislation from the past two decades.

The Bill contains many important features of the Green Paper. It has, however, lost some of its clarity of purpose. We hope that the debates in the House of Lords will provide an opportunity to scrutinise the Bill in greater detail than was achieved in the House of Commons, enabling it to be strengthened to help create a fairer and more effective justice system. This briefing focuses on key clauses to Part 3:

- Community Sentences (Clause 61-63)
- Curfews (Clauses 67 & 75)
- Youth Referral Orders (Clause 73)
- Remand (Clause 83 & Schedule 11)
- Electronic Monitoring (Clauses 87 & 88)
- Remands to youth detention accommodation (Clauses 91, 92, 93 & 94)
- Imprisonment for Public Protection (Clauses 113 & 117)
- Life Sentence for Second Listed Offence & Extended Sentences (Clauses 114-116)
- Youth Cautions (Clauses 124-127)
- Knife Crime (Clause 128)

This briefing also identifies a number of omissions from the Bill, including:

- Women in the criminal justice system
- Restorative Justice
- Rehabilitation of Offenders Act 1974
- Young Adults

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Community Sentences (Part 3, Chapter 1)

The Prison Reform Trust welcomes the reforms to Community Orders allowing greater discretion for supervising officers and more flexibility in relation to the drug rehabilitation and alcohol treatment requirements. Ministry of Justice figures reveal that, in 2008, community sentences were 8 per cent more effective at reducing one year proven reoffending rates than custodial sentences of less than 12 months for similar offences.¹ The National Audit Office has estimated that reoffending by former short-sentenced prisoners in 2007-08 cost the economy £7bn to £10bn a year.²

Duty to give reasons for a sentence (Clause 61)

Clause 61 removes the specific duties in section 174 of the Criminal Justice Act 2003 for the court to explain its consideration of the thresholds for imposing a custodial sentence or community order. The clause does maintain the duty required by the Criminal Justice and Immigration Act 2008 for the court to explain its reasons for passing a youth rehabilitation order or custodial sentence for under-18s.

If prison is genuinely to be a punishment of last resort, it should only be imposed after careful consideration of all other options and with a clear statement as to why a community sentence is not appropriate. We understand the need to remove unnecessary administrative burdens on courts, but remain concerned that removing the specific duty to explain when the custody threshold has been passed has the potential to weaken the seriousness with which a custodial sentence is considered. Given this, we would welcome a more detailed explanation from the Minister how this will be averted.

Breach of community orders (Clause 63)

The Prison Reform Trust welcomes the flexibility the Bill would allow a court in dealing with breaches of community sentences. The new options of, where appropriate, taking no action and fining an offender in relation to a breach recognise that a return to court can of itself prove a sufficiently salutary experience. To guard against the excessive use of custody in breach cases, we favour the inclusion of a presumption against custody which can be displaced where there is no reasonable prospect that the offender will comply with supervision.

The Prison Reform Trust is concerned about the provision in Clause 63 which allows a court to re-sentence someone to custody for breach of an order even if the original offence was not serious enough to justify a custodial sentence. For offenders with particular impairments, such as learning disabilities, we are also concerned that community orders are adapted and appropriate to their needs and abilities and that the terms and conditions of the order are fully understood by individual offenders. We hope Ministers will be persuaded to amend the Bill to address these specific concerns.

¹ *Compendium of reoffending statistics and analysis*, Ministry of Justice (2010)

² *Managing offenders on short custodial sentences*, National Audit Office (2010)

Curfews (Clauses 67 & 75)

Clauses 67 and 75 extend the maximum duration curfews for adults and children respectively from 12 to 16 hours a day and from six to 12 months. Curfews are a form of house arrest and should be considered within the spectrum of forms of incarceration and so used proportionately. The Prison Reform Trust is concerned that such increases could result in courts setting offenders, especially children, up to fail and an increased occurrence of breach of community sentences and Youth Rehabilitation Orders (YRO).

Research suggests that many children have difficulties complying with curfews as a result of factors including lack of parental support, domestic violence and living in unsafe accommodation.³ The Prison Reform Trust supported the previous Government's decision to limit a curfew to a maximum of 12 hours a day and last no longer than six months. If Ministers are unable to explain how this measure will reduce reoffending, we believe clause 75 should be deleted from the Bill. Failing that, we hope the Government will at least be persuaded not to increase the maximum number of hours.

Referral Orders for Young Offenders (Clause 73)

The Prison Reform Trust welcomes the reform in Clause 73 requiring that the court no longer has to choose between making a Referral Order and absolutely discharging the young offender. As a result, the court will now be able to choose to conditionally discharge the offender instead. It also allows offenders to receive a Referral Order if they have had one in the past. This gives courts the flexibility needed to respond to individual offences and the specific support needed to reform a child's behaviour. We would support a similar approach being taken with young adults (18-20 year-olds).

Remand (Clause 83 & Schedule 11)

Over 55,000 people are sent to prison each year to await trial. By law, someone appearing before a court to face charges is entitled to a presumption in favour of bail, unless they are charged with serious offences such as murder, manslaughter or rape. However, unlike sentencing, which is proportionate to the seriousness of the offence, bail decisions can be based on the perceived risk that the defendant will fail to appear for trial, intimidate witnesses, or commit further offences.

- In 2009, an estimated 39 per cent of people remanded into custody did not go on to receive a custodial sentence, including around 11,000 who were acquitted without compensation.⁴
- Just under two-thirds of people received into prison on remand awaiting trial are accused of non-violent offences.
- Remand prisoners make up around 15 per cent of the prison population, but they accounted for 50 per cent of self-inflicted deaths in 2010.⁵

³ *Into the Breach* Prison Reform Trust and National Children's Bureau (May 2011)

⁴ House of Commons, Official Report, 11 July 2011: column 76W

Time on remand is a punishment with harmful effects that go beyond the loss of liberty. In 2009, the average time spent on remand, awaiting trial, was 15 weeks. As remand prisoners are held in local prisons, which are typically older and more overcrowded than those for sentenced prisoners, they are more likely to be locked up for most of the day, more likely to be confined two to a cell designed for one, and less likely to have opportunities to work. Moreover, even a relatively short period in custody can result in homelessness, increased debt, family breakdown and loss of employment.

Clause 83 and Schedule 11 establish a test of a reasonable probability that the offence is imprisonable as a criterion of whether the court can deny bail. The “no real prospect test” would mean that defendants should not be remanded to custody if the offence is such that the defendant is unlikely to receive a custodial sentence. The test will not restrict custodial remand for serious crimes, nor where there is a risk that the person will, if released on bail, engage in domestic violence. We hope Peers will support this reform to the Bail Act to ensure people are only held on remand where necessary.

Electronic Monitoring - minimum age (Clauses 87 & 88)

Clauses 87 and 88 set out a series of requirements for electronic monitoring of children between the ages of 12 and 18. The Prison Reform Trust believes that younger children are likely to find compliance with conditions such as electronic monitoring more difficult due to developmental immaturity and lack of understanding of the consequences of their actions. Our research has shown that breach offences account for a disproportionate number of younger children in custody. Last year, for example, one in six 10-14 year olds in custody was imprisoned primarily for breach of an order.

Home Office research has raised concerns that electronic monitoring can also prevent children from participating in legitimate activities, such as team sports, increasing the likelihood of breach.⁶ We believe the desired outcomes of conditional bail or remand to local authority accommodation are better achieved by encouraging positive engagement than the imposition of onerous conditions. We hope that the debates in the House of Lords will persuade Ministers to agree an amendment to raise the minimum age of electronic monitoring from 12 to 14 years-old.

Remands to youth detention (Clauses 91-94)

One third of children remanded to youth detention accommodation are subsequently given community sentences, and so the Prison Reform Trust backs the reforms in clauses 91, 92, 93 and 94, placing two clear sets of conditions on the court before a child can be remanded. We also support the simplified Single Remand Order to address the anomaly of 17 year-olds being treated as adults in remand legislation. As with electronic monitoring, we believe the minimum age for remand to youth detention accommodation should be raised from 12 to 14 years.

⁵ Safety in Custody 2010, England and Wales, Table 8, Ministry of Justice (2011)

⁶ *Understanding electronic monitoring of juveniles on bail*, Home Office (2005)

Imprisonment for Public Protection (Clauses 113 & 117)

The Prison Reform Trust welcomes clause 113, which abolishes the indeterminate sentence of Imprisonment for Public Protection (IPP) and the equivalent sentence of Detention for Public Protection (DPP) for under-18s. To address the difficulties and injustice of holding well over 3,000 people beyond tariff, clause 117 provides the Secretary of State with the powers to change the test for release on license of certain prisoners, namely those serving an IPP sentence or the new proposed extended sentence. Peers will want to satisfy themselves that Clause 117 provides a sound basis for a just and fair release test for people serving IPP and extended sentences. The IPP and DPP sentences, created by the Criminal Justice Act 2003 and amended by the Criminal Justice and Immigration Act 2008, enable the courts to imprison for an indefinite period those convicted of one of 96 'specified' violent and sexual offences who are deemed to be dangerous, but whose offending is not so serious that they qualify for a life sentence.

The new clauses seek to address the consequences of ill drafted legislation which has left thousands of people sentenced to a bureaucratic limbo with little or no hope of gaining legitimate release. As of November 2010, there were 6,375 prisoners serving an IPP or DPP sentence. 3,173 of these prisoners are held beyond their tariff expiry date.⁷ Between implementation of the Act in 2005 and the end of 2010, just 202 people serving IPPs have been released from custody.⁸

An overstretched and risk averse Parole Board and a lack of availability and access to offending behaviour courses are principle reasons for the extremely low rate of release from the sentence. In December 2009, over half of those IPP prisoners who were over tariff were still awaiting a Parole Board review of their case or a decision from a review.⁹ Of the 2,468 people being held beyond tariff in January 2010, 466 had completed no accredited offending behaviour programmes.¹⁰ People suffering from a mental illness and those with an IQ below 80 are barred from attending offending behaviour programmes and so cannot attest to their reduced risk.

Following widespread criticism from, amongst others, the senior judiciary, Prison Governors Association and Independent Monitoring Boards, changes were made to the legislation limiting IPP sentences to those with a minimum tariff of two years and over (equivalent to a determinate sentence of four years). This came into effect in July 2008. However, a study published in 2010 revealed that IPPs were still being passed by the courts at a rate of around 75 per month.¹¹ It is estimated that, at the present rate, by 2015, about 10 per cent of the entire prison population will be serving IPP sentences.¹² The Coalition Government's *Breaking the Cycle* Green Paper consulted on reform of the

⁷ House of Commons, Official Report, 29 March 2011: column 234W

⁸ Table A3.4, Offender Management Caseload Statistics 2010, Ministry of Justice (2011)

⁹ Letter from Maria Eagle MP to Andrew Stunnell MP, 19 January 2010

¹⁰ House of Commons, Official Report, 26 January 2010: column 732W

¹¹ *Unjust Deserts: imprisonment for public protection*, Table 3.1 Prison Reform Trust (2010)

¹² House of Commons, Official Report, 23 November 2010: column 147

IPP and DPP sentences. The Prison Reform Trust put forward a case for their replacement by determinate sentences which provide greater clarity and transparency. Therefore, we welcome the Government's decision now to abolish the IPP and DPP and to reform the release test for prisoners serving IPP sentences.

Life Sentence for Second Listed Offence (Clause 114)

This clause would require the courts to impose a mandatory life sentence on a person aged 18 or over convicted of a specified offence which is serious enough to justify a sentence of imprisonment of 10 years or more; and who, has previously been convicted of a specified offence for which they were sentenced to imprisonment for life or for a period of 10 years or more.

Currently, a mandatory life sentence is restricted to convictions for murder. To breach this principle, even with the allowances for the exercise of discretion by the courts built into the new provisions, could in time be seen as the thin end of the wedge. Mandatory sentences limit the ability of sentencers to take the specific circumstances of the individual case fully into account. Long, determinate sentences are already available for serious offences and judges should be allowed the discretion needed to sentence appropriately.

New Extended Sentences (Clause 115 and Schedule 18)

The Prison Reform Trust would like to see the IPP and DPP sentences replaced by determinate sentences and revert to the use of the discretionary life sentence for adults who genuinely pose a grave risk to society and whose crime merits a life sentence. A return to the 'just deserts' model would enable all concerned to see that the severity of the sentence was proportionate to the seriousness of the offence, taking into account aggravating and mitigating factors.

The calculation of the new Extended Sentence is complex, which could undermine the Government's desire for clarity and transparency in sentencing. Peers may wish to consider whether the new provisions contained in clause 115 and schedule 18 meet the demands of fairness and proportionality. To ensure proper planning and provision we would like to see a comprehensive resource assessment that sets out the potential impact of these proposals.

Youth Cautions (Clause 124-127)

The Prison Reform Trust supports the simplified approach and extra flexibility provided by the new framework for youth cautions in clauses 124-127, particularly the freedom to offer a youth caution to a young person even if (s)he has previously been convicted of an offence or given a youth conditional caution. We also welcome the requirement to refer a young person who has received a caution to the Youth Offending Team (YOT), as this offers the best hope of diverting them from a pattern of offending behaviour.

The Police and Criminal Evidence (PACE) Act 1984 establishes that only those under the age of 17 years old are to be treated as children and therefore questioned or interviewed in the presence of an “appropriate adult”. Seventeen year-olds do not, therefore, enjoy the same safeguards as younger children. Given that Ministers are using this Bill to resolve the historic anomaly of treating 17 year-olds as adults for the purposes of Bail, we hope they will resolve this anomaly for youth cautions too.

Knife Crime (Clause 128)

Clause 128 was added to the Bill to introduce a mandatory minimum six month sentence for adults convicted of using a knife or offensive weapon to threaten and endanger. The Justice Secretary brought forward a further amendment at Report Stage in the House of Commons, introducing a mandatory minimum four month Detention and Training Order (DTO) for 16 and 17 years olds convicted of the same offence. In the debate, Labour proposed the extension of this mandatory sentence to younger children.

There is understandable public concern about knife crime. Young people themselves are most likely to be the victims of this offence. However, mandatory prison sentences fetter the discretion of judges and magistrates. Under the Violent Crime Reduction Act 2006, the courts already have the power to sentence an under-18 year-old to a term of up to four years in prison for possession of a knife in a public place. The latest statistics show that the number of such offences by children in the last quarter reduced by 27 per cent compared to the same period 2 years ago.

We hope that Peers will support the removal of the extension of the new sentence to 16 and 17 year-old children. Under the UN Convention on the Rights of the Child, imprisonment should be used only as a last resort and for the shortest possible time. The impact assessment for this extension suggests that 200-400 more children are likely to be imprisoned as a result. Given that over 70 per cent of children are reconvicted within a year of leaving custody, evidence suggests that imprisonment is rarely rehabilitative for this age group and that other measures, including restorative justice, could be used to better effect.

Women in the criminal justice system

Over the last 15 years, the number of women in prison has more than doubled. Most serve short sentences for non-violent crime. Almost two-thirds of those serving less than 12 months are reconvicted within a year of release. The Home Office commissioned review by Baroness Corston in 2007, made it clear that there are sound social and economic reasons to reform women's justice.¹³ The independent Women's Justice Taskforce has called for greater ministerial accountability and a cross-government strategy to divert women from crime and reduce the women's prison population.¹⁴

When women are sentenced to custody it has a profound impact on family life. Imprisonment will cause a third of women to lose their homes and around 18,000 children are separated from their mothers each year. Just 5 per cent stay in their own homes when their mum goes to jail. Many women offenders have themselves been victims of serious crime, domestic violence and sustained sexual abuse. In 2009, women accounted for 43 per cent of the 24,114 incidents of self-harm in prisons, despite representing just 5 per cent of the prison population.

With clear leadership it should be possible to reduce offending by women and to drive down prison numbers. But addressing the multiple and complex needs of women offenders requires close co-operation across government departments and between national and local agencies. Experience shows this is unlikely and so we hope the Bill will be amended to require the Government to produce a strategy to promote the just and appropriate treatment of women in the criminal justice system and to report annually to Parliament. This proposal is supported by the National Council of Women and other civic society groups.

Restorative Justice for Victims

Restorative justice brings victims and offenders into communication, so that victims can tell offenders the impact of their crime and receive an apology; and so that offenders take responsibility and make amends. Restorative justice is now embedded within the youth justice system. However, according to Victim Support, fewer than 1 per cent of victims of adult crime currently have access to restorative justice.¹⁵ A Home Office research study showed that:

- Most victims agreed to participate in a face to face meeting with the offender;
- 85 per cent of victims said they were satisfied with the process;
- Participation in restorative justice reduced re-offending by 14 per cent.¹⁶

The Restorative Justice Council has estimated that using restorative justice pre-sentence, with 70,000 adult offenders would produce savings of £185 million from

¹³ *The Corston Report: Women in the Criminal Justice System* Home Office (2007)

¹⁴ *Reforming Women's Justice*, Prison Reform Trust (July 2011)

¹⁵ Victim Support (2011), Policy position statement: restorative justice, London: Victim Support

¹⁶ *Breaking the Cycle Evidence Report*, Ministry of Justice (December 2010)

reductions in re-offending alone. In its March 2010 Report, *Cutting Crime: The case for justice reinvestment*, the Justice Select Committee, concluded, “We urge the Justice Secretary to take immediate action to promote the use of restorative justice.”

The Coalition Government made clear its commitment to restorative justice in its Green Paper, and in a recent speech Minister of State, Lord McNally, said;

“Restorative justice is not a soft option Facing up to wrongdoing can be a difficult and unpleasant process, perhaps even more challenging in some ways than some of the more traditional criminal disposals We’re looking across a range of possibilities, including improving use in community resolution to better tackle low-level crime, and embedding the role of victims in restorative justice.”¹⁷

This Bill provides the best opportunity to fulfill these ambitions. We hope that Ministers will add a requirement for restorative justice to be offered to victims of crime.

Rehabilitation of Offenders Act 1974

Employment is one of the keys to reducing reoffending. And yet, for most types of offence, job applications that disclose a criminal record will be rejected for around half of all advertised vacancies. Reforms to the Rehabilitation of Offenders Act 1974 are now urgently needed to enable ex-offenders to overcome this barrier.

Under the current provisions, an adult who had been sentenced to less than six months in prison would see their conviction become “spent” after seven years; an adult who had been sentenced to between six months and 30 months in prison would not see their conviction become “spent” until ten years after conviction. For those under-18, the “rehabilitation period” would be half that of adults. Anyone who receives a sentence of more than 30 months finds that their conviction is never “spent”. Some posts, such as those working with children or vulnerable adults, or in legal or financial positions are rightly exempt from the 1974 Act and so convictions must always be disclosed.

The 1974 Act was a welcome move when it was first introduced and its objectives remain valid. However, given recent increases in sentence length, and what is known about the key drivers to reducing reoffending, it no longer strikes the right balance between protection and resettlement. Despite the evidence, and commitments to reform from a succession of Ministers, the Act remains unchanged and former offenders continue to face serious difficulties securing employment. We therefore strongly support the inclusion of the reforms proposed in Lord Dholakia’s Private Members Bill.

¹⁷ <http://www.justice.gov.uk/news/features/feature270711a.htm>

Young Adults

Young men aged 18-20 years-old are disproportionately represented in the prison population. While pockets of good practice do exist, figures show that prison is not effective in reducing reoffending by this age group, especially those serving short sentences. Her Majesty's Chief Inspector of Prisons, Nick Hardwick, has specifically raised concerns about young adults sentenced to Detention in a Young Offenders Institution (YOI), describing his impression of "*young men sleeping through their sentences*" in HMYOI Rochester¹⁸ and a lack of engagement in work, education and training opportunities across the YOI estate.¹⁹

The criminal justice system is clearly failing to divert impressionable young men from falling into a pattern of offending in the first place and doing little to help them turn their lives around when they do. Given that the most common offences among young adults are theft, robbery, drugs and assault, no-one should pretend that there are easy answers. But for the sake of future victims of crime, a more focussed and intensive approach to rehabilitating young adult offenders is needed.

The Prison Reform Trust has been impressed by the success of the Intensive Alternative to Custody (IAC) schemes run by Greater Manchester Probation Trust and West Yorkshire Probation Trust, which are tailored to the specific needs of young adults. They are achieving good compliance rates and the early indications are that they are also successful in reducing reoffending rates. Experienced probation officers describe the IACs as the first real opportunity that they have had to create requirements that will change offending behaviour. Local magistrates also support the IAC approach.

We believe the Bill should be amended to introduce a requirement to extend the IAC model to young adults under other probation services.

¹⁸ Report of an announced inspection of HMYOI Rochester, HMCIP (June 2011)

¹⁹ HM Chief Inspector of Prisons – Annual Report 2010/11