Release
Drugs, The Law & Human Rights

# Briefing for MPs – Criminal Justice and Courts Bill 2013-14

## May 2014

Release is the national centre of expertise on drugs and drugs law – providing free and confidential specialist advice to the public and professionals. Release also campaigns for changes to UK drug policy to bring about a fairer and more compassionate legal framework to manage drug use in our society.

This briefing paper outlines Release's response to the proposals contained within the Criminal Justice and Courts Bill 2013-14 which potentially impact on people who use drugs.

In general, it is important to note that Release has significant concerns about the lack of specific detail contained within the Bill, especially where these result in a widening of powers without any additional safeguards for those affected by the proposals.

The main area of concern for Release relates to Cautions:

**Clause 14 (previously clause 15) - Restrictions on use of cautions**

*Caution or conviction in the last 2 years*

It is proposed that a Caution should not be given to someone who has a caution or conviction for a similar offences in the preceding 2 years.

As with the provision in relation to specified offences, those who use drugs problematically will be negatively affected by this proposal. The likelihood is that they will have been in contact with the police and/or Courts for offences of drug possession and on a potentially

regular basis. Under these proposals once someone has caution for drug possession they would automatically be precluded from receiving a further caution unless a senior officer determined that exceptional circumstances existed. The presumption against offering a Caution may affect an officer's view and make it more difficult for someone to demonstrate exceptional circumstances to a satisfactory level. Those who use drugs only recreationally, particularly young people using cannabis, are also more likely to come into contact with the police more frequently because of the target-driven nature of policing. Research has found that police performance was measured by the number of sanctioned detections, or crimes brought to justice, which results in one cannabis warning being worth the same as one resolved rape or murder.[1]

This proposal undermines the provisions of the Rehabilitation of Offenders Act 1974 which "primarily exists to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law."[2] This legislation provides that a Caution is spent immediately and as such someone would thereafter be considered as though they did not have the Caution at all. The next level of response where a Caution cannot be given is charge and prosecution at Court – this escalation may then result in someone receiving a conviction for an offence which is much more serious and has greater consequences in terms of employment prospects after conviction. The UK Drug Policy Commission found that "many employers are extremely reluctant to recruit PDUs; particularly those who admit to current use, but also those who have a history of drug problems (and offending)."[3] Each time someone is then prosecuted for the same or similar offence the sentence is likely to increase, further excluding large sections of society and contributing to unemployment levels. The

[1] Bear D, 2012, 'Questioning stop and search: Could drugs policy actually have a negative impact on the communities that it is designed to protect?', LSE, http://www2.lse.ac.uk/researchAndExpertise/researchHighlights/Law/Questioning-stop-and-search.aspx

[2] Ministry of Justice, 4th March 2014, 'New Guidance on the Rehabilitation of Offenders Act 1974', Pg.3

[3] UK Drug Policy Commission, December 2008, 'Working Towards Recovery: Getting Problem Drugs Users into Jobs' http://www.ukdpc.org.uk/wp-content/uploads/Policy%20report%20-%20Working%20towards%20recovery_%20getting%20problem%20drug%20users%20into%20jobs%20(summary).pdf

scale of this is demonstrated by the fact that "in the 15 year period, 1996 to 2011, 1.2 million criminal records have been generated as a result of drug possession laws."[4]

The Rehabilitation of Offenders Act and the concept of spent Cautions and convictions is also applied in the Court setting and is very relevant to what a Judge will take into consideration when sentencing a defendant. Spent Cautions and convictions will generally be discounted unless they are relevant to "the determination of the issue"[5], and even then there are strict rules[6] that apply in relation to dealing with them. A Judge faced with antecedents containing a Caution less than 2 years old is likely to disregard it when sentencing. It is entirely against the principles of natural justice to afford police officers the power to effectively override provisions in existing legislation, especially in light of the potential negative effects on the public.

Moreover, the use of cautions to deal with simple possession of drugs is significant and the introduction of this proposal could have a number on unintended consequences, including increased pressure on the court system and the likelihood that those falling within this clause face heightened criminalisation. In 2011 there were 79,567 cases of people caught in possession of drugs who were either cautioned for the offence or proceeded against through the courts - of this number 47% received cautions (37,320 cases)[7]. Worryingly, since 2009 there has been a trend where for the first time since this data was initially recorded (1993) more people were proceeded against for simple possession of drugs than received a caution. There is little doubt that this proposal will further entrench this situation and will result in increased numbers of people facing prosecution for the offence of possession. This will add further burden to the criminal justice system and will result in more people having criminal records which impact on their employment. As stated above a caution becomes immediately

[4] Eastwood, N, Shiner, M, Bear, D, August 2013, 'The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales, Pg. 13 http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release%20-%20Race%20Disparity%20Report%20final%20version.pdf

[5] Rehabilitation of Offenders Act 1974, Section 7(2)(a)

[6] Criminal Practice Directions [2013] EWCA Crim 1631

[7] Ministry of Justice , 2013, Drugs: Police Cautions and Convictions, Answer to Parliamentary Question asked by Caroline Lucas MP (25 April 2013) http://www.theyworkforyou.com/wrans/?id=2013-04-25d.150855.h

spent whereas a prosecution resulting in a fine will have a 'rehabilitation period' of one year before it becomes spent. The increased risk of prosecution associated with this clause will lead to a greater level of criminalisation for those who are caught in possession of drugs and will negatively impact on a number of aspects of their lives including employment.

***Release recommends that this clause be removed from the Bill entirely.***

*Specified either way offences*

It is proposed that cautions can only be administered for specified either way offences (those which may be dealt with in either the magistrates' or Crown Court) if a senior police officer deems that there are exceptional circumstances for this. The Bill makes no reference to what offences will be specified, however a factsheet[8] published by the Ministry of Justice refers to existing guidance[9] for police officers and the Crown Prosecution Service which does contain specified offences[10].

If it is assumed that the Bill intends to follow this format there is concern over the inclusion of supplying Class A drugs as a specified offence. This offence covers a wide variety of scenarios from simply passing drugs from one person to another through to large scale commercial supply. At the higher end of the scale a caution would not even be considered so this is not relevant. However the situation of social supply at the lower end is extremely common, especially with those who use drugs problematically and are sharing their drugs. The practice of sharing drugs commonly occurs with those attending festivals groups and groups of young people. Although a criminal record would still be generated if a Caution was administered, it has much less severe implications in later life in terms of education, employment and the ability to travel. Harshly criminalising people at a young age will have a

[8]Ministry of Justice, 5th February 2014, 'Criminal Justice and Courts Bill Factsheet: Cautions' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277716/fact-sheet-cautions.pdf

[9] Ministry of Justice, 14th November 2013, 'Simple Cautions For Adult Offenders' http://www.justice.gov.uk/downloads/oocd/adult-simple-caution-guidance-oocd.pdf

[10] Ibid. Annex B at Pg. 23

negative effect on a whole generation causing them to feel isolated and marginalised. Although these examples would meet the technical elements of a supply offence, but is clearly a much less serious offence than those where there is any financial gain. It is unfair and unjust to subject people who fall into that category of offending to the same processes as more serious alleged offenders.

Under the proposals the default position for those arrested for supply of Class A drugs, even where it is clearly only a technical offence, would be that a Caution should not be given and so the officer considering whether exceptional circumstances exist would already have a preconceived idea of what the outcome of their decision should be. Again, it is assumed that the exceptional circumstances referred to is those contained within the guidance[11]which although non-exhaustive is extremely general and open to interpretation by the officer. The application of discretion could lead to inconsistent approaches across the country whereby certain forces, or even individual officers, are either more or less receptive to arguments about the existence of exceptional circumstances – this effectively creates a postcode lottery around the application of this power. This disparity is likely to extend beyond simple location, with ethnic minorities already treated disproportionately when it comes to a decision to administer a Caution or charge – "in 2009/10 the Metropolitan Police charged 78 per cent of black people caught in possession of cocaine compared with 44 per cent of whites. Alternatively, 22 per cent of black people were given a caution compared with 56 per cent of whites."[12]

The other specified offences in the guidance relate to weapons and sexual offences involving children – it is disproportionate to equate social drug supply with these and subject it to the same restrictions and requirements. There is already provision for the consideration of the suitability serious offences, which supply of Class A drugs would fall into, contained within the guidance and so an additional response is unnecessary. The factors to be considered under

[11] Ibid. Para. 23 at Pg. 7

[12] Eastwood, N, Shiner, M, Bear, D, August 2013, 'The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales, Pg. 13 http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release%20-%20Race%20Disparity%20Report%20final%20version.pdf

the exceptional circumstances provisions would be applied here in any event, but without the presumption that a Caution should not be administered. People who use drugs problematically are already marginalised and stigmatised – this provision will only discriminate against them further. Young people often experience similar feelings of being disregarded by society, and criminalisation only serves to establish this effect. There is also a real risk that this will disproportionately affect certain ethnic minorities, as already happens at all stages of the criminal justice system in relation to the prosecution of drug offences. The situation is even more worrying when considered in light of research that evidences existing racial disparity when it comes to charging decisions, where black people are proceeded against at a rate 4.5 times that of white people.[13] This continues throughout the criminal justice system as black people "are also found guilty of a possession offence at a rate of 4.5 times that of whites and are subject to custody at a rate of 5 times that of whites."[14]

***Release recommends that supply of Class A drugs be removed from the list of specified offences. Alternatively, it is suggested that an exemption be added for instances where the alleged supply is clearly on a social basis.***

Other areas of concern include:

**New Clause 21 (previously clause 14) - Drugs for which prisoners etc. may be tested**

It is proposed that the drug testing provisions in prison are extended beyond those substances which are controlled under the Misuses of Drugs Act 1971, to also include a "specified drug". However, a "specified drug" is defined as "any substance or product specified in prison rules". Furthermore, it is stated that prison rules "may specify any substance or product (which is not a controlled drug for the purposes of the Misuse of Drugs Act 1971) in relation to which a person may be required to provide a sample".

[13] Ibid. at Pg. 42
[14] Ibid

This would confer a broad power on prison officers to test for anything they want to without having to provide a reason for this. This creates potential for abuse of this wide discretion by officers, which may be directed towards individual prisoners or groups that are known to use certain medications.

It is unclear what the purpose is behind this proposal. It is against the principles of natural justice to test and effectively restrict the use of substances which are not controlled by law. There are mechanisms in place to legally control new substances, and the prison regime should not be permitted to operate outside of this.

***Release recommends that the clause be removed from the Bill.***

**Clause 29 (previously clause 32) – Criminal Courts Charge**

It is proposed to introduce a charge for convicted adult offenders related to cost of running the Courts, and additionally apply interest to unpaid charges. There are a number of concerns with this:

*Mandatory charge*

It is extremely worrying that the charge is mandatory upon conviction, and at other points including after proceedings for breaching a Court Order and when an appeal is refused. The lack of discretion within this power will cause difficulties, particularly in cases where there is dispute over the costs as discussed below.

*Charge amount*

The exact levels of the charge will only be specified by secondary legislation, which does not allow for an assessment of the details of the scheme until that point. However, even the basic premise that the charge "will be imposed at a level set according to the costs of their case" and "be set in bands based on factors that drive cost such as the offence type, whether it was dealt with in the magistrates' or the Crown Court and whether the offender pleaded

guilty or not" is problematic. Many of the determining factors are out of the defendant's control, and to levy a charge that relates to these matters is unjust. For instance, there may have been a number of ineffective hearings or delays caused by CPS inefficiency, or a case may have been sent to the Crown Court as a case where sentencing powers were insufficient at the magistrates' Court but the charge was later reduced and would have been suitable to be dealt with at the lower (and cheaper) Court. Even if there is potential for a defendant to argue points like these to reduce the cost apportioned, it seems there will still be a restriction within the particular band because of the fixed elements. Furthermore, arguments such as these may require further investigation and representations before an amount can be fixed which may not allow this to happen on the same date as sentencing. Not only would this cause further delay, but it is unclear whether any Representation Order would extend to deal with additional hearings of this nature – it is presumed that this will not be the case given the ongoing reforms to Legal Aid.

*Effect on already disadvantaged people*

The proposed charge will be levied against all offenders, regardless of their ability to pay and in addition to charges already in existence. Defendants face a 'victim surcharge' at the point of conviction, which does not actually go to victims of crime, but rather is collected to fund services. This surcharge is calculated at a flat rate and means that while for some offenders it's an inconvenience, for others it can be a major hardship. Courts can also award "costs" against criminals as part of their punishment, and this sum goes towards the cost of prosecution.

Many poorer offenders struggle to pay the current charges and will often see their fines, and other charges, taken directly from their benefits. Imposing further charges on unemployed people or those in receipt of a low income creates real hardship not only for the individual but also for their families. As is the position with existing charges, enforcement officers will be able to deduct payments directly from their earnings, which could include taking money from state benefits, under the plan.

Adding a further charge, and imposing interest, which goes directly to the Courts Service will only compound the present problems.

*Enforcement*

The Ministry of Justice "recognise that more must be done to improve the collection of financial impositions" as the current system is already ineffective. It cannot therefore be sensible to implement additional charges and add to the enforcement burden without first ensuring that the existing processes are workable.

The New Economics Foundation think-tank suggested that collecting court charges would be extremely difficult[15], with an estimated £600 million in fines already outstanding[16].

Adding a further charge when the current methods of fine collection are ineffectual does not make any sense. The fact that the Compliance and Enforcement Service is being contracted out does little to alleviate concerns, as it is yet to happen. This should be concluded before any additional load is placed on the service.

*Conflict of Interests*

The Court, its staff and the processes they carry out are designed to be independent. However, as the charge is intended to support running of the venues, administration and paying for staff, and is only applied upon conviction there is a real risk that this could be weakened. The Court will effectively have an interest in the disposal of cases before them, leaving them open to prejudice. This is particularly important where defendants are unrepresented and are assisted and advised by Court officials, which occurs more frequently in the current climate of legal aid cuts. This is the norm for those charged with drug

[15] Whitehead, S., 27 February 2014, 'Who should pay for our courts?', New Economics Foundation blog http://www.neweconomics.org/blog/entry/who-should-pay-for-our-courts

[16] 'Public Accounts Committee – Seventy Fifth Report, Ministry of Justice Financial Management, 23 January 2012, Para. 9 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1778/177806.htm#n16

possession where the interests of justice test has not been met and defendants are therefore without representation.

The proposals within this Bill are a further shift towards a victim-centred justice system, along with cost-saving exercises, to the detriment of those most impacted on by legislation; those accused of and prosecuted for criminal offences. There needs to be greater balance between the competing sides so as to avoid further erosion of the rights of alleged offenders and defendants.

**Clause NC10 – term of imprisonment for murder of police or prison officer**

It is proposed that existing guidance[17], which specifies the appropriate starting point when determining the "tariff" a mandatory life sentenced prisoner must serve before he is eligible for parole, be amended. The effect would be to increase the starting point for the murder of a police officer or prison officer in the course of their duty from 30 years to a "whole life" tariff. These prisoners are never eligible for parole.

As of March 2013, there were fewer than 50 prisoners[18] serving life sentences in England and Wales who have been told they will never leave custody. In our submission, the use of such sentences should be rare, due to their uniquely onerous nature.

There is no prospect of review to consider whether a whole life tariff is still appropriate, if the prisoner should be detained on grounds of "dangerousness" or whether there is a possibility of redemption. Although there is provision for exceptional release on compassionate grounds[19], this power will only be exercised on restrictive medical grounds[20]. There is dispute

[17] Contained in Schedule 21 to the Criminal Justice Act 2003.
[18] Ministry of Justice, Response to Freedom of Information Request, May 2013, Reference 82302 https://www.gov.uk/government/publications/foi-releases-for-june-2013
[19] s30 of the Crime (Sentences) Act 1997.
[20] Prison Service Order 4700 chapter 12

between the ECtHR and domestic courts about whether these circumstances amount to a breach of Art.3 of the ECHR[21] (prohibition of inhumane or degrading punishment).

The imposition of a whole life tariff also carries significant resource implications for the state, as the prison service must manage violent offenders who have nothing to lose, few incentives to work towards, and no hope of, rehabilitation. This often necessitates incarceration in a high security prison for the duration of their sentence.

The elevated starting point is a concerning measure that is likely to lead to an increase in the number of whole life tariffs that are awarded. It is unnecessary, as the existing guidance recognises the vital role that police and prison officer's play in protecting the public[22] and the murder of such an individual would commonly result in other aggravating factors being identified by the judge (use of firearms, planning, intended to interfere with course of justice).

The suggested approach is also likely to lead to a severe inflation in the tariffs of vulnerable prisoners who would not at present, due to mitigating factors, attract a 30 year tariff. These prisoners would avoid a whole life tariff under the new statutory guidance, but would receive a substantially increased sentence.

***Release recommends that the clause be removed from the Bill.***

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[21] Vinter & Others v United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10), R v Ian McLoughlin and Lee Newell [2014] EWCA Crim 188

[22] s.5 of Schedule 21 to the Criminal Justice Act 2003 designates a starting point of 30 years, double that for murders in other circumstances.