RESEARCH PAPER 00/36
27 MARCH 2000

The *Criminal Justice and Court Services Bill*: Probation, Community Sentences and Exclusion Orders

Bill 91 of 1999-2000

The *Criminal Justice and Court Services Bill* is due to be considered on second reading on 28 March 2000. This paper is concerned with the provisions of the *Criminal Justice and Court Services Bill* relating to the establishment of National Probation Service for England and Wales, community sentences and the electronic monitoring of offenders, including the introduction of a new form of order prohibiting an offenders from entering a specified place or area.

Other provisions in the Bill concerning the establishment of a Children and Family Court Advisory and Support Service (CAFCASS), new rules designed to prevent unsuitable people working with children and an increase in the penalty for failing to secure a child's attendance at school are considered separately in Library Research Paper 00/35. Provisions in the Bill seeking to extend powers to test offenders for drugs are considered separately in Library Research Paper 00/37.

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Summary of main points

This paper is concerned with those provisions of the *Criminal Justice and Court Services Bill* which relate to the Probation Service, community sentences and extensions of the use of electronic monitoring of offenders (electronic "tagging"). The establishment of a Children and Family Court Advisory and Support Service (CAFCASS), new rules designed to prevent unsuitable people working with children and an increase in the penalty for failing to secure a child's attendance at school are considered separately in Library Research Paper 00/35 *The Criminal Justice and Court Services Bill: Children and Family Court Advisory and Support Service, Disqualification from Working with Children, and Truancy*. Provisions extending powers to test offenders for drugs are considered separately in Library Research Paper 00/37 *The Criminal Justice and Court Services Bill - Drug Testing*.

The first part of this paper describes the current organisational framework of the probation service. The service is divided into a large number of local probation areas which operate autonomously. The Government considers that the absence of a national element in the current arrangements impedes the efficiency and effectiveness of the service and the development of consistent practice. The Government also considers that under the present arrangements the service is insufficiently accountable. In a 1998 consultation document *Joining Forces to Protect the Public* the Government announced proposals to replace the existing arrangements with a unified National Probation Service for England and Wales with a significant local element. The provisions in Chapter I of Part I of the Bill are designed to implement these proposals. They set out new aims for the probation service which emphasise public protection, the reduction of re-offending and the proper punishment of offenders. They are intended to enable the service to be re-organised into 42 local areas matching police force and Crown Prosecution Service areas. They also enhance the role of the Home Secretary by giving him oversight of, and powers to direct, local boards which will have day-to-day responsibility for the probation service at a local level.

The paper goes on to consider the current use of non-custodial "community sentences" in the context of the overall sentencing framework in England and Wales. The Government is concerned about the enforcement of community penalties and public perceptions that they are a "soft" option. The paper also sets out the existing means by which the criminal law may be used to restrain people's behaviour and exclude them from particular places. The paper then goes on to describe the Bill's provisions renaming certain community sentences. The new names are intended to emphasise the penal nature of the sentences. The Bill seeks to create a new type of community sentence – an exclusion order - designed to enable a court to prohibit an offender from entering a specified place or area. Like curfew orders, which are an existing form of community sentence, the orders are intended to be enforceable through the use of electronic monitoring ("tagging"). The technology required to do this is still being tested. The Bill will also permit exclusion requirements to be applied to offenders who are released from custodial sentences on licence. The Government has suggested that these exclusion provisions might be used to deal with offenders in cases involving stalking, domestic violence and sex offences.

CONTENTS

I The Probation Service

A. The current organisational framework of the Probation Service in England and Wales

In their book *Probation round the world: A comparative study* Koichi Hamai and others suggest that the origin of probation can be traced back to the 1820s when Warwickshire magistrates combined their various common law powers to take sureties and recognizances to secure offenders' future good behaviour by releasing young offenders into the charge of an employer. This subsequently led to young offenders in Birmingham being released into the guardianship of members of the community. In 1876 a Hertford printer, Rainer, suggested to the Church of England Temperance Society that the Society's activities be extended to offering practical help to alcoholic offenders at police courts. This suggestion was taken up and the first missionary was appointed to Southwark Police Court in August of that year. The idea spread and by the time of the enactment of the *Probation of Offenders Act 1907*, which put probation on a statutory footing, there were 143 missionaries at work, including 19 women. The system usually involved supervision being offered in place of a sentence. The 1907 Act included the provision, still set out in what is now the *Probation Service Act 1993*, that part of the role of probation officers was to "advise, assist and befriend" offenders.[1]

The current organisational framework of the probation service in England and Wales and the functions of probation officers are set out in the 1993 Act, which was a consolidation measure. The Act provides for **probation areas**, based on the petty sessions areas within which magistrates' courts operate. There is a single probation area for inner London comprising all the petty sessional divisions of the inner London area. Other petty sessions areas may be combined into single probation areas by orders made by the Secretary of State. Petty sessions areas which are not so combined constitute probation areas on their own. The Home Office consultation document *Joining Forces to Protect the Public*, published in August 1998, states that there are currently 54 probation areas.[2] The probation areas are relatively autonomous: there is no national framework or national co-ordinating body with responsibility for the service.

Every probation area has a **probation committee** made up of local magistrates (including stipendiary magistrates in the case of the inner London probation area) chosen by their fellow magistrates.[3] The Lord Chancellor may also appoint Crown Court judges to serve on probation committees.[4]

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[1] Koichi Hamai et al., *Probation round the world: A comparative study* (1995) p. 32-33
[2] *Joining Forces to Protect the Public* Home Office August 1998 paragraph 2.3
[3] *Probation Service Act 1993* section 3 & Schedule 1 paragraph 1
[4] ibid. paragraph 3

Probation committees are responsible for appointing and paying probation officers within their areas and providing for the efficient carrying out of their work.[5] They must also select those probation officers who are to supervise people subject to probation orders, supervision orders and detention and training orders within their areas.[6] They are also required to ensure that arrangements are made within their area to enable people to carry out work under community service orders.[7] Under section 38 of the *Crime and Disorder Act 1998* they must also co-operate with local authorities to secure the availability of all appropriate youth justice services.

Probation committees also have powers to provide and carry on bail hostels, probation hostels and other establishments for use in connection with the rehabilitation of offenders. In certain prescribed circumstances they may provide financial and other assistance to people remanded on bail and to persons in relation to whom probation officers have responsibilities, The committees also have powers to make grants in certain prescribed cases.

The expenses incurred by probation committees in the performance of their functions, other than those expenses incurred in providing or carrying on probation and bail hostels, are defrayed by local authorities.[8] Slightly different arrangements apply in respect of the expenditure of the inner London probation committee, which is partly paid out of the metropolitan police fund.[9] Cash limits have been imposed on probation services since the implementation of section 94 of the *Criminal Justice Act 1991*.

The 1993 Act also provides for the establishment of **probation liaison committees** in each petty sessions area. Where the petty sessions area is also a probation area the probation liaison committee will be made up of the members of the probation committee for that area. If the area is not a probation area the probation liaison committee will be made up of at least three justices chosen by the justices acting for the petty sessions area. The probation liaison committee for any area within the Inner London probation area may be constituted in any manner determined by the probation committee of the Inner London probation area.[10]

Probation liaison committees are required to review the work of probation officers and perform such other duties in connection with the work of probation officers as may be prescribed.

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[5] ibid. s.4
[6] ibid.
[7] ibid. s.6
[8] ibid. s.19
[9] ibid. s.18
[10] ibid. Schedule 1 paragraphs 4-5

Section 23 of the 1993 Act permits the Home Secretary to appoint **inspectors of probation** to inspect and report on the probation service for each probation area. He also has the power under this section to appoint Her Majesty's Chief Inspector of Probation.

The **Home Secretary** has powers under section 25 of the 1993 Act to make rules regulating the constitution, procedure, powers and duties of probation committees and probation liaison committees, the expenses which may be incurred and the manner in which those expenses are to be defrayed. He may limit the number of staff of probation committees (other than probation officers), regulate the qualifications, manner of appointment and duties of probation officers and prescribe anything else that may be prescribed under the Act.

Section 11(1) of the 1993 Act provides that:

> If the Secretary of State is of the opinion that, without reasonable excuse, a probation committee-
>
> a) is failing properly to discharge any duty imposed on it by or under any enactment; or
> b) has so failed and is likely to do so again;
>
> he may by order make such provision as he considers requisite for the purpose of securing that the duty is properly discharged by the committee.

The probation committee concerned will be obliged to comply with the provision made by such an order.

The Home Secretary has powers under section 26 to make rules regulating community service orders and the supervision of person subject to probation orders. He also has powers under section 27 of the 1993 Act to approve and regulate probation and bail hostels.

The Home Secretary also has powers under section 20 of the 1993 Act to make grants for a number of different purposes. These include:

- the payment of expenditure incurred by local authorities and the metropolitan police fund under the 1993 Act
- the expenditure of probation committees in providing and carrying on bail and probation hostels
- the expenditure of any society or individual involved in the rehabilitation of convicted offenders or in supervising or assisting persons on bail.

The general functions of probation officers are set out in section 14 of the *Probation Service Act 1993*, which provides that:

> It is the duty of probation officers-
>
> a) to supervise the probationers and other persons placed under their supervision and to advise, assist and befriend them;
> b) with a view to assisting the court in determining the most suitable method of dealing with a person's case, to inquire (in accordance with any directions of the court) into, and make reports on, his circumstances or home surroundings;
> c) to advise, assist and befriend, in such cases and in such manner as may be prescribed, persons who have been released from custody; and
> d) to perform such other duties as may be prescribed.

B. The Government's Proposals for Change

In the consultation document *Joining Forces to Protect the Public*, published by the Home Office in August 1998, the Government set out the following criticisms of the probation service's current organisational framework:

> 2.1 Successive Governments have neglected the organisational framework which supports the work of probation officers. A series of Acts of Parliament have merely served to consolidate an outdated reflection of a service that has been engaged in change and modernisation for many years. Legislation still directs probation officers to "advise, assist and befriend" offenders. This is completely out of line not just with the expectations of the courts but also with the reality of the work which probation staff undertake day in and day out.
>
> 2.2 The service now rightly recognises that its core function is public protection, even though a great deal of its important work in this area for the time being goes unsung. The legislative framework needs to be brought up to date in this respect. Moreover, in reflecting the modern probation officer's role, the statutory duties will need to be to confront, challenge and change offending behaviour and to recognise punishment as a central part of that process. This should help the public to understand and value more highly the work which probation staff do on their behalf.

The consultation paper added:

> 2.3 Legislation needs, however, to go beyond "duties" to the organisational structure of the probation service. It is a fragmented organisation, with 54 autonomous units free to deploy the resources allocated by central Government as their committees see fit. There is only limited accountability to central Government. By modern standards, the lack of democratic accountability even at local level is a concern. The Committees have done and continue to do excellent work on a voluntary basis, but the new probation services they have helped to create now have outgrown their organisational origins.[11]

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[11] *Joining Forces to Protect the Public* Home Office August 1998

The consultation paper went on to say:

> 2.5 There are also too many probation services. The boundaries lack co-terminosity with many key partners, particularly the police. The present organisation also too readily leads to:
>
> - inconsistent performance between one area and another;
> - some unacceptable standards in certain areas of service delivery;
> - too much left locally to ad hoc arrangements rather than strategy;
> - and differing interpretations of best practice.
>
> There is little relationship between the performance of different area services and the resources which they use - or indeed with anything else.
>
> 2.6 These are features of the present system rather than criticism of individual committees and chief officers. A great deal of effort has been made, especially in the last year, to develop relationships with the Prison Service and other partner bodies.
>
> 2.7 Fragmentation also inhibits efficiency and value for money. There is no doubt that a unified approach to support services, generating economies of scale, would increase significantly the scope for improved cost-effectiveness. The pressure to reduce public spending is a reality for all public services and the Probation Service is no exception. We need to ensure that organisational arrangements provide managers with the greatest possible flexibility to deliver economies while maintaining the high standards of service delivery.[12]

The Government's view, expressed in the consultation paper, was that the probation service required both stronger national leadership and direct and unequivocal accountability to Ministers and Parliament.[13]

In the consultation document the Government said its preferred option for structural and organisational change was for a unified national probation service operating as a national Next Steps Agency, with employees directly employed by the Home Office and a line of command leading to the Home Secretary. The service would be made up of 42 individually managed operational units matching the 42 police and Crown Prosecution Service (CPS) areas. The new Next Steps Agency would be managed centrally by a Chief Executive to whom local chief offices would be accountable. The consultation paper said:

> Our goals in developing this radical organisational restructuring would therefore be:
>
> - a better balance between the national and local priorities;

[12] ibid.
[13] ibid. paragraphs 2.9-2.11

- maximum local operational discretion and authority;
- an appropriate emphasis on community-based crime reduction initiatives;
- organisational arrangements contributing to improved outcomes on joint effectiveness with the Prison Service;
- a streamlined national Headquarters;
- a light touch regional component;
- co-terminous boundaries with the police and the CPS;
- improved cost-effectiveness.[14]

As far as the probation service in London was concerned, the consultation paper proposed that the Greater London Authority, the Metropolitan Police District and the London probation service should all share a common administrative boundary with the Greater London boroughs. It went on:

> However, we recognise that London represents an unusually large concentration of business in a relatively small geographical area, and the very significant burden that would therefore be placed on the chief officer in developing necessary liaisons and partnerships with other London agencies. He will need to be supported. We consider that the model to be adopted by the Crown Prosecution Service in London provides a pointer to the right approach. The Chief Crown Prosecutor will be supported by five assistants. For probation, a single chief officer supported by five assistants might divide London into five operational units defined geographically: City/Central; North West; North East; South West; and South East. These operational areas should match the boundaries of the Operational Command Areas of the Metropolitan Police within the proposed Greater London Authority boundary, each of which is under the command of an Assistant Commissioner.
>
> This would allow for points of contact between local operational areas with the police similar to those which would exist in the other 41 probation areas around the country. However, another factor which we will need to address within London is the potential gain to be made from producing arrangements which the magistrates' courts could readily match. [15]

As far as the funding of the new national probation service was concerned the consultation paper said:

> The creation of a unified national Probation Service as a Next Steps Agency forming part of the Home Office will end the arrangements whereby 80 per cent of the Service's funding is provided by the Home Office and 20 per cent by local authorities. A national service would be centrally funded. This would break the existing financial tie between probation services and local authorities. But this ought not in any way to affect the development of partnership arrangements relating to local crime reduction strategies under the Crime and Disorder Bill.[16]

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[14] ibid. paragraph 2.23
[15] ibid. paragraphs 2.26-2.27
[16] ibid. paragraph 2.32. The Bill is now the *Crime and Disorder Act 1998*

The consultation paper included the following proposals for replacing the current system of probation committees with new arrangements designed to ensure that the probation service was responsive to local needs:

> We want local decision-making to be less constrained by central Government, and favour increased local accountability. A national Probation service therefore also needs to provide mechanisms which are responsive to local needs and circumstances, secures effective and meaningful input from the community, and ensures that the agency works constructively in partnership with local authorities and other organisations at local level. A variety of mechanisms might be appropriate. Formal and informal joint working in partnership with local authorities and those other local bodies which help to deliver public protection services, will be vital to promote a whole range of desirable outcomes locally. Approaches to joint working could range from some form of forum for the exchange of ideas to joint delivery of services through pooled budgets. One idea would be the establishment of 42 local reference groups or advisory boards within the overall national probation framework. These might provide a forum through which local stakeholders, including victim support groups, local authority representatives, ethnic minority groups and other members of the community can influence the way in which local plans are prepared and delivered. Moreover, these groups could have a developing role to play in influencing the direction of community-based approaches to crime reduction.
>
> Such boards should also include representatives of the local judiciary and magistracy, who will remain amongst the most important users of the probation service. But such representation will not do away with the need for good and close liaison at individual court level to ensure that the probation service meets high service standards. This improved sentencer liaison could also include jointly arranging what offender programmes or activities are available locally and their effectiveness. Amongst other things this would help provide systematic feedback to sentencers about the results of their decisions.[17]

The consultation paper also suggested a number of ways in which the prison and probation services could work together to improve public protection and reduce re-offending. As the Explanatory Notes on the *Criminal Justice and Court Services Bill* note:

> As a result of the consultation process, the Home Secretary decided that the two services should not combine, but should retain their separate identities while using complementary methods to achieve these common goals.

[17] ibid paragraph 2.33-2.34

C. The *Criminal Justice and Court Services Bill*: A National Probation Service

Chapter I of Part I of the *Criminal Justice and Court Services Bill* in designed to provide for the establishment of a unified National Probation Service for England and Wales which will be directly accountable to the Home Secretary. The Explanatory Notes on the Bill make the following comments about the new national service to be created by the Bill:

> It will have a structure based on 42 local areas, each with a board composed of representatives of the local community who understand local needs. The boundaries of these areas will match those of the police forces, a step towards the government's aim of improving efficiency by creating common boundaries across all the agencies in the criminal justice system. The boards will employ staff or make other contractual arrangements for the delivery of the services for which they are responsible. The Children And Family Court Advisory and Support Service, created in Chapter II of this Bill, will take over Family Court work, leaving the National Probation Service for England and Wales to concentrate on working with offenders.
>
> The provisions will allow the Home Secretary to appoint the members of local boards, and to appoint the chief officer of each area. He will be able to give directions to boards, and through them to chief officers, as to how they fulfil their statutory responsibilities.[18]

Clause 1 of the Bill makes general provision for the National Probation Service. It describes the **purpose of the service** as being:

- Giving assistance to the courts in determining the appropriate sentences to pass and making other decisions in respect of people who have been charged with or convicted of offences and
- Supervising and rehabilitating such persons

The Clause also seeks to enable the Secretary of State to make regulations, in the form of statutory instruments, extending the purposes of the service to include other prescribed purposes relating to people charged with or convicted of offences. Any statutory instrument made under this Clause will be subject to annulment by either House of Parliament under the negative procedure.

Clause 2 sets out what are intended to be the **aims of the probation service**. It requires that the functions of the Secretary of State in relation to the National Probation Service, the functions of local boards set up under this part of the Bill, and the functions of officers

[18] *Explanatory Notes* paragraphs 8-9

of those boards, be exercised, where they are being used for the purposes set out in Clause 1, with regard to the following aims:

> (a) the protection of the public,
>
> (b) the reduction of re-offending,
>
> (c) the proper punishment of offenders.

Clause 3 sets out the **function of the Secretary of State** in relation to the National Probation Service as being to ensure that provision is made throughout England and Wales for the purposes set out in Clause 1. It also seeks to enable him to make any payment he thinks appropriate towards expenditure incurred by any person for any of those purposes. Payments may be made on conditions, if the Secretary of State thinks it appropriate to impose them.

Clause 4 is intended to provide for the establishment of **local boards** who will be responsible for the local administration of the probation areas into which the new National Probation Service is to be divided. The Explanatory Notes comment that:

> At present there are 54 separate and independent probation services, each governed by a probation committee. The new service will operate as a single unified service for England and Wales.
>
> The unified service will be administered on a local basis by local boards. This is to allow national priorities to be interpreted in the light of local circumstances and local needs. There will be 42 areas in all; 41 will match the police areas and a London service will cover the Metropolitan Police District and the City of London Police Area. This will reduce the current number of 54 probation areas, with 20 of the existing services amalgamating to form 8 new local areas. This is designed to improve the management of the criminal justice system by creating common boundaries, based on police areas, for the different criminal justice agencies.

The Secretary of State will have powers under Clause 4(6) to make orders altering the probation areas created under Clause 4. An order made under this provision will be in the form of a statutory instrument, which will be subject to annulment under the negative procedure.

Schedule 1 of the Bill provides for the **constitution and operation of the local boards** of the National Probation Service. A board will consist of a chairman, a chief officer and at least 5 other members, one of whom will be a Crown Court judge appointed by the Lord Chancellor. The chairman, chief officer and other members of the board will be appointed by the Secretary of State. There is a power for regulations to be made concerning their appointment of members of the boards. Amongst other things the regulations will have to provide, so far as it is practicable to do so, for the persons appointed to be representative of the local community in the board's area and to live and work, or to have lived and worked, in that area. Regulations may require the chairman to make a report to the

Secretary of State about the performance of the other members, or any of them, and may confer other functions on the chairman.

Under paragraph 8 of Schedule 1, the local boards will have powers to appoint their own staff and determine the terms and conditions of their employment. The terms will, however, require the approval of the Secretary of State. It is furthermore intended that the Secretary of State should be able to give directions as to the appointment of staff of a specified description and specify the qualifications, experience or training of staff.

Paragraph 12 of Schedule 1 is concerned with the supervision of local boards and provides that

> a) Functions and other powers of local boards must be performed in accordance with any directions given to them by the Secretary of State.
>
> b) A local board must provide the Secretary of State with any information relating to the performance of its functions or other powers which may from time to time require.

Paragraph 14 provides that different directions may be given for different purposes, that these directions may be general or special, and that directions may apply to all boards generally or to one or more local boards specified in the direction.

Paragraph 9 of Schedule 1 is intended to enable a local board to delegate its functions to committees, sub-committees or particular members. Paragraph 10 also seeks to enable regulations made by the Secretary of State to prescribe functions which will have to be exercised by the chief officer on behalf of the board. The Explanatory Notes say that the effect of this provision will be to enable the Secretary of State to give directions under paragraph 12 with which the chief officer will be required to comply.

Under paragraphs 15 and 16 of Schedule 1 local boards will be required to prepare annual plans setting out how they intend to exercise their functions, and to make annual reports on the performance of their functions during each financial year. Regulations may also require them to make and publicise arrangements for dealing with complaints.

Regulations made under Schedule 1 will be subject to annulment under the negative procedure.

The intended **functions of the local boards** are set out in Clause 5 of the Bill. These include:

- Making arrangements for ensuring that sufficient provision is made in its area for the purposes set out in Clause 1

- Ensuring the performance of any of the statutory functions of officers of the board

- Contracting with other organisations or individuals, including other local boards, private companies or voluntary organisations, for the performance of the board's functions or those of its officers

The last of these functions includes in particular **contracting** for the provision of assistance to people who have been remanded on bail or for whom officers of the board have responsibilities, and the provision of accommodation in approved premises for persons who have at any time been charged with or convicted of an offence. The Explanatory Notes say that this includes the provision of hostel accommodation for people who are on bail, people who are under supervision, people who have been released on licence from prison and people who accept the need to live in a hostel on a voluntary basis because of the nature of their offending (presumably a reference to paedophiles and other sex offenders). The Secretary of State is to be given powers under Clause 9 to approve the suitability and building of hostels and other premises for the accommodation of these categories of people.

Clause 5(4) seeks to enable a local board to provide for its staff to work with other agencies in their local area on crime prevention and reduction and the giving of assistance to victims of crime. The Explanatory Notes comment that:

> This will include work on local crime reduction strategies undertaken under the provisions of the Crime and Disorder Act 1998 which will require the Boards of the new Service to contribute to the development and implementation of a crime reduction strategy for the local area.

There is a power in Clause 5(5) for regulations to confer further functions on local boards or the officers of local boards. These regulations will be in the form of statutory instruments subject to annulment under the negative procedure.

It will be for the Secretary of State to determine whether or not any provision made by a local board under Clause 5 is sufficient.

The **inspectorate of probation**, established under section 23 of the *Probation Service Act 1993*, is to continue in being under Clause 6 of the Bill. Under Clause 7, the functions of the inspectorate will be to inspect the work of each local board. It is intended that the Secretary of State should be able to issue directions requiring the inspectorate to assess the work of boards by reference to specified criteria. The Secretary of State will also have powers under Clause 7 to give directions conferring additional functions on the chief inspector of probation and other members of the inspectorate.

Clause 8 of the Bill seeks to give the Secretary of State the power to make orders **contracting out** work undertaken by local boards. The Explanatory Notes say:

> This power may be exercised in relation to one or more parts of a board's responsibilities. In contrast to the contracting out power in clause 5, this clause is designed to enable the contracting out of support services which are common to all boards such as the provision of information technology and the administration of the payroll.

> This power would be available for use where greater efficiency or better value for money could be achieved; for instance if a particular activity could be managed more cost effectively by organising it on a national or regional basis. Arrangements for contracting out all the functions of a board are dealt with under clause 10.

Clause 10 is designed to give the Secretary of State **default powers** where he considers that a local board is failing to perform the functions conferred on it or that its arrangements for performing those functions do not represent good value for money. It enables him to make a "management order" modifying the composition of the board by removing all or any of the members of the board, including the chair and the chief officer. They may be replaced in accordance with a "management arrangement" made between the Secretary of State and an organisation which may be a private, voluntary or public sector organisation. Statutory instruments containing management orders will have to be approved by both Houses of Parliament. The Secretary of State will be able to revoke the management order whenever he subsequently considers it necessary or expedient to do so.

Clause 19 is intended to enable the Secretary of State to draw up schemes transferring the property and liabilities of probation committees and the Receiver for the Metropolitan Police District (who owns property on behalf of the Inner London Probation Service) to the Crown and then on to a new organisation. Provisions concerning the content of the transfer schemes are set out in Schedule 3. The Explanatory Notes say that this provision will make possible the central ownership and management, by the Secretary of State, of the current probation service estate which amounts to approximately 1100 buildings.[19] Clauses 20 and 21 are designed to allow the Secretary of State to make schemes transferring staff from probation committees to the new local boards. It is intended that staff should be able to maintain their terms and conditions when they transfer to the new boards.

Clause 22 seeks to provide that where a chief probation officer is transferred to be a chief officer for a local board his or her previous service as a chief probation officer and service in the new position should constitute a period of continuous employment. The terms and conditions of employment of chief probation officers who are transferred into these positions will be transferred with them, so far as they are consistent with the new appointment. Under paragraph 3(5) of Schedule 1 chief officers are to have the same employment rights they would have under the *Employment Rights Act 1996* if they were in Crown employment, such as rights against unfair dismissal. Chief probation officers who are not appointed as chief officers for local boards, whether because they object to the employment or for any other reason, will be deemed to have been made redundant.[20]

The Explanatory Notes make the following remarks about the **cost** of establishing a National Probation Service:

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[19] *Criminal Justice and Court Services Bill Explanatory Notes* paragraph 58
[20] Clause 22(7) and *Explanatory Notes* paragraph 60

> The total costs to establish the National Probation Service for England and Wales are estimated at approximately £28.1 million. This includes costs for the establishment of the National Directorate, the amalgamation of 54 services into 42 areas, national IT support, training and recruiting 42 Chairs for the new local Boards. The net annual savings are likely to be in the region of £11.5 million although these are not likely to be realised until around 2003/4.[21]

As far as the effects of this part of the Bill on public service staffing are concerned, the Explanatory Notes say that there may be a reduction of up to 170 posts due to the amalgamations of local areas but this will be offset by 50 new posts in headquarters.[22]

D. Responses to the Bill

The proposals to create a national Probation Service for England and Wales have generally been welcomed. In a briefing on the Bill the National Association of Probation Officers (NAPO) said:

> The Association believes that the creation of one service with a director and co-terminous boundaries with the courts, police and the Crown Prosecution Service will bring about greater consistency and co-operation between the criminal justice agencies. NAPO believes, however, that support services such as administration and information technology should remain an integral part of each local service. NAPO believes that if the Government decided to contract out any of these services, it would lead to fragmentation and would diminish efficiency.
>
> NAPO believes that if the modern Probation Service is to deliver effective programmes it must be properly resourced. During the last five years, the probation budget has been cut by 25% and at the same time caseloads have risen by 30%. If this situation continues, NAPO believes that the modernisation programme will not be realised.[23]

The Association of Chief Officers of Probation (ACOP) also welcomed this part of the Bill. Its chair, Geoff Dobson, said:

> This legislation will be the launch pad for the service that makes probation better able to cut crime. We predict that probation will become a major player, equivalent in stature to the police and prisons in the 21st century criminal justice system.
>
> The one distinguishing feature of probation is that it works in and with communities. It offers potent solutions - backed by research – that, properly resourced, will make a real difference in cutting crime and the blight it has on people's lives.

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[21] Explanatory Notes paragraph 129
[22] ibid. paragraph 140

> Probation staff are increasingly finding that effectively dealing with crime requires a complex range of measures from punishment at one end to tackling the consequences of social exclusion at the other.[24]

The penal reform pressure group National Association for the Care and Rehabilitation of Offenders (NACRO) said:

> The new unified probation service will be in a better position to persuade courts and the public that community supervision is rigorous and effective in cutting crime. This change should therefore help to reduce the country's excessive use of prison sentences. At present, with a probation service fragmented into 54 areas and no national leader, it is difficult to ensure consistency of practice across England and Wales. The reorganisation will make it easier to spread effective practice in supervising offenders nationwide.[25]

II Community Sentences

Part II of the *Criminal Justice and Court Services Bill* seeks to rename some existing community sentences in England and Wales and to create two new orders: exclusion orders and drug abstinence orders. It is also designed to provide new warning and punishment measures for breach of orders and for new conditions to be attached to community sentences and to prisoners on their release from custody. It also sets out new police powers to test people for drugs and amends the *Bail Act 1976* by requiring courts considering applications for bail to have regard to any misuse of controlled drugs by the defendants concerned. The provisions of this part of the Bill which are concerned with drug misuse are dealt with separately in Library research paper 00/37 *The Criminal Justice and Court Services Bill: Drug-testing*. Section III of this paper deals with the provisions concerning exclusion orders. This section is concerned with the general provisions relating to community sentences.

The Clauses of the Bill relating to community sentences refer to and amend the "*Powers of Criminal Courts (Sentencing) Act 2000*". This is a consolidation measure currently before Parliament. The *Powers of Criminal Courts (Sentencing) Bill* [HL Bill 41 of 1999-2000] was introduced in the House of Lords on 1 March 2000. It had its second reading there on 21 March 2000 and was referred to the Joint Committee on Consolidated Bills.[26] References to the Bill in this paper will refer to it as the *Powers of Criminal Courts (Sentences) Act 2000* because, although it is still a Bill, it is referred to as an Act in the *Criminal Justice and Court Services Bill*.

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[23] *RE: Criminal Justice and Court Services Bill* NAPO briefing 20 March 2000

[24] Probation chiefs' reaction to the Criminal Justice and Court Services Bill – ACOP news release 16 March 2000

[25] NACRO comments on the new crime bill – NACRO news release 16 March 2000

[26] HL Deb 21 March 2000 c145-146

A. The Current Sentencing Framework in England and Wales

1. Mandatory Penalties

A person convicted of murder must be sentenced to life imprisonment[27]. Section 2 of the *Crime (Sentences) Act 1997* also requires a court to impose a sentence of life imprisonment on a person convicted after 1 October 1997 of a serious offence, where the person is aged 18 or over and he or she has a previous conviction for a serious offence, unless the court considers that there are exceptional circumstances relating to either of the offences or the offender which justify not doing so. "Serious offences" are defined in section 2 of the 1997 Act and include:

> a) attempting to commit or soliciting murder;
> b) manslaughter;
> c) wounding or causing grievous bodily harm with intent;
> d) rape, or attempted rape;
> e) sexual intercourse with a girl under the age of 13;
> f) possessing a firearm with intent to injure, using a firearm with intent to resist arrest, or carrying a firearms with criminal intent;
> g) robbery where the offender is in possession of a firearms or imitation firearms at some time during the commission of the offence

Section 3 of the *Crime (Sentences) Act 1997*, which was also implemented on 1 October 1997, provides for a mandatory minimum sentence of seven years' imprisonment to be imposed on a person convicted for the third time of an offence involving trafficking in "Class A drugs", such as heroin or cocaine. Section 4 of the 1997 Act, which provides for a mandatory minimum sentence of three years' imprisonment to be imposed on a person convicted for the third time of an offence of domestic burglary, was implemented on 1 December 1999.

Except where these mandatory sentences are concerned, the penalty imposed on an offender in a particular case is a matter for the sentencing judge's discretion. He or she must, however, keep within any statutory maximum penalty specified for the particular offence concerned. Maximum penalties are designed to cater for the worst possible offence and have had little effect on the question of what should be the appropriate period of imprisonment for the majority of cases which come before the courts. Instead a "tariff" has been established by the Court of Appeal, guiding judges on the range of penalties imposed for offences for which the statutory maximum penalties are high. This tariff is not to be found in any official publication, but can be found in a loose-leaf compendium *Current Sentencing Practice*, which is regarded as virtually authoritative. The range of sentences set out in the tariff tends to be well below the statutory maximum for a particular offence.

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[27] *Murder (Abolition of Death Penalty) Act 1965* s.1

The *Criminal Justice Act 1991* sets out the procedures to be followed in cases where the sentence to be imposed on an offender is at the discretion of the judge or magistrate dealing with the case are set out.

2. Custodial sentences

Under section 1 of the *Criminal Justice Act 1991*, a court may only impose a custodial sentence on an offender where:

- it takes the view that the offence is so serious that only a custodial sentence is justified or,

- if the offence is a violent or sexual offence, where it takes the view that only a custodial sentence will be adequate to protect the public from serious harm from the offender.

Where the court does impose a custodial sentence, section 2 of the 1991 Act provides that the sentences should be:

> a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or
> b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

Section 22 of the *Powers of Criminal Courts Act 1973* enables a court which passes a sentence of up to two years' imprisonment on an offender to order that it should be "suspended", that is, that it should not take effect unless, during a specified period of between one and two years, the offender commits another offence punishable with imprisonment.

3. Non-custodial Sentences

For offences which are not so serious as to require a custodial sentence, other "community sentences" may be imposed. Under section 6 of the *Criminal Justice Act 1991* (and section 35 of the consolidating *Powers of Criminal Courts (Sentencing) Bill* currently before Parliament) courts may only impose community sentences if they are of the opinion that the offences concerned are serious enough to warrant such a sentence. The orders imposed as part of the community sentence must be those which the court considers most suitable for the offender and any restrictions on liberty imposed must be in proportion to the seriousness of the offences for which they are imposed. The orders which may be imposed include the following types of "community order":

- probation orders, involving supervision in the community

- community service orders , involving work in the community

- combination orders, involving a mixture of probation and community service
- curfew orders, where the offender is required to remain at a specified place for specified periods and is monitored by electronic "tagging"
- drug treatment and testing orders
- attendance centre orders
- supervision orders
- orders requiring young offenders to comply with action plans

A sentence consisting of one or more of these orders is known as a "community sentence".

The penalty most frequently imposed by the criminal courts is a fine. Most offenders who are fined have been convicted of the more minor, "summary" offences, which are dealt with by magistrates rather than by a judge with a jury. A court may also impose a compensation order, requiring an offender to pay compensation for personal injury, loss or damage resulting from his offence. Confiscation orders may also be made against offenders how have benefited from drug trafficking offences and certain other crimes.

Courts have powers under the *Road Traffic Offenders Act 1988* to disqualify offenders convicted of driving offences from holding or obtaining driving licences. Where some of these offences are concerned disqualification is mandatory. Sections 39 and 40 of the *Crime (Sentences) Act 1997* gave the courts additional powers to impose driving disqualification on offenders convicted of any other offences, in addition to, or instead of dealing with them in any other way.

Sections 89-95 of the *Crime and Disorder Act 1998* introduced drug treatment and testing orders, which enable a court to impose drug treatment on an offender, with the offender's consent, to specify the terms of the treatment and to review the offender's progress. The orders include regular, but random, mandatory drug testing.

Where a court considers that it would be inexpedient to punish an offender it may impose an absolute discharge, in which case no further action will be taken, or a conditional discharge, under which no action will be taken unless the offender re-offends within a specified period of not more than three years.

Magistrates have powers, of medieval origin, to "bind-over" people who appear before them, whether or not the people concerned have been convicted of an offence. The person will be bound over to keep the peace and/or be of good behaviour and will be required to enter into a recognizance for a specified sum and time. Binding over requires the person's

consent, although if consent is not forthcoming the magistrates may commit the person concerned into prison custody for up to six months.

4. Enforcement of Probation and Community Sentences

The *Criminal Justice Act 1991* sets out provisions for the enforcement of community penalties. The Government has been concerned that ineffective enforcement of community sentences, including failures by probation officers to take action against offenders who are found to be in breach of community orders, has contributed to the commonly-held view that non-custodial sentences are a "soft" form of punishment involving little if any cost or inconvenience to the offenders on whom they are imposed. The Government carried out an audit of enforcement by all probation services across the country and has subsequently tried to improve the enforcement of community sentences by issuing guidance and "best practice" on what such sentences should involve and how breaches of orders by offenders should be dealt with.[28] The results of a further audit of enforcement will be announced on 11 April.[29] There are *National Standards for Supervision of Offenders in the Community* and the Government is seeking to tighten these to enable offenders who fail to comply with their community sentences to be returned to court more quickly.

5. Curfew orders and electronic "tagging"

Provisions designed to introduce a new "curfew order", which could be imposed as a sentence on convicted offenders who were aged 16 or over, and would require the offender to remain at a specified place for specified periods, were introduced by Section 12 of the *Criminal Justice Act 1991*. Section 13 of the 1991 Act provides that a curfew order may include requirements for securing the electronic monitoring of the offender's whereabouts during the curfew periods specified in the order. The *Crime (Sentences) Act 1997* also amended the 1991 Act so that the offender's consent was not required for electronic monitoring to be carried out.

Section 43 of the *Crime (Sentences) Act 1997* extended the courts' powers to impose curfew orders enforced by electronic tags to offenders aged from 10-15. Section 43 of the 1997 Act was implemented on January 1st 1998.[30] Electronic monitoring of curfews imposed as a condition of bail was the subject of a pilot scheme in 1998 and 1999. The Explanatory Notes on the *Criminal Justice and Court Services Bill* say that no decision has been taken on the future of these uses.[31]

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[28] see e.g. HM Inspectorate of Probation *Strategies for Effective Offender Supervision* January 1998; HM Inspectorate of Probation, *Evidence-based Practice: A Guide to Effective Practice* November 1998

[29] Probation chiefs' reaction to the new Criminal Justice and Court Services Bill – Association of Chief Officers of Probation news release 16.3.2000

[30] SI 1997/2200

[31] Explanatory Notes paragraph 22

Extensive pilot tests have been carried out on the effectiveness of electronic tagging as a form of punishment. National implementation of the power under the 1991 Act to impose curfew orders enforced by electronic tags as a form of sentence took place on 1 December 1999.

Sections 99 and 100 of the *Crime & Disorder Act 1998* inserted new sections 34A, 37A and 38A into the *Criminal Justice Act 1991*, introducing a new form of early release for certain categories of prisoner. This "home detention curfew" was introduced in England and Wales on 28 January 1999. The curfew is monitored through the use of electronic tagging.

Most prisoners serving sentences of three months or over but less than four years are eligible for consideration for home detention curfew.[32] Those prisoners who are ineligible for home detention curfew are described in paragraphs 2.3 and 2.4 of the Prison Service's guidance on home detention curfew.[33] They include violent and sex offenders currently serving an extended sentence involving extended supervision under section 58 of the *Crime & Disorder Act 1998*, and prisoners who have not yet reached the age of 18.

The Prison Service guidance also makes the following comments about prisoners convicted of sexual offences:

> 2.5 Prisoners who will be required to register with the police under Part I of the Sex Offenders Act 1997 present a particular type of risk to the public. Establishments must not commence a risk assessment on such prisoners unless there are exceptional circumstances which indicate that the individual's release on Home Detention Curfew might be appropriate.
>
> 2.6 A Governor authorised to determine suitability for release on HDC must decide whether the case warrants assessment. He or she must consider all such cases on their merits, taking into account the circumstances of the offence, the prisoner's risk to the public and the potential supervision arrangements.
>
> 2.7 No prisoner falling into this category should be released without the most careful scrutiny and clear evidence of either minimal or no risk to the public at large and of a clear potential benefit to the chances of successful resettlement, treatment or supervision. For instance, if release into a treatment centre is judged central to the release plan of a prisoner who whilst under supervision is likely to present no significant risk to the public at large and if the curfew was considered to support the likely completion of the treatment (by requiring the offender to remain in residency), this might qualify the case exceptionally as suitable for consideration.

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[32] HM Prison Service, *Home Detention Curfew* Prison Service Order 6700 2.10.1998 paragraph 2.1
[33] ibid.

The Explanatory Notes on the *Criminal Justice and Court Services Bill* include the following comments about the courts' use of curfew orders with electronic tagging and the implementation of home detention curfew:

> Electronic Monitoring is delivered by the private sector. Following successful trials of curfew orders, new five-year contracts were issued to the private sector in 1999. In the first year of the contract (28 January 1999 to 31 January 2000), electronic monitoring was used in 19,642 cases. Of these, 84.5% (16,589) were prisoners released on Home Detention Curfew, and 13.1% (2,568) were curfew orders made under the Criminal Justice Act 1991 (others account for the remaining 2.4% (471)). As at February 2000 the successful compliance rate of the Home Detention Curfew scheme was 95% and is estimated at 88% for all other forms of electronic monitoring.[34]

B. Existing 'exclusion' powers [Arabella Thorp]

The courts already have some specific powers to make orders excluding people from particular places or areas. These powers come from a variety of statutes, relating for example to harassment, anti-social behaviour and domestic violence, as well from as the common law. Such orders do not necessarily have to follow from a conviction for an offence, and an individual can in most cases apply for them in the civil courts.

1. The Protection from Harassment Act 1997

The *Protection from Harassment Act 1997* includes provisions for two types of order: one that can be made on conviction for one of the offences created by the Act; and another free-standing order that can be applied for by a person who is being harassed. There is no definition of harassment in the Act: it is certainly not limited to the problem of 'stalking' which originally inspired the legislation. However, section 7 provides that references to harassing a person include alarming the person or causing the person distress, that a 'course of conduct' must involve conduct on at least two occasions, and that 'conduct' includes speech.

Section 1 of the *1997 Act* makes a general declaration prohibiting a course of conduct amounting to harassment which, if carried out, would give rise to a criminal penalty under section 2 and may be the subject of a claim in civil proceedings under section 3. The Act provides three possible defences to a charge or allegation of harassment:

1. the conduct was for the purposes of preventing or detecting crime;
2. it was pursued under an enactment or rule of law; or
3. in the particular circumstances the conduct was reasonable.[35]

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[34] Explanatory Notes paragraph 24

[35] section 1(3)

Section 2 of the *1997 Act* states that 'a person who pursues a course of conduct in breach of section 1 is guilty of an offence'. Section 4 of the Act also created a more serious criminal offence, of carrying out a course of conduct that puts people in fear of violence.

The courts have sometimes imposed a variety of community sentences on offenders convicted of these offences. These can be, for example, probation orders, supervision orders or curfew orders, each containing their own terms and conditions. In the first year when the *1997 Act* was in force, 316 out of 1,687 people proceeded against for the section 2 offence, and 95 out of 955 proceeded against for the section 4 offence, received a community sentence.[36]

However, section 5 gives a court sentencing a person convicted of an offence under section 2 or section 4 the specific power to make a 'restraining order'. This would forbid him from pursuing further conduct against the victim (or any other person named in the order) which amounts to harassment, or which will cause a fear of violence. The order may have effect for a specified period or until a further order is made (ie. indefinitely). Breach such an order without reasonable excuse is an arrestable offence, attracting a maximum sentence of five years' imprisonment and/or an unlimited fine (on conviction on indictment), or six months' imprisonment and/or a fine of up to £5,000 (on summary conviction).

Bridget Prentice introduced a ten-minute-rule bill in April 1999 which was intended replace this 'restraining order' provision with one allowing the courts to impose restraining orders on people convicted of a variety of serious offences, not just those under the *1997 Act*.[37] She proposed that these restraining orders could have been made by the court on its own motion or on application by the prosecutor.

Section 3 of the *1997 Act* allows a person to take civil proceedings in respect of actual or apprehended harassment. In such civil proceedings the pursuer can seek a 'non-harassment' order, and/or damages. A non-harassment order would contain whatever terms and conditions the court considered appropriate in the circumstances. As with ordinary injunctions and some domestic violence remedies, interim non-harassment orders may be sought by a victim *ex parte* (i.e. without the appearance of the alleged harasser at court to defend the case made against him).

Section 3(3) to (9) of the *1997 Act* made it an arrestable criminal offence for a person, without reasonable excuse, to breach a non-harassment order. This provision can be seen as blurring the distinctions between the criminal and civil law, and has been controversial. It did not come into force until over a year after the main part of the Act.[38] Penalties for this offence are the same as for breach of a restraining order.

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36 HC Deb 2 March 1999 vol 326 c634W

37 HC Bill 93 of 1998-99; see HC Deb 28 April 1999 vol 330 cc346-8

38 1 September 1998 (SI 1998/1902) – the main part of the Act was brought into force on 16 June 1997 (SI 1997/1498)

A research project to assess the use and effectiveness of the *1997 Act* is in progress, and a report is expected to be published in June.[39]

2. Anti-Social Behaviour Orders

Section 1 of the *Crime and Disorder Act 1998* enables local authorities and the police to apply for an anti-social behaviour order (ASBO) for any person aged 10 or over who has acted in an anti-social manner and who is likely to do so again in the local government area.

The behaviour complained of need not be criminal in itself. 'Anti-social behaviour' is not described in the Act, beyond the explanation in section 1(1)(a) that acting in an anti-social manner would mean 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself'. The words 'harassment, alarm or distress' originally appeared in the *Public Order Act 1986*, but the behaviour triggering an application for an ASBO need not amount to an offence under the 1986 Act (or indeed any other legislation), nor need it have the element of intent required under that Act. Section 1(5) provides that such behaviour will not be considered anti-social if the defendant can show it was reasonable in the circumstances.

Only a local authority or the police may apply for such an order. This is apparently to emphasise the 'community' nature of the order, and to distinguish it from the 'personal' remedies in the *Protection from Harassment Act 1997*. The phrase 'not of the same household' as the defendant appears to be intended to distinguish ASBOs from the remedies against domestic violence contained in Part IV of the *Family Law Act 1996.*

The terms imposed by an ASBO must be those necessary for the purpose of protecting persons in the local government area from further anti-social acts by the defendant. The order will not therefore be limited to the actual behaviour, or even the type of behaviour, which triggered the application. The consultation paper that preceded this legislation envisaged that the court's powers would include the power to impose a curfew on a defendant, or exclusion orders in relation to a specified address or area.[40]

An ASBO may be imposed for a minimum of two years, but there is no statutory maximum and no provision for interim orders. The government's explanation for this is that the duration of the order should reflect not the nature of the conduct itself, but the period of time necessary to protect the community.[41]

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[39] HC Deb 21 October 1999 vol 336 c622W; and see 'Register of Britain's stalkers is proposed', *Independent* 21 February 2000

[40] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2

[41] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2

Either the person subject to an order, or the person who sought it, can apply to the court to have the order varied or discharged. However, an order will only be discharged before two years have passed if both parties consent. Each party has a right of appeal to the Crown Court against the decision of the magistrate to grant (or not to grant) an ASBO [section 4(1)]. The Crown Court is given the power to make any orders necessary to give effect to its decision [section 4(2)].

Breach of the terms of an ASBO is a criminal offence, subject to a maximum sentence on summary conviction of six months' imprisonment or a fine of up to £5000; and on indictment of five years' imprisonment or an unlimited fine. The courts cannot grant a conditional discharge for breach of an order, as the government considers an ASBO to be already comparable to a conditional discharge for a crime.[42]

Since these provisions came into force in April 1999 about 25-30 ASBOs have been made in England and Wales.[43]

3. Sex Offender Orders

Under section 2 of the *Crime and Disorder Act 1998*, a chief officer of police may apply to a magistrates' court for a Sex Offender Order ('SOO') to be imposed on a sex offender who has, since the commencement of section, acted in such a way as to give reasonable cause to believe an order is necessary to the public from serious harm from him. Again, this behaviour need not be criminal.

The definition of 'sex offender' is given in section 3(1), as a person who has committed a sexual offence to which the registration provisions of the *Sex Offenders Act 1997* apply. This 'triggering' offence could have been committed at any time (and even abroad), not necessarily since the *1998 Act* came into force.

The contents of an SOO are left to the discretion of the courts, although section 2(4) provides that the conditions would have to be necessary for the protection of the public from serious harm from the defendant. SOOs cannot be punitive or impose positive obligations. An SOO might, for example, prohibit the person concerned from loitering near schools or playgrounds. One sex offender in Wales was made subject to an SOO prohibiting him from taking a puppy out for a walk, displaying teddy bears in his windows, standing outside shops which may be visited by children, going near to any children's play area, or going within 50 metres of any school.[44]

An SOO would initially be imposed for a minimum of five years, although it could be discharged within that time if both the police and the person to whom it applied consented. Under section 2(6), an SOO could be varied at any time.

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42 Lord Williams of Mostyn, HL Deb vol 585 cc 605-6
43 HC Deb 14 March 2000 vol 346 c162W

Breach of an SOO without reasonable excuse is a criminal offence punishable by up to five years imprisonment and/or an unlimited fine.[45] As with ASBOs, the court would not be able to grant a conditional discharge for a breach of an order.

4. Social landlords

Several social landlords, including the Hackney Council and Manchester City Council, have successfully sought injunctions against some of their tenants in an attempt to tackle vandalism, violence, noise, harassment, threatening and un-neighbourly behaviour on their estates.

The *Housing Act 1996* strengthened the powers of local housing authorities to obtain injunctions against the perpetrators of anti-social behaviour, including allowing a power of arrest to be attached to injunctions where there is actual or threatened violence.[46] Sections 152, 153, 154 155(1) and (2), 157 and 158 of the 1996 Act (applications for injunctions to restrain anti-social behaviour) were brought into force on 1 September 1997.[47] Manchester City Council has reportedly used these new powers, which enable the immediate arrest of 'nuisance neighbours' if they break a court injunction.[48]

Local authorities may also rely on their general power to institute proceedings leading to an injunction under section 222 of the *Local Government Act 1972*. This enables an authority, where it considers it expedient to promote or protect the interests of inhabitants of its area, to prosecute, defend or appear in legal proceedings. Coventry City Council reportedly used section 222 to obtain an order excluding two brothers from their mother's home following a series of burglaries on her estate.[49]

5. Domestic violence

Part IV of the *Family Law Act 1996* introduced a single set of civil remedies to deal with domestic violence, encompassing 'non-molestation orders' and 'occupation orders'. A number of different people can apply for an order against another person with whom they are linked by a domestic or family relationship. These include:

- people who are or have been married to each other
- people who, although not married to each other, are living together or have lived together as husband and wife

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44 'Restrictions put on paedophile's life', *Western Mail* 4 August 1999

45 for conviction on indictment only - the maximum penalty for summary conviction is six months imprisonment and/or a £5,000 fine

46 Sections 152-158

47 SI 1997/1851

48 'New nuisance neighbour laws used for first time by Manchester', *Manchester Evening News*, 10 November 1997

49 'Anti-social antidotes', *Roof*, July/August 1995

- close relatives, including parents, grandparents, children, grandchildren, stepparents, stepchildren, brothers, sisters, uncles, aunts, nieces and nephews
- people who live or have lived in the same household (other than as employer and employee, or landlord and tenant or lodger)
- people who have agreed to marry each other (provided that the agreement has not ended more than three years ago)
- the parents of a child, or people with parental responsibility for that child
- where a child is adopted, the natural parents and grandparents of the child, the adoptive parents, and the child

An occupation order can, for example:

- exclude the violent person from an area including the home
- order the violent person to leave the family home, or a part of it
- order the violent person to allow the victim of violence to enter and stay in the home, or a part of it
- decide what rights the violent person and the victim of violence have to occupy the home

A non-molestation order can stop one person pestering, threatening or being violent to another person, or to any child involved. There is no definition of 'molestation' in the Act, but in deciding whether or not to make a non-molestation order the court must have regard to all the circumstances of the case, including the need to secure the health, safety and well-being of the applicant.

The court making a non-molestation order can attach a power of arrest to the order. Indeed, if the person has already used or threatened violence against the applicant or a child it must do so unless it is satisfied that this is not necessary. If no power of arrest is attached, a warrant for arrest would have to be issued if the person disobeys an order.

Either order may be made for a specific period or until further order (ie. indefinitely). Occupation orders may alternatively be made to last until the occurrence of a specified event.

6. Other injunctions

It is possible to obtain injunctions ancillary to a variety of proceedings, for example trespass, trespass to the person, nuisance or personal injury. Normally only the person(s) who actually suffered from the behaviour would be able to seek an injunction; however, social landlords may apply for an injunction where it can be shown that the tenant in question is in breach of a tenancy condition not to indulge in particular sorts of behaviour.

An injunction may be perpetual, ie a final order, or interlocutory, which is an interim order pending the final outcome of the matter. An interlocutory order can, in an emergency, be obtained without the defendant being given notice of the proceedings.

No power of arrest may be attached to these general injunctions. However, in two recent cases on the use of injunctions involving threatening and abusive behaviour, heard by the courts before the enactment of the *Protection from Harassment Act 1997,* the courts made use of their power to imprison for contempt of court for failure to observe such injunctions.[50] Contempt of court is punishable by, sequestration, fine, or committal to prison (for a maximum period of two years). Those imprisoned for civil contempt do not gain a criminal record, and are housed separately from other prisoners.

C. New measures in the Criminal Justice and Court Services Bill

1. New names for community sentences

Clauses 36, 37 and 38 rename the following community sentences:

Clause No.	Current name	New name
36	Probation order	Community rehabilitation order
37	Community service order	Community punishment order
38	Combination order	Community punishment and rehabilitation order

The Explanatory Notes comment that this is being done in order to reflect better the nature of these orders and to make them more easily understood.[51]

2. Exclusion orders and curfews

Clause 39 of the Bill inserts new sections 40A-40D into the *Power of Criminal Courts (Sentencing) Act 2000*. They are designed to create a new type of community order: an "exclusion order". Exclusion orders will be broadly similar to curfew orders except that where a curfew orders require offenders to remain at specified places, exclusion orders will require convicted offenders to stay away from specified places or areas for specified periods of up to 1 year (or 3 months for juvenile offenders). The Secretary of State will have the power to make orders altering these maximum periods. Such an order will have to be made by statutory instrument, subject to the negative procedure.

A court making an exclusion order will be able to specify different places or areas for different periods. As with curfew orders, the requirements in an exclusion order will have to be such as to avoid, as far as practicable:

> a) any conflict with the offender's religious beliefs or with the requirements of any other community order to which he may be subject; and
> b) any interference with the times, if any, at which he normally works or attends school or any other educational establishment.

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[50] *Burris v Azadani* [1996] 1 FLR 266 and *Khorasandjian v Bush* [1993] 2 FLR 66

[51] Explanatory Notes paragraph 20

The Secretary of State will have the power to make orders, by statutory instrument subject to the negative procedure, adding to these restrictions.

As with curfew orders, the court will have to obtain and consider information about the offender's family circumstances and the likely effect of an exclusion order on those circumstances.

When an exclusion order is made, the court will have to explain to the defendant in ordinary language the effect of the order and its possible consequences, together with the court's power to review it.

Section 40B makes provision for the monitoring of exclusion orders to be carried out electronically, as is the case with curfew orders. Where a court proposes to include a requirement for securing electronic monitoring in an exclusion order imposed on an offender, but this will require the co-operation of another person, such as the victim of the offence, the court will have to obtain that person's consent before including the requirement in the order.

Section 40C provides for Schedule 3 of the *Power of Criminal Courts (Sentencing) Act 2000*, which is concerned with the breach, revocation and amendment of curfew orders and other community orders, to be extended to cover the breach, revocation and amendment of exclusion orders.

The Secretary of State will have powers under Clause 39 to make rules regulating the monitoring of offenders subject to exclusion orders and the functions of those people who are responsible for monitoring them. The rules will be subject to the negative procedure.

Schedule 2 of the *Powers of Criminal Courts (Sentencing) Act 2000* sets out additional requirements which may be included in probation orders. These include:

- residence requirements,
- requirements that offenders carry out or refrain from carrying out certain activities, requirements that offenders attend at probation centres
- requirements that offenders submit to treatment for any mental conditions they may have
- requirements that offenders submit to treatment for drug or alcohol dependency

Clause 43 of the *Criminal Justice and Court Services Bill* is designed to add to these requirements by enabling enable community rehabilitation orders, as probation orders will be known, to include curfew requirements similar to those also available under curfew orders. As with curfew orders, the court will have to obtain and consider information about the place where the offender will be required to remain, including information about the attitude of people who are likely to be affected by his or her enforced presence there, before including a curfew requirement in a community

rehabilitation order. Clause 44 of the *Criminal Justice and Court Services Bill* similarly seeks to enable community rehabilitation orders to include exclusion requirements in line with those available under exclusion orders.

Where a community sentence imposed on an offender includes a curfew order and the court wishes to impose a community rehabilitation order in addition to that order, the court will not be able to include a curfew requirement in the community rehabilitation order. The same is true where an exclusion order is imposed on an offender. Curfew orders and exclusion orders are intended to be free-standing penalties capable of being imposed on offenders whether or not other community penalties are imposed. Where a community rehabilitation order is being imposed the court will be able to specify curfew or exclusion requirements without the need to make a separate order.[52] The measures enabling exclusion or curfew requirements to be included in community rehabilitation orders, when an exclusion or curfew order will in any event be available to form part of a sentence in addition to a community rehabilitation order, are intended to make it easier to deal with breaches of exclusion or curfew requirements by offenders subject to community rehabilitation orders.[53]

Clause 45 is intended to enable arrangements to be made for the electronic monitoring of any requirement of a community rehabilitation order. The technology required to enable exclusion orders to be monitored electronically is still being developed and tested. A court will not be able to make an exclusion order unless it has been notified by the Secretary of State that arrangements for monitoring the offender's whereabouts are available in the area in which the place to be specified in the order is situated. This will allow for the piloting of the provisions concerning exclusion orders and the full operational testing of the technology needed to enable them to be monitored electronically.

The Explanatory Notes comment that electronic monitoring of requirements in community rehabilitation orders might be used to require an offender to register his attendance at a particular place by means of a swipe card, for example.[54]

As with exclusion orders generally, where a court proposes to include an exclusion requirement secured by electronic monitoring in a community rehabilitation order and this will require the co-operation of another person, such as the victim of the offence, the court will have to obtain that person's consent before including the requirement in the order.

Clause 46 of the *Criminal Justice and Court Services Bill* seeks to add to Schedule 3 of the *Powers of Criminal Courts (Sentencing) Bill 1999-2000* a provision enabling a

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[52] Source: Home Office
[53] ibid
[54] Explanatory Notes paragraph 98

warning to be given to an offender before he or she is punished for breaching a community order. The Explanatory Notes describe the context in which this provision is being introduced as follows:

> The revised *National Standards for the supervision of offenders in the community*, which will come into force on 1 April 2000, set the standards to which offenders are supervised in the community and the action that will be taken if they fail to comply with their sentence. The purpose of these Bill measures is to enhance compliance with community sentences by creating a statutory warning to reinforce the new National Standards. Offenders will be issued with a maximum of one warning for an unacceptable failure to comply with a community sentence in any 12 month period, rather than the current two warnings. A presumption of imprisonment is then introduced, unless there are exceptional circumstances, where the offender fails to heed the warning and is returned to court and found to be in breach of his order.[55]

Where an offender is in breach of a community order and the staff employed by the local board do not refer him or her back to court they will have to issue a warning. The warning will have to describe the circumstances of the failure, state that the failure is unacceptable and inform the offender that if he fails again to comply with any requirement of the order within the next 12 months (or 6 months in the case of a curfew order) he will be liable to be brought before a court. The fact that a warning has been given will have to be recorded. Where 2 or more orders were imposed for the same offence it is intended that they should be considered as one order to which the warning scheme applies. In such cases, only 1 warning will be given in any 12 month period. Where an offender aged 18 or over is sent to court for breach of an order to which the warning provisions apply, the court will be required to impose a custodial sentence on him unless there are exceptional circumstances. The maximum sentence of imprisonment the court will be able to impose will be three months unless the court considers that, if it were sentencing the offender again for the original offence, it would have imposed a longer period of imprisonment. If this is so, the longer period of imprisonment will apply.

Where the offender is under the age of 18 or the court considers the circumstances of the case to be exceptional the existing discretionary sanctions will apply without the need for what the Explanatory Notes call "the new presumption of imprisonment".[56]

The warnings and punishment measures will not apply to a failure to comply with requirements to abstain from misusing specified Class A drugs.

Clause 47 enables the Secretary of State to make regulations in relation to community orders. The regulations, which will be subject to the negative procedure, are intended to allow the Secretary of State to set standards for the delivery of the orders.[57]

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[55] ibid. paragraph 33
[56] ibid. paragraph 102

Clauses 50 of the Bill is designed to provide that, where an offender who receives a custodial sentence is released on licence, the licence may include a condition requiring the offender to submit to electronic monitoring. The Explanatory Notes comment that:

> The Secretary of State currently has the power under section 37(4) of the Criminal Justice Act 1991 and section 31(2) of the Crime (Sentences) Act 1997 to attach conditions to a release licence. It is therefore already possible to impose curfew conditions, non-contact or exclusion conditions, and such conditions are used where appropriate. This clause will enable these types of condition to have the additional requirement of electronic monitoring attached to them. The new powers provided for in subsection 1(a) may therefore be used:
>
> - in relation to a licence requirement for the released person to observe a curfew or otherwise remain at a specified place, to use electronic monitoring to determine whether the curfew is observed;
> - in relation to a licence requirement for the released person not to enter a specified place or places, to use electronic monitoring to determine whether that person has entered the restricted area.
>
> In addition, *subsection 1(b)* of Clause 50 introduces new powers enabling the "tracking" of those offenders released from prison on licence, by electronically monitoring their whereabouts, on a continuous basis, until the expiry of the licence or the removal of the condition, whichever happens first. Suitable technology to support "tracking" is not currently available, but is under development. These powers will therefore provide the basis for making use of "tracking" technology as and when it becomes available. *Subsection (3)* of Clause 50 establishes that these new powers should not be used to achieve the electronic monitoring of curfew conditions imposed on prisoners who are subject to the Home Detention Curfew scheme. Those powers are provided for separately in the Criminal Justice Act 1991, as amended by the Crime and Disorder Act 1998.[58]

The Secretary of State will have powers under Clause 50(4) to make rules about the conditions that may be included in a prisoner's licence under this provision. The rules will be subject to annulment under the negative procedure.

Clause 51 is intended to apply provisions similar to those in Clause 50 to young offenders who are released from terms of detention in a young offender institution, or under section 53 of the *Children and Young Persons Act 1933.* Section 65 of *the Criminal Justice Act 1991* provides for these offenders to be released on a Notice of Supervision instead of a licence. Where these offenders are released, the requirement to submit to electronic monitoring will cease to have effect on or after the day on which the person would (but for his release) have served his term in full.

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[57] ibid. paragraph 105

[58] Explanatory Notes paragraphs 112-113

The enforcement mechanism for breaches of electronically monitored conditions in licences or notices of supervision will be the same as those applying for breach of any other type of condition included in a licence.[59] What those arrangements are depends on the particular type of licence. Where adult prisoners are concerned, for example, different mechanisms apply depending on whether or not the offender is subject to home detention curfew. The mechanism where an offenders on home detention curfew are set out in section 38A of the *Criminal Justice Act 1991*, which was inserted by section 100(2) of the *Crime and Disorder Act 1998*. Arrangements for the recall of other short-term prisoners, and of long-term prisoners, are set out in section 39 of the 1991 Act.

D. Responses to the Bill

In a briefing on the Bill the National Association of Probation Officers (NAPO) makes the following comments about the provisions changing the names of community sentences:

> NAPO believes that the case for changing the names of existing orders has not been proved. Probation and community service orders do have wide international and public understanding. Indeed the probation order has been in use since the early part of the century. The term "combination order" is, however, confusing – a combination order is a joint probation and community service order. Rather than call it a "community punishment and rehabilitation order" NAPO would suggest "probation and community service order".[60]

The penal reform pressure group the National Association for the Care and Rehabilitation of Offenders (NACRO) makes the following comments about the clauses concerning electronically monitored exclusion orders:

> The new tagging provisions would be useful in certain circumstances where stalkers, sex offenders or perpetrators of domestic violence need to be kept away from their previous or potential victims. It is more likely to succeed if it is combined with supervision or treatment of these offenders to change their attitudes and offending behaviour.[61]

The National Association of Probation Officers makes the following comments about these provisions:

> NAPO understands that the technology has not yet been fully developed and that it is envisaged that an offender who had been found guilty of offences such as domestic violence, race-hate or stalking would be fitted with a device that prohibited him from going near victims. The victims would receive a warning if the offender breached the prescribed area. If this is the case, the measure should

[59] Explanatory Notes paragraph 115
[60] Re: Criminal Justice and Court Services Bill – NAPO briefing 20.3.2000
[61] NACRO comments on the new crime bill" – NACRO briefing 16.3.2000

> be piloted to see if it does have the required deterrent effect. NAPO fears, however, that there could be net-widening with the exclusion order and that it will be used in general circumstances rather than exclusively with those offenders who pose particular and dangerous risks to victims. In the past, schemes which have net-widened and been applied to inappropriate offenders have led to high breach levels and, as with many other measures in this bill, an increased reliance on custody.[62]

In its briefing for the second reading of the Bill the pressure group Liberty says:

> We understand the Government's commitment to making community penalties more effective, and in appropriate circumstances tougher on the offender. If the effect of these provisions is to enable community sentences to be passed on individuals that would otherwise have been sentenced to imprisonment they are to be welcomed.
>
> We envisage that there are circumstances when restricting and monitoring the movements of offenders during community sentences and licence periods will allow these measures to be more effectively used, and provide greater protection for the public, for example by preventing a sex offender from going to the vicinity of a school, or for a stalker from going to the vicinity of a victim's house.
>
> However the proposals as drafted are much wider than this. There is no restriction as to when, or in what circumstances these orders can be made, save in Clause 40A (5) the requirement that exclusion orders should, as for as practicable, avoid interference with religious belief, work or education.
>
> The imposition of an exclusion order with tagging, raises issues under Article 8 of the European Convention on Human Rights, the right to privacy (see above), Article 11, the right to freedom of assembly, and potentially Articles 10, the right to freedom of expression and Article 9, the right to freedom of religion. Interference with these rights can only be justified [in the circumstances of this bill] 'for the prevention of disorder or crime', and must be proportionate.
>
> An order excluding an offender from the vicinity of a victim's home, when the offender has been convicted of harassment, might be justifiable as proportionate and for the prevention of crime. However it is less likely that an order banning an individual from the underground, when they had been convicted of only one pick-pocketing offence, would be considered necessary for the prevention of crime and proportionate.
>
> ***Summary***
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> We consider that without restrictions or guidance in the legislation as to the use of these orders there is a real risk that these provisions will be used in

[62] Re: Criminal Justice and Court Services Bill – NAPO briefing 20.3.2000

> circumstances that will not be compliant with individuals rights under the Human Rights Act.[63]

The Home Office press notice announcing the publication of the Bill quoted the Home Secretary, Jack Straw, as saying:

> Everyone has the right to feel safe in their homes and on the streets and it is time to get even tougher on burglars, muggers and stalkers and those who commit domestic violence and sexual offences. That is why we are proposing to strengthen community sentences and extend electronic monitoring to provide new safeguards against these criminals.[64]

[63] Criminal Justice and Court Services Bill 2nd reading briefing – Liberty March 2000
[64] Protecting the Public – Crime Fighting Plans Unveiled – Home Office press notice 16.3.2000