

## **THE MAGISTRATES' ASSOCIATION**

### **SENTENCING POLICY AND PRACTICE COMMITTEE**

#### **Curfew Orders with Electronic Monitoring (Tagging) – Policy Paper**

##### **Background**

Lord Chancellor Ken Clarke has described short prison sentences in a recent policy speech in the same terms as the Prison Reform Trust has done. He says they are expensive and ineffective at reducing reoffending. He also has to plan to save at least 25% of his departmental budget over the next 4 years.

He could save 10% of the prison budget if he did not have to look after short-sentenced (under 12 months) prisoners and more if he could start to close prisons instead of building new ones.

We can expect some radical policy announcements from the government in the near to medium term future restricting the use of short custodial sentences. The Magistrates' Association wants to make constructive suggestions of alternative sentences which the government can incorporate into its decisions.

##### **The current legislative position**

The Criminal Justice Act (CJA) 2003 requires judges and magistrates to impose custodial sentences only when the offence(s) are 'so serious' that only a custodial sentence is justified.

Even when that threshold has been crossed, a custodial sentence can be avoided if the sentencer can find an alternative community penalty with an adequate combination of punishment and rehabilitation.

If there is no such alternative, the custodial sentence can still be suspended under a suspended sentence order to which various requirements must be added.

In practice, therefore, the sentencer has these options for 'so serious' offences:

- Immediate custody.
- Suspended custody with requirements, such as a drug rehabilitation requirement, during the suspended period.
- A community order with punitive (eg curfew or unpaid work) requirements and rehabilitative (eg drug rehabilitation) requirements, providing the punitive element is adequate for a 'so serious' offence.

There are pilot schemes around the country testing intensive alternatives to custody (IACs) and these are managed by the Probation Service and may involve a curfew among other interventions.

Finally there is the rarely used provision to impose a Band E fine (400% of relevant weekly income) instead of custody.

### **Curfews**

Curfew orders with an electronic monitoring requirement (tagging) were introduced in 1995 and it was abundantly clear from the outset that the sentence was to be regarded by sentencers as a high-end community order, due to the significant restriction on an offender's liberty. Sentencers quickly realised that curfew was unpopular with offenders. It had many of the disadvantages of prison (loss of liberty etc) without any of the benefits of prison (a bed, a warm room, three meals a day, good healthcare and dental treatment, a structured life and no need to think for yourself).

In addition the electronic monitoring gave it a 'no excuses' impersonal rigour and inflexibility not always present in a drug rehabilitation requirement (DRR) or a supervision requirement. It also did not make demands of Probation Service resources and it could start, generally, on the very day that sentence was passed.

The perception of the closeness of tagging to custody has been reinforced by the introduction of initiatives such as:

- a) Home detention curfew (HDC) where the prisoner serves the final 2 weeks to 4.5 months of his sentence (of between 3 months and 4 years) at home with a 12 hour curfew monitored by a 'tag'.
- b) 50% credit against any custodial sentence imposed for periods a defendant has been subject to a bail condition of curfew for at least 9 hours per day with electronic monitoring.

The above examples show that a curfew with tagging might be considered an alternative to a custodial sentence. This paper provides some proposals of the circumstances in which that might be appropriate.

### **Curfew Orders and Curfew Requirements**

When first introduced, a curfew order was a standalone sentence below the custody threshold. With the introduction of the CJA 2003, a curfew requirement became one of 12 requirements which could be attached to a community order.

A curfew requirement means that an offender must remain at a specified place for certain periods (between 2 and 12 hours in any 24 hour period and between 1 and 7 days per week) and is limited to up to 6 months from the date of the order. The curfew can be at different places and / or different periods on different days. The court must impose electronic monitoring unless it is not available, the necessary consent not being given, or the court considers it inappropriate. There is clearly a wide range available to sentencers from a very light curfew of a few hours on 1 day per week to a very onerous curfew of 12 hours per day every day.

Thus there is no longer a standalone curfew sentence available to the courts. However a community order with a curfew as one of its requirements (or its only requirement) can be imposed:

- whenever a community order is appropriate, or
- for a ‘so serious’ offence or offences if the court is satisfied that the punitive element is an adequate alternative to custody, and that it is appropriate to do so.

### **Proposed reintroduction of Curfew Orders**

Legislation could reintroduce curfew orders (they could alternatively be called home detention orders (HDOs) and to avoid confusion in this paper are so called hereafter) as a standalone sentence which would be a direct alternative to custody. The features of such a HDO would be:

- Between 9 and 12 hours in any period of 24 hours (9 hours because it is the minimum required during remand on bail to get 50% credit against a custodial sentence)
- Between 5 and 7 days per week, or 36 hours, counting as 3 days, in a weekend
- For a minimum of 60 curfew days

A HDO could be a direct substitution for a custodial sentence of the same length, thereby allowing consecutive or concurrent sentences. In other words, a custodial sentence of 12 weeks which would involve a maximum of 6 weeks in custody followed by 6 weeks on licence in the community would be replaced by 12 weeks of curfew, or 24 weeks of weekend only curfew.

As with a suspended sentence order, additional requirements could (subject to the considerations below) be added to the order and as with immediate and suspended custodial sentences, credit against the order could be given for curfew time on bail before sentence.

Breach proceedings for HDOs could be instituted, processed, tried etc in exactly the same manner as breach of community orders.

This would not change any of the arrangements currently in place for imposing community orders and their 12 requirements.

It would however give sentencers three interchangeable options for ‘so serious’ offences; immediate custody, suspended sentence order or home detention order. Under this proposal, sentencers would know from the legislation that a HDO of a minimum of 60 curfew days had enough punitive sanction automatically to satisfy the ‘so serious’ threshold.

A HDO would, depending on its length, be very onerous on an offender and so courts would have to consider carefully what other requirements, if any, they intended to impose concurrently. Nevertheless sentencers might find it an attractive proposition that as an alternative to a short custodial sentence with little or no rehabilitative value, they could impose an equivalent sentence with both punitive and rehabilitative elements. Of course this option already exists with a suspended sentence order. The latter puts more emphasis on rehabilitation (because the punishment is the risk of the activation of the custodial sentence and so the associated requirements should be supportive and rehabilitative) and the former would put more emphasis on punishment because the curfew is a real restriction of liberty. If no suitable rehabilitative requirement was available or necessary, a HDO could still be imposed as pure punishment.

However because of the very flexible nature of electronic monitoring there is also scope for enabling weekend curfews to be imposed, between say 7pm on Friday and 7am on Monday with no curfew restrictions on the offender's liberty during the rest of the week. Some time out for essential food shopping etc would certainly be needed (and there is also the decision of the Court of Appeal that control orders with 18 hours per day curfew breach the Human Rights Act to be considered) but a curfew of up to 36 hours during this 60 hour period alone, divided into blocks of 3 or 4 hours at a time might be acceptable. The flexibility of electronic monitoring can also be used imaginatively by the courts on a daily basis. A curfew of 4 hours on and 4 hours off does not exceed 12 hours in any 24 hours but restricts the distance an offender can travel in his 4 hours of free time.

There should be no compulsion on sentencers always to impose a HDO instead of a short custodial sentence. Those with a history of breaching curfews or community penalties, those of no fixed abode and those with a history of domestic violence would be as unsuitable for curfew orders as they would be for a curfew requirement under a community order. The courts will always have to consider that a curfew can be as much or more of a punishment on those also living in the same house as it is on the offender himself. If the court believes that a curfew will harm relationships within a household and lead ultimately to the offender losing his accommodation, the court may decide that a curfew will do more harm than good.

### **Future development of a curfew requirement as an alternative to other community requirements**

Although this paper concentrates on curfew as an alternative to custody, the Magistrates' Association also has ideas on how curfew could be used more frequently as an alternative to unpaid work in community orders.

In some parts of the country and in London in particular, an overstretched Probation Service is recommending it in pre-sentence reports instead of unpaid work.

It would be helpful to courts to have a guideline of how many days of curfew were equivalent to 100 hours of unpaid work. If that figure was set at 20, then:

- A curfew of 2 days per week for 4 weeks (8 days total) would be the equivalent of 40 hours unpaid work
- A curfew of 4 days per week for 15 weeks (60 days total) would be the equivalent of 300 hours unpaid work

And a curfew exceeding a total of 60 days would be regarded as very onerous indeed. Going back to 'so serious' offences as discussed above, a custodial sentence of 12 weeks, replaced by a HDO of 12 weeks would involve 84 days of curfew if imposed for 7 days per week or 72 days of curfew if imposed for 6 days per week. If it were imposed for 5 days per week it would be the equivalent of 300 hours of unpaid work and if it were a 24 week weekend curfew it would amount to 72 curfew days or equivalent days.

The use of electronic monitoring or tagging has increased every year since it was first introduced and there has been some concern that the cost is becoming too high. However the increased use is also generating economies of scale and allowing commissioners to get more cost effective contracts. The technology itself is also developing and in future it might be

possible to monitor an exclusion requirement by tagging the offender and placing the 'box' in the excluded premises (which might be suitable in domestic violence cases, for example).

**KEY RECOMMENDATIONS**

- Legislation should reintroduce curfew or 'home detention' orders onerous enough to be a direct and interchangeable alternative to custody.
- The Sentencing Council should be asked to provide an equivalence between unpaid work and curfew to help courts imposing community orders.

August 2010