

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

**Briefing for Second Reading
House of Commons
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About the Criminal Justice Alliance

The Criminal Justice Alliance (CJA) is a coalition of 58 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.¹ 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. Given the very short period of time between the publication of the Bill and the Second Reading, we intend to produce a more detailed briefing in time for the Committee Stage.

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, and restrictions on the use of remand. All of these measures will allow for a more effective, and indeed, a more efficient use of resources, at a time when the need for efficiency and effectiveness is particularly pressing.

We are, however, concerned by a number of provisions, including: a ‘means’ and ‘merits’ test for initial legal advice and assistance for those arrested and held in police custody; extended curfew hours for those serving a sentence in the community, with a new maximum of 16 hours per day; the imposition of conditional cautions by the police without referral to the Crown Prosecution Service; and mandatory minimum sentences for new knife offences. There would, in our opinion, be negative consequences as a result of the introduction of all of these measures, and we would strongly 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, under Clause 12 of the Bill, of a ‘means’ and ‘merit’ test for the provision of initial legal advice and assistance for those arrested and held in police custody, thus removing the current automatic entitlement to free legal advice for all in such circumstances. 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.

PART 3 - SENTENCING AND PUNISHMENT OF OFFENDERS

Clauses 53 & 54: 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 53, for courts to consider making a compensation order. Additionally, we welcome the duty, in Clause 54, 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 would echo the concern raised by JUSTICE, a member of the CJA, in their briefing for the Second Reading of this Bill,² about the order-making power

¹ 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>

² Available at <http://www.justice.org.uk/data/files/resources/284/LASB-HC2R.pdf>

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 would also echo JUSTICE's concern at the omission, under the new Clause 174, of the current duties on courts to explain their consideration of the thresholds for both custodial and community sentences. These duties are an integral part of ensuring that sentences passed are fair and proportionate, and they should be retained.

Clause 56: Breach of a community order

We also welcome, albeit rather 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."³ Taking into account an individual's financial circumstances when imposing any fine will, therefore, need to be addressed. 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.

Clauses 57 & 58: 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, although we would agree with JUSTICE that it is not clear why, to be suspended, a custodial sentence must be a minimum of 14 days. We also 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. As we have set out in the paragraph above in relation to community orders, we welcome, cautiously, the introduction of fines as a possible response to breach of a suspended sentence order, as this will allow sentencers greater flexibility. However, as with fines for breaching a community order, any fine imposed for a breach of a suspended sentence order will need to be means-tested. This will ensure fairness, and will also aid compliance with financial penalties. We would also recommend that the maximum fine available for breach of a suspended sentence order should be lowered.

Clause 59: Programme requirement

We support JUSTICE's opposition to the removal of Sub-clause 202(5) of the Criminal Justice Act 2003 (as set out in Sub-clause 59(3) of this bill), which requires the consent of third parties for programme requirements. As they point out, it is important that providers of programmes have consented to the placement of those on community orders with them: without this consent, productive engagement with a programme requirement can hardly be expected.

Clause 60: Curfew requirement

The CJA is not opposed to extending the maximum length of a curfew requirement as part of a community order from six to twelve months, as this may encourage their use for offenders who would otherwise receive a prison sentence, which is to be welcomed: curfew requirements offer a punitive and preventative alternative to custody that avoids

³ 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.

the disruptive effects of prison sentences, such as loss of housing and employment, and separation from family and friends, all of which can contribute to further offending behaviour. It will be essential, though, that sentencers are provided with guidance to ensure that such orders are used appropriately, and only for those offences that truly merit them. However, we are extremely concerned by the extension of the maximum hours of curfew to sixteen hours per day. 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.⁴ However, as the National Audit Office has reported, curfew orders of up to twelve hours can limit the employment opportunities available to offenders;⁵ 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. In addition, 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 61: Foreign travel prohibition requirement

As JUSTICE highlight in their briefing on the Bill, a foreign travel prohibition requirement could be appropriate in a small number of cases where a community order is imposed, such as cases involving football hooliganism. However, as they set out, strict criteria will need to be set out to ensure that orders are not made routinely or inappropriately.

Clause 62: Mental health treatment requirement

The CJA supports the removal, under Clause 62, 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 problem,⁶ in 2009, for instance, just 809 MHTRs commenced out of a total of 231,444 requirements issued with community orders.⁷ 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"⁸, and we therefore welcome a more flexible approach.

⁴ Social Exclusion Unit (2002) *Reducing reoffending by ex-prisoners*, London: Office of the Deputy Prime Minister.

⁵ National Audit Office (2006) *The electronic monitoring of adult offenders*, London: The Stationery Office.

⁶ Khanom, H., Samele, C. and Rutherford, M. (2009) *A missed opportunity? Community sentences and the Mental Health Treatment Requirement*, London: Centre for Mental Health.

⁷ Ministry of Justice (2010) *Offender management caseload statistics 2009* - available at <http://www.justice.gov.uk/publications/docs/omcs-2009-complete-210710a.pdf>

⁸ 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.

Clause 73: Bail

We welcome the restrictions placed on the use of remand through Clause 73 and Schedule 10 of the Bill, 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 sentence⁹ - results in the needless separation of children from their mothers, and the loss of accommodation, and this provision should serve to limit this.

The further provision inserted through Clause 73 and Schedule 10, that remand should remain an option in cases where there is a risk of domestic violence, provides an appropriate and necessary safeguard, and we are fully supportive of this.

Clause 103: Employment in prisons

We are concerned by the inclusion, through Sub-clause 103(4), 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 imposition of any additional conditions; to impose any conditions upon the receipt of these earnings would be unfair and, indeed, exploitative.

Clause 107: Conditional cautions

The CJA does not support the inclusion of Clause 107, 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. This could therefore lead to less use of the conditional caution, or less time and focus given to ensuring that the conditions are appropriate and will be effective.

Clause 113: Offences of threatening with an article with a blade or point or an offensive weapon

As JUSTICE highlight in their briefing, the necessity of creating the offence of threatening with an article with a blade or point or an offensive weapon is questionable, since other offences already exist to address such behaviour. We are, additionally, extremely concerned by the introduction of a mandatory minimum sentence of six months for these offences. A mandatory custodial sentence is a blunt instrument with which to attempt to tackle the problem of knife crime. The evidence for the deterrent value of such sentences is non-existent,¹⁰ and custodial sentences simply cannot address the complex social problems underlying such behaviour, as is clear from the high reoffending rates for those released from custody. Indeed, short custodial sentences are particularly ineffective at tackling offending behaviour - in 2009, 59.4% of those who served a sentence of under 12 months were convicted of a further offence within a year of release.¹¹ Additionally,

⁹ Ministry of Justice (2010) *Statistics on women and the criminal justice system* - available at <http://www.justice.gov.uk/statistics-women-cjs-2010.pdf>

¹⁰ Ashworth, A. (2010) *Sentencing and criminal justice*, Cambridge: Cambridge University Press.

¹¹ Ministry of Justice (2011) *Adult reconvictions: Results from the 2009 cohort England and Wales* - available at <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/adult-reoffending-statistics-09.pdf>

mandatory minimum sentences do not allow the specific circumstances of an offence to be taken into account by the individual sentencer and, as such, can lead to the disruption of proportionality, fairness and consistency in sentencing. The Sentencing Council, the introduction of which the CJA fully supported, has done a great deal already to inject a greater degree of clarity and consistency into sentencing, and we would recommend against any measures, including mandatory minimum sentences, that work against these efforts.

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