Prison Reform Trust response to the Joint Committee on Human Rights: Legislative scrutiny of the Police, Crime, Sentencing and Courts Bill – May 2021

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system.

Part 7, Chapter 1 — Custodial sentences

1. The Bill's impact assessment acknowledges that there is "limited evidence that the combined set of measures will deter offenders long term or reduce overall crime. Therefore, the combined effect of all the measures proposed cannot be described as a cost or benefit due to limited evidence to indicate the direction or magnitude of change" (paragraph 77) despite the threat to Article 5 it represents.[1]

Clause 100: Minimum sentences for particular offences

2. These proposals, which seek to limit the discretion of sentencers with the knowledge and the full facts of a case before them, are at odds with the government's own evidence. Their recent research on the most effective responses to prolific offending shows that reconviction rates for prolific offenders are lower when agencies persist with the use of community sentences rather than resorting to custody— and the positive impact is even more marked for people with mental health issues.[2] The government's own research on the management of behaviour in prisons also recognises that providing support and positive encouragement is a more effective tool than threatening people with ever more serious consequences.[3]

3. This clause further limits the discretion of judges to deviate from imposing the minimum term for certain offences by allowing them to do so only in "exceptional circumstances". The Committee will want to be sure that this new test does not impose an unnecessary limit on judicial discretion, and that sentencers will still be able to deviate from imposing the minimum term when it is in the interests of justice to do so.

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

4. Although the Court of Appeal has upheld the principle of the whole life tariff, it is nonetheless subject of legal controversy and potential ongoing dispute between the national and European courts. We question the rationale for further expanding its

[1] Ministry of Justice (2021) Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures—Impact assessment, London: Ministry of Justice
[2] Hillier, J. and Mews, A. (2018) Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?, London: Ministry of Justice
[3] HM Prison & Probation Service (2020) Incentives Policy Framework, London: Ministry of Justice

use, and particularly the logic of making it the starting point for the offence of premeditated child murder. This will unnecessarily tie the hands of judges in reaching the appropriate sentence in what may be particularly troubling and complex cases. For instance, cases involving a mother murdering a new born baby, when the mother may be suffering from post-natal depression or another mental health condition, which might contribute to causing her to commit such a serious offence.

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

5. This clause is the first of several that fly in the face of evidence on maturity which the government has previously accepted and promised to take into account in its policy concerning young adults in the criminal justice system.[4]

6. That evidence establishes that the development of maturity extends well beyond adolescence, and typically into a person's mid-twenties. Young adults who are still maturing are more capable of change and more likely to desist from crime in future. In its response to Lord Harris' report into the deaths of 18–24 year olds in custody, the government agreed that "what is widely known and accepted is that young adults, particularly males, are still maturing until the age of 25". There has been no change in that evidence, nor, so far as we know, in the government's wish to have regard to it.

7. Extending whole life tariffs to young adults flies in the face of the evidence and is a denial of their potential to mature and desist from crime. The origin of this provision derives entirely from a single recent case. We do not believe there is any justification for extending whole life orders to young adults and recommend it is removed from the bill.

Clauses 106 and 107: Increase in requisite custodial period

8. The government has already acknowledged that there is no evidence of deterrent impact from measures of this sort, and sought instead to justify them on the basis of crime prevented during a longer period in custody. But as already pointed out, the impact assessment for the Bill is unable to conclude that its measures will have any measurable impact on crime, and no analysis has been prepared to show the number or type of offences which these provisions might prevent.

9. The principal benefit claimed is public confidence in the criminal justice system, but again no evidence is presented to support the premise that harsher sentencing increases public confidence. The conclusion of relevant research in this area has for over two decades been that the public is poorly informed about the actual severity of existing sentencing.

10. Given the rapid and extreme increase in the severity of punishment for more serious offending since the turn of the century, the obvious conclusion to draw is that a policy of seeking to increase public confidence through harsher punishments has already been pursued relentlessly and failed in its objective.

[4] Ministry of Justice (2015) Government response to the Harris Review into self-inflicted deaths in National Offender Management Service custody of 18-24 year olds, London: Ministry of Justice

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

11. This proposal is triggered by concern over terrorism, and the risks of radicalisation within prisons. But it reflects the muddle the government has created by reaching for hurried sentencing reform as a response to a phenomenon which sentencing is highly unlikely to change. In the process, this clause creates a constitutional and legal mess, with potential infringements of both Article 5 and Article 7 of the ECHR.

12. The government has prayed in aid public protection in the face of a terrorist threat to allow retrospective sentencing; to introduce parole consideration for some terrorist offenders—and then to rule it out for others. Now it cites it as the justification for executive sentencing, radically changing the nature of a sentence mid-stream on the basis of alleged behaviour that post-dates not just the original offence, but the trial that the offence brought about.

13. Even the criteria to identify cases where the power might be invoked are vague. Two scenarios are envisaged in the preceding white paper.

14. In the first, a person serving a sentence for a non-terrorist offence is judged to pose a terrorist threat (the radicalisation phenomenon). It is not clear what the evidential test for this would be, the standard of proof required, or why there should not simply be an expectation that the person is prosecuted for an appropriate offence related to their behaviour. The scope of legislation designed to catch people sympathetic to terrorist causes is wide—the proposal simply appears to be a mechanism to avoid the inconvenience of having to provide evidence and have it tested in open court.

15. The second scenario is that someone is a terrorist but has not been convicted of a terrorist offence. Exactly why the authorities would not bring evidence of terrorism to the sentencing court's attention is not explained, but the fundamental problem is the same.

16. Making release from custody discretionary, and contemplating the possibility that the period in custody could be doubled as a result, is not some minor alteration in the administration of a sentence. It is retrospective sentencing by the executive, a form of internment, circumventing the judicial process and all the protections it confers.

17. Although an appeal process is built into the provision, it is not clear what rights the prisoner will have under the appeals process, including whether they will be granted full rights of disclosure. The Committee will want to be assured that prisoners will be granted full legal rights as they would in a criminal trial.

18. Parliament is invited to take on trust that the application of these powers will be rare, but the criteria on the face of the Bill are broad and there is no mechanism to guard against the abuse of executive power in a matter which properly belongs wholly within the remit of a court.

Part 7, Chapter 2 — Community sentences

Clause 124: Supervision by responsible officer
Clause 126: Power for responsible officer to vary curfew requirements etc

19. Within this part of the Bill there are two particular clauses which we believe require close scrutiny by the committee, given the potential implications under Article 5 and Article 6.

20. The above clauses would give individual probation officers the power to restrict a person's liberty in ways that go beyond what the court has sanctioned, by compelling attendance at additional appointments and increasing curfew periods.

21. Given that the consequences of failing to abide by such additional restrictions could involve breach proceedings and even imprisonment, understanding the exact procedure by which such decisions can be made and appealed will be critical.

22. People with learning disabilities can find it particularly difficult to comply with measures such as additional appointments or reporting requirements, and so special attention will need to be given to ensuring they are not unfairly disadvantaged by these provisions.

Clause 128 and Schedule 13: Special procedures relating to review and breach

23. This section of the Bill outlines the measures to enable the piloting of problem-solving courts and are welcome.

24. Their focus on underlying needs could contribute to restoring confidence among BAME communities in criminal justice processes. As the Government's response to the Lammy Review states "Trusted figures in the CJS were described as those who had taken the time to get to know an individual, their background and specific needs and vulnerabilities."[5]

25. However, there is a contradiction in that participation requires a guilty plea, something which analysis conducted for the Lammy Review found was less likely amongst defendants from Black, Asian or mixed ethnicity backgrounds—meaning that they are also more likely to be disadvantaged.

Children

26. This Bill will increase the time spent in custody for children convicted of certain offences from the current halfway point, to two-thirds of their custodial sentence length. We are not aware of any evidence that being "tough" with children helps to achieve any of the objectives this paper sets for the youth justice system, but a good deal of evidence that it may do the reverse, both reducing the prospects of a

[5] Ministry of Justice (2020) Tackling Racial Disparity in the Criminal Justice System: 2020 Update, London: Ministry of Justice

reduction in reoffending and doing harm to children who have often been traumatised by such an approach before entering the criminal justice system.[6]

27. Many of these proposed measures undermine our compliance with a number of articles of the UN Convention on the Rights of the Child (UNCRC), including Article 3, Article 6, Article 9, Article 19, Article 37 and Article 40.

Clause 103: Starting points for murder committed when under 18

28. This clause increases the tariffs for DHMP sentences on the grounds that children nearer the age of 18 should receive custodial terms closer to the grossly inflated tariffs the law now stipulates for adults. The proposal completely ignores the evidence on maturity (see above), and the commitment of the previous government to take that evidence into account in determining policy. It invents a new, unevidenced presumption not only that maturation ceases at 18 but that the obligations of the state towards the distinctive approach required in relation to children gradually diminish as they approach that age.

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

29. This clause reduces the number of tariff review elements for murder on the basis that this spares victims' families distress and that such reviews are rarely successful. The white paper acknowledged that the review process is necessary because of the fact of maturation, but then ignored the science that shows that maturation continues into the mid-twenties. Again, a desire to make a political response to a single high profile case appears to be driving the government's approach.

30. There is legal precedent for extending a welfare based approach into adulthood which this provision seems to undermine. In R(Smith) v Secretary of State for the Home Department [2005] UKHL 51; [2006] 1 AC 159, the House of Lords considered the progress in prison of those who have committed murder as children. The judgment affirmed the need for the punishment term to be kept under review, even into adulthood. Baroness Hale outlined that "an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity." (Smith, paragraph 25).

Clause 131: Youth remand

31. We welcome the addition of a new statutory duty for courts that requires them to consider the welfare and best interests of the child when applying the sets of conditions that must be met in order to remand to custody, including that the court must be of the opinion that the prospect of a custodial sentence is "very likely", rather

[6] Ross, A. et al. (2010) Prevention and Reduction: A review of strategies for intervening early to prevent or reduce youth crime and anti-social behaviour, London: Department for Education and Centre for Analysis of Youth Transitions

This report is just one of many examples of research that demonstrates the futility of deterrence as an approach to preventing offending by children.

than the lower threshold of it being a possibility. In contrast to the previous two clauses, this measure will strengthen our compliance with the same UNCRC articles.

Discrimination — Equality Impact Assessment

32. The treatment in the overarching equality statement accompanying the Bill of the discriminatory impacts of its proposals for people with protected characteristics falls far short of the duties placed upon it by law, and undermine our compliance with Article 14 of the ECHR. In particular, there are a significant number of measures contained within the Bill which are likely to perpetuate the inequalities highlighted in the government's independently commissioned review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System.[7]

33. It also chooses to gloss over the impact these provisions will have in relation to the protected characteristics of both age and race. Those consequences are very likely to be that the disproportionate and growing representation of black children and young black men in custody will increase, reflecting the systematic bias disclosed by the Lammy report and which the government is supposedly committed to tackling.

34. Consistent with other proposals first outlined in the preceding White Paper, a lack of data is presented in the Equality Impact Assessment as the absence of discrimination.

[7] Lammy, D. (2017) The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, London: Ministry of Justice