SENTENCING ACADEMY

# Response to the publication of the Police, Crime, Sentencing and Courts Bill

*26 March 2021*

The sentencing provisions in the Police, Crime, Sentencing and Courts Bill provided few surprises as they closely followed the proposals contained in last September's White Paper, *A Smarter Approach to Sentencing*.[1] The Sentencing Academy produced a response to the publication of the White Paper and we are providing this additional response to the Bill itself now that substantive legislative proposals have been published.[2] This document provides a brief commentary on several key areas of the Bill.

Overall, we are sceptical that the sentencing provisions in this Bill will significantly advance the Government's stated aims of cutting crime, building safer communities and restoring public confidence in the criminal justice system. It is highly unlikely that the mostly technical changes to sentences for the most serious offences will deter would-be offenders from committed these offences. The more punitive elements of the Bill, notably longer sentences and changes to release provisions that result in offenders spending longer in custody than at present, will only serve the aim of (greater) punishment.

## Clause 2: Increase in penalty for assault on emergency worker

The Bill seeks to double the statutory maximum sentence for assaulting an emergency worker from 12 months to two years. Whilst this delivers on a manifesto commitment, it is difficult to ascertain the evidence base for this proposal. The 12 month maximum sentence for this offence (as opposed to the six month maximum for common assault that is not aggravated by the victim being an emergency worker), introduced by the Assaults on Emergency Workers (Offences) Act 2018, had been in force for only one year when the Government committed itself to doubling this again to two years. The extent to which this proposal will deter such offences must be unknown as so little time had been given to assess the impact of the increase to the maximum sentence from six months to 12 months.

[1] Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf.

[2] Our response to the publication of the White Paper is available here: https://sentencingacademy.org.uk/2020/09/sentencing-academys-response-to-the-a-smarter-approach-to-sentencing-white-paper/.

If this proposal is directed at increasing the sentences for these offences, as a means of recognising the additional seriousness of attacking emergency workers, then it will satisfy that aim. However, there will be a significant disparity between the sentence to be imposed for a common assault or assault by beating committed on a non-emergency worker and the same offence committed on an emergency worker. Can it properly be said that the employment status of the victim can have the effect of quadrupling the seriousness of the offence?

**Clause 46: Criminal damage to memorials: mode of trial**

At present, an offence of criminal damage where the monetary value of the damage does not exceed £5,000 is triable only in the magistrates' courts (where the maximum sentence for this offence is three months' imprisonment). Where the damage exceeds £5,000 the offence can be tried either in the magistrates' courts or the Crown Court (and, if tried in the Crown Court, the maximum sentence is 10 years' imprisonment). This provision will remove the consideration of the monetary value of the damage when the criminal damage is to a memorial. It will therefore enable these offences to be tried in the Crown Court and sentences in excess of three months' imprisonment may be imposed even where the value of the damage is £5,000 or less.

This provision has attracted more interest than perhaps anticipated and the debate around it has not been of the highest quality. It is true that the maximum sentence for minor damage to a memorial would become 10 years' imprisonment but a statutory maximum is just that: a maximum. In reality, under the Sentencing Council's guideline for criminal damage sentenced in the Crown Court, the top of the range is four years' imprisonment and it is impossible to envisage a set of circumstances in which a sentence anywhere near 10 years' imprisonment could lawfully be imposed for the criminal damage of a memorial if this provision is enacted. This provision merely gives more flexibility to sentencers to account for all forms of harm (and not only those measurable in monetary terms) that is caused by memorials being subject to criminal damage. It will also allow courts to take into account the context in which the damage was caused (for example, during widespread disorder).

**Clause 64: Causing death by dangerous driving or careless driving when under the influence of drink or drugs: increased penalties**

This provision will enact a long-standing Government commitment to raise the maximum sentence for the most serious driving offences that cause death from 14 years to life imprisonment. Since the Criminal Justice Act 2003 there has been a clear increase in sentencing levels for offences that result in death and, in particular, this provision is likely to result in higher sentences in cases involving multiple deaths. This may assist courts since the common law guidance had limited the extent to which a second or subsequent death could be reflected in the sentence in light of the 14 year maximum sentence. However, it is unlikely that raising the maximum penalty will prevent further instances of these offences through deterrence.

**Clause 100: Minimum sentences for particular offences**

The Bill seeks to raise the threshold required for a sentencing court to impose a sentence below the minimum sentence Parliament has legislated for in the case of certain offences.[3] These sentences might be considered to be 'presumptive' minimum sentences rather than mandatory sentences as there is provision for courts to impose a lower sentence where it finds particular circumstances that would make the minimum sentence unjust.

The White Paper stated that: 'We will seek to reduce the occasions in which the court would depart from the minimum custodial sentence, with the aim of reducing the prospect that the court would depart from the minimum term' (pp. 33-34). This Bill does so by changing the test to depart from imposing a minimum sentence for these offences from requiring 'particular' circumstances that would make such a sentence unjust to requiring 'exceptional' circumstances.

In response to the proposal in the White Paper we noted that the current regime is quite clear, and courts have been applying the criteria without difficulty (albeit that there are inconsistencies among the various provisions at present). If a court decides to impose a lesser sentence because the legislative minimum 'would make it unjust to do so under all the circumstances', Parliament should not try and pre-empt this exercise of judicial discretion. At the very least, the Government should undertake or commission and publish research into the ways that courts have exercised their discretion in this regard. Until, and unless, the Government can demonstrate that judges have been excessively indulgent, or that the provisions are misfiring in some way, these amendments are unhelpful and inappropriate. To date, the Government has offered no such demonstration.

Most common law jurisdictions operate mandatory sentences for offences of particular concern, or where deterrence is the most important sentencing objective. However, we consider mandatory sentences of any form to be an unnecessary part of the sentencing system as sentences should be crafted based on the harm and culpability present in each individual offence. Mandatory sentences undermine the key principles of proportionality and individualisation and judicial discretion is essential to a just sentencing system.

**Clause 101: Whole life order as starting point for premeditated child murder**

This clause amends Schedule 21 to the Sentencing Code to include in the list of cases to which the whole life starting point would normally apply 'the murder of a child involving a substantial degree of premeditation or planning'. At present, unless the murder also involved either the abduction of the child or a sexual or sadistic motivation, such cases are likely to fall within the 15 year starting point category – although a substantial increase to that starting point would be expected to take account of the statutory aggravating factors of 'a significant degree of planning

[3] These are: "third strike" importation of class A drug (seven years minimum); "third strike" domestic burglary (three years minimum); "second strike" possession of a knife or offensive weapon (six months minimum); and threatening a person with a blade or offensive weapon in public (six months minimum). Also included in these reforms are 16- and 17-year-olds who receive a four month detention and training order for a repeat offence involving a weapon or bladed article or threatening a person with weapon or bladed article.

or premeditation' and that 'the fact that the victim was particularly vulnerable because of age or disability'.

The impact assessment for the Bill notes that this change will, on average, increase the length of time served in custody by offenders convicted of this offence by 12 years. As a whole life order requires the offender to spend the rest of their life in prison, this does suggest that such offences are already severely sentenced with such offenders serving on average just 12 years short of their natural life in prison. The number of people convicted of this type of murder is relatively small (the impact assessment suggests that around 10 adults commit the murder of a child per year on average) but if this provision applies to many of these cases it will lead to a proportionately significant increase in the number of whole life orders imposed each year, which is estimated by the impact assessment as being fewer than five on average.

**Clause 102: Whole life orders for young adult offenders in exceptional cases**

This proposal appeared to be a late addition to the White Paper following the sentencing of Hashem Abedi in August 2020 for 22 counts of murder for his involvement in the Manchester Arena bombing in 2017. As he was under the age of 21 at the time of the offence, the judge had no power to impose a whole life order in his case. This provision will remove this prohibition on the imposition of a whole life order on an offender aged 18 to 20 at the time of the offence.

This provision is much narrower than those that apply to those aged 21 or over at the time of the offence. The highest applicable starting point for those aged 18 to 20 at the time of the offence will remain 30 years and, under clause 102, a whole life order can only be imposed on someone is this age group where the court 'considers that the seriousness of the offence, or combination of offences, is exceptionally high even by the standard of offences which would normally result in a whole life order'.

Such cases are likely to be few and far between and it is notable, considering the current sentencing regime for murder came into force in 2003, that the issue of a sentencing judge being prohibited from imposing a whole life order on someone aged 18 to 20 at the time of offence arose for the first time only in 2020. If the provision was to align sentencing for this age group with the regime for those aged 21 or over at the time of the offence it would have a more significant impact in practice than the requirement for the offending to be 'exceptionally high' even by the standards normally required for a whole life order.

**Clause 103: Starting points for murder committed when under 18**

Perhaps the most significant of the proposals relating to the sentencing regime for murder is the complete overhaul of starting points for murder committed by someone under the age of 18 at the time of the offence, replacing the current single starting point of 12 years. The starting points specified in clause 103 are more punitive than those proposed last year in the White

Paper: the range of starting points has increased from eight years to 20 years in the White Paper to eight years to 27 years in the Bill.[4]

The impact assessment suggests that these new starting points are 'likely' to lead to some older children spending longer in custody as a result whilst some younger children 'may' spend less time in custody. Another important knock-on effect of this provision is also noted by the impact assessment: an increase in the length of minimum terms imposed on older children could lead to longer sentences for younger adults convicted of murder. By increasing the starting points for older children it begins to close the gap on the starting point applied to them and that applied to an offender aged 18 at the time of the offence. This, in turn, reduces the power of youth/immaturity as a mitigating factor in the case of young adults (as even if they had been under 18 at the time of the offence the starting point would have been higher than it currently is). However, in doing so, we note that this proposal would reduce the disparity between the sentences imposed on adults and children and provide greater guidance to what is currently a highly discretionary area of sentencing, in particular in multiple defendant cases where, for example, there is one defendant aged under 18, one aged 20 and one aged over 21.

Whilst this provision seeks to bring more nuance to sentencing children convicted of murder, it also highlights the extent to which successive Governments have struggled to rationalise the murder sentencing framework since sweeping, ill conceived reforms were introduced without consultation, and with scant legislative scrutiny, in 2003. It is time for a full review of sentencing for murder rather than piecemeal changes which continue to push up sentences to close the artificial gaps between sentences created by the starting points introduced by the Criminal Justice Act 2003.

**Clause 104: Sentences of detention during Her Majesty's pleasure: review of minimum term**

Anyone convicted of a murder committed when they were under the age of 18 at the time of the offence is sentenced to Detention at Her Majesty's Pleasure (DHMP) rather than life imprisonment. The most substantive difference between these two sentences is that those sentenced to DHMP are entitled to apply to the High Court for a review of their minimum term from the halfway point of their sentence. If the court considers that the offender has made exceptional progress in custody, or that there are any other factors that make the initially imposed minimum term inappropriate, it can reduce the length of the minimum term, usually by one year or two years.

At present, this applies to anyone serving a sentence of DHMP (irrespective of their age at the time of sentencing) and they are entitled to seek subsequent reviews every two years if their initial review is unsuccessful. Clause 104 restricts these reviews in two ways: those who have reached the age of 18 at the time of sentencing will no longer be entitled to reviews and for those who are entitled to reviews, these will be restricted to a single review at the halfway point and, if they have reached the age of 18 by this stage, they are entitled to no further reviews.

[4] According to the accompanying impact assessment, between 2011 and 2019 the spread of minimum terms imposed on offenders convicted of a murder committed when under the age of 18 ranged from five years to 27 years. The highest proposed starting point therefore sits at the top of the level of sentences that has been imposed in recent years.

Taken together with clause 103, this Bill will have a double impact on those sentenced to DHMP as they are likely to receive a longer minimum term in the first instance due to the amended starting points and they are having their opportunity to have the minimum term reviewed either restricted or removed altogether.

We have grave concerns about the removal of reviews from people simply because they have reached the age of 18 at the time of sentencing – particularly at a time when cases are taking so long to reach court due to the backlog of cases that has been exacerbated by the pandemic. The accompanying 'factsheet' justifies removing reviews from those aged 18 by the time of sentencing on the grounds that: 'This is because their age and maturity will have been taken into account at their sentencing'.[5] However, it is an accepted feature of sentencing law that the passing of an offender's 18th birthday is not a cliff edge in terms of their emotional and developmental maturity; chronological age is used as an inaccurate proxy for maturity which is relevant to culpability. The proposal at present is too blunt a tool.

Furthermore, the issue of subsequent reviews beyond the halfway point does not appear to be a significant concern in practice as the impact assessment notes that since 2010 fewer than 10% of people serving DHMP have applied for a second review. It is possible, therefore, that this restriction will merely remove the opportunity of review from a small handful of cases in which exceptional progress has been achieved after the halfway point in the sentence.

**Clause 105: Life sentence not fixed by law: minimum term**

Minimum terms in discretionary life sentence cases have long been calculated as being one-half of the notional determinate sentence length (this is to reflect the long-standing position of the halfway point of a determinate sentence being the earliest point for release and the fact that life sentence prisoners must serve their full minimum term before they can first apply to the Parole Board for release).

The Bill brings forward the White Paper proposal to change the calculation from one-half to two-thirds the notional determinate sentence length[6] and, in doing so, solving a problem of the Government's own making. Recent changes to release arrangements have meant that certain categories of offenders now have to serve two-thirds of their sentence in custody, rather than one-half, before release (for example, those serving extended determinate sentences or longer determinate sentences for certain offences) and this left the eligibility for release from a discretionary life sentence in an anomalous position of earlier potential release at the equivalent of the halfway stage of a determinate sentence.

This is a further example of sentence inflation via the back door and will only increase the number of prisoners serving very long sentences. The impact assessment estimates that the average minimum term for discretionary life sentence prisoners is 11 years; if this has been calculated on average at one-half of the notional determinate sentence length then we would

[5] See: https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-youth-custodial-sentences-factsheet.
[6] With the exception of certain terrorist prisoners for whom early release provisions will not apply; for these offenders the minimum term will be the whole custodial term of that notional determinate sentence.

expect, all other things being equal, for this average minimum term length to increase to 14 years 8 months.

### Clause 106: Increase in requisite custodial period for certain violent or sexual offenders

Last year, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (SI 2020/158) altered the automatic release point for offenders who have committed a specified sexual or violent offence, for which the maximum penalty is life imprisonment, and who receive a sentence of seven years or more, from the halfway point of their sentence to two-thirds. This Bill takes forward the White Paper proposal to extend this provision to sentences of between four and seven years for any of the sexual offences already specified but only to *some* of the specified violent offences: it will apply only to manslaughter, soliciting murder, attempted murder and wounding/causing grievous bodily harm with intent. This unquestionably makes sentencing more complex and less intelligible to the public. Anecdotal evidence suggests that the judiciary are already struggling in discharging their statutory duty to explain the effect of the sentence as a result of the SI 2020/158 change. This proposal will make this task more difficult and result in a greater number of errors.

We expressed concerns about the reforms last year and this provision exacerbates our concern. Proportionate sentencing is not well-served by a system in which identical sentence lengths have a significantly diverging impact in practice: two nine year sentences should carry the same penal weight; it should not mean six years in custody for one offence and four-and-a-half years in custody for another. The decision to exclude some violent offences from this proposal makes the system yet more perplexing: how can a seven year sentence for kidnapping justify four years and eight months in prison when a six year sentence for the same offence merits three years? The person sentenced to seven years will serve more than 50% longer in custody than the person sentenced to six years.

### Clause 107: Increase in requisite custodial period for certain other offenders of particular concern

The Sentence for Offenders of Particular Concern (SOPC) was introduced in 2015 and applies to offenders convicted of one of two child sexual offences[7] or certain terrorist offences.[8] At present, different release arrangements apply to those convicted of a specified terrorist offence, who must serve two-thirds of the sentence before they can apply to the Parole Board for release, to those convicted of one of the two child sexual offences, who can apply to the Parole Board for release at the halfway point in the sentence.[9] The provision in this Bill ensures that all offenders serving this sentence must serve two-thirds of their sentence in custody before they can apply to the Parole Board for release. Whilst this rationalises the release arrangements for this sentence, and also brings it in line with the proposed new arrangements for standard determinate sentences, it does so by increasing its severity.

[7] Either the rape or sexual assault by penetration of a child under the age of 13.
[8] The full list of applicable offences is contained in Schedule 13 to the Sentencing Code.
[9] This anomaly was introduced last year when the Government legislated to increase the proportion of the sentence that those convicted of a specified terrorist offence must serve in custody.

**Clause 108: Power to refer high-risk offenders to Parole Board in place of automatic release**

Clause 108 will create a new power for the Secretary of State for Justice to be able to vary, after the imposition of sentence, the effect of a standard determinate sentence for individual prisoners. This provision will empower the Secretary of State to halt the automatic early release of a prisoner if they believe that, if released, the prisoner would pose a significant risk to members of the public of serious harm by committing either murder or a specified offence within the meaning of section 306 of the Sentencing Code. Instead of automatic release, these prisoners would be referred to the Parole Board and could be kept in prison to serve their full sentence if the Parole Board does not deem them safe to release.

Whilst it is understandable that the Government wishes to introduce a safeguard against the automatic early release of a prisoner deemed to pose a significant public protection risk, giving the Secretary of State for Justice the power to intervene in the management of an individual offender's sentence gives rise to concern about undue political interference in the sentences of individual offenders. It is unclear how such cases will be brought to the Justice Secretary's attention but given the strong incentive to refer to the Parole Board all cases flagged to them – there would appear to be no political advantage to risking not referring a case to the Parole Board and allowing automatic release to take place – the effect of this provision in practice will depend heavily on any gatekeeping process before cases are brought to the Secretary of State's attention.

There are also significant concerns that someone who has served their full sentence due to being deemed too dangerous to release earlier will ultimately be released at the end of their sentence with no licence conditions or supervision. This problem is explicitly acknowledged in the Ministry of Justice's accompanying factsheet on the release of serious offenders. In answer to its own question '*Why not ensure serious or violent offenders spend all their sentence in custody?*' they state that: 'The licence period is an important element of all custodial sentences, delivering a phased return to the community with supervision in place. Keeping offenders in prison until the end of their custodial sentence would mean releasing them with no licence conditions, which we think would be worse for victim confidence and safety, and offender rehabilitation.'[10] Yet this is precisely the situation that clause 108 proposes to create for prisoners deemed to pose the greatest risk of serious harm upon release.

[10] https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-release-of-serious-offenders-factsheet.