THE LAW COMMISSION

(LAW COM. No. 214)

PROBATION SERVICE BILL

REPORT ON THE CONSOLIDATION OF
CERTAIN ENACTMENTS RELATING
TO THE PROBATION SERVICE

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PROBATION SERVICE BILL

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To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain.

The Probation Service Bill which is the subject of this Report consolidates certain enactments relating to the probation service and its functions (together with some associated provisions concerning persons on bail and the rehabilitation of offenders). In order to produce a satisfactory consolidation it is necessary to make the following recommendations. The Home Office has been consulted about the recommendations and has not objected to any of them.

Henry BROOKE,
Chairman, Law Commission

27th May 1993

RECOMMENDATIONS

1. Local authority functions

Under Schedule 3 to the Powers of Criminal Courts Act 1973 ("the 1973 Act"), responsibility for defraying the greater part of the expenditure of probation committees falls on local authorities. While presenting few problems in practice, the wording of the enactments being consolidated is confusing and inconsistent when describing the authorities having functions in relation to probation. This increases the possibility of error in amending legislation and has contributed to the increasing complexity of statute law in this area.

Section 57(1) of the 1973 Act contains the following definition-

> ""local authority" means, in relation to any probation area, any authority out of whose funds the salary of the clerk to the justices for a petty sessions area contained in the probation area is paid;"

Those words, read with the Justices of the Peace Act 1979, refer to the councils of non-metropolitan counties, metropolitan districts and outer London boroughs and the Common Council of the City of London. It is not clear whether the Receiver for the metropolitan police district ("the Receiver") is included in the definition or whether it is intended to allow for the possibility of more than one "local authority" for each probation area. Such doubts may explain why some provisions in the 1973 Act deal expressly with these points.

Different formulations are used in Schedule 3 of the 1973 Act to identify the authorities having particular functions. For example-

(a) paragraph 3(1)(a) requires the probation committee for any probation area to determine how many probation officers to appoint, subject to resolving any objections raised by "the responsible authority" (defined as being, outside inner London, "the local authority in whose area that probation area is situated" and, for inner London, as including the Receiver);

(b) paragraph 14 requires the expenses of probation officers shared by two or more probation committees to be apportioned between "the local authorities which, by virtue of paragraph 15 below, are required to defray the expenses of those committees";

(c) paragraph 15 requires certain expenditure to be defrayed by the local authority or authorities in whose area the probation area is situated;

(d) paragraph 16 uses the term "the local authority or authorities concerned", defined as the local authority or authorities in whose area is situated any part of the inner London probation area which is outside "inner London".

In substance these provisions identify the same authorities, or classes of the same authorities, but in different ways. That has always been understood to be the effect in practice and is what we would expect. It is, however, difficult to explain the variety of ways in which the provisions are drafted. It may be the result of successive amendments of provisions dating back to 1948.

The statutory language can be made simpler and more consistent in the Bill by relying on *clause 29*, which contains the general propositions about local authorities. Subsection (2) of that clause lists the types of council involved, without requiring detailed reference to other Acts. In some contexts the term "responsible authority" defined in subsection (1) helps to avoid repetition. The Receiver's position is dealt with for the whole Bill in subsection (3). Subject to two points that are resolved in recommendations 4 and 5 below, we consider that the new approach in the Bill to provisions about local authorities reproduces the effect of the enactments from which they derive. While we have no real doubts about that conclusion, the revision involves extensive redrafting and would remove any possible arguments about the effect of any provision based on the existing verbal differences between the relevant provisions. Such arguments would be unlikely to have much force but their availability, together with the fact that the redrafting involves a substantial alteration in the structure of the legislation, justifies the new approach being the subject of a recommendation from us rather than being treated as a mere matter of drafting.

We are satisfied that the proposed approach represents a substantial improvement on the current position and recommend that the Bill should be drafted accordingly.

2. Proposals from magistrates' courts committees about combined probation areas

Paragraph 1(1) of Schedule 3 to the 1973 Act empowers the Secretary of State to establish a combined probation area by order *"either upon consideration of proposals submitted to him by a magistrates' courts committee for a county or without any such proposals, ..."* As such proposals are not a pre-requisite for making an order, the legal effect of the words in italics is little more than a statutory acknowledgement of a power to make proposals. Two points arise on consolidation:-

(a) *Meaning of "magistrates' courts committee for a county"*: this phrase pre-dates the Local Government Act 1972 and was substituted, by the Courts Act 1971, for the previous reference to "a court of quarter sessions for a county". We would have expected a reference either to "a magistrates' courts committee" or to such a committee "for a non-metropolitan county, a metropolitan district or any of the outer London boroughs". It is not clear whether the current wording can be construed as including committees for areas other than non-metropolitan counties - it may be that there was a missed consequential amendment in the 1972 Act. We can see no reason why any magistrates' courts committee established under the Justices of the Peace Act 1979 should be excluded. The committee for the City of London should also be included, following the amendment made by section 75(2) of the Criminal Justice Act 1991, which enabled the City to be combined with other areas into a single probation area. We recommend that all magistrates' courts committees should be able to make proposals of the kind mentioned in paragraph 1(1) of Schedule 3.

(b) *Duty to consider proposals:* There appears to be nothing that would prevent a magistrates' courts committee from making proposals if clause 2(5) were omitted. So, in order to give the proposition some legal content, we recommend that there be a duty on the Secretary of State to consider any proposals submitted to him. That would be consistent with clause 2(2), which contains the same requirement in relation to representations from justices.

Effect is given to these recommendations in *clause 2(5)*.

3. Selection of probation officers

The assignment of a probation officer to an offender's case is a vital element of the probation system. An important principle is that, whenever possible, the same officer should act throughout a period of probation. Paragraph 9 of Schedule 3 to the 1973 Act (reproduced in *clause 4(1)(c)*) requires the probation committee to make arrangements for the selection of an officer to supervise a person on probation. That obligation is clear. But paragraph 9, as originally enacted, continued as follows (the words in italics being repealed in 1977)-

"and, if the probation officer ... dies or is unable for any reason to carry out his duties, *or if the case committee dealing with the case think it desirable that another officer should take his place*, another probation officer shall be selected in like manner..."

A literal interpretation of those words suggests that the scheme was to allow the chosen officer to be changed administratively where the reasons were unavoidable (such as death or physical or mental incapacity) while requiring a formal decision from the case committee in any other case. On that interpretation the repeal in 1977 left only a limited power to substitute another officer. Against that view is the fact that there may be perfectly good reasons, despite the principle mentioned above, for substitution. A change in the assigned officer's other duties, or his promotion, are examples. Difficulties in the relationship between officer and offender might also make substitution desirable.

We understand that the practice before 1977 was to interpret the words "dies or is unable for any reason to carry out his duties" liberally and to regard the following reference to the case committee as an extra power. The purpose behind the repeal in 1977 was said to be the removal of a power that had long ceased to be used. The repeal was presented as a minor amendment removing words of little practical utility. Nobody seems to have thought that it limited the freedom to make sensible arrangements for the substitution of officers where appropriate. The practice has not changed since 1977 and continues to take account of the desirability of a single officer being responsible throughout an offender's period of probation. However it appears to us that the words of paragraph 9 can be read as being more restrictive than the established practice, although a court might be persuaded that a more liberal interpretation is necessary to enable the system to work.

We consider it unsatisfactory for a question of administrative practice to be the subject of unnecessary statutory restriction, particularly as the detailed operation of the probation system will rarely be a suitable matter for determination by the courts. In our view it would be preferable to leave it to probation committees to make sensible arrangements for substitution in appropriate cases. Any necessary detail about the arrangements could be supplied by probation rules. This approach is consistent with the new section 2(2) of the 1973 Act (substituted by the Criminal Justice Act 1991) which merely requires a probationer to be under the supervision of an officer appointed for or assigned to the relevant area.

Accordingly we recommend that the references to the substitution of one officer for another should not be reproduced in the Bill.

4. Determination of the number of probation officers for a probation area
Paragraph 3(1) of Schedule 3 to the 1973 Act requires consultation about the number of probation officers needed for a probation area between the probation committee and "the responsible authority". That term is defined in sub-paragraph (5) for a probation area outside inner London as "the local authority in whose area that probation area is situated" and, for the inner London probation area, as the Receiver and "the local authority or authorities in whose area or areas" is situated any petty sessions area (such as the City of London) that is both within that probation area and outside the inner London area.

The approach in recommendation 1 above enables the current wording of paragraph 3(1) to be made simpler. It cannot, however, resolve one awkward point, which is how paragraph 3(1)(a) (substituted by the Criminal Justice Act 1991) works in practice when two or more authorities form "the responsible authority" but disagree among themselves. A literal reading of paragraph 3(1) and (5) suggests that the relevant authorities all have to agree before "the responsible authority" can do anything. That produces the unsatisfactory result that a single authority, which would be responsible for a share of the financial consequences, might be unable to secure the agreement of the other responsible authorities to making an objection to the committee's proposal. In other contexts the 1973 Act allows for the individual participation of each relevant authority in reaching agreement, and we doubt whether any different result was intended when the 1991 amendments were made.

We recommend that it should be made explicit that local authorities have the same individual rights in relation to the determination of the number of probation officers as they have in relation to other matters affecting their financial obligations. Effect is given to this recommendation in *clause 4(3)*.

5. Consultation between authorities where probation officers are shared by probation committees
Where probation officers are shared by two or more committees, paragraph 14(1) of Schedule 3 to the 1973 Act requires the expenditure involved to be apportioned between them, after consultation with the responsible local authorities. While the proposition appears to apply to all probation committees, the authorities to be consulted are described as "the local authorities which, by virtue of paragraph 15 below, are required to defray the expenses of those committees." As the inner London probation committee is not subject to paragraph 15 it appears that there is no requirement to consult the Receiver as well as any other responsible authorities.

The effect of paragraph 14(1) may be the result of a drafting error, as we cannot think of any reason why the Receiver should not have the same right to be consulted about matters affecting his financial responsibilities as any other responsible authority. It would also be awkward to preserve the distinction in the light of the new drafting approach in the Bill which relies on the general concept of "responsible authorities".

We recommend that the Bill be drafted on the assumption that the consultation requirement in paragraph 14(1) applies to the Receiver. Effect is given to this recommendation in *clause 16(2)*.

6. "Qualifying expenses" of probation committees

Paragraph 15(1) of Schedule 3 to the 1973 Act provides as follows:-

> "... the sums required to meet-
>
> (a) any expenses incurred by a probation committee *under the provisions of this Schedule* (including allowances under paragraph 13);
>
> (b) any expenses incurred by a probation committee in respect of superannuation allowances, gratuities or compensation payable by virtue of regulations under section 7 of the Superannuation Act 1972 to or in respect of probation officers and clerks appointed by probation committees or probation officers to assist probation officers in the performance of their duties; and
>
> (c) any other expenses incurred by a probation committee in accordance with rules made under this Schedule;
>
> shall be defrayed, in accordance with rules so made, by the local authority in whose area the probation area is situated."

The intention behind the financial provisions of Schedule 3 is to provide a framework for the defraying by local authorities of all probation service expenditure apart from the provision of certain hostels funded by the Home Office. Paragraph 15(1) has always been understood to cover all expenses of a probation committee, including any incurred in performing functions depending in part on other legislation. But the drafting of that paragraph presents a verbal trap for those preparing subsequent provisions about the probation service, since questions may arise as to whether expenses incurred by virtue of provisions of other legislation are incurred "under the provisions of this Schedule". We think another enactment adding to the functions of a probation committee would (subject to anything appearing to the contrary) be likely to be construed as one with Schedule 3 even if no express provision to that effect appeared. Any other view would produce a legal vacuum as probation committees would have been given new statutory functions without the means to discharge them.

It would be an improvement in the form of the law for the starting point on committee expenditure to be clarified, so that future enactments can be drafted without having to consider whether paragraph 15 is of general application. It is undesirable for the words of that paragraph to appear more limited than their actual effect. As statutory corporations only have the functions conferred by or under an enactment, a reference to the expenses of probation committees "incurred in the performance of their functions" seems to us to be a more direct description of the expenses to which paragraph 15 applies in practice. It would also cover the expenses of performing any new functions and those incurred under subordinate legislation.

We recommend that the description of the expenses to be defrayed by local authorities should be in terms simply of the expenses incurred in the performance of the committee's functions. Effect is given to this recommendation in *clause 17(2)*.

7. Probation rules

Section 15(6) of the Local Government Act 1985 provides that probation rules may make provision for probation areas affected by the abolition of metropolitan counties different from that made for other areas. Including that provision in *clause 25* would suggest that there is no general power to make different provision for different cases in probation rules. That suggestion would be contrary to the manner in which the rule-making power has been exercised from time to time.

We have no reason to doubt that different cases can be dealt with differently in probation rules where appropriate. We also understand that section 15(6) is unlikely to be relied on in the future and that no rules have been made citing it for their *vires*. Although the Probation (Amendment) Rules 1985 (SI 1985/1506) included provisions of a kind that might have been contemplated by section 15(6), that section was not relied on in making them.

We recommend that section 15(6) of the 1985 Act should not be reproduced in the Bill.

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