Police, Crime, Sentencing and Courts Bill

NACRO BRIEFING: POLICE, CRIME, SENTENCING AND COURTS BILL GROUP MEETING ON ADULT SENTENCING MEASURES

PURPOSE OF MEETING: a group discussion focussing on the Ministry of Justice youth measures in the Police, Crime, Sentencing and Courts (PCSC) Bill, which the Lord Chancellor will chair. He is aware that a number of groups with interest in the youth justice system have written to him and his ministerial team regarding the Bill and would welcome the opportunity to discuss the points you have raised. He would like to consider measures in the PCSC Bill covering:

- Remand
- custodial sentencing
- community sentencing
- criminal record rehabilitation periods.

The meeting will also provide an opportunity for him to listen to views on the implementation of the Youth Rehabilitation Order pilots, so they can consider feedback as they design the pilots.

This is a meeting to discuss the measures already before Parliament, rather than to bring forward new proposals.

Introduction

In our briefing for the second reading we confirmed our support for a number of the measures in the Bill, including:

- The commitment to criminal record disclosure reform
- The piloting of problem-solving courts
- Increasing the threshold for custodial remand of children

Overarching points:

- Although the White Paper which preceded this legislation claimed to understand and seek to address the root causes of children coming into contact with the law, and

highlighting the primacy of welfare needs of children, the legislation being introduced rolls out extremely punitive, ineffective measures. The government's own Impact Assessment admits there is "limited evidence that the combined set of measures will deter offenders long term or reduce overall crime"

- Instead of reforming sentencing to take a distinct and child-centred approach, the adult regime continues to be the starting point, with minor modifications for children.
- We would have liked to have seen consideration being give to the piloting of problem solving courts (or similar) for children as well as adults.
- We are pleased to note that Serious Violence Reduction Orders will not apply to children
- We are disappointed to see that the Bill will increase the proportion of their sentence that some children will spend in custody before they may be supervised in the community, and removes opportunities for tariff review for those children serving life sentences. This will increase the amount of time that some children spend in custody, when we know that the threat of harsher custodial sentences is unlikely to deter children from offending, and that imprisonment is extremely harmful to children, causing disruption to their long-term development.
- The Bill fails to address the fact that children who are alleged to have committed an offence as a child but turn 18 before being prosecuted are dealt with and sentenced as adults. This is a simple and common sense legislative change that should be included within the Bill to eliminate an unfairness which can be caused by court delays. This is particularly salient now as the pandemic has had a significant impact on the speed at which cases are brought to trial.
- Many of punitive proposals in the Bill are set to disproportionately impact Black, Asian and Minority Ethnic (BAME) children. Children from ethnic minorities are over-policed, more likely to be stopped and searched, arrested, less likely to be diverted, and are therefore disproportionately likely to end up in the criminal justice system.
- Across all aspects of the youth justice system, careful attention must be paid to the existence of institutional racism and structural disadvantage that contributes to the disproportionate representation and inequitable treatment of Black Asian and Minority Ethnic children.
- It is also important to recognise that children in trouble with the law are often victims of crime and exploitation, and the responses should reflect this. Children in trouble with the law are often extremely vulnerable, and their involvement in the criminal justice system may be the result of the failure of other, welfare-based services to identify and appropriately and effectively respond to their needs.
- Missed opportunity: raising the minimum age of criminal responsibility.

Discussion topics:

1. **Remand**

Background: The Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Act 2012 introduced new youth remand provisions. The changes aimed to reduce numbers of children unnecessarily remanded to custody by making it more difficult to remand a child and giving local authorities a financial incentive to reduce remands.

However, there was a significant increased in the use of remand:

- A 2019 report from the Independent Inquiry into Child Sexual Abuse ("IICSA") noted a significant increase in the use of custodial remand for children
- in 2018/19, only a third of children remanded to custody or local authority accommodation ("LAA") went on to receive a custodial sentence.

Following IICSA's recommendation to investigate why the child remand population is as high as it is, the Government committed to a review of custodial remand for children

The Bill: will amend the LASPO framework to tighten the tests the courts must satisfy to decide when to remand a child to custody:

- introduces a statutory duty for courts to consider the welfare and best interests of the child when making remand decisions.
- It amends the tests courts must apply to determine whether to remand a child into custody
- makes it a statutory requirement for the courts to record the reasons for their decision
- amends the 'real prospect' test and the 'necessity condition,' so that remand in Youth Detention Accommodation (Young Offender Institution, Secure Training Centre or Secure Children's Home) can only be imposed for the most serious cases, where a custodial sentence appears the only option and the risk posed by the child cannot be safely managed in the community.

Comment: We welcome the steps to reform the legislative threshold for remanding a child to custody. The overuse of custodial remands for children is a longstanding issue, and particularly impacts on BAME children. The impact of court backlogs as a result of the pandemic has increased the need for urgent action. Pleased with:

- the introduction to the LASPO 'Necessity Condition' that for a remand to custody to be deemed necessary, the court must consider the risks posed by the child cannot be managed safely in the community
- the legislation will explicitly set out that the court must consider the interests and welfare of the child.

AYJ and others will say that to achieve the aim of custodial remand only being used as a last resort, the proposals should go further:

- **Remove or tighten the History Conditions:** Tightening of the 'History Conditions' in LASPO, so that previous instances of breach or offending while on bail must be significant, relevant, and recent to justify remanding a child to custody is welcome but does not go far enough. The issues addressed in the History Conditions are more suitably considerations for the court regarding whether the Necessity Condition is met: whether the child poses a risk and whether that risk is manageable in the community. AYJ position: **The History Conditions should be removed. If they are not removed, 'recent' should be restricted to within the last six weeks.** If we are to take a child-centred approach, we must consider how children experience time, and recognise the well-established principle that children change and develop in a shorter time than adults.
- **strengthen the Offence Condition:** AYJ are disappointed that the broad 'Offence Condition' - that the child is charged with (a) a violent or sexual offence OR (b) an offence punishable in the case of an adult with imprisonment of 14 years or more, remains unchanged. For remand to custody to be a genuine last resort as the government wishes, decisions must be based on risk of serious harm. The Offence Conditions must be strengthened such that remand to custody is only available if a child is alleged to have committed a serious offence, such that they may present a danger to the public. We propose streamlining and narrowing the Condition by removing (a), which is so broad as to undermine the threshold set by (b), as well as updating (b) to be offences for which a life sentence is available as a sentencing option - ensuring that only children deemed by current legislation to be "dangerous" and to have committed "serious", "grave" crimes are remanded to custody
- **strengthen the necessity condition:** The 'Necessity Condition' should be further strengthened as the latter part of the condition (to prevent the commission of an imprisonable offence) sets such a low threshold for meeting the Condition as to render the first threshold (to protect the public from death or serious personal injury) somewhat redundant. This latter part of the Necessity Condition should be removed, or tightened.
- **bring police remand criteria in line with the new court remand criteria:** Research by Transform Justice indicates that police remand is a driver of custodial remand, in part because children held in police custody must be presented to court within 24 hours, meaning YOTs can struggle to develop a satisfactory bail package. Transform Justice's therefore suggests that provisions should be introduced to the Bill that bring police remand criteria in line with the new court remand criteria
- **Remand for own welfare pending trial or sentence:** Howard League pushing for repeal of this power as it is unacceptable for a child to be refused bail for their own welfare, as is currently the case under the Bail Act 1976.

2. Custodial sentencing

Detention and Training Orders

Background: A Detention and Training Order ("DTO") is a youth custodial sentence that can be given for 4, 6, 8, 10, 12, 18 or 24 months. Clause 132 amends the Code to remove the fixed lengths so that a DTO of any length, from 4 to 24 months can be given.

Comment: the proposals to make DTOs any length, in particular to better account for periods spent on remand or on bail with electronic curfew are sensible but arguably not enough is known about the impacts this will have, and it is of concern that the proposals are predicted to increase the steady state number of children in custody by up to 50 children by 2023/24.

Starting points for murder committed when under 18

Background: Detention at Her Majesty's Pleasure ("DHMP") is a mandatory life sentence for offenders who commit the offence of murder when they are a child, as set out in section 259 of the Code. As with all life sentences, the court must set a minimum term to be served in custody before the offender can be considered for release by the Parole Board. Paragraph 6 of Schedule 21 to the 2020 Act sets the minimum term starting point at 12 years for all children. Clause 103 amends the Code to introduce a sliding scale of starting points for minimum terms. The scale takes into consideration the age of the child and the seriousness of the murder. **The older the child and the more serious the murder, the higher the starting point.**

Those who are sentenced to DHMP can currently apply for a review of their minimum term at the halfway point. The purpose of the review is to determine if the existing minimum term is still appropriate, in light of the individual's progress in custody. The individual can apply for further reviews every two years under current policy. Clause 103 enshrines the minimum term review process into legislation**. It also removes eligibility for continuing reviews past the age of 18**. Those sentenced to DHMP will be eligible for only a single review at the halfway point of their minimum term but no further reviews once they have turned 18. Those who were already age 18 or over at sentencing will no longer be eligible for any minimum term review.

Comment: Government acknowledges that maturity is an important factor in sentencing, and accepts the growing evidence on maturity which shows that young adults, particularly males, are still maturing until the age of 25. The starting point for sentencing of those aged 18-25 should be a nuanced approach that is closer to sentencing for children, not adults, and yet the Bill proposes to bring older children's sentencing closer in line with adults. This is the wrong approach, and it is inappropriate for the starting point for tariffs for older children to be set at 90 per cent (17-year-olds) and 66 per cent (15-16-year-olds) of the starting point for adults. The evidence on maturity is also not reflected in the clause which proposes that whole life tariffs can be given to 18 year olds.

Minimum sentences for particular offences

For some serious offences the law provides minimum custodial sentences (generally for repeat offences, such as a third conviction for domestic burglary). These minimum sentences are not technically mandatory, but are a mandatory consideration that the court must make before passing a sentence. Courts have the discretion not to impose the minimum when it considers that there are particular circumstances pertaining to the offender and/or the offence which would make it unjust.

A large proportion of repeat offenders do not receive the minimum custodial sentence. In order to aim to reduce the occasions in which the court could depart from the minimum term, the Government is proposing to change the threshold for passing a sentence below the minimum term for offences including:

- a third class A drug trafficking offence (7 years minimum);
- a third domestic burglary (3 years minimum);
- a repeat offence involving a weapon or bladed article (6 months minimum);
- threatening a person with a weapon or bladed article (6 months minimum).
- The changes will also apply to 16- and 17-year-olds who receive a 4-month detention and training order ("DTO") for a repeat offence involving a weapon or bladed article or threatening a person with weapon or bladed article.

These changes will also align the criteria with that used for offences involving firearms that **the court must impose an appropriate custodial sentence of at least the minimum term unless the court is of the opinion that there are "exceptional" circumstances which relate to the offence or to the offender which would justify not doing so**.

Comment: this changes the threshold for passing sentences below the minimum term for certain repeat offences, and seems to do so on the basis that judicial discretion is being exercised inappropriately, as 'a large proportion' don't get the minimum term. Judicial discretion is important, the judiciary carry out an important function in weighing the facts of each case and taking all the circumstances into account in arriving at the appropriate sentence. The very fact that a large number of people don't receive the minimum custodial sentence demonstrates the importance of judicial discretion and the fact that it is working to provide justice which is tailored to the circumstances. Restricting/fettering judicial discretion is harmful for the exercise of the independent judicial function and its inappropriate to fetter just to get the result you want!

Automatic release

Clause 106 will amend the Criminal Justice Act 2003 moving the custody release point, or 'minimum term', from halfway to two-thirds of the sentence for sentences of 7 years or more under s250 of the Sentencing Code. Clause 105 does the same thing for discretionary life sentences.

Comment: extending the automatic release point from half- to two-thirds of the sentence will have a disproportionate impact on, Men, people with a Black or Black British ethnicity as well as younger adult offenders (aged 18-24) and offenders over the age of 50. Government in its equality impact assessment justifies the unequal impact of these changes as a 'proportionate means of achieving the legitimate aim of protecting the public'. However, it provides no evidence or reasoning in support of this claim, and so without an evidential basis to support the position that increasingly punitive sentencing deters crime or reduces reoffending we believe that the disproportionate impact of these changes cannot be justified.

Extending automatic release points does not sit well with the position that sentencing a child to custody must be a last resort and for the shortest period of time possible.

Extending the time that some people convicted of some offences spend in custody does not, arguably achieve the aims of the white paper of providing a simpler and more coherent sentencing structure, but takes sentencing for some offences to a harsher level, and so adjusts the harshness of those sentences in isolation, without giving proper consideration to how that fits into an overall scheme of punishment.

3. Community Sentencing

Youth Rehabilitation Orders

The Criminal Justice and Immigration Act 2008 (the 2008 Act) introduced the Youth Rehabilitation Order ("YRO"), a new generic community sentence for youths which provides courts with a choice of 18 requirements from which a sentence can be designed. The YRO also provides for two high-intensity requirements (Intensive Supervision and Surveillance ("ISS") or Intensive Fostering) that are set as alternatives to custody for the most serious offenders.

The Bill makes the following changes to the YRO:

a. a standalone electronic whereabouts monitoring requirement will be added to the list of available requirements;
b. the curfew requirement will be amended to raise the maximum number of daily hours from 16 to 20 while retaining a weekly maximum of 112 hours;
c. youth offending teams or probation staff will be made the Responsible Officers for YROs with electronic compliance monitoring requirements;
d. the maximum length of the extended activity requirement of a YRO with Intensive Supervision and Surveillance will be extended from 180 days to 365 days;

e. a mandatory location monitoring requirement will be added to YROs with Intensive Supervision and Surveillance; and
f. the age limit of the education requirement will be raised so that it is the same as the age of compulsory education and training, rather than compulsory school age.

These measures make provision for the Government to pilot items a., d. and e. above and to restrict their use if necessary, in light of evidence of use in practice.

Comment:

- if tougher community sentences results in reduced numbers of children sent to custody - this would of course be preferable to custody. However, it is not clear that this will be the case, and there is always the risk of up tariffing with more punitive community orders being used for those who would have always got a community order, rather than genuinely being used as an alternative to custody.
- The focus is very much on increasing surveillance and restrictions, rather than on better responding to children's needs and addressing root causes of offending behaviour. We know from the BYC work that YOTs have an important role in supporting a young person's shift to a more positive, or pro-social, identity – an identity where a young person is empowered to make better choices in their behaviour and with wider life decisions, including relationships. The young person recognises that they can gain status and security from these positive choices. They are more future-oriented in their motivations and choices. Research shows that when a young person at risk of offending finds a new pro-social identity, it can replace the need to maintain status and peer respect through negative behaviour. Increasing surveillance and restrictions is not supportive of the creation of a pro-social identity
- Increasingly restrictive community sentences can simply set children up to fail and lead to more children being further criminalised through breaches. Many of the children who will be the subject of community orders may lead chaotic lives with substance misuse or MH issues, lacking maturity and acting impulsively – these children will find adherence to restrictive orders very difficult.
- Increasingly restrictive orders based on surveillance may disproportionately impact certain groups of children due to the over-policing of certain communities, and if there is discrimination in enforcement and decisions around breach proceedings.
- Increasing used of electronic tags is of concern and won't tackle child exploitation (as it's only the child at risk of breach, not the exploiter)

4. Criminal record rehabilitation periods.

In our submission for the second reading we made the following comments regarding the changes to criminal record disclosure:

We welcome the direction of travel of the Government in reducing the rehabilitation/ disclosure periods for criminal records for a number of disposals including some community and custodial sentences for adults and Youth Rehabilitation Orders for children.

AYJ proposes:

- amendment to the 'relevant date' for rehabilitation periods of children who turn 18 between committing an offence and conviction, so the corresponding date is when the offence was committed, rather than the date of conviction
- Remove children from the exclusion from rehabilitation periods for certain offences where a custodial sentence of over four years is given.

5. Misc bits

Abolition of Reparation Orders

Required to make reparation to the victim(s) of the offence or to the community at large. Being abolished due to under-use.

Secure Schools and Secure Children's Homes

Temporary Release from Secure Children's Homes

Background: The Youth Custody Service and Secure Children's Homes ("SCHs") providers currently rely on inherent powers to make arrangements for the mobility of children detained in such accommodation to help address their offending behaviour and to support the integration of children back into the community at the end of their sentence. Clause 137 places existing provisions on a statutory basis. The Secretary of State and SCH registered managers will be able to temporarily release children detained following a court sentence or breach of a civil order. As secure 16 to 19 academies will be legally constituted as SCHs, this will also have the effect of conferring autonomy on that provider to take decisions about temporary release.

Comment: none

Secure 16 to 19 Academies

Background: Secure 16 to 19 academies are a new type of custodial provision for children and young people remanded or sentenced to detention in relation to a criminal offence. They will be run by child-focused providers and create a therapeutic environment within a secure setting, in line with international evidence that this is the most successful approach in reducing reoffending.

They will be dually established as 16 to 19 academies and SCHs. This means that they must be principally concerned with the provision of education to young people between the ages of 16 and 19. The Government intends that the majority of young people to be accommodated in secure 16 to 19 academies will fall within this age range. Key to the vision for secure 16 to 19 academies is the autonomy of providers. The market for providers consists primarily of charities at the present time. This legislative change aims to provide confidence to future secure school providers regarding their ability to autonomously operate secure schools in line with both their charitable objects and the Government's vision.

Comment: none

Court hearings via videolink

The expansion of live links in court should not be permanently embedded without evaluation of impact. Available evidence on the use of live audio and video links in court raises concerns they hamper the effective participation of children in their court proceedings. The government must not permanently embed measures introduced due to COVID-19 without the necessary evaluation of their impact.

Comment: would want to see safeguards introdcued to ensure live links are only used in exceptional circumstances with children, and following health screenings.

Criminalising children for taking part in non-violent protest

Children must not be criminalised for exercising their right to protest. The public order provisions in the Bill threaten civil liberties and create harsher sentencing for children who "ought to have known" restrictions were in place.

Serious Violence Duty

The Bill introduces a Serious Violence Duty on relevant agencies to collaborate, where possible through existing partnership structures, to prevent and reduce serious violence.

Comment: such a duty should be focussed on safeguarding and have children's welfare as its primary concern, without this it will have unintentional punitive consequences for children at risk of violence. However, the AYJ suggests that the duty very much sits in a crime reduction rather than a safety space – the focus is on crime rather than contextual safeguarding and welfare, the bodies involved are primarily criminal justice organisations rather than safeguarding partnerships and Local Safeguarding Children Boards – which do not feature in the Bill - and children's services more broadly. Of particular concern that local policing bodies appear to be the intended leads. Creates a Duty that artificially treats violence as if it is a separate issue to wider issues impacting children's safety. A broader strategy is needed which equips the safeguarding system, statutory and voluntary services to protect children from harm outside the home, with resources and guidance to do so. This

should embed a response that takes account of the context in which children are at risk and is trauma-informed. A duty for serious violence which presents these issues as distinct from wider safeguarding duties could lead to a more punitive approach to these children.