Crime and Courts Bill - Schedule 15

House of Commons, Second Reading – Monday 14 January 2013

Schedule 15 (previously 16) "Dealing non-custodially with offenders" of the Crime and Courts Bill develops proposals contained in the Ministry of Justice's consultation *Punishment and reform: effective community sentences*. It builds on the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to extend the length and duration of curfews and introduce a new foreign travel prohibition, alcohol abstinence and monitoring requirements as well as giving discretion for sentencers to impose treatment requirements for offenders with mental health needs or problems with alcohol or substance misuse.

The Crime and Courts Bill presents an opportunity to build on the success of community sentences which are now outperforming short prison sentences and are 8.3% more effective in reducing re-offending rates. This briefing, prepared by the Prison Reform Trust with the assistance of Paul Cavadino, is intended to assist MPs in the Second Reading Stage debate on the Bill. Following discussions with MPs and the outcome of previous stages of the Bill, this briefing highlights key parts to Schedule 15:

- Part 1: Community orders: punitive elements
- Part 2: Deferring the passage of sentence to allow for restorative justice
- Part 3: Removal of limits on compensation orders made against adults
- Part 4: Electronic monitoring of offenders
- Part 5: Community orders: further provision: breach
- Part 6: Statements of assets and other financial circumstances of offenders
- Part 7: Provision for female offenders

The briefing also highlights significant omissions in the bill on

- Probation Service reform
- Young adults
- Vulnerable defendants

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Part 1: Community orders: punitive elements

Part 1 amends section 177 of the Criminal Justice Act 2003 so as to require a court imposing a community order either to include a requirement that fulfils the purpose of punishment in the order or to impose a fine (or do both) unless there are exceptional circumstances that would make that unjust.

The Prison Reform Trust is concerned that the new duty will limit the discretion of judges and magistrates in setting an appropriate sentence based on the facts and circumstances of the individual case. The duty creates a false and unhelpful divide between "punitive" and "rehabilitative" requirements. Essentially any sentence handed down by the courts is a sanction or punishment and offenders are required by law to comply with an order of the court.

The new duty does not contain sufficient safeguards to ensure that the large number of offenders with particular support needs, such as mental health problems, learning disabilities and difficulties, substance misuse and people with primary care responsibilities, are not subject to inappropriate punitive requirements. It could undermine the success of community sentences, which are now outperforming short prison sentences and are 8.3% more effective in reducing re-offending rates.[1] The government's own original impact assessment of the proposals published in March 2012 with the consultation acknowledged that they could have an adverse impact on reoffending rates by causing "primarily rehabilitative requirements to be substituted with primarily punitive ones".[2]

It does not make sense to require courts to impose punitive requirements where they consider that this could increase rather than reduce the likelihood that the offender will commit further offences and create more victims in the future. We hope MPs will use the opportunity of the debate to seek assurances that vulnerable groups will not be subject to inappropriate punitive requirements and that the new duty will not have an adverse impact on reoffending rates.

Part 2: Deferring the passage of sentence to allow for restorative justice

Part 2 allows the courts to defer at the pre-sentence stage in order for the victim and offender to be offered restorative justice at the earliest opportunity. This is the most significant development for restorative justice in England and Wales since legislation introducing referral order panels to the youth justice system in 1999. The Prison Reform Trust, the Restorative Justice Council, Criminal Justice Alliance and Victim Support have all supported moves to establish a legislative framework for restorative justice. We are particularly grateful to MPs and Peers from all three main political parties who put the case for legislation during debates on the Legal Aid, Sentencing and Punishment of Offenders Bill.

[1] Ministry of Justice (2011) 2011 Compendium of reoffending statistics and analysis, London: Ministry of Justice

[2] Ministry of Justice (2012) Consultation on sentences in the community and the future shape of probation services: Impact Assessment 04/01/2012, London: Ministry of Justice

Pre-sentence restorative justice has been shown to work internationally and by positive evidence from a £7 million government research programme.[3] It provides the judiciary with better information to inform sentencing and can be introduced without causing delay in court proceedings.[4] With 22% of victims who participated in restorative justice saying it should have been offered to them sooner, pre-sentence restorative justice provides victims with the earliest opportunity to participate.[5] There has not been a single instance of pre-sentence restorative justice in this country since the research trials closed in 2004.

Without legislation pre-sentence restorative justice will not happen and we would encourage MPs to support the government's proposals. Strong guidance and secondary legislation will be necessary to ensure successful implementation and secure the confidence of the Judiciary.

Part 3: Removal of limits on compensation orders made against adults

Part 3 removes the existing £5,000 limit on compensation orders imposed in the magistrates' courts, whilst retaining it for those under 18. As the government acknowledged in its community sentence consultation, the value of compensation orders should be dependent on the ability of the offender to pay. The removal of the limit makes it essential that appropriate safeguards are in place. Safeguards should ensure that details of an offender's financial circumstances are accurate and fully taken into account during the setting of the order. This is the intention of Part 6 of Schedule 15 and MPs will want to scrutinise these proposals to ensure that they provide adequate protection (see below).

A forthcoming review by the government of the Victim Personal Statement will look at how more effective use can be made to provide courts with relevant information about injury, loss or damage an offence has caused to a victim. The statement aims to provide courts with better information to consider when deciding whether to impose a compensation order. The Sentencing Council will also examine whether changes are necessary to existing guidelines on compensation orders. The Prison Reform Trust welcomes this; however, it will be necessary to ensure that necessary safeguards are taken into account when setting the compensation order and that the value is proportionate to the offence.

Part 4: Electronic monitoring of offenders

Part 4 broadens the provisions in the CJA 2003 that enable the courts to impose an electronic monitoring requirement as part of a community order or suspended sentence order. Paragraph 16 extends the definition of "electronic monitoring requirement" to enable the courts to impose the monitoring of an offender's whereabouts as a requirement on its own as well as for monitoring compliance with other requirements. Paragraphs 12 and 13 amend sections 177 and 190 of the CJA 2003 so as to add "electronic monitoring requirement" to the list of primary requirements that may be imposed as part of a community order or suspended

[3] Ministry of Justice (2010), Green Paper Evidence Report: Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, London: Ministry of Justice
[4] Ibid.
[5] Ibid.

sentence order respectively, so that electronic monitoring will no longer only be ancillary to another requirement.

Electronic monitoring, where used appropriately, in conjunction with supervision and other supportive and rehabilitative requirements, and subject to the recommendation of trained probation staff, can be an effective means of enabling a person to comply with the requirements of their community order. However electronic monitoring should not be seen as an alternative to the crucial face-to-face relationships, supervision and support needed for many offenders. Existing research, most recently evidenced in a report by HM Inspectorate of Probation,[6] is far from conclusive on the ability of electronic monitoring to act as a deterrent to re-offending and its rehabilitative qualities, particularly as a standalone measure. The Inspectorate also found that only 29% of community orders with electronic monitoring curfews had been made following a pre-sentence report by a probation officer, compared with 90% in 2008.[7] This is concerning and suggests that they could be being used ineffectively or in inappropriate situations, such as where there is a risk of domestic violence.

In the context of probation staff and budget cuts, and the opening of the market in community sentence provision to the private sector, we are concerned that the new measure could result in the increased use of electronic monitoring as a standalone requirement, with potentially negative consequences for reoffending and public safety. MPs will want to ensure that appropriate safeguards are in place and that electronic monitoring is used as much as possible in conjunction with other supportive and rehabilitative requirements. In addition, full account should be taken of civil liberties considerations, including access, retention, and disposal of location based monitoring data.

Part 5: Community orders: further provision

Paragraph 22 of Part 5 removes uncommenced elements of section 67 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This removes a court's power to take no action if an offender is brought back to court as a consequence of a breach of a community order. The effect is that if a court finds that an offender has breached an order without reasonable excuse, it must make the order more onerous, revoke the order and re-sentence for the original offence, or impose a fine.

The Prison Reform Trust welcomed the flexibility the LASPO Act allowed a court in dealing with breaches of community sentences through the option of taking no action if that were deemed appropriate, and we are concerned that the government has now decided to remove this uncommenced provision of the Act. The measure recognised that a return to court can of itself prove a sufficiently salutary experience in many cases. For many people with a mental health need of learning disability, making an order more onerous is simply setting them up to fail and increases the likelihood of further breach. In some cases, fines could increase the financial pressure on offenders who are struggling financially and increase the risk of further offences of theft, burglary or robbery to obtain money.

[6] HMI Probation (2012) It's Complicated: The Management of Electronically Monitored Curfews: A follow up inspection of electronically monitored curfews, London: HMI Probation
[7] Ibid.

Figures published for the calendar year 2009 show that 3,996 people were received into prison establishments in England and Wales for breach of a community sentence.[8] With a prison place costing around £40,000 per year,[9] and almost half of adults leaving prison reconvicted within one year of release, rising to 57% for those serving sentences of less than 12 months, the use of custody as a punishment for technical breach is expensive and in many cases ineffective. Having introduced sensible measures to allow courts increased flexibility in dealing with breach of community orders, MPs will want to clarify why the government has now chosen to remove these provisions.

Part 6: Statements of assets and other financial circumstances of offenders etc

Part 6 makes changes to the current powers of courts to order offenders to provide a statement of their financial circumstances in various contexts. These powers exist in order to support courts in fixing a fine or other financial order that is proportionate and equitable with regard to an offender's circumstances. The Prison Reform Trust welcomes the introduction of provisions to enable courts to take account of an offender's financial means when fixing a compensation order or fine. However, additional safeguards should be introduced to ensure that financial penalties do not have a disproportionate impact on the families of offenders, particularly where they offender has primary care responsibilities for children or dependent relatives.

In the government's consultation on effective community sentences it outlined the need to safeguard third-party property rights in its proposals for asset confiscation. In its response the government revised these plans, removing planned asset seizures and instead allowing courts to take account of an offender's assets when fixing the value of a financial penalty. Despite initial recognition of the need to protect property rights, Schedule 15 currently provides no safeguards to ensure that jointly owned assets (e.g. joint home or vehicle ownership) are identified or that dependents are not adversely affected as a result of the actions of the offender. MPs will want to ensure that appropriate safeguards are introduced to make certain that financial penalties do not have a disproportionate impact on the families of offenders.

Part 7: Provision for female offenders

Part 7 provides that contracts made by the Secretary of State with Probation Trusts are to require each Probation Trust to make appropriate provision for the delivery of services to female offenders (subsection 1). Subsection 2 requires contracts referred to in subsection 1 to make provision for women to carry out unpaid work (where appropriate), and to participate in rehabilitative programmes, with the needs of women in mind.

Part 7 was included in the Bill as a result of an amendment drafted by the Prison Reform Trust, with the assistance of Paul Cavadino, and tabled by Lord Woolf, chair of the Prison Reform Trust, at Third Reading of the Bill in the House of Lords. In debate, Lord Woolf said there was nothing in the amendment that cut across the

[8] Table 6.9, Offender Management Caseload Statistics 2009, Ministry of Justice
[9] Table 1, Ministry of Justice (2012), Cost per place and cost per prisoner by individual prison, National Offender Management Service Annual Report and Accounts 2011-2012: Management Information Addendum, London: Ministry of Justice

Government's "good intentions" and its plan to launch a strategy on women's justice. He emphasised that "the statute should contain a statement of recognition of the special position of women in the criminal justice system".[10]

The new part will help to ensure appropriate community provision for women which takes account of their different offending profile, the complexity of their support needs and the impact of separating children from primary carers. Over half the women in prison report having suffered domestic violence and one in three has been sexually abused.[11] Most women serve very short sentences, with 58% sentenced to custody for six months or less.[12] 81% of women entering custody under sentence had committed a non-violent offence, compared with 71% of men.[13] They also accounted for 31% of all incidents of self-harm despite representing just 5% of the total prison population.[14]

The recent joint inspection report on the use of alternatives to custody for women offenders found a lack of women-specific provision for both unpaid work and offending behaviour programmes and noted that "women-only groups, where run, were often successful."[15] It found that "women's community centres could play an important role in securing women's engagement in work to address her offending and promote compliance with her order or licence." [16]

Ministry of Justice funding for the national network of women's centres is guaranteed only until March 2013, and the future of the centres under payment by results commissioning is uncertain. Without adequate statutory protection and secure funding, many centres are likely to cease being able to provide vital services for women offenders and supervising court orders. Their closure would result in the immediate loss of expertise and support for a particularly vulnerable group in the justice system. By giving a statutory footing to community provision for female offenders, the new part will help to protect the vital role played by women's centres and other local services in the effective delivery of community provision for women. We would encourage MPs to support it.

[10] Crime and Courts Bill, 3rd Reading, House of Lords, 18 December 2012. Available at http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121218-0001.htm#12121864000897
[11] Social Exclusion Unit (2002), Reducing reoffending by ex-prisoners, London: Social Exclusion Unit
[12]
[13] Table 2.2b, Ministry of Justice (2012), Offender Management Statistics Quarterly Bulletin, April ro June 2012, London: Ministry of Justice
[14] Table 3, Ministry of Justice (2012), Safety in custody statistics, Quarterly update to June 2012, London: Ministry of Justice
[15] Criminal Justice Joint Inspection (2011), Thematic Inspection Report Equal but different? An inspection of the use of alternatives to custody for women offenders, London: CJJI
[16] Ibid.

Omissions from the Bill

Probation Service reforms

The government has just published its response to the Probation Review,[17] which it consulted on jointly with its community sentence proposals. The latter are in many ways dependant on the government's plans for the Probation Service which, if adopted, would result in arguably the most significant changes to the Probation Service since the 1925 Criminal Justice Act established probation committees and the appointment of probation officers became a requirement of the courts. Despite this, under current law many of the reforms would not necessarily require new legislation to be enacted. This would deny Parliament its proper role in scrutiny and oversight of the planned reforms.

The proposed model would see the management of low risk offenders competed out to the private and voluntary sector with the public sector only able to bid for these contracts as part of a private and / or voluntary sector consortium. The current 35 probation trust areas would be merged into possibly six to eight regions so that bids can be invited on a national commissioning basis. Successful bidders would be paid on a payment by results model according to their success at reducing reoffending. Certain functions, such as advice to the courts on appropriate sentences for offenders, initial assessments of risk, and responsibility for high-risk offenders, are reserved for the public sector. The public sector "will retain ultimate responsibility for public protection in all cases" although it is unclear how this will be guaranteed under the proposed new arrangements.

In an article, 'The future of Probation',[18] an edited version of which was published in Society Guardian, on 23 May 2012,[19] Geoff Dobson, (who is company secretary to the Prison Reform Trust and was a chief probation officer and chaired ACOP, the Association of Chief Officers of Probation), said that the current proposal fails to stand up to several vital tests:

- It sees risk as a static concept, failing to recognise that circumstances can change abruptly and the risk posed by an individual can increase markedly overnight.
- It fails to understand the complexities of accountability in the criminal justice system
- Changes would involve a massive personnel upheaval for a key part of a criminal justice system that is already under considerable strain.

Without proper safeguards the proposed reforms could lead to a fragmented service which compromises accountability and puts public safety at risk. We hope MPs will use the opportunity of the debate to ensure proper oversight and scrutiny of the government's plans.

[17] Ministry of Justice (2012), Transforming Rehabilitation – a revolution in the way we manage offenders', London: Ministry of Justice. Available at https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation
[18] http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/154
[19] http://www.guardian.co.uk/society/2012/may/22/problem-with-privatising-probation-services

Young adults

The Prison Reform Trust would like to see provision in the bill to ensure that probation trusts make appropriate arrangements for young adult offenders aged 18-20 serving community sentences. This includes provision for services which provide supervision, support and rehabilitation appropriate to the level of maturity of young adult offenders and which increases the likelihood of compliance with community orders. The Prison Reform Trust supported amendments on young adults tabled by Lord Ramsbotham in the House of Lords committee and third reading debates on the bill.

There is extensive evidence, both demographic and developmental, for recognising 'young adulthood' as a particular life stage.[20] Young adults, aged 18-20, constitute 4% of the population but make up 15% of those commencing a community sentence and 14% of those sentenced to prison each year. Young adults in contact with the criminal justice system often have complex and multiple needs including homelessness, poverty, unemployment, educational failure, substance misuse, mental health problems and needs associated with young parenthood and victimisation. All these are experienced while many young adults are still in the process of physical and mental maturation.

This is exacerbated by the fact that many child-focused support services – such as care services, child and adolescent mental health services, children's services and youth offending services – fall away when young people reach the age of 18. These specific needs should be recognised across the criminal justice system, including in the design and delivery of education and training. The Final Report of the Riots Communities and Victims Panel identified weaknesses in the transition of 18 year olds into the adult criminal justice system, and recommended that all probation trusts take a specialist approach to dealing with young adults within the next two years.[21]

The Barrow Cadbury Trust's Transition to Adulthood Alliance (T2A) has piloted a new approach to working with young adults in three areas (Birmingham, West Mercia and London) with positive results. A focus on young adult offenders would complement the successful recent work by the Youth Justice Board and individual youth offending teams with the Prison Reform Trust and allied charities to reduce the number of children in custody by over 40%. While pockets of good practice do exist, reoffending rates on release from custody are particularly poor for young adults, especially those serving short sentences.

Vulnerable defendants

The Prison Reform Trust would like to see provision made in the bill to ensure that, where necessary, vulnerable defendants are provided with the appropriate support to enable their effective participation in court proceedings and in preparing for their own trial. Currently far too many people face court impeded in their understanding due to a learning disability, mental illness, a low IQ or significant communication difficulties.

[20] University of Birmingham (2010), Literature review of maturity. Barrow Cadbury Trust: London
[21] Riots Communities and Victims Panel (2012). After the riots – the final report of the riots communities and victims panel, London: RCVP

Over 60% of children who offend have communication difficulties. High numbers of adult offenders have mental health problems and between 5-10% of adults who offend have learning disabilities – both of these conditions can significantly impair an individual's ability to communicate effectively, especially in the stressful environment of a court room.[22]

The use of special measures in court is intended to reduce the stresses associated with the court environment so that the individual can give his or her best evidence. While protection and support for vulnerable witnesses in court has been significantly enhanced, most notably by the provisions contained in Part II of the Youth Justice and Criminal Evidence (YJCE) Act 1999, section 16 of this Act makes it explicit that these measures are not designed to include defendants.

One such special measure is support provided by an intermediary, whose role is to facilitate two-way communication between the vulnerable individual and other participants in court proceedings, and to ensure their communication is as complete, accurate and coherent as possible. Intermediaries appointed to assist vulnerable witnesses are 'registered' and subject to a stringent selection, training and accreditation process, and quality assurance, regulation and monitoring procedures.

Although vulnerable defendants do not have the same statutory rights to special measures as vulnerable witnesses, intermediaries can be appointed at the discretion of the court. However, intermediaries appointed to support vulnerable defendants are neither 'registered' nor regulated. The practice of 'registered' and 'non-registered' intermediaries – potentially in the same trial and paid different fees – is anomalous. The Prison Reform Trust supported amendments to provide assistance for vulnerable defendants through intermediaries tabled by Baroness Linklater in the House of Lords report stage debate and Lord Bradley in the third reading debate on the bill.

[22] Talbot, J (2012), Fair access to justice, London: Prison Reform Trust