Sentencing Academy Briefing: Criminal Justice Bill and Sentencing Bill

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The Sentencing Academy is a research and engagement charitable incorporated organisation dedicated to developing understanding of sentencing in England and Wales and informing public debate. It promotes an evidence-based approach to sentencing and encourages effective sentencing practices that reduce re-offending, provide justice to victims, and promote public confidence.

This response considers the most significant sentencing changes contained in two pieces of legislation currently being considered by Parliament: clause 28 of the Criminal Justice Bill (originally clause 22) and clauses 1, 2-5, 6, 7 and 8 of the Sentencing Bill.

We note that the reforms relate primarily to custodial sentencing. The most consequential provision, contained in clause 6 of the Sentencing Bill, introduces a presumption against imposing custodial sentences of 12 months or less. This, combined with the extension of eligibility for Home Detention Curfew, has the potential to ameliorate pressure on the prison system caused, at least in part, by overcrowding. But these gains will be offset to some extent by the reforms to the release dates of those convicted of serious sexual offences.

For enquiries, please contact Gavin Dingwall, Head of Policy and Communications, at g.dingwall@sentencingacademy.org.uk.

Criminal Justice Bill

Clause 28 (as amended in the Public Bill Committee)

Clause 28 will create a new contempt offence where an offender who is to be sentenced in the Crown Court for an offence with a maximum penalty of life imprisonment refuses to comply with an order from the judge to attend the sentencing hearing. Failure to comply will be punishable by up to two years in prison for an adult and a maximum fine of £2,500 for a child.

The Sentencing Academy has published a blog by Dr Gabrielle Watson which analyses the existing legal framework relating to compelling offenders to attend sentencing hearings. The rationale for the offence is understandable. Clear upset can be caused to victims and their families when offenders fail to attend their sentencing hearing. In high profile cases the outrage can be widespread. Particular anger followed the decision by Lucy Letby, convicted on multiple counts of murder, to refuse to appear in court for sentence. However, introducing an offence may not deter non-attendance.

Some additional points can be made. First, judges retain a discretion *not* to compel attendance. This recognises – correctly – that more distress may be caused by an offender who acts in a disruptive and / or disrespectful manner in court. Research will reveal how often judges determine that the potential for disruption outweighs the underlying policy objective that offenders should be in court to hear sentence. This would help understand the process by which judges make this determination. Second, clause 28 cannot be viewed in isolation. Rather it expands and augments existing powers. A full consideration of the relationship and the interaction between these powers is necessary. Third, reasonable force can be used to ensure attendance and this poses a risk of injury to staff and the offender themselves.

Sentencing Bill

Clause 1

Clause 1 makes a subtle but legally-significant change to the imposition of whole life orders (WLOs): where an offence of murder falls within the WLO starting point in Schedule 21 to the Sentencing Act 2020 a judge must impose a WLO unless exceptional circumstances justify not doing so. This departs from the framework for murder sentencing first introduced in the Criminal Justice Act 2003 that set out a series of starting points to which judges then apply the relevant aggravating and mitigating factors to arrive at a final minimum term. This clause reduces judicial discretion when sentencing cases that fall within the WLO starting point, although its practical significance will be limited. As the impact assessment for the Bill notes, 'It is considered... that murder cases that attract a WLO starting point but do not receive one under current legislation are extremely rare'.[1] However, mandating the imposition of a WLO for cases where that starting point applies unless there are exceptional circumstances does bring a degree of incoherence to the sentencing framework as paragraph 8 of Schedule 21 states: 'Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order'. How this flexibility co-exists in the same Schedule that mandates a WLO unless exceptional circumstances apply remains to be seen.

Clause 1 also extends the circumstances in which a WLO should be imposed in murder cases. Since 2003, a murder involving sexual or sadistic conduct has been subject to a starting point of 30 years but the Sentencing Bill will move this to within the ambit of the WLO starting point. Whilst these offences already attract very substantial minimum terms, and the numbers of those convicted of such offences are small, the proportionate increase in the use of WLOs may well be noteworthy. The impact assessment for the Bill states that 'fewer than five' WLOs were imposed in 2022.[2] It further notes that the average number of offenders convicted of murder and of a sexual offence at the same time was four per year between 2018 and 2022. The Ministry of Justice was unable to identify the number of murders that involved sadistic conduct so in practice the total number of offenders affected by this amendment to Schedule 21 may be slightly higher than four per year – or, to put it another way, this change may be anticipated to approximately double the number of WLOs imposed each year.

Taken together, the impact of these two amendments to the WLO starting point is likely to be modest. The total number of offenders serving a WLO will remain extremely small in the

[1] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAWLOs.pdf at p. 7.
[2] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAWLOs.pdf at p. 3.

context of the overall prison population and all those offenders subject to a WLO will have been convicted of offences of the utmost gravity. Nonetheless, the potential to double the number of people sentenced on an annual basis to the most severe sanction available in our legal system is a change of some significance.

Clauses 2-5 and Clause 7

It is convenient to consider these clauses in the round as clauses 2-5 concern special custodial sentences for certain sex offenders whilst clause 7 concerns the removal of early release for certain sex offenders.

The number of offences which can result in a Sentence for Offenders of Particular Concern will be expanded to include rape and certain other serious sexual offences that have a maximum sentence of life imprisonment. Where a court does not impose a life sentence or an extended determinate sentence for one of these offences, it must impose a Sentence for Offenders of Particular Concern. The effect of this sentence is that the full custodial term must be served in custody with no opportunity for earlier release (for example, an offender sentenced to a nine year sentence for rape must serve nine years in prison) and upon release there is a 12 month licence period to ensure that offenders subject to this sentence are not released without supervision or licence conditions.

Clause 7 makes important amendments to release for certain sex offenders to bring their release arrangements in line with those sentenced for rape and other serious sexual offences. Those who receive either an extended determinate sentence or a Sentence for Offenders of Particular Concern for one of the existing applicable child sexual offences will serve all of their sentence in custody. This contrasts with the current position where they would be referred to the Parole Board after serving two-thirds of the term, with possible release from that point in the sentence.

These reforms are justified by the Government primarily on the grounds of public confidence. The impact assessment states:

'The offence of rape and the other most serious sexual offences are worrying the public. Given the unique nature of this offending, the significant amount of public concern relating to these offences at present, and the need to improve public confidence that the justice system appropriately addresses and punishes this offending, the offence of rape, and the other most serious sexual offences, are the focus of consideration.'[3]

The practical effect of this reform is that the time served in custody for many of those convicted of rape and other serious sexual offences will have doubled in a relatively short space of time. Prior to April 2020, someone sentenced to a 10 year prison sentence for rape would serve five years in custody; under the changes made in the Sentencing Bill they will serve 10 years in prison.[4] Whilst these offenders will serve longer in custody, they will have a much shorter licence period upon release. Consequently, additional prison places will be required – a best

[3] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIASexualOffences.pdf at p. 3.
[4] The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 increased the proportion of a standard determinate sentence of seven years or more for certain violent and sexual offences to be served in custody from one-half to two-thirds. The Police, Crime, Sentencing and Courts Act 2022 reduced the minimum sentence for most applicable offences to four years or more.

estimate of 2,850 as a steady state by 2047/48[5] – but there will be a reduction in the number of offenders on licence in the community to be supervised by the Probation Service – estimated by the impact assessment as being a reduction of between 1,950 to 2,600 offenders by 2042/43.[6]

Public confidence in the criminal justice system is a legitimate policy goal. However, it is questionable whether it is best served by further complicating release arrangements for various offences. After the implementation of this clause, an offender sentenced to 12 years for a serious sexual offence will serve 12 years in custody; another offender sentenced to 12 years for a serious violent offence will serve eight years in custody; and another offender sentenced to 12 years for a non-violent or sexual offence will be released after six years in custody. The label attached to the sentence does not clearly state what the sentence means in practice and any member of the public who wishes to understand when release will take place will need to consult the statutory arrangements in order to know whether release will take place after six, eight or 12 years.

We make one final observation. Between 2012 and 2022, there was an anomalous situation in the release arrangements for those offenders deemed dangerous at the point of sentencing and given either an extended determinate sentence or a life sentence. Whilst the most serious offenders were more likely to receive a life sentence, those who did so received a minimum term that was calculated at one-half of the notional determinate sentence length. After serving this minimum term, they could apply to the Parole Board for release. However, those who received an extended determinate sentence had to serve two-thirds of their sentence (i.e. two-thirds of the notional determinate sentence) before they could apply to the Parole Board for release. This anomaly was ended by the Police, Crime, Sentencing and Courts Act 2022 which stipulates that minimum terms for discretionary life sentences are calculated as two-thirds of the notional determinate sentence length, meaning that someone who received a life sentence would not be eligible for release sooner than someone who received an extended determinate sentence. Ensuring that offenders subject to a Sentence for Offenders of Particular Concern serve their full sentence in custody potentially recreates this anomalous situation whereby an offender deemed dangerous and convicted of the most serious sexual offences may receive a life sentence with a minimum term calculated at two-thirds of the sentence length that would be served in full if a Sentence for Offenders of Particular Concern was imposed. This raises the possibility of earlier release for those who receive a life sentence than those who do not. Further legislation may be required if this is not a desired outcome from these clauses.

Clause 6

The most significant of the sentencing reforms in the Government's legislative programme is the presumption in favour of a suspended sentence for custodial sentences of 12 months or less unless there are exceptional circumstances relating to the offence or offender that justify not doing so. The duty to impose a suspended sentence applies to adults aged over 18.

In addition to the 'exceptional circumstances' exemption, there are also a number of other instances where the presumption to suspend a sentence of 12 months or less will not apply: (i) where the offender is already in custody in connection to another offence (either serving a sentence for it or on remand for it); (ii) where the offender has been on remand and is deemed

[5] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIASexualOffences.pdf at p. 8.
[6] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIASexualOffences.pdf at p. 10.

to have served the whole custodial period for the offence; (iii) where the offender was on licence or subject to post-sentence supervision at the time of the offence; (iv) where the offence constitutes a breach of a court order; and (v) where the court considers that imposing a suspended sentence would put a particular individual at significant risk of harm.

The justification is evidence-based: the Government cites statistics which show that re-conviction rates for those serving short prison terms are especially high and contrast unfavourably with community sentences. According to the impact assessment for the Bill: 'Sentences of less than 12 months have a proven reoffending rate of 55.3% and studies suggest that diverting those individuals to community-based sentences could create a c.4 percentage point reduction in reoffending'.[7]

Whilst we welcome this change, the estimates contained in the impact assessment for the Bill suggest that a significant number of offenders will still end up in custody on sentences of 12 months or less. The Ministry of Justice's central assumption is that 37% of offenders who receive sentences of 12 months or less will be presumed unsuitable for the presumption (this is based on an estimated 15% being excluded due to posing an unacceptable risk of harm to a named individual, an estimated 24% being in breach of a current court order and 2% deemed to have exceptional circumstances that would make the presumption unjust). Furthermore, the central assumption also estimates that 40% of those who receive a suspended sentence who would previously have received an immediate custodial sentence will go on to breach the suspended sentence and have their custodial sentence activated.[8] Therefore, based on this central assumption, the majority of those currently sentenced to an immediate custodial sentence of 12 months or less may still ultimately end up in custody. The impact assessment also notes the risk of 'uptariffing' where sentences are increased above 12 months to avoid the presumption. The central estimate for this eventuality is that 50% of those sentenced to 9-12 months and all offenders receiving a sentence of exactly 12 months will now receive sentences of over 12 months.[9]

Overall, the presumption will hopefully alleviate stress in the Prison Service but may entail additional pressure being placed on an over-stretched Probation Service. Unless there is investment, probation staff will struggle to cope with unrealistic caseloads, particularly if breach rates are as high as the central estimate of 40%. Additional resource is paramount but there will inevitably be a lag from investment to increases in trained personnel.

The impact of this reform in practice will have to be monitored closely, particularly if the high rates of exemptions, breaches and uptariffing contained in the Ministry of Justice's central estimate emerge. The combination of a significant proportion of those receiving a sentence of 12 months or less ultimately ending up in custody, combined with longer sentences imposed in order to side-step the presumption could mean that the benefits of this presumption are limited. These assumptions demonstrate how difficult it is in practice to eradicate short immediate custodial sentences from the sentencing framework but this is an important initiative that has the potential to reduce them in number.

[7] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAShortSentences.pdf at p. 11.
[8] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAShortSentences.pdf at p. 8.
[9] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAShortSentences.pdf at p. 8.

Clause 8

Clause 8 makes changes to the eligibility for Home Detention Curfew (HDC). Those sentenced to a standard determinate sentence of four years or more will become eligible if they would be subject to automatic release at the halfway point of their sentence if they were sentenced under current legislation. This restriction ensures that those sentenced to longer sentences for violent or sexual offences would not become eligible for HDC (as their release point is likely to be at the two-thirds stage). Moreover, those who have been previously recalled or returned to custody or who have previously breached the conditions of a HDC are not necessarily disqualified. However, the impact assessment notes that: 'The current, strict eligibility criteria and assessment processes will remain in place, as will the robust monitoring and enforcement regime. HDC is discretionary, subject to risk assessment, and non-compliance is dealt with firmly, leading to immediate recall where necessary'.[10]

Those released on HDC may be released up to six months before their automatic release date and it is clear that alleviating prison overcrowding is a primary rationale for these reforms. The impact assessment states that these reforms 'may help make prisons safer places for both prisoners and staff, by delivering a modest reduction in prison population thereby enabling staff to be better placed to work with prisoners on their rehabilitation' and that reduced overcrowding should improve living conditions in prisons, reduce the stringency of the prison regime and improve the ratio of staff to prisoners.[11]

We welcome this extension of eligibility of HDC as a sensible measure to potentially alleviate prison overcrowding. It also acknowledges the changes that have taken place in the composition of the prison population since HDC was first introduced in 1999, which has seen a reduction in the number of prisoners serving sentences of less than four years and a growth in those serving four years or more.

[10] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAHDC.pdf at p. 6.
[11] https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillIAHDC.pdf at pp. 9-10.