

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Committee Stage Briefing on
Part 3 of the Legal Aid, Sentencing and
Punishment of Offenders Bill in the
House of Lords**

January 2012

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

Liberty shares the Government's expressed aim of reducing re-offending and facilitating rehabilitation, particularly by ensuring that sentencing measures aid rather than hinder reintegration into society. A number of proposals set out in Part 3 of the Bill acknowledge that prison is not always the solution, particularly in relation to petty offending, and provide judges with the flexibility to adapt sentences to the requirements of an individual case. Liberty is further delighted that the Government is honouring a pledge to abolish the unjust and unworkable IPP regime.

Notwithstanding these progressive measures Liberty has ongoing concerns about other of the Government's sentencing proposals in particular plans to extend curfews and remove prosecutorial oversight of out-of-court disposals. We further have some concerns about the new offences included in Chapter 8 of the Bill – particularly the reliance on presumptive sentences which fetter judicial discretion and the creation of an offence of squatting in residential premises.

Sentencing

The effect of Chapter 1

Clauses 62 - 63 provide for community orders to have a clearly specified end-date. Courts will further have more options when considering how to respond to a breach of a community order, including making no order or imposing a fine.¹ The Bill provides for wider use to be made of suspended sentences; the regime will be reformed to allow sentences of between 14 days and 2 years to be suspended, by contrast with current provisions which limit suspension to sentences of 12 months or less.² Courts will also be given a discretion as to whether or not to attach a community requirement to a suspended sentence and will be empowered to impose a higher fine for breach of a suspended sentence order.³ Provisions set out in Part 3 would further give Courts wider powers to include programme requirements in criminal sentences, for example requirements aimed at helping offenders to overcome drug and alcohol dependency problems.⁴

¹ Clause 63(2).

² Clause 64.

³ Clauses 64 and 65.

⁴ Clause 66.

The Bill proposes welcome changes to the youth sentencing regime, giving judges additional powers to discharge young offenders conditionally, in addition to powers to give an absolute discharge or make a referral order.⁵ Referral orders, which refer offenders to a youth offender panel who will meet with the young person and supervise rehabilitative activities, would be more widely available to judges under the provisions of the Bill, including in cases where there is a previous guilty plea or a referral order has already been made.⁶ Courts are to have wider powers to sanction offenders for breach of Detention and Training Orders, including by imposing an additional period of supervision.⁷ Clause 77 provides powers to extend the maximum duration of a youth rehabilitation order by 6 months and to impose an increased fine for breach of an order.

New clauses 79 – 81 of the Bill, introduced during Report Stage in the House of Commons, extend Magistrates' powers to impose fines. New clause 79 provides that, where offences are punishable on summary conviction by fines of £5,000 or more, they will instead be punishable by a fine of any amount. The clause applies to fines prescribed by both primary and secondary legislation. The Lord Chancellor is further given wide powers, by way of secondary legislation, to create offences which are punishable on summary conviction by a fine with a limit of £5,000 or more, so that they are punishable by a fine of any amount. If passed in its current form, the Bill would allow the Secretary of State to disapply limits and to set alternative limits, subject to certain restrictions. Clause 78 significantly increases the maximum fine to which a child can be sentenced for breach of a requirement of a youth rehabilitation order.

Clause 80 deals with fixed fines of less than £5,000. The Lord Chancellor is again given wide regulation-making powers to raise the level of fines for offences punishable by a fine on summary conviction. Regulations made under this clause may not increase the level of fines above whichever is the larger of the sum specified at level 4 on the standard scale, or a sum of £5,000. Provision under this section is restricted to adult offenders. Clause 81 provides for the Secretary of State to alter, by order, the sums specified at levels 1-4 of the standard scale

⁵ Clause 73(1).

⁶ Clause 73. In the later case, this can presently only happen with the recommendation of an appropriate officer – usually the local youth offending team.

⁷ Clause 74(2).

The Bill proposes to extend the maximum period for curfews operating as part of a community sentence to 16 hours per day for a maximum of 12 months. Where a curfew is attached to a Youth Rehabilitation Order (YRO), the maximum limit will be extended in line with adult curfew requirements to a maximum of 16 hours per day for 12 months.⁸ The current limit caps curfew at 12 hours per day for a 6 month duration.⁹

Proposed amendments to Chapter 1

Amendment 1 – omit clause 67

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| Page 50, line 16, omit clause 67 |
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Effect

This amendment would reinstate the current statutory framework governing curfew requirements, meaning that a curfew may not last for more than 12 hours a day and may not apply for a period of more than six months.

Briefing

Liberty has grave concerns about measures which provide for the wider use of curfews and more onerous curfew requirements for both adults and children. In its Green Paper published in March this year, the Government envisaged the implementation of these new tougher measures in the place of custodial sentences. Whilst the deprivations of liberty involved in the imposition of a curfew are far less than would be the case on receipt of a custodial sentence, Liberty is concerned that, once legislation is passed introducing new and extended powers to tag and curfew, there will be no way of ensuring that they are used as intended. In the past, tougher community penalties have not always been used in practice as an alternative to custody, but rather as additional, harsh punishments which are available to courts in circumstances where a custodial sentence would not be appropriate. Curfews of the level and duration proposed will make it difficult for individuals to hold down regular work or perform other useful functions. This level of punishment in the community, amounting to virtual house arrest, is likely to have a stigmatising effect preventing

⁸ Clause 75.

⁹ Clause 67.

successful reintegration. Such extensive curfew requirements further severely disrupt normal family life, effecting not simply the individual subject, but also family members and others residing with him including minor siblings or children who are in no way implicated in criminality.

Amendment 2 - amend clause 68

Page 50, line 30, after subclause (2) insert -

“() In section 177 of that Act, after subsection (6) insert -

(7) A court may only impose a foreign travel prohibition requirement where:

(a) given the pattern of offending behaviour, it is necessary to prevent further offences being committed; or

(b) it is necessary to ensure compliance with other aspects of a sentence or any existing sentence to which an offender remains subject.”

Effect

This amendment would make imposing foreign travel orders contingent upon one of two specific requirements.

Briefing

Liberty has no objection to the use of foreign travel requirements as part of community sentences where they are, for example, used to ensure that the requirements of a community sentence are complied with, or an individual does not engage in further criminality abroad. Liberty believes that restrictions on an individual’s ability to travel abroad should be firmly linked to the offending behaviour or compliance with other elements of a sentence.

Amendment 3 – omit clause 69

Page 51, line 18, leave out clause 69

Effect

This amendment would reinstate the requirement that mental health treatment requirements be contingent upon medical evidence from a suitably qualified professional.

Briefing

Liberty understands the objective underpinning clause 69. From a practical perspective, mental health treatment requirements are an underused resource thanks, in no small part, to the difficulty of obtaining medical evidence from over-subscribed professionals within tight deadlines. We are concerned, however, that without medical opinion, these orders may be imposed inappropriately and place unhelpful burdens on the individual which fail to contribute towards effective rehabilitation. Liberty urges the Government to explore other ways of facilitating the appropriate use of orders, such as increasing the number of suitable professionals who may provide evidence or providing necessary additional resource.

Amendment 4 – omit clause 75

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| Page 57, line 18, omit clause 75. |
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Effect

Removes extended curfew powers for juveniles.

Briefing

The briefing provided in relation to amendment 1 (clause 67) above, applies with still greater force in relation to young people, for whom long curfews may have a particularly profound affect. 16 hour curfews lasting for up to a year are likely to ostracise a young person in his or her community at an important time in their personal and social development and may impede effective rehabilitation, for example, by preventing children from taking part in productive activities such as after school sports or music classes.

Amendment 5 – omit clause 76

Page 57, line 25, omit clause 76.

Effect

This amendment would reinstate the requirement for expert evidence prior to including a youth mental health treatment requirement in a sentence. For briefing see amendment 3 (clause 69) above.

Amendment 6 – amends clause 77

Page 58, line 24, omit “subject to that” and after “may” insert “not”.

Page 58, line 45, omit “subject to that” and after “may” insert “not”.

Page 59, line 20, omit “subject to that” and after “may” insert “not”

Effect

This amendment would allow for the duration of a youth rehabilitation order to be extended by up to six months in response to a breach, but provides that an order may not be extended beyond the 3 year limit for which provision is currently made.

Briefing

Liberty agrees that there will be cases in which it is far more effective and proportionate to extend the period of a youth rehabilitation order in response to a minor or technical breach as opposed to, for example, imposing custody or a financial penalty. However placing children under extremely protracted requirements and rendering them vulnerable to further penalty for breach can have a counter-productive effect, including escalation into further sanction for minor failures, frustrating the rehabilitation process. Liberty therefore opposes plans which would enable courts to extend youth rehabilitation orders beyond their current three year limit.

Amendment 7 – omit clause 78

Page 59, line 44, omit clause 78 and insert:

“78 **Magistrates’ courts’ powers to impose imprisonment**

(1) The provisions of the Criminal Justice Act 2003 mentioned in subsection (2) are repealed.

(2) The provisions are:

(a) section 154 (general limit on magistrates’ court’s power to impose imprisonment),

(b) section 155 (consecutive terms of imprisonment)

(c) section 280(2) (alteration of policies for specified summary offences),

(d) section 281 (alteration of penalties for other summary offences),

(e) section 282 (increase in the maximum term that may be imposed on summary conviction of offence triable either way),

(f) section 283 (enabling powers: power to alter maximum sentences),

(g) Schedule 26 (increase in maximum term for certain summary offences),

(h) Schedule 27 (enabling powers: alteration of maximum penalty etc).

(3) In Part 7 of Schedule 37 of that Act (repeals relating to sentencing)

(a) in the entry relating to the Magistrates’ Courts Act 1980, omit “Section 133(2)”, and

(b) in the entry relating to the Powers of Criminal Courts (Sentencing) Act 2000, for “78” substitute “79”.

(4) In consequence of the repeal of section 154 of the Criminal Justice Act 2003, omit paragraph 154 of Schedule 13 to the Tribunals, Courts and Enforcement Act 2007.”

Effect

This amendment would remove powers to significantly increase the maximum fine to which a child can be sentenced for breach of a requirement of a youth rehabilitation order.

This amendment would also reintroduce a provision that was included in the Bill as originally published. Original clause 71 of the Bill provided for the repeal of uncommenced sections of the *Criminal Justice Act 2003* which, if commenced would have the effect of extending the sentencing powers of Magistrates or providing for alterations to sentencing requirements to be made by means of secondary legislation. The suggested amendment above re-inserts the repeal of these uncommenced provisions.

Briefing

Liberty accepts that fines are a useful part of the adult sentencing regime and further accepts that, in order to be a useful deterrent, sums must be sufficiently large as a proportion of an offender's assets or income. We are concerned, however, at plans to increase fines to £2,500 for children breaching youth rehabilitation orders. This is a substantial increase from the current limits of £250 for offenders under 14 and £1000 for older children. The vast majority of minors and particularly those under 16 have no independent financial resources. Fines are therefore effectively a punishment for parents. Liberty believes that increasing the financial hardship facing parents is unlikely to improve outcomes for struggling families and may, in any event, have little direct effect on the child.

Liberty supported a provision of the Bill, as originally drafted, which would have seen the repeal of uncommenced measures extending the maximum sentencing powers of Magistrates from 6 to 12 months. Liberty regrets the Government's decision to remove old clause 71 from the Bill. Offending behaviour serious enough to warrant a sentence of 12 months imprisonment should properly be the preserve of the Crown Court – where an individual pleads not guilty, his guilt or otherwise should be determined by a jury of his peers. Liberty does not underestimate the gravity of the disorder which blighted our towns and cities during last August's riots, however our Courts have shown themselves willing to impose lengthy custodial sentences in relation to large scale disorder. Indeed Magistrates Courts have been praised by the

Government for their tough and efficient response to the riots. For more serious offending, defendants were quickly diverted to the Crown Court and heavy sentences were handed down in many cases. Most commentary around the judicial response to the riots has highlighted the severity of the sentences imposed and indeed a significant number of sentences passed have been successfully appealed. Liberty does not believe that this Augusts' riots help to make the case for increasing the sentencing powers of Magistrates' – in fact the response to the riots demonstrated that lengthy custodial sentences are already available in the Magistrates and the Crown Court and can be passed with speed in response to large scale offending. We urge the Government to think again about retaining a provision on the statute book which erodes the constitutional bulwark of the right to trial by jury.

Reform of the remand regime

Chapter 2 of the Bill amends the bail regime to provide for exceptions to the presumption in favour of bail to be disapplied where there is *'no real prospect of a custodial sentence'*.¹⁰ However, a new exception to the presumption, which will not be subject to the *'no real prospect'* test, is proposed to deal with cases where, if released on bail, an individual is likely to engage in conduct amounting to domestic violence.¹¹ The Bill corrects an anomaly in the current remand system by bringing 17 year olds within provisions designed to deal with remand for children.¹²

Where children are not granted bail, the Bill provides that they must be remanded to local authority accommodation except where a series of conditions apply including where the alleged offence is sexual or violent in nature and only remand to a youth detention accommodation would be sufficient to protect the public from death or serious injury, or to prevent the young person from committing an imprisonable offence.¹³ Under clauses 91-94 of the Bill, remand to youth detention accommodation would only be available in cases where it is rendered imperative by a combination of factors going to, amongst other things, the seriousness of the offence, the risk of absconding and any risk to public.

¹⁰ Limited to adult defendants with no prior convictions and to non-extradition proceedings.

¹¹ For offences punishable with imprisonment – certain exceptions to the presumption in favour of bail do not apply. In relation to non-imprisonable offences some of exceptions to the presumption in favour of bail will only be applicable where a defendant is aged under 18 or has been convicted of the offence.

¹² Clause 84(6).

¹³ Clause 84.

Liberty strongly supports measures which would remove the option of remand for many defendants unlikely to receive custodial sentences if convicted. The deprivation of liberty involved in imprisonment can lead to family breakdown, loss of employment and wider social stigmatisation. As a result, Liberty believes that prison should be reserved for those convicted of or awaiting trial for offences of a serious nature which are likely to justify the imposition of custody after proper consideration of the nature of the crime and any mitigating or aggravating factors. On this basis we welcome the Government's plans to introduce a new test which requires judges to recognise the presumption in favour of bail, even where certain exceptions apply, in cases where there is *'no real prospect that the person will be sentenced to a custodial sentence in the proceedings'*.¹⁴

We further welcome plans to create a single remand regime for all minors, recognising the unique position of children in the criminal justice system and addressing the injustice created by remand legislation which treats 17 year olds as adults. Liberty further welcomes plans to ensure that, where remand is appropriate in the case of minors, it is confined, wherever feasible, to remand in local authority custody as opposed to incarceration in youth detention accommodation.

Preventative Detention

The effect of Chapter 5

Liberty strongly supports the Government's decision to abolish the discredited and counterproductive regime of indefinite detention for public protection (IPPs).¹⁵ IPPs have proven to be a dishonest sentencing tool undermining public understanding of the sentencing regime and unnecessarily inflating prison numbers. The IPP regime effectively introduced life sentences via the backdoor for a huge range of offence categories. Statistics produced by the Ministry of Justice reveal that at the end of March 2011 there were a total of 6,550 IPP prisoners – three quarters of whom had a tariff of less than four years, with almost a quarter attracting a tariff of less than two years. Over half of the current IPP prison population have passed their tariff date.

Through Liberty's experience of operating a public advice and information line, it has become apparent to us that the IPP scheme has been blighted by practical

¹⁴ Schedule 11, paragraph 5.

¹⁵ Clause 113.

inefficiency, with many unable to access the courses which must be completed before a prisoner can be considered for release. Additionally, the indefinite legal limbo created by IPP sentences has worked to undermine rehabilitation, leaving prisoners and their families unable to prepare, psychologically or in practical terms, for release. Crucially, while these proposed reforms will deal with the problems identified above, they will not prevent the imposition of lengthy custodial sentences for those convicted of serious criminality – in particular serious violent and sexual offences.

New clause 114 provides that adults convicted of a second serious violent, sexual or terrorism related offence warranting a sentence of at least 10 years, will face a presumption that a life sentence should be imposed.¹⁶ Provisions which unduly fetter judicial sentencing discretion are a cause for concern. The most appropriate authority to assess what penalty justice demands in the particular circumstances of a case is a judge seized of all the relevant facts. We note, however, that built into the new system is a provision which allows judges to impose a sentence reflecting the interests of justice and taking account of all relevant factors.

Clauses 115 and 116 would establish a new extended sentence regime for certain violent or sexual offences committed by adults. On conviction for a specified offence which warrants a custodial sentence of at least four years, individuals who have a prior conviction for one of a list of serious offences and who are deemed to represent an ongoing risk, will be required to serve two-thirds as opposed to the usual half of their custodial term and will further face an extended period on licence. This extra licence period may not exceed five years for a specified violent offence and eight years for a specified sexual offence and in any event the total sentence may not exceed the statutory maximum for the offence. Under the Government's proposals a sub-category of prisoners convicted of certain offences, or sentenced to a custodial term of more than 10 years will not be automatically released at the end of their custodial sentence, but will be referred to the parole board for an assessment of ongoing risk. Liberty has concerns about provisions which effectively reverse the presumption in favour of release on completion of a specified custodial term.¹⁷ This notwithstanding, the regime represents a definite improvement on the IPP scheme

¹⁶ Save where it would be unjust, in all the circumstances of the case, to impose a sentence of this gravity (Clause 114(1) and (2)).

¹⁷ Clause 116(3) inserting new Clause 246A into the Criminal Justice Act 2003.

as, save for life sentence prisoners, there will always be a finite limit on the period of time an individual can spend in custody.

Clause 117 makes provision for the Lord Chancellor to, by order, set a release test, or tests, that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under existing provisions, or prisoners serving extended sentences.

Proposed amendments to Chapter 5

Amendment 8 – new clause

Page 91, line 19, after clause 113 insert –

“() Existing indeterminate sentences

(1) Where P is serving an existing sentence under sections 225 – 226 of the Criminal Justice Act 2003 and has served the entirety of his tariff the Secretary of State must immediately refer his case to the Parole Board.

(2) Where P falls within subsection (1) it is the duty of the Secretary of State to release P on license as soon as the Board has directed his release under this section.

(3) The Board must direct P's release unless the Board is satisfied, on the basis of clear and compelling evidence which post-dates P's conviction, that there is a strong and immediate probability that P will commit a serious violent or sexual offence on release.

(4) Where the Board has declined to direct release in accordance with subsection (3), it is the duty of the Secretary of State to:

- (a) demonstrate that provision has been made for P to undergo relevant programmes with a view to reducing the risk of future offending; and
- (b) refer P's case to the Board at 6 monthly intervals until such time as the Board directs P's release under subsection (2).

(5) Notwithstanding the provisions of this section, no existing prisoner serving an indeterminate sentence may serve a period in excess of:

- (a) 5 years post-tariff custody in the case of a specified violent offence, or
- (b) 8 years post-tariff custody in the case of a specified sexual offence.”

Effect

This amendment would make provision, on the face of the Bill, for those already serving indefinite sentences. On expiry of their tariff period the Secretary of State would be compelled to refer the individual's case to the Parole Board which would be required to direct release unless they were satisfied, on the basis of cogent evidence, that an individual represents a clear and immediate threat to the public. Where the Parole Board decline to release a prisoner on this basis, this amendment would place a statutory duty on the Secretary of State to ensure that access to appropriate courses is made available. The amendment would bring provision for those already sentenced to preventative detention into line with provision made in clause 116 by placing a finite limit on the length of the sentence.

Briefing

Whilst Liberty is delighted that the Government has honoured a pledge to replace the IPP regime with a fairer system, we believe that provision must be made, on the face of the Bill, for the thousands of adults and children currently facing indefinite sentencing limbo. In reversing the burden of proof on referral to the parole board and requiring compelling evidence of ongoing risk, the amendment would moderate the unfairness of a system which calls upon a prisoner to establish that he will not commit offences in the future. The amendment would also address a very real practical difficulty with the IPP regime – namely difficulty in accessing the courses which must be completed as a pre-condition of release – and place a finite limit on periods spent in custody.

Amendment 10 – amends clause 116

Page 95, line 27, after “must” leave out “not”.

Page 95, line 29, leave out lines 29 and 30 and insert -

“(b) the Board is satisfied, on the basis of clear and compelling evidence

which post-dates P's conviction, that there is a strong and immediate probability that P will commit a serious violent or sexual offence on release.”

Page 95, line 30, at end insert -

“() Where the Board declines to direct release in accordance with subsection (6) it is the duty of the Secretary of State to demonstrate that provision has been made for P to undergo relevant programmes with a view to reducing the risk of future offending.”

Effect

The proposed amendments would bring the Government's planned regime of extended sentences closer to sentencing orthodoxy by removing from the individual the burden of establishing that he poses no ongoing risk and making provision for proper access to rehabilitative programmes.

Briefing

Liberty believes that preventative detention, based as it is on assumptions about future behaviour, requires stringent safeguards. The proposed amendment would ensure that periods spent in custody as part of an extended preventative detention are reserved for those individuals against whom there is strong and compelling evidence of a serious risk to the safety of the public. It also ensures, in accordance with the basic requirements of fairness and to advance the cause of effective rehabilitation, that programmes aimed at addressing offending behaviour are practically available to those serving extended sentences.

Out of Court Disposals

The effect of Chapter 7

Chapter 7 of the Bill is concerned with out of court disposals and would allow for chief officers of police to set up new schemes allowing officers to combine penalty notices for disorderly behaviour (PNBD) with education courses, paid for by the individual, which are designed to reduce the risk of reoffending. The Bill also removes limitations which currently restrict the issuing of penalty notices to authorised uniformed officers.¹⁸ This section of the Bill also makes provision for the Secretary of

¹⁸ Clause 121 read together with Schedule 20.

State to issue guidance regarding education courses and regulations dealing with the revocation of PNBDs.¹⁹

Clauses 122 and 123 deal with cautions in adult cases, removing the requirement for prosecutorial authorisation before a conditional caution can be issued.²⁰ Where an offender is a foreign national and does not have leave to enter or remain in the UK, new conditions can be attached to a caution designed to facilitate departure from the UK or ensure that an individual does not return within a specified period of time.²¹

Clauses 124 -127 abolish the current system of out of court disposals for young people known as the ‘final warning scheme’, replacing it with a new youth caution. The circumstances in which the new cautions can be given broadly mirror provisions of the final warning scheme, but the new youth cautions will be available even if a young person has a previous conviction or has already been given a caution. Under the new scheme there will be no requirement that officers consult with the Crown Prosecution Service before a youth caution or a youth conditional caution is administered to determine whether there is enough evidence to charge. Other requirements incorporated into the final warning scheme still apply, for example the requirement that an adult must be in attendance. Where a young person is given a caution she must be referred to a youth offending team (YOT) as soon as practicable, and a rehabilitation scheme must be put in place where appropriate.

Proposed amendments to Chapter 7

Amendment 11 – amend Schedule 20

Schedule 20, page 220, line 9, omit subsections (4) and (5)

Schedule 20, page 220, line 30, omit:

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(a) completing an approved educational course, and

(b) paying the course fee.”

and insert “completing an approved educational course.”

Schedule 20, page 220, line 39, omit line 39.

Schedule 20, page 221, line 10, omit subparagraph (b).

¹⁹ Schedule 20(4) inserting new subclause 2A (5) of the Criminal Justice and Police Act 2001.

²⁰ Clause 122.

²¹ Clause 123.

Schedule 20, page 221, line 23, omit subparagraph (a).
Schedule 20, page 222, line 39, omit subparagraph (i).
Schedule 20, page 222, line 44, omit “(iii)” and insert “(ii)”.
Schedule 20, page 223, line 5, omit “(iii)” and insert “(ii)”.
Schedule 20, page 223, line 14, omit text in brackets from “including” to “8”.
Schedule 20, page 224, line 32, omit paragraphs 13 and 14.

Effect

Schedule 20 of the Bill as drafted would introduce an alternative to pure financial penalties for those given penalty notices for disorderly behaviour such as drunk and disorderly behaviour, destroying or damaging property or engaging in behaviour likely to cause harassment, alarm or distress. Under the scheme proposed in the Bill, those accused of disorderly behaviour could be given the option of undertaking an education course.

The suggested set of amendments, whilst retaining the proposed education course scheme, would re-introduce the requirement that all penalty notices, whatever the penalty, are handed out by specially authorised officers in uniform. The suggested amendments would further remove the requirement that the alleged offender would be required to pay the cost of an education course.

Briefing

Liberty remains seriously concerned about the use out-of-court disposals, which operate without ordinary due process safeguards, and produce worryingly inconsistent results. Our concerns are set out in greater detail in our briefing on amendment 12 below which relates to clause 122 of the Bill. Against the backdrop of these concerns, the proposed amendments to Schedule 20, would reinsert a number of safeguards into the system of penalty notices for disorderly behaviour, including requirements that notices are only handed out by uniformed and specially authorised officers.

The proposed amendments remove the requirement that individuals be required to reimburse the cost of education courses. Whilst some of those arrested will be in a position to cover this cost, for some the expense may be prohibitive – this could lead

to a highly unsatisfactory two tier system whereby those who can afford to pay have the option of undertaking activity designed to rehabilitate them, whilst this option is unavailable to those who may have similar rehabilitative needs, but lack the necessary resources.

Amendment 12 – omit clause 122

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| Page 104, line 11, omit clause 122 |
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Effect

This suggested amendment would insert the requirement that prosecutorial authority must be obtained before police officers issue a caution or a conditional caution.

Briefing

Of all the proposals set out in Part 3 of the Bill, those sections providing for wider use of out-of-court disposal without even the protection of prosecutorial authorisation are the greatest cause for concern. Out-of-court disposals are presented as a softer alternative for low-level offending, but these measures are prone to use as a short-cut to punishment, and the Government's plans would see them implemented in large numbers of cases. On-the-spot police punishment without the involvement of the judiciary or even prosecutors undermines traditional due process standards. Bypassing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects. The consequences for the individual render it critical that sentencing remains firmly in the hands of the judiciary. Liberty is concerned that out-of-court disposals are part of a wider trend of legal short cuts; punitive measures dressed-up as "preventative" to escape the fair trial safeguards that civilised societies normally abide by before punishing their citizens.²²

²² Other such measures include the Violent Offender Order or VOO to the ASBO and the Parenting Order.

Liberty believes that the Government needs to urgently take stock of current use of out-of-court disposals. Since 2003, the total number of out-of-court disposals has increased significantly, by 135%.²³ In 2003, 241 000 alleged offences were dealt with out of court and in 2008, the figure was 567 000.²⁴ This means that the proportion of alleged offences dealt with outside court went from 23% in 2003 to just under 40% in 2008.²⁵ This represents a huge sea-change in the way that offences are dealt with. Instead of being brought before an open court for evidence to be presented and judgment reached, well over a third of offences are now dealt with entirely by the police who act as investigator, prosecutor, and judge. In the wake of the recent serious public disorder, the dangers inherent in this system have never been so apparent. The importance of open justice and due process are thrown into sharp focus by the swell of public concern over the recent riots.

As each new disposal power has been added to the statute book, Liberty has consistently raised concerns about the way in which summary justice of this type can undermine justice standards, make individuals subject to arbitrary and inconsistent decision-making and damage public perceptions of the police and the justice system as a whole. We have warned, in particular, that the powers are likely to result in an inconsistent approach by different police officers and different forces, especially where complicated judgments are necessary in determining whether a fixed penalty notice, for example, is appropriate. Where ascertaining guilt is a simple black and white matter (i.e. did this person drop a cigarette butt?) the risks are perhaps minimal. By contrast, where a police officer has to determine whether to issue a penalty notice for disorder the judgments are far more open to differing interpretations given that the definition of relevant behaviour can be as vague as whether the person's behaviour is "likely to cause harassment, alarm or distress".²⁶

Indeed, our concerns have been borne out in practice. According to a recent report on out-of-court disposals by the Her Majesty's Inspectorate of Constabulary (HMIC)

²³ Exercising Discretion: The Gateway to Justice, June 2011, Criminal Justice Joint Inspection – A study by Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate on cautions, penalty notices for disorder and restorative justice available at:

http://www.hmic.gov.uk/SiteCollectionDocuments/Joint%20Inspections/CJI_20110609.pdf.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Section 1, Criminal Justice and Police Act 2001.

and the Crown Prosecution Service (CPS) there are “*wide variations in practice across police force areas in the proportion and types of offences handled out of court*”.²⁷ The method accounted for from 26 to 49% of offences ‘brought to justice’ in different police force areas and the report found that “*where greater use is evident, this is linked in some places to a strong emphasis on achieving targets associated with improving performance in the level of offences brought to justice. Target chasing has not been conducive to the effective exercise of discretion.*” The report recommends, in view of the wide variations in practice and the consequences for alleged offenders and victims, that there ought to be a national strategy for out-of-court disposals to improve consistency. The report also recommends better record-keeping to enhance public confidence. Perhaps most worryingly, of the 190 cases of out-of-court disposals that the report considered that in “*one-third of the cases the disposal selected did not meet the standards set out in the existing national and force guidelines that were available.*”

We do not take issue with the principle that the police should be able to use their professional discretion to determine that despite suspicions or evidence, a prosecution against a suspected offender should not be sought. Indeed, as Sir Hartley Shawcross (then Attorney-General) said in 1951: “*It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution*”.²⁸ However the current system of formalised out-of court disposals fails on two counts. First, as a result of understandable cost-saving and target-achieving desires, it appears that persistent alleged offenders and those suspected of serious offences are not being prosecuted when they should be. Indeed, the recent HMIC report notes that (contrary to national guidance) out-of court disposals are being used to deal with those who appear to be persistent offenders and for alleged offences whose nature or gravity mean that they should not be dealt with out of court. One example being that “*An offender with numerous convictions was issued with a simple caution for criminal damage caused during a repeat domestic abuse incident, where the matter had not been referred to CPS for charging advice*”.

The fact that out-of court disposals can be formally recorded and retained and punishment handed out only increases the temptation for this disposal mechanism to be used. Secondly, the system allows for punishment and criminal records to be

²⁷ Ibid at Footnote 29.

²⁸ House of Commons Debates, Volume 483, 29 January 1951.

created and kept without fundamental principles of justice being adhered to. Instead, prosecutors and police are able to impose on-the-spot punishment without the involvement of the judiciary. By-passing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects as it is disclosable through a CRB check. A caution can also restrict someone's ability to obtain a visa to travel abroad.

While Liberty appreciates the desire to remove delays in the criminal justice system, powers designed to achieve this should not be at the expense of justice. The move towards summary justice is not only of concern from the perspective of the rights of the suspect. Fair trial safeguards, and the involvement of the independent court in the delivery of punishment, are also in the wider public interest and the interests of victims of crime. The rigours of a criminal trial, in which the prosecution is required to establish guilt beyond reasonable doubt and the defendant has the opportunity to argue their innocence, help to ensure that the right person is convicted. Furthermore, hearing criminal cases and handing down punishments in open court, demonstrates that justice is being done and that the state will not accept criminal behaviour, providing a public warning against offending.

New Offences

When the Bill was published, Chapter 8 created offences of threatening with a weapon in public and threatening with a bladed article in a public place or in school premises. During both Committee and Report Stage Chapter 8 was subject to a number of significant amendments. The new and widely publicised offences dealing with knife crime remain, but provision for the statutory maximum sentence has changed. Thanks to the removal of old clause 71 from the Bill, uncommenced provisions extending Magistrates sentencing powers from 6 months to 12 months for a single offence will remain on the statute book. If section 154 of the Criminal Justice Act 2003 is commenced, the statutory maximum sentence which could be given by a Magistrate for these offences would be 12 months as opposed to the 6 months

envisaged when the Bill was published.²⁹ The minimum custodial sentence for both offences remains 6 months where the offender is aged over 18 and 4 months when the offender is aged 16 or 17 unless there are particular circumstances relating to the offender which make it unjust to do impose a sentence of this nature.³⁰

Liberty has reservations about presumptive minimum sentences - these concerns are particularly pressing given the Government's recent decision to extend the regime to sentences for 16 and 17 year olds,³¹ albeit that new clause 128 gives judges the scope to assess the demands of justice in an individual case and to consider the impact of a custodial sentence on a child.³² Liberty urges Peers to support two amendments proposed by the Prison Reform Trust which would remove from clause 128 the extension of the new sentence to 16 and 17 year olds.³³

A further amendment during Committee Stage would create an offence of causing serious injury by dangerous driving.³⁴ An individual summarily convicted of this offence would be liable to imprisonment for 6 months or for 12 months if section 154 of the Criminal Justice Act 2003 is commenced.³⁵ For those convicted on indictment, the offence would attract a maximum sentence of 5 years imprisonment.³⁶ New clause 130 introduced during Report stage creates an offence of squatting in a residential building. The clause will capture persons who have entered a building as a trespasser and are living, or intend to live in the building – it will not include those who remain in a property after the termination of a lease.³⁷ A person summarily convicted of this offence would be liable to imprisonment for a term not exceeding 51 weeks and/ or to a fine not exceeding level 5 on the standard scale.

New clause 130 introduced during Report stage in the Commons creates an offence of squatting in a residential building. The clause will capture persons who have

²⁹ Clause 128(1) inserting new section 1A (5) and (7) of the Crime Prevention Act 1953 and Clause 128(2), inserting new section 139AA (8) and (10) of the Criminal Justice Act 1988.

³⁰ Clause 128(1) inserting new section 1A(6) of the Prevention of Crime Act and clause 128(2) inserting new section 139AA(9) into the Criminal Justice Act 1988.

³¹ Clause 128 (1) introducing new section 1A(5) into the Prevention of Crime Act 1953.

³² Clause 128 (1) introducing new section 1A(7) into the Prevention of Crime Act 1953.

³³ See the Prison Reform Trust's Committee Stage Briefing on Part 3 of the Bill which can be accessed at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/PRT%20Briefing%20-%20LASPO%20Bill%20Lords%20Committee%20Stage.pdf>. See page 11 for amendments to clause 128.

³⁴ New clause 129.

³⁵ Clause 129 inserting new section 1A(5) of the Road Traffic Act 1988.

³⁶ Clause 129 inserting new section 1A(5) of the Road Traffic Act 1988.

³⁷ Clause 130(2).

entered a building as a trespasser and are living, or intend to live in the building – it will not include those who remain in a property after the termination of a lease. A person summarily convicted of this offence would be liable to imprisonment for a term not exceeding 51 weeks and/ or to a fine not exceeding level 5 on the standard scale.

Liberty understands the rationale behind a new offence targeting squatters and in particular notes the potential anguish suffered by home owners where residential property is illegally occupied. This notwithstanding, the criminal law already provides a significant level of protection. It is a criminal offence under section 7 of the Criminal Law Act 1977 for a person who entered premises as a trespasser to fail to leave at the request of a *'displaced residential occupier'* or *'an individual who is a protected intending occupier of the premises'*. It is a defence to show that the premises occupied formed part of premises used for non-residential purposes and that the trespasser was not on any part of the premises used wholly or mainly for residential purposes. Liberty believes that this offence provides important protection for home owners prevented from occupying their homes by squatters. Individuals convicted under this provision face 6 months imprisonment or a substantial fine. In some circumstances, squatters may be guilty of other offences such as criminal damage and burglary – both of which are well accommodated within the criminal law. The range of applicable offences currently available, particularly when combined with the civil law of trespass, provide a significant level of protection for home owners.

We are concerned that the proposed new offence will largely affect empty or abandoned homes and will expose vulnerable homeless people to the criminal law. Liberty is further concerned that, if passed, clause 130 could leave individuals with no choice but to sleep on the streets, exposing them to acute suffering and considerable risks to their personal safety. As the very minimum level of acceptable protection, Liberty supports an amendment proposed by Crisis which would see an exception to the new criminal offence where the occupied property has been empty for more than 6 months and where there are no steps being taken to bring it back into use.³⁸

New clause 131 consolidates the law on the use of reasonable force for the purposes of self-defence, placing the common law defence of defence of property on a statutory footing.

³⁸ Crisis Report stage and amendment briefing: Offence of squatting in a residential building – available at: <http://l-r-c.org.uk/files/CrisisSquattingamendmentbriefing.pdf>.

Conclusion

Liberty welcomes many of the provisions set out in Part 3 of the Bill and in particular the abolition of the IPP sentence which has proved so unfair and unworkable in practice. We urge Peers to support the suggested amendments to the Government's proposals to ensure that the extended sentence regime operates in a way liable to facilitate effective rehabilitation wherever possible. Liberty further urges Peers to oppose proposals which remove vital safeguards from the out-of-court disposal regime and to ensure that the proposed new squatting offence does not criminalize some of the most vulnerable people in our society.

Rachel Robinson