Centre for Justice Innovation

BRIEFING FOR SECOND READING DEBATE ON POLICE, CRIME, SENTENCING AND COURTS BILL

SUMMARY

At the Centre for Justice Innovation, we seek to build a justice system which every citizen believes is fair and effective. We believe in putting frontline practitioners and the evidence at the heart of justice reform.

We support a number of the measures in the Police, Crime, Sentencing and Courts Bill ('the Bill'). We support the measures taken to protect the police and other emergency workers (Part 1). We also support a number of the measures to improve the community supervision of offenders, especially the reforms of out of court disposals (clauses 76-94), new powers to trial new forms of problem-solving court (clauses 128 and 129), and the new duty placed on probation to ensure local stakeholders are consulted on Unpaid Work carried out by offenders as part of a community sentence (clause 130).

We are concerned, however, that a number of the measures in the Bill will put further pressure on an already stretched prison system over the next ten years, are unlikely to deter crime and re-offending, and are likely to disproportionately impact on specific communities.

Moreover, we believe the changes that will increase the use of prison represent the wrong investment of scarce resources. Instead of spending money on more prison places, we strongly argue that the Government should invest energy and more resources into a smarter justice strategy: (i) more effective prevention and early intervention; (ii) the creative use of deferred sentencing and problem-solving at court; (iii) the rapid national roll out of high, quality treatment for offenders; (iv) more dynamic use of electronic monitoring; and (v) the empowerment and professionalization of our probation service.

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PROPOSED REFORMS

As the Government's recent White Paper stated, "failures in sentencing lead to never-ending cycles of criminality, with low-level offenders stuck in a revolving door of crime… our system of sentencing is not properly equipped to support them to address… (the) causes of their offending. This means they have little hope of rehabilitation and we as a society have little hope of cutting the crime they commit in the longer term."[1] We agree with that and therefore **we welcome a number of the measures in the Police, Crime, Sentencing and Courts Bill ('the Bill')**, a number of which implement recommendations we have previously called for,[2] specifically:

- The measures taken to protect the police and other emergency workers. We are especially supportive of the measures which place a duty on the Secretary of State to publish an annual report on progress against the delivery of the Police Covenant (clause 1) and which double the maximum penalty for assault on emergency workers (clause 2).

- The new streamlined two tier formal out of court disposal framework for individuals over 18, consisting of a diversionary caution and a community caution (clauses 76-94). These changes go a long way to simplifying the existing arrangements and have been trailed for long enough for forces to be ready for

their implementation.

- The new powers to help pilot new forms of problem-solving court (clauses 128 and 129). As we understand it, the Government intends to pilot three new types of problem-solving court (a substance misuse model at Crown Court, and a female offender and domestic violence model at magistrate court) in at least five pilot areas by the end of this calendar year, and are keen to see Government deliver on that objective.

- The new duty placed on probation to ensure local stakeholders are consulted on Unpaid Work carried out by offenders as part of a community sentence (clause 130). In previous work,[3] we have called for this change. For the public to have confidence in community sentences, they need to see tangible evidence that the unpaid work carried out by offenders on community sentences repairs and rebuilds community assets.

However, despite our support for these measures, we are **concerned that a number of the measures in the Bill will put further pressure on an already stretched prison system over the next ten years**. The Government's own impact assessment suggests Prison Services and the Youth Custody Service will face "increased population and longer times spent in custody for some offenders, which may compound prison instability, self-harm, violence and overcrowding."[4] Furthermore, it is also likely that the impact on offenders and their families of serving longer periods in custody "may mean family breakdown is more likely, affecting prisoner mental health and subsequent reoffending risk."[5]

We are particular concerned that the **Government's proposals on minimum custodial sentences (clause 100) are unlikely to deter crime and re-offending and are likely to disproportionately impact on specific communities**. These changes will restrict courts' discretion on imposing minimum custodial sentences for "third strike" burglary, "second strike" knife possession and "third strike" Class A drug trafficking offences. The Government's Equality Impact Assessment states that "30-39 year olds are overrepresented in the total population of those sentenced for these offences" and that "BAME individuals appear to have high representation in the Class A drug trafficking cohort and possession of or threatening with a blade."[6] The proposed changes are therefore likely to further impact on these groups, accentuating existing disparities.

SMARTER JUSTICE

Alongside the impact of these changes on communities and on practitioners working in our custodial estate, we are also concerned that, taken together, the **measures that seek to increase the use of prison represent the wrong investment of scarce resources**. The Government's estimates of offender supervision costs of the Bill suggest that between 75%-78% of the costs over the next ten years will be expended on custody. And yet the Government's own assessment suggests that there "is, however, limited evidence that the combined set of measures will deter offenders long term or reduce overall crime."[7] In answer to a Parliamentary Question on March 1st 2021, Minister Chris Philp suggested that "the deterrent effect of sentence severity has received a high level of attention in wider research literature. The evidence is mixed, although harsher sentencing tends to be associated with limited or no general deterrent effect."[8]

Instead of spending money on more prison places, we strongly argue that **the Government should invest their energy and more resources into a smarter justice strategy**, that is more likely to achieve the stated aims of the Government to "turn people away from crime and end the cycle of reoffending." The sections below set out the detail of what a smarter justice strategy would look like and provide our more detailed analysis of the specific sections of the Bill but a smarter justice strategy would:

- prioritise and invest in the prevention of crime, especially serious violence through a public health approach, as well as ensuring that we maximise the opportunities to place vulnerable, complex and low risk offenders into effective, evidence led out-of-court disposals and diversion schemes;

- make more creative use of deferred sentencing and problem-solving approaches at court, using all the opportunities we can at court to tackle re-offending and provide opportunities for reparation;
- embrace the evidence that shows that swift access to high quality treatment for offenders is likely to reduce re-offending and ensure that, by the end of this Parliament, offender treatment provision is rolled out nationally and that the Government should ring-fencing this funding;
- rather than just lengthen electronically monitored curfews, we believe the Government should set out a smarter electronic monitoring strategy, using the full range of electronic monitoring technology in a more dynamic way.
- have, at is centre, an empowered, professionalised probation service, with Government establishing a new licence to practice for probation and other offender management roles, creating a register to monitor those who can practice and the creation of an independent regulatory body to oversee their maintenance.

SMARTER JUSTICE

More effective prevention and early intervention

A smarter justice strategy needs to **prioritise and invest in the prevention of crime, especially serious violence through a public health approach**, as well as ensuring that we **maximise the opportunities to place vulnerable, complex and low risk offenders into effective, evidence led out of court disposals and diversion schemes**.

Preventing serious violence

Clause 7 of the Bill places a duty on specified authorities (including local and health authorities and chief officers of police) to collaborate with each other to prevent and reduce serious violence. As we have seen across the country, the creation of many collaborative partnerships, especially in Violence Reduction Units, has been very welcome in ensuring we take a public health approach to tackling serious violence.

We are, however, concerned that it is unclear what resources will follow to ensure that this new duty to tackle serious violence does not simply place new burdens on local authorities and Police and Crime Commissioners. Without additional resources to invest in evidence-led approaches to serious violence, there is a risk that the new duty imposes administrative and bureaucratic burdens on local partnerships, and does not assist the many dedicated practitioners across the country seeking to tackle serious violence.

Early intervention

We know that out of court disposals are important tools in addressing early stages of offending behaviour. While we **support the changes to the statutory framework for out of court disposals, we do have some suggested amendments**:

- Calling the upper tier disposal, the diversionary caution, is potentially confusing (clauses 77-85). Diversion is commonly used as a term to describe activity moving people away from any contact with the formal justice system, whether that be a prosecution or a statutory out of court disposal. The proposed new disposal is, in essence, similar to the existing conditional caution. There are already a number of forces using a two tier framework including the conditional caution. We anticipate that this name change will confuse police forces, when the intention is to simplify.

- The community caution should be able to be offered to individuals who accept responsibility for their behaviour, rather than requiring a formal admission of guilt (clauses 86-93). There is reason to believe that out of court disposals which do not require people to admit guilt to be eligible for diversion may help address disproportionate outcomes for those from Black Asian and Minority Ethnic (BAME) backgrounds, as highlighted in the Lammy Review.[9] Out of court disposals that do not require a formal admission of guilt and only require individuals to 'accept responsibility' may encourage the participation of people from groups which tend to have less trust in the criminal justice system and therefore may be more reluctant to make a formal admission.

- The community caution should be able to be offered to individuals without the imposition of conditions (clauses 86-93). Currently, the existing framework contains a simple caution in which no conditions are attached. There are a range of circumstances in which an offence has occurred but in which the police may judge that no conditions should be imposed. Clause 76(4) states that community cautions must have one or more conditions attached to them— this should be changed to 'may'.

Moreover, while the Bill follows what has been a general direction of travel for some years, it is **critical that these changes are implemented effectively to ensure that, in the future, out of court disposals and diversion**

offer a truly effective way to addressing low-level offending:

- Implement safeguards against up-tariffing: The Code of Practice and additional guidance for practitioners, that would be issued under clause 94 of the Bill, should make it clear in eligibility criteria that each of the two disposals, as far as possible, the individuals get the same as they would have or, where appropriate, a less onerous sanction. The evidence suggests that up-tariffing (loading more requirements on low risk offenders) is likely to backfire and increase non-compliance and re-offending.

- Scrutiny to build trust: We are keen that the work to regularly scrutinise out of court disposals, via scrutiny panels, becomes the norm, rather than the patchwork system we currently have, where some areas have panels and others do not. We think it is vital ingredient in satisfying the court and magistrates that the use of out of court disposals is in the interest of justice as well as providing a useful feedback mechanism on what's working and what operational issues are arising.

- Consistency to point-of-arrest diversion: The evidence is clear that diversion for particularly vulnerable adults, including women who have been abused and people with mental health illnesses, away from not only court but also from formal out of court disposals is effective at reducing re-offending and improving well-being. As they implement the new framework, we are keen that the Government work with police to ensure that evidence based diversion is both encouraged and that the recording and tracking of data round it is placed on a more consistent basis.

Creative use of deferred sentencing and problem-solving at court

Diversion away from court will not be appropriate in all cases. Nonetheless, we strongly suggest that we are not currently using all the opportunities we can at court to tackle re-offending and provide opportunities for reparation. A smarter justice strategy would **make more creative use of deferred sentencing and problem-solving approaches at court**.

Deferred sentencing

There is extensive evidence that there are many of the individuals who come into our criminal courts have complex needs, including substance misuse, mental health illnesses and learning disabilities.[10] Courts have the power to defer sentences to place offenders in a meaningful community programme while retaining the option of an alternative disposal based on the offenders' engagement and compliance with that programme.[11] However, currently this power is seldom used. Anecdotal evidence suggests that deferring sentences is actively discouraged as it lengthens the time within which a case is concluded and therefore impacts on the HMCTS court timeliness targets.

Yet **deferred sentencing can provide the window of opportunity that services, individuals and the court needs to give low risk, but high need individuals the chance to change their lives around**, and, if they do so, to materially change their criminal justice pathway. For example, In Australia, the Assessment and Referral Court, Victoria, helps people address underlying factors that contribute to their offending behaviours. Sentencing is deferred while the accused participates in an individual support plan, while also meeting regularly with their case manager and being brought back monthly before the same judge, to check on their progress. The findings for the Assessment and Referral Court are positive: 82% of participants successfully completed the program and 43% of participants did not re-offend in the two years' post-completion.[12]

In a similar way, the greater **use of deferred sentencing could also provide space to encourage the greater use of restorative justice**, where victims and offenders consent to it, for low level offending. In New Zealand, deferring sentence at the District Court and referring cases into restorative justice conferencing is common, and evidence shows that the reoffending rate for offenders who participated in restorative justice was 15% lower over the following 12-month period than comparable offenders and 7.5% lower over three years.[13]

Problem-solving courts

Problem-solving courts are a diverse family of court models, albeit with shared characteristics. They are used in adult criminal justice, youth justice and family justice settings. Their common familial features are that they (i) specialise in a specific set of issues or around a specific target group; (ii) integrate the court process with a multi-agency approach that rests on a collaborative intervention and supervision; (iii) use the court to hold individuals and agencies to account through judicial monitoring; (iv) endeavour to create a procedurally fair environment; (v) focus on improving outcomes.[14]

We support the Government plans to pilot three new types of problem-solving court (a substance misuse model at Crown Court, and a female offender and domestic violence model at magistrate court) in at least five pilot areas. **The Ministry should ensure that the five problem-solving court pilots are up and running by the end of the calendar year** and should also build on and **support the range of existing problem-solving courts across England and Wales**. We recommend a mapping exercise at national level to determine where there are already relevant test bed areas where the pilots may find the most fertile soil to grow in. This should be twinned with a wide ranging call for expressions of interest, to identify the key agencies and individuals in each locality that have the enthusiasm and drive to implement the pilots and to tease out where there is local buy in and resources are— which is the key to future sustainability. The pilots, and other existing problem-solving courts, should then be supported to deliver effective, evidence led interventions, while the Ministry invests in robust evaluation.

National roll out of high, quality treatment for offenders

Substance misuse and mental health issues are widespread among the offending population.[15] A smarter justice strategy, therefore, should embrace the evidence that shows that **swift access to high quality treatment for offenders is likely to reduce re-offending**.[16]

However, the three treatment requirements (known collectively as Community Sentence Treatment Requirements (CSTRs)) [17] that courts can use as part of a community sentence are rarely used as part of community sentences— the latest available statistics show that alcohol treatment, drug treatment and mental health treatment requirements were part of only 3%, 4% and 0.5% of orders respectively. The low use of treatment requirements has primarily been driven by a lack of treatment provision—for example, Dame Carol Black's review of drugs concluded that "the amount of un-met need is growing, some treatment services are disappearing, and the treatment workforce is declining in number and quality." Moreover, the removal of the previous ring-fence on treatment spending for offenders has been associated with these decreases.

While the Government committed in its White Paper to the expansion of its treatment provision,[18] it has only committed to "achieve 50% coverage of mental health provision by 2023/24" and it remains unclear what the expansion for drug and alcohol treatment is. Given the upcoming Spending Review, we **urge Government to ensure that, by the end of this Parliament, offender treatment provision is rolled out nationally** and that **the Government should ring-fencing this funding**. Now is an ideal time to make use of what has been learned, and to make sure that in every part of the country, CSTRS can be used to help people with alcohol and substance misuse challenges, and to better protect our communities from crime.

Intelligent and dynamic electronic monitoring

The Bill proposes (clauses 125) to expand the length and intensity that courts can impose electronically monitored curfews by (i) increasing community sentence's curfew length, by legislating to increase the maximum period of electronic monitoring curfew from 12 months to two years to deal with more serious offenders serving community sentences; (ii) increasing community sentence's curfew intensity, by legislating to increase number of hours a day someone is under curfew, from the current from the daily maximum of 16 curfew hours up to 20 hours a day.

Yet, the evidence suggests that keeping some people, both when individuals are young and when they are assessed as low risk, on **longer periods of electronic location monitoring "can have a backfire effect – that is, it can lead to increases in re-offending**…"[19] Moreover, simply lengthening curfews does not take account of the evidence suggests that electronic monitoring impacts people differently, not least because the homes/living spaces in which people are curfewed vary in size and character, and that a longer curfew "alters the calculus of compliance; what is bearable punishment for a year may not be for twice that."[20]

Instead, rather than just lengthen electronically monitored curfews, we believe **the Government should set out a smarter electronic monitoring strategy, using the full range of electronic monitoring technology in a more dynamic way**. For example, the Ministry of Justice and HMPPS should develop a range of electronic monitoring 'packages' and market them to sentencers. These could, for example, include community sentence packages including GPS monitoring of exclusion zones for violent offenders whose behaviour stems from the misuse of alcohol associated with the night time economy. Separately, another package could involve the use of exclusion zones and remote alcohol monitoring for domestic abuse perpetrators, where the victim's views and circumstances play a crucial role in setting the details of the restrictions. The development of these packages needs to be informed by analysis of the main sub groups of offenders likely to receive community sentences who would benefit from electronic monitoring.

Alongside these packages, HMPPS should consider the evidence that 'blended' electronic monitoring (where monitoring is combined with support and supervision) is likely to be more effective than standalone electronic monitoring. It seems that the default should be that courts and prisons always consider the imposition of supervision and rehabilitative support any time they are considering imposing an electronic monitoring requirement. To enact this, the Ministry could introduce a presumption toward supervision/support whenever electronic monitoring is being considered in a community sentence or in a prison release.

The empowerment and professionalization of our probation service.

The decision to re-unify the management of offenders within the National Probation Service presents a once in a generation opportunity to build an effective probation service. We have previously argued that a **smarter justice system would have, at is centre, an empowered probation service**: one where probation practitioners have the time, support and tools to develop effective relationships with those they supervise, to deliver effective interventions directly, and to place offenders with other rehabilitative services. We therefore welcome provisions in the Bill to empower probation to use their professional discretion more (clauses 124 and 125 sections). These will enable provide probation with the ability to require offenders to attend appointments at any stage of community sentence (clause 124) and provide them with powers to vary Electronic Monitoring requirements, so they do not have to go to court to make a shift in start and/or end times of the curfew periods or make a change to the residence of the offender (clause 126).

However, this **empowerment must be accompanied by reform, notably a commitment to properly professionalise the probation service**. The Government (tentatively) committed in their White Paper to "to improve the professionalisation of the probation officer and probation support officer role."[21] We believe the opportunity to do so is now. In a recent policy paper on the topic,[22] we outline that this can be done by: (i) establishing a new licence to practice for probation and other offender management roles, analogous to those used in social work and other professions; (ii) creating a register to monitor those who can practice; (iii) creation of an independent regulatory body to oversee the right to practice and to drive up standards through requirements for continuous professional development. By taking these steps, we can improve probation's ability to protect the public as well as helping to restore the confidence of the judiciary in probation.

ENDNOTES

[1] Ministry of Justice. (2020). A Smarter Approach to Sentencing. Available at: https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing
[2] See our '*Delivering a Smarter Approach'* briefings at: www.justiceinnovation.org
[3] Bowen. (2020). *Smarter Community Sentence*s. Centre for Justice Innovation. Available at: https://justiceinnovation.org/publications/smarter-community-sentences
[4] Ministry of Justice (2021). *Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures: Impact Assessment*. Available at: https://publications.parliament.uk/pa/bills/cbill/58-01/0268/MOJ_Sentencing_IA_FINAL_2021.pdf
[5] Ibid.
[6] Ministry of Justice (2021). *Overarching equality statement: sentencing, release, probation and youth justice measures>* Available at: https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-overarching-documents/overarching-equality-statement-sentencing-release-probation-and-youth-justice-measures
[7] Ministry of Justice (2021). *Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures: Impact Assessment*. Available at: https://publications.parliament.uk/pa/bills/cbill/58-01/0268/MOJ_Sentencing_IA_FINAL_2021.pdf
[8] See: Hansard, Pets: Theft Question for Ministry of Justice UIN 155490, tabled on 19 February 2021. Available at: https://questions-statements.parliament.uk/written-questions/detail/2021-02-19/155490
[9] The Ministry of Justice (2017). *The Lammy Review*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf
[10] Ministry of Justice. (2013). *Transforming Rehabilitation: a summary of evidence on reducing reoffending*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243718/evidence-reduce-reoffending.pdf
[11] Our criminal courts are empowered to defer passing sentence for up to six months (Powers of Criminal Courts (Sentencing) Act ("PCCSA") 2000, s.1)
[12] Rutter et al (2017). *The Assessment and Referral Court (ARC) list & Borderline Personality Disorder (BPD) – are they compatible?*, Australian Catholic University. Available at: https://aija.org.au/wp-content/uploads/2017/05/RutterChesser-Hardy.pdf
[13] Ministry of Justice, New Zealand (2014). *Reoffending Analysis for Restorative Justice Cases*. Available at: http://www.justice.govt.nz/assets/Documents/Publications/rj-Reoffending-Analysis-for-Restorative-Justice-Cases-2008-2013-Summary-Results.pdf
[14] Bowen & Whitehead. (2015). *Problem-Solving Courts: An Evidence Review*. Centre for Justice Innovation: London.
[15] The Ministry of Justice's evidence summary concludes that there are "well-established links between drug misuse and offending," and that "[d]rug misuse is also associated with reoffending".
[16] The Ministry of Justice's evidence summary that "[t]here is good evidence that a wide range of drug interventions have a positive impact on reducing reoffending" and that "…there is good evidence that alcohol-related interventions can reduce hazardous drinking". Recent research for the Ministry of Justice and Public Health England, suggests that drug and alcohol treatment lead to a 33% reduction in reoffending in a two-year period (49% for individuals with alcohol misuse problems) (see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674858/PHE-MoJ-experimental-MoJ-publication-version.pdf
[17] The three types of CSTR are: Mental health treatment requirements (MHTR), Drug rehabilitation requirements (DRR) and Alcohol treatment requirements (ATR). They consist of treatment that will be arranged as part of the sentence and can last a maximum of three years as part of a Community Order and two years as part of a Suspended Sentence Order. (Related to CSTRS, Rehabilitation Activity Requirements (RARs) were introduced in 2015 and are intended to address non-dependent alcohol misuse, and emotional/mental health needs that do not involve a diagnosis. RARs have seen significant uptake but are distinct from CSTRs because they involve a lower level of need and intensity of intervention.)
[18] Ministry of Justice. (2020). A Smarter Approach to Sentencing. Available at: https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing
[19] Belur, J., Thornton, A., Tompson, L., Manning, M., Sidebottom, A. and Bowers, K. (2017). *A Systematic Review Of The Effectiveness Of The Electronic Monitoring Of Offenders*, London: University College London. Available at: https://whatworks.college.police.uk/Research/Systematic_Review_Series/Documents/Electronic_monitoring_SR.pdf
[20] Nellis. (2020). *Comment: Electronic monitoring curfews: Back with a vengeance*. Centre for Crime and Justice Studies.

Available at: https://www.crimeandjustice.org.uk/resources/electronic-monitoring-curfews-back-vengeance
[21] Ministry of Justice. (2020). A Smarter Approach to Sentencing. Available at: https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing
[22] Bowen. (2021). *Delivering a Smarter Approach: Professionalising Probation*. Centre for Justice Innovation. Available at: https://justiceinnovation.org/publications/delivering-smarter-approach-probation-professionalisation