

## Prison Reform Trust Briefing on the Sentencing Bill

House of Commons, Second Reading, 6 December 2023

This bill is one of three pieces of legislation announced in the King's Speech focused on criminal justice. Over the last three decades there has been no shortage of legislative and policy change to ensure that more people spend longer in prison. Several of the measures contained within this bill continue that trend. One of the consequences of this ill thought through approach to penal policy is a capacity crisis which has brought the prison system dangerously close to breaking point. The prison population is predicted to rise by as high as 106,000 by March 2027. The prison system has been under emergency measures since November 2022. Further emergency measures to increase prison capacity and reduce demand on the system were announced by the Lord Chancellor and Secretary of State for Justice on 16 October.<sup>1</sup>

Successive governments have been extremely effective in delivering on their promises to "toughen" sentences, whilst failing to give any serious consideration to the effectiveness of such measures or their impact on demand for prison capacity. The Justice Committee has found that this approach has contributed to a "dysfunctional and reactive cycle" of public debate on sentencing policy.<sup>2</sup>

This bill does include some sensible measures which address the reality of the current crisis facing the prison system.<sup>3</sup> A presumption to suspend short sentences of 12 months or less will lead to better criminal justice outcomes and also has the potential to reduce demand on the system, particularly in overcrowded reception prisons. An expansion in the eligibility criteria for Home Detention Curfew will further reduce demand and mean more people in prison gain the rehabilitative benefits of release under electronic curfew.

However, expanding the use of controversial whole life orders could lead to problems for prison management, creating a growing population of prisoners with no prospect of release and therefore no incentive to comply with the regime. Furthermore, expanding the use of special custodial sentence for offenders of particular concern (SOPC) to a range of serious sexual offences will have an inflationary impact on

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<sup>1</sup> *Hansard*. (2023, October 16). House of Commons debate (738), col. 58. <https://hansard.parliament.uk/Commons/2023-10-16/debates/50D29A75-C1E4-4FFC-A77D-11BBC20BCD99/details#contribution-52760981-6DB3-4220-8E7A-52D67711D5CC>

<sup>2</sup> House of Commons Justice Committee. (2023). *Public debate on sentencing is "stuck in a dysfunctional and reactive cycle" Justice Committee warns*. Parliament.uk. <https://committees.parliament.uk/committee/102/justice-committee/news/198089/public-debate-on-sentencing-is-stuck-in-a-dysfunctional-and-reactive-cycle-justice-committee-warns/>

<sup>3</sup> Richards, G., & Davies, N. (2023, October 30). *Performance Tracker 2023: Prisons*. Institute for Government. <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2023/prisons>

prison sentences and the size of the prison population at a time when there is simply no space available.

This briefing focuses on the following provisions within the bill:

- Mandatory life sentences: whole life orders (clause 1)
- Sexual offences attracting special custodial sentence for offenders of particular concern; and removal of early release for certain sex offenders (clauses 2–5 and clause 7)
- Duty to impose suspended sentence order for sentences of 12 months or less (clause 6)
- Extension of home detention curfew (clause 8)

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## **Clause 1: Mandatory life sentences: whole life orders**

Clause 1 limits the discretion of courts, requiring them to impose a whole life order (WLO) in cases where this is currently the starting point for sentencing—unless there are exceptional circumstances.<sup>4</sup> A WLO means that a person will most likely spend the rest of their natural life in prison. If the court is of the opinion that there are exceptional circumstances which relate to the offence and justify not making a WLO, then they are required to state why they have departed from this mandatory sentence. The measures will also be applied retrospectively to currently active cases, and even if the offence is committed before commencement of the legislation.<sup>5</sup>

We object in principle to mandatory sentences, particularly in cases involving the imposition of the most serious form of custodial sentence a court can impose. In such cases where a WLO is in scope, it is vital that the court can take account of all aggravating and mitigating factors which may be relevant to the sentence. This provision will limit the discretion of the court in be able to reach a just and proportionate sentence which takes account of all the circumstances of the case.

Furthermore, increasing the number of WLOs passed by the courts risks creating a growing population of people in prison with no prospect for release and therefore no incentive to comply with the prison regime. This development could undermine the effective management of prisons and the safety of other prisoners and prison staff. The number of WLOs imposed by the courts has increased significantly in recent years, and there are currently 67 people in prison serving a WLO.<sup>6</sup> The government's impact assessment acknowledges that the number of people affected by the

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<sup>4</sup> Chalk, A. (2023). *Whole lifer order announcement*. 25 August 2023 [Letter]. <https://data.parliament.uk/DepositedPapers/files/DEP2023-0697/108320.pdf>

<sup>5</sup> Ministry of Justice. (2023, October 3). Whole Life Order reforms to be applied to active cases. *GOV.UK*. <https://www.gov.uk/government/news/whole-life-order-reforms-to-be-applied-to-active-cases>

<sup>6</sup> Table 1.9a. Ministry of Justice. (2023). Offender management statistics quarterly: April to June 2023.

proposal is subject to a high degree of uncertainty, and that the measures “may compound prison capacity and overcrowding pressures...and may potentially increase prison instability.”

The impact assessment is also curiously vague on the stated benefits of pursuing this measure. It states:

*“[the measure] is expected to provide greater public protection and increase public confidence in the sentencing of these offences. It is also expected to provide assurance to the families of victims that those responsible for such crimes will receive the maximum punishment available.”*

Yet it provides no objective measure or baseline for how it will assess whether this stated policy ambition has been achieved.

## **Clauses 2–5: Special custodial sentence for certain sex offenders**

### **Clause 7: Removal of early release for certain sex offenders**

These clauses expand the number of offences which fall within scope of the Sentence for Offenders of Particular Concern (SOPC) to include several defined sexual offences including rape. This means that if a court does not impose a life sentence or an extended determinate sentence (EDS) following conviction for one of the listed offences, then it has no option but to impose a SOPC, yet again binding the hands of the courts.

The provisions also alter the release point for people who receive an EDS or SOPC so that they will now serve the entirety of the custodial term in custody, with no referral to the Parole Board at the two-thirds point of the term.

After release at the end of the custodial term, there is a further mandatory licence period of 12 months for those serving a SOPC; and a further licence period of up to eight years, as determined by the court, for those serving an EDS.

Our principal concerns regarding these proposals are as follows:

#### **1. They undermine transparency in the justice system, adding further complexity and confusion to our sentencing framework.**

As the Justice Committee highlights in the final report of its inquiry on public opinion and understanding of sentencing, public understanding of how sentencing works is low and frequently incorrect. Fewer than half of respondents to the Justice Committee’s survey were aware that a person sentenced to a prison term of four years or less will typically be released from custody at the halfway point (to serve the remainder of the sentence on licence in the community).

However, even this seemingly straightforward task of determining when a person is released from prison is fraught with inconsistency, following frequent piecemeal amendment of sentencing legislation. Some prisoners are released at the two-thirds point of their custodial sentence whilst others are released at the halfway point depending on the length of sentence and crime committed. These measures further

confuse the picture by making some people “serve the entirety of the custodial term handed down to them by the courts”.<sup>7</sup>

Rather than increasing the statutory maximum sentence, these measures inflate sentence lengths by the back door. Rather than promoting consistency and understanding in sentencing they introduce yet another release point. It is hardly surprising that the public are confused.

Research by the Sentencing Council of England and Wales has shown that a majority of the public overestimate their understanding of how certain sentences function in practice.

For example, most survey participants commonly associated a life sentence as being a prison sentence of 25 years, with very few being aware that a life sentence meant the person would remain on licence for the rest of their life.<sup>8</sup>

Improving public confidence is the stated aim of these measures, yet with such a low level of understanding of our current sentencing framework and key terminology, these provisions seem certain to follow the same failed path as all other inflationary sentencing measures before them.

## **2. Commencement of this provision will be dependent on there being sufficient prison capacity.**

Considering the current prison capacity crisis, the acknowledgement by Alex Chalk that inflationary sentencing legislation requires sufficient prison places, is as welcome as it is novel.<sup>9</sup> In his announcement on emergency measures on 16 October, Alex Chalk said:

*“When we legislate to keep rapists behind bars for the whole of their custodial term, I will ensure that commencement is dependent on there being sufficient prison capacity.”*

However, it remains unclear if and when this provision would be commenced and what measures will be introduced to ensure it is only enacted when the government can guarantee sufficient capacity.

The impact of the provision will be felt over the longer term, with the additional cost inherited by future administrations to whom this government is not accountable.

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<sup>7</sup> Ministry of Justice. (2023, October 16). *The Government's approach to criminal justice*. GOV.UK. <https://www.gov.uk/government/speeches/the-governments-approach-to-criminal-justice>

<sup>8</sup> Marsh, N., McKay, E., Pelly, C., & Cereda, S. (2019). *Public knowledge of and confidence in the criminal justice system and sentencing: A report for the Sentencing Council*. Sentencing Council of England and Wales. <https://www.sentencingcouncil.org.uk/publications/item/public-confidence-in-sentencing-and-the-criminal-justice-system/>

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*Hansard*. (2023, October 16). House of Commons debate (738), cols. 60-61. <https://hansard.parliament.uk/commons/2023-10-16/debates/50D29A75-C1E4-4FFC-A77D-11BBC20BCD99/PrisonCapacity>

The government's impact assessment suggests that because of this provision "an additional 1,500 prison places would be required by March 2034, and an additional 2,850 required by March 2048, with an additional running cost to the prison service of £123.7m per year."

Furthermore, the government estimates significant upfront and ongoing costs:

*"Additional prison capacity will need to be constructed which is estimated to cost the prison service a total minimum of £1,153m over the next 40 years. The net present cost over this period is estimated to be £3,147m for the best estimate option."*

At a time when the prison system is in a capacity crisis, it is irresponsible to be legislating for changes in sentencing policy which will further inflate prison numbers.

### **3. These measures could undermine effective arrangements for public protection.**

Whilst the proposals include a period of supervision on licence after release, the government's own assessment acknowledges that these measures could lead to precisely the opposite outcome that they are trying to achieve—and increase the risk of reoffending.

As the impact assessment states:

*"A reduced licence period for some cohorts may also reduce opportunities for rehabilitation in the community, leading to higher reoffending rates due to less time spent in the community undergoing post-custody rehabilitation activity from the probation service."*

Furthermore, by increasing demand on prison places in future, the impact assessment cautions that the necessary pre-conditions for ensuring that any time in prison is spent working towards reducing the risk of reoffending, could be further undermined.

*"Anything that increases prison demand could result in crowding in prisons in future. This would worsen the living conditions in prison, affect the stringency of the implemented regime, and the ratio of staff to prisoners."*

Pursuing such a poorly evidenced, costly proposal on the basis of such uncertain outcomes is surely a poor use of legislation.

### **4. These changes to EDS and SOPC sentences will also apply to children**

These measures will also continue the dangerous trend of the adultification<sup>10</sup> of children seen in the Counter-Terrorism and Sentencing Act 2021.

The government's impact assessment states that these changes "will apply to children who are not assessed as dangerous but who have been convicted of the serious relevant offences that are deemed inherently concerning". This measure is

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<sup>10</sup> The process or fact of treating or considering a child as if they are an adult, usually in a way that is wrong or harmful.

justified on the basis of “keep[ing] the public protected for longer and to ensure rehabilitative interventions can be conducted to minimise the risks of recidivism.” As we have already highlighted above, both of these arguments are equally unconvincing and undermined by the government’s own impact assessment.

## Clause 6: Duty to impose suspended sentence order for sentences of 12 months or less

Clause 6 introduces a presumption that custodial sentences of 12 months or less will be suspended. Instead, a person who previously would have received a short prison sentence would now serve their sentence in the community on a Suspended Sentence Order (SSO). They would be subject to conditions which could see them sent to prison for the original offence if they fail to comply; or if they went on to commit another offence whilst subject to the SSO.

Furthermore, a presumption does **not** forbid a court from passing a short prison sentence if it is merited in a particular case. Indeed, paragraph 2(3) sets out a number of circumstances where the presumption does not apply, including if the offence was committed whilst on licence; if the offence relates to failure to surrender; or if doing so would put a particular individual at significant risk of harm.

PRT has consistently highlighted the damage caused by short prison sentences and we welcome this new provision. It has long been recognised that short prison sentences do more harm than good<sup>11</sup> and that suspended sentences and community orders are more effective at reducing reoffending.<sup>12</sup> The Ministry of Justice’s own evidence shows that reconviction rates are lower for people on suspended sentenced and community orders than short sentences<sup>13</sup>, and the positive impact is even more marked for people with mental ill-health.<sup>14</sup>

Suspended sentences are a robust and credible alternative to a short prison sentence. Conditions can be attached to a suspended sentence including unpaid work, a curfew, or accessing treatment for drug and alcohol addictions. Unlike imprisonment, they allow for maintenance of family ties, jobs, and childcare responsibilities – all factors which reduce the risk of reoffending. If the person does not comply with the requirements, or is convicted of another offence during the time

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<sup>11</sup> Gormley, J., Hamilton, M., & Belton, I. (2022). *The Effectiveness of Sentencing Options on Reoffending*. Sentencing Council of England and Wales. <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-FINAL.pdf>

<sup>12</sup> Eaton, G., & Mews, A. (2019). *The impact of short custodial sentences, community orders and suspended sentence orders on reoffending*. Ministry of Justice. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/814177/impact-short-custodial-sentences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814177/impact-short-custodial-sentences.pdf)

<sup>13</sup> Ministry of Justice. (2013). *2013 Compendium of re-offending statistics and analysis*. Ministry of Justice Statistics bulletin. <https://assets.publishing.service.gov.uk/media/5a7b826fe5274a7202e17a13/compendium-reoffending-stats-2013.pdf>

<sup>14</sup> Hillier, J. & Mews, M. (2018). *Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?*. Ministry of Justice. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf)

of their suspended sentence, they are likely to serve the original custodial term as well as the sentence they get for the new offence.

A presumption to suspend short prison sentences is a good thing in and of itself and has the potential to lead to a reduction in the number of short sentences passed and an increase in the uptake of suspended sentences and community alternatives. This would not only reduce overall demand on the prison system but also lead to better outcomes. The use of suspended sentences has fluctuated over the last decade and currently account for just 4% of all sentences.<sup>15</sup>

However, we must be careful not to simply shift the prison crisis to an already overburdened probation service. A high-quality probation service with sufficient capacity and resources will be vital to meet the additional pressures of supervising a greater number of people in the community.<sup>16</sup>

### **Clause 8: Extension of home detention curfew**

Clause 8 legislates to extend eligibility for Home Detention Curfew (HDC) to those sentenced to four years or more. It also introduces a more proportionate approach to eligibility for those who have been previously recalled or returned to custody, or who have previously breached the conditions of a home detention curfew. The same exclusions that prevent people convicted of violent, sexual and terrorist offences and those convicted of domestic abuse from being eligible for the scheme will continue to apply.

This proposal is eminently sensible and a policy PRT has long advocated.<sup>17</sup> It will mean more prisoners gain the rehabilitative benefits of release under curfew and relieve immediate population pressures.

The HDC scheme was introduced in 1999. It enables eligible prisoners to serve the final part of their prison sentence in the community subject to electronic monitoring. The aim of the scheme is to assist the transition from custody to the community and ease population pressures on the prison estate.

When HDC was introduced in 1999 it was only available to people serving prison sentences of four years or less – a criteria which was fixed in the legislation and remains in place to this day. However, sentence inflation over the past two decades has contributed to higher numbers of people receiving sentences of four years or more. In 1999, a person who had committed a crime that would have seen them receive a sentence of four years or less could now receive a significantly longer sentence for the same offence. In June 1993, 54% of the sentenced prison population were serving sentences of less than four years. This proportion had

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<sup>15</sup> Table Q5.1b. and Q5.4. Ministry of Justice. (2023). *Criminal justice statistics quarterly December 2022*.

<sup>16</sup> Fox, A. (2023). *The government's plans to address the crisis in prison capacity – welcome first steps, but more to be done*. Clinks. <https://www.clinks.org/community/blog-posts/governments-plans-address-crisis-prison-capacity-welcome-first-steps-more-be>

<sup>17</sup> Prison Reform Trust. (2021). *Home Detention Curfew (HDC): Expanding eligibility and improving efficiency*. <https://prisonreformtrust.org.uk/publication/home-detention-curfew-expanding-eligibility-and-improving-efficiency/>

dropped to 50% by June 2003, and as of June 2016 only around one in three (34%) sentenced prisoners were serving less than four years.<sup>18</sup>

This Sentencing Council of England and Wales acknowledges the impact of sentence inflation on the increase in the prison population over the past 25 years:

*“Though fewer offenders are sentenced to immediate custody than before, they are sentenced for longer. Within the overall figures, the [Ministry of Justice] data show that the biggest shift has been from those serving sentences of four or more years: in 1993 over half of the ‘sentenced prison population’ were serving sentences of ‘less than four years’, whereas by 2016 this had reduced to about a third.”*<sup>19</sup>

The length of prison sentences and the size of the prison population have grown in a way which the originators of the HDC scheme did not foresee. As a result, its eligibility criteria have become an anachronism and are excluding the very people for whom the scheme was originally intended for. Expanding the eligibility criteria for HDC would be a means of significantly increasing the number of prisoners who could benefit from the scheme. It would also address the inequity that has arisen as a result of sentence inflation over the past two decades.

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<sup>18</sup>Ministry of Justice. (2016). *Story of the prison population 1993 to 2016*.  
<https://www.gov.uk/government/statistics/story-of-the-prison-population-1993-to-2016>

<sup>19</sup> Sentencing Council of England and Wales. (2018). *Written Evidence from the Sentencing Council of England and Wales: Justice Committee inquiry on the prison population 2022: planning for the future*. House of Commons.  
<https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-population-2022-planning-for-the-future/written/78134.pdf>