

## **OFFENDER REHABILITATION BILL**

### **UPDATED DELEGATED POWERS MEMORANDUM**

#### **INTRODUCTION**

1. This memorandum concerns the Offender Rehabilitation Bill as brought from the House of Lords on 9 July 2013. The memorandum identifies the provisions for delegated legislation in the Bill. It explains the purpose of the delegated powers taken, describes why the matter is to be left to delegated legislation, and explains the procedure selected for each power and why it has been chosen.

#### **SUMMARY OF THE BILL**

2. The current adult sentencing framework is broadly governed by the Criminal Justice Act 2003 (the 2003 Act). The Bill makes a number of changes to the release arrangements set out in the 2003 Act for offenders serving custodial sentences of less than 12 months and those serving sentences of between 12 months and 2 years. The Bill is designed to ensure that all adult offenders serving custodial sentences can be supervised on release for a period of at least 12 months. In particular the Bill:
  - Applies arrangements for release under licence to offenders serving fixed-term custodial sentences of more than 1 day but less than 12 months.
  - Introduces new supervision arrangements for offenders released from fixed term custodial sentences of less than 2 years so that all offenders are supervised in the community for a least 12 months.
  - Introduces a new drug rehabilitation requirement for periods of licence and supervision, and expands existing drug testing requirements to include Class B as well as Class A drugs.
  - Creates a new court process and sanctions for breach of supervision requirements for offenders serving fixed term custodial sentences of less than 2 years.
  - Introduces a requirement that offenders sentenced to an extended determinate sentence must have an extension period of supervision of at least 1 year.
  - Introduces a requirement that any juvenile who reaches his or her 18<sup>th</sup> birthday before being released from a fixed-term custodial sentence should spend at least 12 months on licence and or supervision in the community.
3. The Bill also makes a number of changes to the 2003 Act provisions governing community orders and suspended sentence orders. In particular it:
  - Creates a new rehabilitation activity requirement for community orders and suspended sentence orders and in doing so abolishes the supervision and activity requirements.
  - Introduces new arrangements for the designation of responsible officers in relation to the supervision of offenders and makes clear that the responsibility for bringing breach action lies with the public sector.
  - Introduces a new requirement that offenders subject to community orders and suspended sentence orders must seek permission from their responsible officers before changing residence.

## DELEGATED POWERS

### Probation

#### **Clause 1: Probation service reform: Parliamentary approval**

*Power conferred on:* *Not specified*

*Power exercisable by:* *Not specified*

*Parliamentary Procedure:* *Other (resolution of both Houses)*

4. Clause 1 was inserted at Report stage in the House of Lords as a non-Government amendment. The effect is that any proposal to change the structure of the probation service needs to be laid before and approved by a resolution of both Houses of Parliament. The Government considers that the scope of the power is uncertain and that the power is therefore technically unworkable.

### **Release and supervision of offenders sentenced to less than 2 years**

#### **Clause 5: Supervision of certain young offenders after release from detention**

*Power conferred on:* *Secretary of State*

*Power exercisable by:* *Rules made by Statutory Instrument*

*Parliamentary Procedure:* *Negative Resolution*

5. Clause 5 amends section 256B of the 2003 Act to restrict it to offenders who are under 18 at the half way point in their sentence and to offenders who are released from a sentence imposed under sections 91 or 96 of the Powers of Criminal Courts (Sentencing) Act 2000 for an offence committed before the commencement of the new provisions. The effect of the clause is that section 256B (as amended) will continue to apply to those young offenders with sentences of under 12 months to whom the new supervision arrangements in clause 3 do not apply. Clause 5(6) replaces an existing rule making power in section 256B which allows the Secretary of State to make rules about the requirements that may be imposed by the court to secure electronic monitoring of the offender (either for the purpose of monitoring his compliance with another requirement or for monitoring his whereabouts) or for the offender to provide a sample for the purpose of testing for specified Class A or Class B drugs.
6. Clause 5(6) substantially restates the existing rule making power, but omits the power to make rules about the provision of samples for drug testing. As a result, the new power relates only to rules about electronic monitoring requirements.
7. The existing power is subject to the negative resolution procedure, and the Government therefore proposes that the substitute power should be subject to the same level of Parliamentary scrutiny. The negative resolution procedure is suitable because it concerns

procedural matters about the delivery of electronic monitoring requirements of young offender under supervision.

### **Clause 8: Minor and consequential provision**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by Statutory Instrument

*Parliamentary Procedure:* None

8. Clause 8 confers a power on the Secretary of State to amend the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003 to replace a reference to a date on which a provision of the Bill comes into force with a reference to the actual date and to insert provision explaining the date.
9. This power is purely administrative in nature and is designed to facilitate ease of use and accessibility of legislation. The power is not substantive and will merely ensure that a reader does not have to check other sources. Given the administrative nature of this power it is considered that parliamentary scrutiny of the exercise of this power is not necessary.

### **Drugs and offenders released during custodial sentence**

#### **Clause 12: Drug testing of offenders after release**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Negative Resolution

10. Clause 12 extends an existing order-making power conferred on the Secretary of State by section 70(1) of the Criminal Justice and Court Services Act 2000 to enable the Secretary of State to specify Class B drugs for the purposes of drug testing requirements.
11. Currently when an offender is released from a sentence of imprisonment imposed for certain offences, the Secretary of State may impose a condition as part of the release licence for the offender to be tested for specified Class A drugs. The amendments in clause 12 will allow for that testing to be extended to certain Class B drugs and consequently the order making power for the specific drugs to be listed is also extended.
12. The consequence for an offender of the discovery of certain drugs in his system is that he could be recalled back to prison. Therefore, it is appropriate for it to be made clear in legislation which drugs will be subject of the testing. The changes to names and classification of various drugs, and invention of new and combined drugs, means that there is a need to be able to amend and update the list on a regular basis. On that basis it is suitable for such a list to be specified in subordinate legislation, as it currently is for Class A drugs.

13. Changes will be dictated by medical science and have not been seen as controversial in respect of Class A drugs, and therefore the negative resolution procedure should also apply to the extension of the power to Class B drugs.

## **General**

### **Clause 20: Power to make consequential and supplementary provision etc**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative and Negative Resolution

14. Clause 20 confers an order making power on the Secretary of State to make consequential, supplementary or incidental provision in relation to any provision of the Bill. Such an order may amend, repeal, revoke legislation and make different provision for different purposes. In respect of clauses 2 to 8, Schedules 1, 2 and 3 and paragraph 2 of Schedule 6, such provision can be made for different areas.
15. The power in this clause is needed in order to make consequential and other provision after the Bill has been passed. The Bill provides new requirements for community orders and suspended sentences and puts in place a new system for the supervision of offenders serving sentences of imprisonment of under 2 years, introducing a licence period for sentences of under 12 months and extending supervision so all offenders released from a custodial sentence are supervised in the community for at least 12 months. The current release and recall system is complex and the need for minor changes to the existing system may not emerge until the system begins to be operated alongside the current system. The consequence of not being able to make consequential, supplementary or incidental provision if required would be that for community orders the Government would not be able to properly carry out an order of the court and for sentences of imprisonment an offender may be subject to longer or more onerous conditions than that intended by Parliament. Without this power primary legislation would be needed to give effect to changes which would not allow for sufficient immediate relief to be provided.
16. Subsections 5 and 6 prescribe that any regulations under this clause will be subject to the negative resolution procedure unless they amend or repeal an Act, in which case they will be subject to the affirmative resolution procedure. Amendments to current subordinate legislation will not require a higher level of Parliamentary scrutiny where the instrument itself does not attract such scrutiny. However, where the order amends primary legislation, it is appropriate for the affirmative resolution procedure to be used.

## **Clause 22: Commencement**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order

*Parliamentary Procedure:* None

17. Clause 22 enables the Secretary of State, by order, to commence the provisions of the Act on such days as he may appoint. The power allows for transitional, transitory or saving provisions to be made in connection with the coming into force of any provisions of the Act and different provisions may be made for different purposes, and for clauses 2 to 8, Schedules 1, 2 and 3 and paragraph 2 of Schedule 6, different provision can be made for different areas.
18. As is standard with orders which bring into force the provisions as agreed by Parliament, no parliamentary procedure is proposed.

## **Clause 23: Extent**

*Power conferred on:* Her Majesty

*Power exercisable by:* Order in Council

*Parliamentary Procedure:* None

19. Clause 19 and Schedule 6 amend the Armed Forces Act 2006 to apply the new provisions to offenders sentenced by service courts. Clause 23(4) enables the provisions in Schedule 6 and provisions applied by the Armed Forces Act which are amended or repealed by this Act to be extended, with or without modifications, to the Channel Islands, the Isle of Man and British overseas territories by Order in Council. This provision is similar to the example in section 33 of the Armed Forces Act 2011. As with that example such Orders in Council are not subject to any Parliamentary procedure.
20. Clause 23(5) enables the provisions in the Criminal Justice Act 2003 amended by this Act to be extended, with or without modifications, to the Channel Islands and the Isle of Man by Order in Council. It does this by extending the scope of the existing Order in Council-making power in section 338 of the Criminal Justice Act 2003 to cover the amendments made to that Act. Orders in Council made under section 338 of the Criminal Justice Act 2003 are not subject to any Parliamentary procedure; again the amendments made to that Act do not warrant a change to that standard arrangement.

## **Schedules**

### **Schedule 1: Supervision requirements – new section 256AB of the Criminal Justice Act 2003**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative Resolution

21. Schedule 1 adds new section 256AB to the Criminal Justice Act 2003, which creates a list of requirements that the Secretary of State may impose within a supervision period upon an offender released from a sentence of imprisonment with under 12 months of licence period to serve. Subsection (5) of new section 256AB gives the Secretary of State an order making power to alter that list, by adding, amending or removing requirements and for making provision as to the imposition and instructions for such requirements. Clause 7(4) provides that the new power in section 256AB(5) includes a power to make the same amendments in respect of those offenders who are subject to a detention and training order (DTO) and who turn 18 before the half-way point of the term of the DTO, and who are subject to the new top up supervision period under new section 256AA.
22. The list of requirements sets out the current position in respect of how it is envisaged that offenders should be managed during the supervision period. However, as new ideas and schemes are developed to reduce re-offending this list may be subject to change. To keep up with progress and new thinking in relation to the rehabilitation of offenders, it is essential that this list can be updated to benefit offenders without having to wait for a suitable legislative vehicle. Therefore amendment by order has been deemed the most efficient way of updating requirements within the context of potentially swift improvements in interventions to tackle the causes of offending.
23. It is very likely that Parliament would have a keen interest in measures imposed on offenders to facilitate their rehabilitation. Further, any measure has the potential to engage the Article 8 rights of the offender and as such could be to a certain extent controversial. For these reasons it has been deemed suitable for Parliament scrutiny to be by the affirmative resolution process.

### **Schedule 1: Supervision requirements – new section 256D of the Criminal Justice Act 2003**

*Power conferred on:* Secretary of State

*Power exercisable by:* Rules made by Statutory Instrument

*Parliamentary Procedure:* Negative Resolution

24. Schedule 1 also adds a new section 256D to the Criminal Justice Act 2003, which makes provision for a drug testing requirement that the Secretary of State may specify for an offender as part of a supervision period. The requirement is for the offender to provide a

sample to be tested for certain drugs. Subsection (4) gives the Secretary of State a rule making power to regulate the provision of such samples.

25. The testing measure as set out in primary legislation is intrusive and it is therefore appropriate for parameters and procedures to be set out in rules to ensure that offender rights are protected throughout the process, and that it is clear what the permissible procedures are. However, it would not be appropriate to put what is essentially the process and operational detail in primary legislation. Further, such procedures may vary or change from time to time and subordinate legislation would be the suitable vehicle to effect such changes.
26. The power is to supplement the policy as set out in primary legislation, and use of the power to set out the process and operational detail will not, in its own right, be controversial. Therefore the negative resolution procedure is appropriate.

## **Schedule 2: Supervision Default Orders – new Schedule 19A to Criminal Justice Act 2003**

*Power conferred on:* Secretary of State

*Power exercisable by:* Orders/rules made by Statutory Instrument

*Parliamentary Procedure:* Negative and Affirmative Resolution

27. Part 1 of Schedule 2 inserts new Schedule 19A into the Criminal Justice Act 2003, which applies the provisions of Chapter 4 of Part 12 of the 2003 Act to a supervision default order in the same way as that Chapter currently applies to a community order. Under the new scheme set out in the Bill offenders serving sentences of imprisonment of less than 2 years will be subject to supervision requirements. A breach of those requirements will be dealt with by the court and it is proposed that the court will be able to impose certain penalties (“supervision default order requirements”) which are the same as two existing community order requirements. Rather than duplicate such provisions Schedule 19A applies the relevant community order requirements legislation with modifications. There are various relevant delegated powers in that legislation, and paragraphs 4 and 5 of new Schedule 19A extend those powers so that they can be exercised in relation to supervision default order requirements in the same way as they currently apply to community order requirements. Paragraph 6 of new Schedule 19A provides for a power equivalent to a power that applies to the community order requirements.
28. Section 217(3) of the 2003 Act allows additional restrictions to be applied in relation to the requirement to avoid conflict with religious beliefs, work or education when imposing any requirement for offenders subject to community orders. Paragraph 4 of Schedule 19A extends that power in respect of supervision default order requirements imposed on offenders. Paragraph 5 of Schedule 19A extends the power in section 222 of the 2003 Act to make rules regulating the supervision of persons subject to community orders so that the power may be exercised in relation to the supervision of offenders subject to supervision default orders. The power in paragraph 6 is equivalent to the power in section 223 of the 2003 Act and gives the Secretary of State the power to alter time limits for

supervision default order requirements including the maximum number of hours for a curfew or for unpaid work.

29. The use of subordinate legislation currently in sections 217 and 222 of the 2003 Act is appropriately delegated in that it deals with the detail supporting and regulating the policy decided by Parliament. Delegated legislation is equally appropriate for the extension of these powers to supervision default order requirements. Replicating the power in section 223 of the 2003 Act so that the same effects can be achieved in respect of supervision default orders requirements is appropriate for the same reasons.
30. The instruments in section 217 and 222 of the 2003 Act are made by the negative resolution procedure and we propose that the same is appropriate for paragraphs 4 and 5 of new Schedule 19A to the 2003 Act inserted by Schedule 2 to the Bill. . The extension of the power is to keep the provisions and their application in line and as such would not be any more controversial than the current use of the powers. Exercise of the power in section 223 is subject to the affirmative resolution process as there is possibility of interference with the Article 8 rights of the offender and there will likely to be a high level of interest by Parliament in any changes. The power in paragraph 6 engages the same considerations and therefore it is proposed that the same level of scrutiny for the power is appropriate.