



Sentencing Bill
House of Commons
Second Reading
Briefing
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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system – administrative, civil, and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Our vision is of a UK justice system that is fair, accessible, and respects the rights of all, and which reflects the country’s international reputation for upholding and promoting the rule of law.
2. This briefing outlines JUSTICE’s views concerning the Sentencing Bill (the “**Bill**”), which is scheduled to have its Second Reading in the House of Commons on 6 December 2023. The Bill deals with four major subjects: whole life orders; a ‘special custodial sentence’ for certain sex offenders; suspension of custodial sentences; and the release of offenders. In short, while the Bill makes long-awaited positive changes around reducing short prison sentences and increasing availability of home detention curfew, JUSTICE is concerned by other measures which infringe upon the role of the judiciary while also failing to improve public protection, as is the Government’s ostensible aim.

Whole Life Orders

3. Clause 1 of the Bill deals with mandatory life sentences in relation to murder, and specifically with whole life orders. JUSTICE is concerned by the expansion of the use of whole life orders which Clause 1 envisages, and particularly that their imposition is to be made mandatory in a variety of circumstances. There are several reasons, both principled and practical, for this concern, but it may first assist to explain the sentencing process in relation to murder and the proposed amendments.
4. Unlike other offences, there is no sentencing guideline for murder, which carries a mandatory life sentence. In passing a life sentence, the court must either pass a minimum term order (and after serving the minimum term, the individual becomes eligible for release via the Parole Board), or a whole life order¹ (meaning that the individual is never eligible for release save for on compassionate grounds at the Secretary of State’s discretion).²

¹ Sentencing Act 2020, s.321.

² Crime (Sentences) Act 1997, s.30.

5. Judicial discretion around whole life orders is already narrow: the order made on passing a life sentence “*must be a whole life order*”³ if the offender was 18 or over when the offence was committed and “*the court is of the opinion that, because of the seriousness of (i) the offence, or (ii) the combination of the offence and one or more offences associated with it, it should not make a minimum term order*”.⁴ These same considerations as to seriousness apply in determining the duration of a minimum term order.⁵
6. In determining both whether a whole life order must be imposed, or what minimum term is appropriate, “*the court must have regard to: (i) the general principles set out in Schedule 21, and (ii) any sentencing guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.*”⁶ Paragraph 2(2) of Schedule 21 outlines the kinds of case that would ordinarily take a whole life order as the starting point of the court’s consideration of sentence. The court must then go on to take account of aggravating and mitigating factors relation to the offence and the offender.
7. The list of factors in paragraph 2(2) are identical to those set out in what would be new subsection 321(2B) to the Sentencing Act 2020 as inserted by Clause 1. What the Bill does, however, is to remove judicial discretion to either confirm that a whole life order is appropriate, or instead make a lengthy minimum term order, by taking into account those aggravating and mitigating factors. In the circumstances specified, Clause 1 obliges courts to pass a whole life order against an offender aged 21 or over save in “*exceptional circumstances*”.
8. JUSTICE’s primary concern on grounds of principle relates to the fact that the task of sentencing is a judicial one. The role of Parliament in a legal system defined by the rule of law and the separation of powers is to legislate in general terms: in relation to sentencing, this is primarily by fixing maximum terms. It is for the courts to decide, on the specific facts before them, what the correct outcome is in any individual case. In criminal proceedings, following conviction, this is by determining the punishment which appropriately fits the offence and the offender. While mandatory sentences have long existed, their increasing use and breadth challenges the competence and independence of the judiciary.
9. Moreover, there is no evidence that the judiciary have not been sentencing appropriately in serious murder cases. The unduly lenient sentence scheme allows the Attorney-General

³ Sentencing Act 2020, s.321(3).

⁴ Sentencing Act 2020, s.321(3B).

⁵ Sentencing Act 2020, s.322(2).

⁶ Sentencing Act 2020, s.322(3).

to refer to the Court of Appeal sentences passed by the Crown Court which appear to be too low. Any member of the public may contact the Attorney-General's Office to request that internal review and external reference occur.⁷ So far in 2023, there have been 99 requests to the Attorney-General's Office for a murder sentence to be reviewed, with just five being referred on to the Court of Appeal and three remaining under consideration.

10. The vast majority of the remainder have not been referred, indicating that the Law Officers did not consider the sentence to have warranted greater severity.⁸ None of the referrals to the Court of Appeal during 2023 have so far been successful. Accordingly, there is no evidence that the Crown Courts have been failing to make whole life orders where it would be appropriate to do so.
11. There is also a potential downside for the families of murder victims. Guilty pleas in murder cases are not common but nor are they unheard of. At present, entering a guilty plea is explicitly relevant to whether a whole life order is appropriate.⁹ That would be removed were whole life orders made mandatory as proposed. Nor will there be any incentive for individuals ineligible for release to aid authorities at any later stage – for example, by revealing the location of the body of a deceased person. Accordingly, greater harm may unwittingly be caused to victims' families by introduction of this measure, leading more to have to endure the trial process or to be left in the dark as to the fate of their loved one.
12. Moreover, prisoners facing indeterminate sentences are more likely to experience hopelessness and accordingly less likely to engage in rehabilitative or other pro-social activities, as well as more likely to attempt suicide.¹⁰ That is not an outcome which should be favoured in a humane society. Those who receive lengthy sentences at an early stage in life are also likely to mature and develop greater insight into the impacts of their offending, such that they may well be capable of rehabilitation and leading different lives. That would surely be a better outcome than locking them up and throwing away the key.

⁷ See e.g. <https://www.cps.gov.uk/legal-guidance/unduly-lenient-sentences> for an explanation of the scheme.

⁸ Five applications were withdrawn and three were out of time: see https://assets.publishing.service.gov.uk/media/656728e7d6ad7500d02fc9b/ULS_Data_Tool_29.11.2023.xlsx via <https://www.gov.uk/government/publications/outcome-of-unduly-lenient-sentence-referrals>.

⁹ Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (1 June 2017), available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf>, p.8.

¹⁰ See e.g. Simon Hattenstone, 'Indefinite Sentences Should Be Suicide Risk Factor, Says Prisons Watchdog', *The Guardian* (9 September 2023), available at <https://www.theguardian.com/law/2023/sep/09/indefinite-sentences-should-be-suicide-risk-factor-says-prisons-watchdog>; and see generally Ben Jarman and Claudia Vince, *Making Progress in Prison: What Progress Means for People Serving the Longest Sentences* (PRT, 2022), available at https://prisonreformtrust.org.uk/wp-content/uploads/2022/09/Making_progress.pdf.

13. It is also an irrefutable fact that the prisons of England and Wales are presently filled beyond the capacity and that many extant Victorian prisons are not fit for purpose. We are as yet uncertain of the impact of RAAC on habitability of others.¹¹ The Government's plan to build 20,000 new places by the mid-2020s is on the verge of failure and the rate of increase in the prison population means that that number will be outstripped even if constructed in time.¹² Prison overcrowding is dangerous for prisoners and prison staff alike, while prison officers simply are not equipped or trained to be carers, as they will increasingly need to be if significant numbers of individuals are remaining in prison until the ends of their natural lives. At present, there are 67 prisoners on whole life orders in prisons across England and Wales for offences dating back to the 1970s, however that number can clearly be expected to increase if this provision is enacted, with the concomitant costs.¹³

14. Last but certainly not least, these provisions are unlikely to prevent or deter future murders. That is significant if the Government is truly concerned about public protection. Criminological research shows that the severity of punishment is an ineffective deterrent; indeed, prisons are widely acknowledged to be criminogenic themselves.¹⁴ Instead, if deterrence is the aim, resources would be better directed at increasing the prospects of detection and conviction.¹⁵ This means better equipping police and prosecution services to carry out fair and effective investigations; funding legal aid to ensure that that evidence can be properly tested in fair and open proceedings to ensure the right person faces justice; and adequately resourcing the court system more broadly so that trials can run in a timely and proper fashion, to the benefit of defendants and victims' families alike.

'Special Custodial Sentence' for Certain Sex Offenders

15. Clauses 2 to 5 seek to extend 'special custodial sentences' (which presently apply only in relation to terrorism offences) to a number of sexual offences. A 'special custodial

¹¹ See e.g. Peter Walker, 'Amount of Raac in English and Welsh Prisons Won't Be Known for at Least Two Months', *The Guardian* (7 September 2023), available at <https://www.theguardian.com/uk-news/2023/sep/07/amount-of-raac-in-english-and-welsh-prisons-wont-be-known-for-at-least-two-months>; Inside Time Reports, 'Ministers Won't Say Which Prisons Contain RAAC', *Inside Time* (26 October 2023), available at <https://insidetime.org/ministers-wont-say-which-prisons-contain-raac/>.

¹² See e.g. Rajeev Sayal, 'Plan for 20,000 More Prison Places in England and Wales Won't Be Complete until 2030', *The Guardian* (29 September 2023), available at <https://www.theguardian.com/society/2023/sep/29/plan-for-20000-more-prison-places-in-england-and-wales-wont-be-complete-until-2030>; *Prison Reform Trust*, available at <https://prisonreformtrust.org.uk/blog-unpicking-the-governments-prison-building-plans/>; 'Exclusive: New Prisons Can't Open before 2027', *Inside Time* (26 June 2023), available at <https://insidetime.org/exclusive-new-prisons-cant-open-before-2027-prison-service-official-admits/>.

¹³ See *SkyNews*, 'The Whole-life Prisoners Currently behind Bars Serving the Same Sentence as Lucy Letby', (23 August 2023), available at <https://news.sky.com/story/the-whole-life-prisoners-currently-behind-bars-serving-the-same-sentence-as-lucy-letby-12944945>.

¹⁴ FT Cullen, CL Jonson and DS & Nagin, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 91 (3rd supp) *The Prison Journal* 48S <https://doi.org/10.1177/0032885511415224>.

¹⁵ See e.g. Daniel S. Nagin, 'Deterrence in the Twenty-First Century' (2013) 42(1) *Crime and Justice* 199.

sentence'¹⁶ (also known as an sentence for offenders of particular concern, or “**SOPC**”) is one which is equal to the aggregate of the term of immediate imprisonment that the sentencing judge considers appropriate, and a further one-year licence period beyond the period on licence they would already serve in the community. SOPCs are available in relation to children as well as adults.¹⁷

16. It bears noting that at present, those convicted of violent or sexual offences which lead to a custodial term of four years or more must serve two-thirds of their sentence in prison, rather than the usual half.¹⁸ So, by way of example, if Clauses 2 to 5 were passed, then an individual sentenced to nine years' imprisonment for rape would serve six years in custody and four years on licence in the community, rather than three. However, these provisions will interact with the amendments resulting from Clause 7, discussed below. Using the same example, if both Clauses 2-5 and Clause 7 are passed, the offender would serve 9 years in custody and one on licence.
17. The public protection rationale in relation to repeat sexual offending is comprehensible, and it could be argued that the additional restriction on liberty is proportionate. JUSTICE would urge caution, however, in considering whether these changes are necessary.
18. It is to be noted that these sentences will be available only where the court does not impose a sentence of imprisonment for life or an extended sentence. A life sentence is of course mandatory for certain offences and the maximum available for others, in relation to which it reflects the gravest of offences of the specific type. An extended sentence is available where “*the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences*” but is not required to impose imprisonment for life, and the individual has committed an earlier qualifying offence or is to be sentenced to at least four years' imprisonment.¹⁹
19. It is difficult to envisage circumstances in which the life or extended sentence provisions did not bite and yet it would seem appropriate to impose an SOPC. Of course, such sentences have been passed in relation to terrorism offences; the number, however, is unclear. Nor is it known whether these have led to positive outcomes such as crime prevention or deeper engagement by offenders with community rehabilitation services. It

¹⁶ See Sentencing Act, ss.252A, 265 and 278.

¹⁷ Clause 2 amends Schedule 13 to the Sentencing Act 2020 to specify the relevant sexual offences; clause 3 deals with those under 18 at the time of the offence; clause 4 with those who were aged 18 or over at the time of the offence; and clause 5 with like service offences.

¹⁸ See Criminal Justice Act 2003, ss.244, 244ZA.

¹⁹ See Sentencing Act, ss.255, 267 and 280.

is arguable that more evidence of effectiveness is required before greater restrictions on liberty are contemplated. At the same time, HM Probation Service will need to be granted further resources to manage additional licence periods, yet it is not clear that this has been considered adequately in impact assessments relating to this Bill.²⁰

Suspension of Custodial Sentences

20. Clause 6 deals with the suspension of custodial sentences. JUSTICE is pleased to see this introduction of a presumption against immediate custodial sentences²¹ of 12 months or less.²² This measure is a logical response to evidence which indicates that short sentences of immediate custody are counterproductive, impairing an individual's community ties and the positive effect that those have on rehabilitation, while not allowing sufficient time to engage with the rehabilitation programmes that should be available in prisons. It bears noting that Scotland first introduced a presumption against short sentences of immediate custody in 2010, extending its original application to sentences of up to 3 months to those of up to 12 months in 2019.²³

21. This measure is particularly welcome at the present time, where prisons are operating over-capacity, compromising the safety of prisoners and prison staff alike. The latest available offender management statistics show that, as of 30 September 2023, there were 3,853 prisoners serving 12 months or less. Almost 60% of these serving just 6 months or less, an 8% increase on the previous year.²⁴ In total, these short-sentence prisoners make up just over 4% of the total prison population, however at a cost per prisoner of £47,434,²⁵

²⁰ Where a judge has determined that a custodial sentence of between 14 days and two years is appropriate, they have a discretion to suspend, taking into account factors such as danger to the public, realistic prospects of rehabilitation, and significant personal mitigation: see Sentencing Council, *Imposition of Community and Custodial Sentences* (1 February 2017), available at <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/#Suspended%20sentences:%20general%20guidance>.

²¹ See Impact Assessment No. MoJ071/2023, *Sentencing Bill – Changes Relating to Serious Sexual Offences* (14 November 2023), available at <https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillASexualOffences.pdf>.

²² Where a judge has determined that a custodial sentence of between 14 days and 2 years is appropriate, they have a discretion to suspend, taking into account factors such as danger to the public, realistic prospects of rehabilitation, and significant personal mitigation: see Sentencing Council, *Imposition of Community and Custodial Sentences* (1 February 2017), available at <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/#Suspended%20sentences:%20general%20guidance>.

²³ Scottish Government, *Extended Presumption against Short Sentences: Monitoring Information – January-December 2020*, available at <https://www.gov.scot/publications/extended-presumption-against-short-sentences-monitoring-information-january-december-2020/pages/3/>.

²⁴ Gov.UK, *Offender Management Statistics Quarterly: April to June 2023 – Prison Population: 30 September 2023* (26 October 2023), available at https://assets.publishing.service.gov.uk/media/65384fcb1bf90d000dd84550/Population_30Sep2023 ods

²⁵ Ministry of Justice, *Costs Per Place and Costs Per Prisoner by Individual Prison: HM Prison & Probation Service Annual Report and Accounts 2021-22 Management Information Addendum* (9 March 2023), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140557/costs-per-place-and-costs-per-prisoner-2021-to-2022-summary.pdf

the total bill is likely over £100 million a year. Given the futility of short sentences, this is not a wise use of public funds.

22. Of course, individuals on suspended sentences are managed by HM Probation Service, another part of the criminal justice system that is sorely underfunded. The Impact Assessment for this section of the Bill²⁶ appears to recognise the transfer of costs from one to the other, however budgetary commitments will be crucial if this measure is to be effective at improving rehabilitative outcomes, and accordingly public safety.

Release of Offenders

23. JUSTICE welcomes the provision in Clause 8 for the extension of home detention curfew (“HDC”) to individuals serving sentences of four years or more, as well as adults serving special and extended sentences, among others. HDC allows prisoners to be released up to 180 days before they would otherwise be due for release on licence – ordinarily at the halfway point of their sentence, as mentioned at paragraphs 16 and 26 above.

24. The Home Detention Curfew Policy Framework provides further detail about how HDC decisions are made in individual cases.²⁷ It bears noting that individuals will not be released on HDC – regardless of eligibility – where it is not possible to safely manage their early release in the community, or a risk management plan cannot be put in place at their proposed release address.

25. Accordingly, the increase in eligibility will be tempered in practice by the application of risk assessments, in the interests of public safety. It bears noting that such risk assessments are inherently cautious and produce more false positives than false negatives (that is, tend to keep in prison those who may well not go on to cause harm more than releasing those who do).²⁸ Nonetheless, JUSTICE is pleased to see this progressive step which allows more individuals who do not raise public safety concerns to be released at an earlier stage, in the interests of their continued rehabilitation and reintegration into the community.

²⁶ Impact Assessment No. MoJ070/2023, *Sentencing Bill – Changes on the Presumption of the Suspension of Short Sentences* (14 November 2023), available at <https://publications.parliament.uk/pa/bills/cbill/58-04/0011/SentencingBillAShortSentences.pdf>.

²⁷ See Ministry of Justice/HM Prison and Probation Service, *Home Detention Curfew (HDC) Policy Framework* (6 June 2003), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1161231/home-detention-curfew-pf.pdf.

²⁸ See the useful discussion of risk in Ben Jarman and Claudia Vince, *Making Progress in Prison: What Progress Means for People Serving the Longest Sentences* (PRT, 2022), available at https://prisonreformtrust.org.uk/wp-content/uploads/2022/09/Making_progress.pdf.

26. On the other hand, it is difficult to see any reason in principle to exclude certain types of offences from early release eligibility, as clause 7 seeks to do. Ordinarily, those serving immediate custodial sentences are either entitled to,²⁹ or eligible for,³⁰ release on licence halfway through their sentence, although as mentioned above, this has already been extended for some offences. Clause 7, however, means that those sentenced to serve an extended determinate sentence or SOPC after the passing of this provision will serve their whole sentence in custody, without being eligible for release via the Parole Board.
27. JUSTICE has several concerns with this provision. First, increasing the complexity of sentencing arrangements is unhelpful for lawyers, judges, prisons, defendants and victims alike. It is crucial that the public, as much as professionals, are able to understand sentencing processes, and introducing over-particular, niche sentencing regimes only serves to create confusion.
28. Secondly, sentencing guidelines have been developed around the existing state of affairs, where early release was available to those covered by clause 7; there is no suggestion that these are to be updated to reflect this legislative change. It is fundamentally arbitrary and unfair that individuals sentenced after a certain date will have to serve longer in custody than those already serving: parity demands that like be treated alike. Thirdly, this measure will only serve to increase prison overcrowding, meaning (*inter alia*) that the poor rehabilitative provision presently available will be even more thinly spread.
29. Finally, a consequential amendment contained in Schedule 3 to the Bill means that individuals released after serving a full sentence of less than two years will not be subject to, or have the benefit of, supervision requirements at all. At the same time, as highlighted at paragraph 16 above, individuals released at the end of longer sentences will be subject to supervision for a shorter time than were they released on licence. This may have potentially negative consequences both for community reintegration and public safety.

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²⁹ If serving a standard determinate sentence: Criminal Justice Act 2003, s.244.

³⁰ See Criminal Justice Act 2003, s.244A.