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BRIEFING PAPER

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Police, Crime, Sentencing and Courts Bill: Part 7 - Sentencing and release

By Jacqueline Beard

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Summary

This briefing paper is one of a collection of Commons Library briefing papers on the Police, Crime, Sentencing and Courts Bill (the Bill). It deals only with the provisions in Part 7 of the Bill which concern sentencing and release. Briefing papers covering other parts of the Bill and general background, are available on the Commons Library website.

Part 7 of the Bill is divided into two Chapters.

Part 7, Chapter 1 makes provisions regarding custodial sentences and would:

- Require courts to impose minimum sentences for certain repeat offences unless there are exceptiona**l** circumstances that relate to any of the offences or to the offender which would make it unjust to do so
- Make the "starting point" a whole life order when setting the term of a life sentence for the premeditated murder of a child
- Allow judges to impose, in exceptional circumstances, a whole life order on offenders aged 18 to 20
- Provide for new starting points for murder committed by children, based on the adult system, and depending on seriousness and age
- Reduce the number of reviews of their minimum term an offender, sentenced to Detention at Her Majesty's Pleasure for murder committed whilst under 18, is entitled to after they turn 18
- Change the way the minimum term of a life sentence is calculated, where imposed other than for murder, from being based on half of a notional determinate sentence length to at least two thirds
- Provide that for offenders sentenced to between four and seven years for certain sexual and violent offences, the automatic release point will be the two thirds point of their sentence (currently it is halfway)
- Provide that offenders serving a 'sentence for offenders of particular concern' for a child sex offence, would be required to serve two thirds of their sentence in prison before they can apply to the Parole Board for release
- Enable the Secretary of State to refer to the Parole Board any prisoner who would normally be released automatically, but who is deemed to present a terrorist or other significant danger to the public.
- Expand the rules the Secretary of State may make concerning proceedings of the Parole Board, allowing the Secretary of State to make rules:
  - requiring or permitting the Parole Board to make provisional decisions; and
  - conferring a power on the Parole Board to set aside its decisions and directions in certain circumstances
- Repeal uncommenced provisions for the establishment of recall adjudicators, set out responsibilities for setting licence conditions for fixed term prisoners and make changes to the law on the recall and re-release of recalled prisoners serving determinate sentences
- Provide a power for the Secretary of State to change the test for the release of fixed term prisoners following recall

- Amend the law so that the Parole Board would no longer be able to direct 'immediate' release. Instead, the Secretary of State would be required to give effect to the direction as soon as it is reasonably practicable in all the circumstances
- Make changes to the law so that the length of the extension period required when a driver disqualification is imposed with a custodial sentence takes account of the new release points for various offenders resulting from recent changes to the law.

Part 7, Chapter 2 makes provisions regarding community sentences and would:

- Give probation practitioners the power to require an offender serving a community order or suspended sentence order to attend an appointment for the duration of the order
- Increase the maximum daily curfew hours which can be imposed as part of a curfew requirement and the maximum curfew requirement period under a community order or suspended sentence order
- Allow probation practitioners to vary curfew requirements in two limited respects without approval from the court
- Make provision for pilots of problem-solving courts
- Impose a duty on the probation service to consult with key stakeholders on the delivery of unpaid work.

The clauses discussed in this briefing would apply and extend to England and Wales only, except for clauses 117 and 118 which would apply to Scotland only, and clause 123, which would extend and apply to England and Wales and Scotland.

Many of these provisions reflect changes proposed in A Smarter Approach to Sentencing published in September 2020.

The Government has published the following factsheets in connection with this part of this Bill:

- Police, Crime, Sentencing and Courts Bill 2021: release of serious offenders factsheet
- Police, Crime, Sentencing and Courts Bill 2021: sentence lengths for serious offenders factsheet
- Police, Crime, Sentencing and Courts Bill 2021: parole and licence conditions factsheet
- Police, Crime, Sentencing and Courts Bill 2021: community sentences factsheet

1. Background

1.1 Sentencing in England and Wales

The maximum sentence available for each criminal offence is, in most instances, set out in legislation. Where the offence is a common law offence and no maximum sentence has been set out in legislation, the maximum sentence available is life imprisonment. In a few instances, legislation also provides for a minimum sentence. Within the maximum available, either in legislation or at common law, it is for the sentencing court to decide on the appropriate sentence in each particular case.

The Sentencing Council and sentencing guidelines

The Sentencing Council issues guidelines on sentencing for the most common offences and overarching guidelines that deal with specific sentencing topics. These guidelines set out the process judges and magistrates should follow and the factors they should consider when determining the appropriate sentence in a particular case. A sentencing court is required by legislation[1] to follow these guidelines unless it is in the interests of justice not to do so. The primary purpose of the guidelines is to promote a more consistent approach to sentencing across courts in England and Wales.

When sentencing, sentencers follow the steps in the relevant guideline. They decide on the level of seriousness of the case, taking into account the harm caused and the offender's level of responsibility or culpability for that harm. For each level of seriousness for that particular offence the guideline provides sentences ranges and a 'starting point' sentence. The sentencing court then considers all relevant aggravating and mitigating factors, the most important of which will be specified in the guideline, and increases or decreases the sentence to reflect these factors. A reduction will be made if the offender has pleaded guilty or assisted the prosecution.

Consolidation: the Sentencing Code

There has been a lot of sentencing legislation in past decades, as the Law Commission noted in a 2018 report:

> Over the past 30 years the law governing sentencing procedure has been continually amended, with at least 14 major pieces of primary legislation in 1991, 1993, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014, 2015 and 2018. This legislation has created, amended and repealed sentencing orders and the procedure relating to the sentencing of offenders. [2]

The Sentencing Act 2020 restated the law of sentencing procedure into the Sentencing Code. It was the result of a Law Commission project which aimed to make the law simpler and easier to use; increase public confidence in the criminal justice system; and increase the efficiency of the sentencing process. The Sentencing Act 2020 was a consolidation of the existing law. The Sentencing Code applies to any offender convicted

1 Section 59 of the Sentencing Act 2020
2 Law Commission, The Sentencing Code, Volume I: Report, HC 1724, Law Com No 382, November 2018, para 1.14

after 1 December 2020. For background information see the Library briefing Sentencing Bill [HL] 2019-21, 22 September 2020.

The purposes of sentencing

Legislation[3] sets out the five purposes of sentencing the courts must bear in mind when dealing with most adult offenders.

- The punishment of the offender
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences.

These purposes are not given any order of priority.

When sentencing a child (meaning someone aged under 18) judges and magistrates must consider the main aim of the youth justice system, the prevention of offending, as well as the welfare of the child.[4] The Sentencing Council has issued a definitive overarching guideline on the sentencing of children and young persons.

1.2 Types of sentence

There are different types of sentence, including discharges, fines, community sentences and custodial sentences. The following gives a brief overview of custodial and community sentences for adults.[5]

Custodial sentences – adults

A custodial sentence can only be imposed where the custody threshold is reached. This means that the offence is so serious that neither a fine nor a community sentence can be justified for the offence.[6] The threshold is intended to operate to ensure that custodial sentences are used as a last resort. The custodial sentence must be for the shortest term that, in the opinion of the court, is commensurate with the seriousness of the offence.[7] The Sentencing Council has issued a guideline dealing with the imposition of custodial sentences.

There are different types of custodial sentence as described below.[8] The most common is a standard determinate sentence. Release arrangements vary for the different types of custodial sentences. Offenders rarely serve all of their custodial sentence in prison. Usually

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3 Section 57 of the Sentencing Act 2020
4 Section 37 of the Crime and Disorder Act 1998 and section 44 of the Children and Young Persons Act 1933
5 Information on sentences for children is provided in the Library briefing paper on Part 8 of the Bill.
6 Section 230 of the Sentencing Act 2020
7 Section 231 of the Sentencing Act 2020
8 Note there are different forms of custodial sentence for adult aged 18-20 and those aged 21 or over. Those aged 18-20 are sentenced to sentences of detention in a young offenders institution (YOI) or sentences of custody for life. Those aged 21 or over are given sentences of imprisonment or sentences of life imprisonment. There are very limited differences in practice between detention in a YOI and imprisonment.

offenders are released part way through on licence. While on licence they will be subject to supervision and must comply with the conditions of their licence. Offenders on licence can be recalled to prison if they breach their licence conditions. Release is sometimes automatic and in other cases requires the Parole Board to decide it is safe.[9]

Suspended sentences

Custodial sentences can be immediate or suspended. If the court imposes a term of imprisonment of between 14 days and 2 years it may suspend the sentence for between 6 months and 2 years. This means the person is not immediately sent to prison. When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are the same as those available for community orders (see below). If a person given a suspended sentence order breaches its conditions, or is convicted of another offence during their suspended sentence, their suspended sentence can be activated and they may be sent to prison. The Sentencing Council has published general guidance on the imposition of suspended sentences.

Standard determinate sentences

The most common type of prison sentence is a determinate sentence which has a fixed length. Most prisoners sentenced to a standard determinate sentence are released automatically halfway through their sentence with no involvement from the Parole Board. The remainder of the sentence is spent on licence.[10]

If a prisoner serving a determinate sentence has been convicted of a terrorism or terrorism connected offence they are not released automatically at the halfway point. Changes made to the law in 2020 require that they cannot be considered for release by the Parole Board until the two thirds point of their sentence.[11] If the Parole Board does not conclude that it is safe to release them, they may serve the whole of their sentence in prison.

The law was also changed in 2020 with regard to prisoners sentenced to a standard determinate sentence for certain serious violent and sexual offences where the maximum penalty for the offence is life imprisonment and the standard determinate sentence imposed was for seven years or more.[12] These prisoners, sentenced on or after 1 April 2020, must serve two thirds of their sentence in prison before automatic release.

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9 For information on the Parole Board see section 1.4 of this briefing.

10 For offences committed on or after 1 February 2015, prisoners sentenced to less than two years will additionally be subject to post sentence supervision so that the licence and supervision periods will together make up 12 months. The Offender Rehabilitation Act 2014 inserted section 256AA into the Criminal Justice Act 2003.

11 Terrorist Offenders (Restriction of Early Release) Act 2020. Note that these changes also applied retrospectively to those already serving a sentence at the point the Act came into force.
Changes to the law proposed in the Counter-Terrorism and Sentencing Bill would mean that most terrorist offenders would no longer be eligible for a SDS.

12 The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020

Sentence for Offenders of Particular Concern

A Sentence for Offenders of Particular Concern (SOPC) can be imposed on offenders who have been convicted of certain child sex offences and certain terrorism offences.[13] Where the court imposes a custodial sentence for an offence for which an SOPC is available it must impose a SOPC if it does not impose either an extended sentence or a life sentence.

An SOPC is made up of a custodial term and a fixed 12 month licence period. Prisoners serving a SOPC for a child sexual offence are currently eligible to apply to the Parole Board for release at the halfway point of the custodial term. Following changes made to the law in 2020 terrorist offenders serving a SOPC cannot apply to the Parole Board for release until the two thirds point of the custodial term.

Extended Determinate Sentences

An Extended Determinate Sentence (EDS) is comprised of a custodial term and an extended period of licence.[14]

A judge can impose an EDS where:

- A person is convicted of a specified offence, listed in Schedule 18 of the Sentencing Act 2020;
- The court considers that there is a significant risk to members of the public of serious harm from further specified offences committed by the offender (this is known as the dangerousness test);
- The court is not required to impose a life sentence; **and**
- **Either**:
  - At the time the offence was committed the offender had been convicted of an offence listed in Schedule 14 of the Sentencing Act 2020, **or**
  - If the court were to impose an extended sentence the term that it would specify as the appropriate custodial term would be at least 4 years.

A prisoner serving an EDS must serve at least two thirds of the custodial term of their sentence in prison before being eligible to apply to the Parole Board for release. The Parole Board will only order release if it considers the prisoner's detention is no longer necessary for the protection of the public. If the prisoner is not released by the Parole Board during the final third of the custodial period he or she will be released at the end of the custodial period. Once released, either by the Parole Board or at the end of the custodial period, the offender will be on licence for the remainder (if any) of the custodial period plus the period of extended licence. The extended period can be up to 5 years

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13 Sections 265 and 278 of the Sentencing Act 2020. SOPCs were created by the Criminal Justice and Courts Act 2015.

14 Sections 266-268 and 279-281 of the Sentencing Act 2020
Extended determinate sentences were created by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and replaced the Extended Sentence for Public Protection which had been introduced by the Criminal Justice Act 2003.

for a specified violent offence and 8 years for a specified sexual offence or terrorism offence. The length of the extended period is decided by the sentencing judge.

The Counter-Terrorism and Sentencing Bill contains provisions which would mean that certain terrorist offenders who receive an EDS would be required to serve the whole of the custodial term in prison.

Life sentences

A **life sentence** is mandatory for those convicted for murder. A life sentence can also be imposed for certain other serious offences.[15] These offences include robbery, rape and manslaughter. The court may impose a life sentence where it is justified by the seriousness of the offence and, in the court's opinion, the offender poses a significant risk to the public of serious harm by committing further specified offences.[16] A life sentence can also be imposed where an offender has committed a second serious or violent offence.[17] Although rarely used in practice, courts have the power to impose a discretionary life sentence on an offender convicted of an offence where the maximum sentence is life imprisonment even where the conditions for dangerous offenders or those convicted of a second listed offence have not been met.

In the most serious cases of murder the courts can impose a whole life order. These orders are rare and mean that the offender will spend the rest of their lives in prison apart from in exceptional cases of compassionate release.

For all other life sentences, the judge sets the minimum term that must be served in prison, sometimes called the tariff. At the end of this term the prisoner can apply to the Parole Board for release. The Parole Board will only allow release if it is satisfied that detention is no longer required for the protection of the public. Prisoners serving a life sentence can be kept in prison indefinitely if the Parole Board considers it would not be safe to release them. Once released, the offender will be on licence for the rest of their life. This means that they can be recalled to prison at any point in the future should they breach their licence conditions or commit any further offences.

When setting the minimum term or deciding whether to impose a whole life order for murder, the court must have regard to the starting points for different types of murder set out in Schedule 21 of the Sentencing Act 2020. The judge in each case will identify the appropriate starting point in Schedule 21 and consider the aggravating and mitigating factors in the case in order to determine the appropriate minimum term which may be of any length, whatever the starting point. The judge must state in open court the starting point chosen and the reasons for this and for the order made.

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15 For details of the circumstances in which a life sentence can be imposed other than for murder see the Sentencing Academy, Sentencing Explained: Life Sentences

16 Section 274 and 285 of the Sentencing Act 2020

17 Section 273 and 283 of the Sentencing Act 2020

Community sentences - adults

A community order is the most severe form of non-custodial sentence. A community order must not be imposed unless the offence is 'serious enough to warrant the making of such an order'.[18]

A community order may last up to three years and must subject the offender to one or more "community requirements". The possible requirements are listed in Section 201 of the Sentencing Act 2020:

- Unpaid work requirement (40 – 300 hours to be completed within 12 months)
- Rehabilitation activity requirement (RAR). The court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete. The responsible officer will decide the activities to be undertaken.
- Programme requirement - taking part in an accredited programme to help change offending behaviour for a number of days set by the court
- Prohibited activity requirement - being forbidden to take part in particular activities
- Curfew requirement (2 – 16 hours in any 24 hours; maximum term 12 months)
- Exclusion requirement (from a specified place/places)
- Residence requirement (to reside at a place specified or as directed by the responsible officer)
- Foreign travel prohibition requirement (not to exceed 12 months)
- With the offender's consent:
  - mental health treatment requirement
  - drug rehabilitation requirement
  - alcohol treatment requirement
- Alcohol abstinence and monitoring requirement
- Attendance centre requirement (only available for offenders under 25 when convicted).
- Electronic compliance monitoring requirement (may only be imposed to ensure compliance with other community requirements)
- Electronic whereabouts monitoring requirement.

The most commonly used requirements are rehabilitation activity requirements and unpaid work.

The court must impose the community requirements that are most suitable for the offender and that are commensurate with the seriousness of the offence. The order must include at least one requirement imposed for the purpose of punishment, unless the court

[18] Section 204 of the Sentencing Act 2020

also imposes a fine or there are exceptional circumstances.[19] Offenders under a community sentence are supervised by probation staff. If an offender fails to comply with the terms of a community order, the order can be revoked and the offender can be resentenced.[20]

The Sentencing Council has issued a guideline dealing with the imposition of community orders.

1.3 Recent Government policy

The Conservative's 2019 manifesto said:

> We will introduce tougher sentencing for the worst offenders and end automatic halfway release from prison for serious crimes. For child murderers, there will be life imprisonment without parole.[21]

Queen's Speech

The December 2019 Queen's Speech stated that "New sentencing laws will ensure the most serious violent offenders, including terrorists, serve longer in custody". Briefing notes published by the Prime Minister's Office said that the purpose of the Bill would be to:

- Ensure that the most serious violent and sexual offenders spend time in prison that matches the severity of their crimes, protecting victims and giving the public confidence.
- Tackle repeat and prolific offenders through robust community sentences which punish and also address offenders' needs.

White Paper

In September 2020 the Ministry of Justice published a White Paper, A Smarter Approach to Sentencing. In his Ministerial Foreword Robert Buckland stated that a new, smarter approach to sentencing was needed:

> …one that is robust enough to keep the worst offenders behind bars for as long as possible, in order to protect the public from harm; but agile enough to give offenders a fair start on their road to rehabilitation.[22]

The introduction to the White Paper explained that the proposals it contained were underpinned by concerns about "three fundamental problems" in the current sentencing framework: automatic release; improving confidence and addressing the cases of offending. The White Paper stated that the blanket use of automatic release has undermined confidence in the system, that confidence in non-custodial sentencing options is low and that not enough had been done to tackle the causes of offending, particularly where it is driven by drug and alcohol misuse.

The Government noted that reoffending rates in the UK have "remained persistently high for over a decade" and that reoffending

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19 Section 208 of the Sentencing Act 2020
20 For further explanation of community orders see: Sentencing Academy, Sentencing Explained: Community Orders
21 The Conservative and Unionist Party Manifesto 2019
22 Ministry of Justice A Smarter Approach to Sentencing, September 2020, p3

weakens public confidence in the system and costs society £18bn each year.[23]

In the White Paper the Government recognised that short custodial sentences "often fail to rehabilitate the offender or to stop reoffending". The White Paper referred to a Ministry of Justice study which suggested that community sentences are more effective than short custodial sentences in preventing reoffending. The previous Government had indicated that it was considering measures to reduce the use of short custodial sentences. In Scotland the Government has introduced a presumption against short custodial sentences. However, this Government has moved away from that approach to focus on improving community sentences.

The White Paper had 5 sections covering the following themes:

- Protecting the public from serious offenders.
- Supervising offenders in the community
- Empowering probation
- Reducing reoffending
- Youth sentencing

Two annexes were also included, one on race disparity in the criminal justice system and one on female offenders.

The White Paper contained proposals for legislation which are now included in the Bill. The White Paper also contained other proposals which would not require legislation.

The White Paper set out the legislative action the Government had already taken on sentencing reform, including:

- The Sentencing Code, in the Sentencing Act 2020
- The Terrorist Offenders (Restriction of Early Release) (TORER) Act 2000
- The introduction of the Counter-Terrorism and Sentencing Bill
- The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020
- The bringing into force of provisions that allow for an alcohol abstinence and monitoring requirement to be imposed as part of a requirement of a community order or a suspended sentence order.[24]

Impact assessments and an equalities statement were published alongside the White Paper.

Comment on the White Paper

The Criminal Justice Alliance expressed disappointment that the White Paper had not been preceded by a Green Paper to allow for proposals

[23] Ministry of Justice A Smarter Approach to Sentencing, September 2020, para 222
[24] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 14) Order 2020

to be consulted on and adapted accordingly.[25] The Alliance said that the White Paper added "further layers" to the confusion regarding the philosophy and principles underpinning sentencing policy and practice already caused by legislation in recent decades. Transform Justice stated that the paper lacked "an over-riding strategy – a theory of change" and asked whether the Government thinks that punishment will reduce crime.[26]

Andrew Ashworth, Emeritus Vinerian Professor of English Law, described the changes proposed to the sentencing system as adopting "a bifurcated approach":

> The White Paper announces several initiatives to replace short prison sentences with community sentences, but on the other hand the imperatives of public protection are invoked to drive the ramping-up of already long sentences.[27]

He concluded that the White Paper is "full of proposals, but sometimes rather short on supporting reasons".

Nicola Padfield, Professor in Criminal and Penal Justice, described some of the proposals, including changes to release points, the extension of whole life orders and increased starting points for murders committed by children as "deeply punitive (and expensive, often inappropriate and unduly complex)". On other proposals, including criminal record reform, reducing the use of remand for children and problem-solving courts, she said they were "probably positive (not new ideas, and all require significant funding and plenty of "piloting").[28]

1.4 Statistics: sentencing trends[29]

Types of sentence passed

In 2019, close to 200,000 sentences were handed down for indictable and triable-either-way offences. These are the most serious kind of offences. The large majority of convictions for summary (less serious offences) result in a fine.

The most common type of sentence given for indictable and triable-either-way offences was immediate custody, which was the sentence in around one-third (32%) of cases. This was followed by a community sentence in 22% of cases, a fine in 17% of cases, and a suspended sentence in 15% of cases.

The equivalent figures for each year since 1969 are shown in the chart and summarised in the text below.

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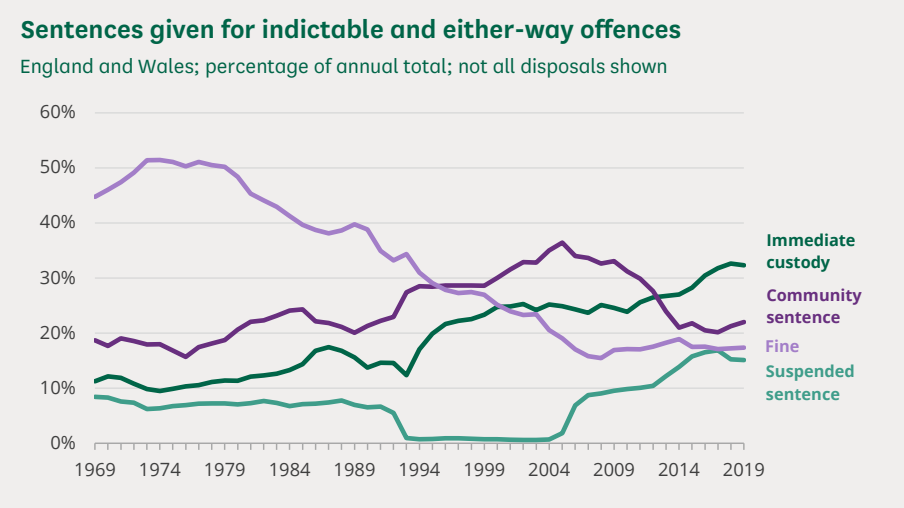
25 Criminal Justice Alliance, A Smarter Approach to Sentencing ?: A response to the government's White Paper on sentencing, undated, p4

26 Transform Justice, The sentencing white paper: tough on crime but tough enough on the causes?, 18 September 2020

27 Centre for Crime and Justice Studies, Smarter Sentencing?, 5 October 2020

28 Archbold Review, White Paper: A Smarter Approach to Sentencing (Sept 2020), Issue 8, 30 October 2020

29 Contributed by Georgina Sturge, Social and General Statistics Section



Sources: Ministry of Justice, Criminal justice statistics quarterly: October to December 2019: Outcomes by offence data tool; Ministry of Justice, Sentencing statistics (2009); ONS, Annual abstract of statistics, various years.
Notes: 1) The chart shows the sentence passed for the principal offence of which a person was convicted. In cases where a person is convicted of multiple offences, the sentence recorded in the data is that which is the most severe.
2) Not all disposals are shown.

During the 1970s, a fine was by far the most common sentence handed down, and this accounted for the majority of sentences passed in some years. The use of fines declined during the 1980s and was overtaken in the mid-1990s by the community sentence as the most common type of sentence. This in turn was overtaken by immediate custody from 2013 onwards, this type of sentence having been rising steadily in use since the mid-1990s.

Suspended sentences stopped being used almost completely following the passage of the Criminal Justice Act 1991. This restricted their use to exceptional cases, which meant the number per year fell from around 22,000 in 1990 to around 2,400 per year in the decade-and-a-half that followed. Suspended sentences were reintroduced by the Criminal Justice Act 2003, which came into force in April 2005. Their use as a proportion of all disposals has surpassed pre-1991 levels and been rising since 2013. In 2019, they made up 15% of all sentences passed for indictable and either-way offences.

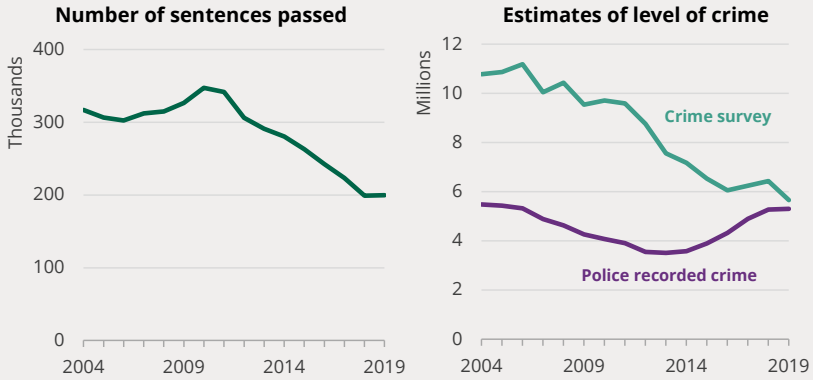
Volume of sentences passed

The number of sentences being passed for serious (indictable and triable-either-way) crimes has been in decline since 2009. This mirrors a fall in the overall level of crime, as estimated by the Office for National Statistics using their Crime Survey for England and Wales.

In contrast to this, the volume of police recorded crime has been increasing since 2013. This rise is mainly due to a rise in recorded violent crime, specifically violence without injury. In particular, recorded offences of 'sending malicious communications' and 'stalking and harassment' have risen in number. This is in part due to changes in how these offences are recorded and in part due to an increasing focus on offences committed online. The number of convictions for these offences has also risen but to a lesser extent.

A fall in people sentenced mirrors falling estimated crime - but sits alongside a rise in police recorded crime

England and Wales

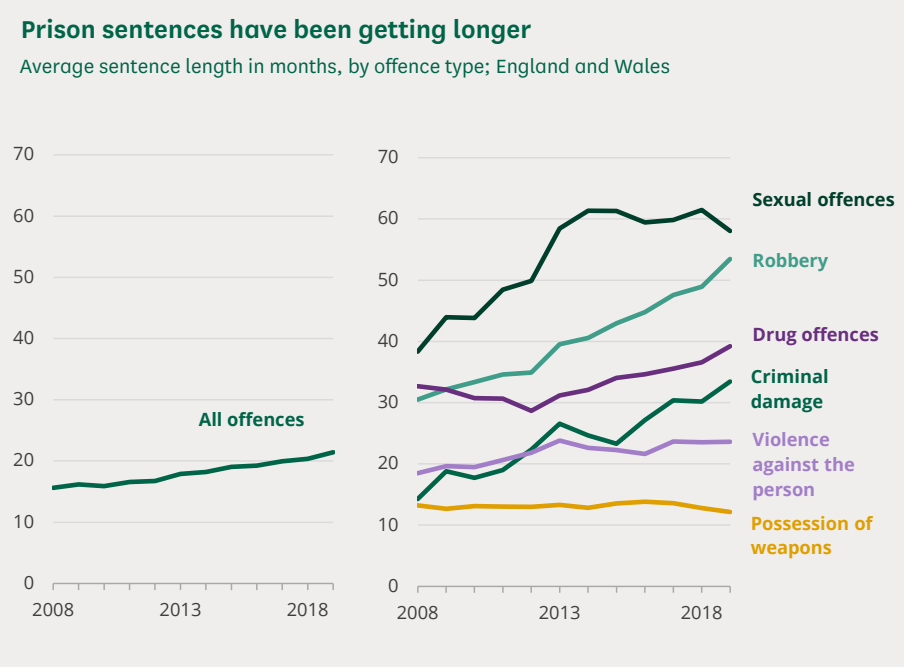


Sources: Ministry of Justice, Criminal justice statistics quarterly: October to December 2019: Outcomes by offence data tool; Ministry of Justice, Sentencing statistics (2009); ONS, Crime in England and Wales: Appendix tables, June 2020 edition
Notes: 1) Sentences shown are for indictable and triable-either-way offences
2) Crime survey and PRC exclude fraud and computer misuse offences
3) Crime survey estimates are of victim-based crime
4) The rise in police recorded crime is mainly accounted for by a rise in recorded offences in the category of violence without injury.

Custodial sentence length

Custodial sentences have been lengthening for the past 10 or more years. The average sentence length for indictable and triable-either-way offences in 2008 was 15.6 months, compared with 21.4 months in 2019.

Some categories of offence have seen a greater lengthening of custodial sentences than others. The average sentence for robbery grew the most between 2008 and 2019, going from 32 months to 53 months. The average sentence for sexual offences and for criminal damage also lengthened by around 20 months during this period. The average custodial sentence for criminal damage grew the most in percentage terms, more than doubling during this period.



Sources: Ministry of Justice, Criminal justice statistics quarterly: October to December 2019: Outcomes by offence data tool
Notes: All offences only includes indictable and triable-either-way offences.

Time served in prison for custodial sentences

Most people who are given a custodial sentence do not serve all of that sentence in custody. According to the latest quarterly Ministry of Justice statistics published at the time of writing, offenders serving determinate sentences had served 62% of their sentence on average when released from custody. [30]

Only those who are sentenced to less than 3 months in custody serve *longer* on average than their custodial sentence length.[31] This is likely because some offenders in this category have spent longer on remand awaiting their trial than the length of the sentence they receive on conviction.

In general, the longer the sentence, the lower the proportion that offenders serve in custody upon release. This is because time served includes remand, which ends up having a greater impact on total time served for those on short sentences. The exception is extended determinate sentences, where release is not possible until the two thirds point of the custodial part of the sentence. Offenders released from these sentences in 2019 had served 92% of their sentence term, on average.

For indeterminate sentences, we only have data on the average number of years served. In 2019, the average (mean) release point from a mandatory life sentence was 18 years; from other life sentences it was

30 Ministry of Justice, Offender management statistics quarterly: October to December 2019, Table A3.2i
31 Average here refers to the mean.

also 18 years; and from imprisonment for public protection (IPP) sentences it was 10 years.[32]

1.5 Parole Board

The Parole Board is an executive non-departmental public body, which is responsible for the parole system. It is governed by the Parole Board Rules, secondary legislation that sets out the procedures that must be followed when determining parole cases.

The Parole Board carries out risk assessments on prisoners serving certain types of sentences to determine whether they can be safely released into the community. The Parole Board decides:

- whether to release prisoners serving an indeterminate and some fixed sentences, approving licence conditions when it does so; and
- whether to re-release prisoners serving indeterminate and some determinate sentences who have been recalled to prison for alleged or actual re-offending, or breach of licence during the probation supervision period.

The Parole Board also makes recommendations to the Secretary of State for Justice for the transfer of indeterminate sentence prisoners from a closed (high or medium security) prison to an open (low security) prison.

The legal test for release is that the Parole Board is satisfied that it is no longer necessary for the protection of the public that the person should be confined.

The Parole Board's website explains its work and how it makes its decisions.

There have been recent reforms to the Parole Board, partly in response to the case of John Warboys (now known as John Radford).[33] Rule 25 of the Parole Board Rules was amended in 2018 to allow summaries of Parole Board decisions to be provided to victims and other interested parties. Previously Rule 25 had prohibited any release of information about parole proceedings.

A reconsideration mechanism was introduced in 2019 to allow the prisoner or the Secretary of State to apply, within 21 days of a decision, for the Parole Board to reconsider certain decisions. Victims can ask the Secretary of State to apply to the Parole Board to reconsider a case on their behalf. The criteria for reconsideration are based on judicial review grounds and the decision has to be legally flawed in some way.

In October 2020 the Government announced a "Root-and-Branch review of the parole system in England and Wales".[34] Its terms of reference state that it will focus on 4 areas:

1. An evaluation of the parole reforms to date

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32 Ministry of Justice, Offender management statistics quarterly: October to December 2019, Table A3.3

33 For background information see the Library briefing, The Parole System of England and Wales, September 2019

34 Gov.uk, press release, Government launches Root-and-Branch review of the parole system, 20 October 2020

2. The constitution and status of the Parole Board
3. Improving public understanding and confidence
4. Openness and transparency.

As part of the review a public consultation was published inviting views on whether victims should be allowed to observe parole hearings and whether the media and wider public could have greater access to hearings. In its response to consultation the Government said it was

> …persuaded that the current blanket ban in legislation on public hearings is unnecessary, and that victims, offenders, the media or the wider public should have the right to make a request for a public hearing, and to have that request considered.[35]

Also published at the same time was The Parole Board for England and Wales: Tailored Review. The Government said the "Root and Branch" review will aim to report by summer 2021 and the outcomes will be published.

1.6 Probation

A new model for probation services in England and Wales is due to be in place by June 2021. This follows earlier heavily criticised reforms of the probation service which took place from 2014.[36] A consultation, Strengthening probation, building confidence was held in 2018 and the Government published a response in 2019.

Under the new model all sentence management, for low, medium and high risk offenders will be carried out by the National Probation Service. The probation service in Wales was unified in December 2019.

In the draft Target Operating Model published in March 2020 it had been proposed that the delivery of unpaid work and behavioural change programmes would be contracted out to 'Probation Delivery Partners'. This element of the model was changed in June 2020 so that these services will instead be delivered by the National Probation Service.[37]

In February 2021 the Ministry of Justice published a Target Operating Model for the probation services to be in place from June 2021 together with revised draft National Standards.

There will be 11 new probation areas in England. In England, each area will be overseen by a regional director who will be responsible for the overall delivery and commissioning of probation services. A "Dynamic Framework" will allow for charities and private sector organisations to compete to run services such as education, employment and accommodation.

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35 Ministry of Justice, Root and branch review of the parole system: Government response to the public consultation on making some parole hearings open to victims of crime and the wider public,

36 For background see the Library briefing Contracting out of probation services, 21 May 2019

37 HMPPS, Update to the Draft Target Operating Model for Probation Services in England and Wales Probation Reform Programme, June 2020

2. Part 7, Chapter 1: Custodial sentences

2.1 Minimum sentences for particular offences

The law currently provides for minimum custodial sentences in certain circumstances, including for the following offences for repeat offenders:

- A "third strike" importation of class A drug (7 year minimum)[38]
- A "third strike" domestic burglary (3 year minimum)[39]
- A "second strike" possession of a knife or offensive weapon (6 months minimum)[40]

Also, for offenders convicted of threatening a person with a blade or offensive weapon in public (6 months minimum).[41]

The court will make a reduction for a guilty plea, although that reduction cannot take the sentence length to below 80% of the minimum.[42]

Courts are not required to impose these minimum sentences where the court is of the opinion that there are **particular** circumstances which relate to the offences or offender and would make it unjust to do so in the circumstances.

The White Paper stated that "concerns have been raised that offenders are receiving sentences for repeat offences which carry a minimum custodial sentence that fail to provide an appropriate level of punishment and deterrence."[43] The White Paper said the Government would change the criteria for passing a sentence below the minimum term for repeat offences.

Commenting on the White Paper, the Sentencing Academy[44] said that any such amendment would be unnecessary and inappropriate. It considers that mandatory sentences in any form are unnecessary because they undermine the key principle of proportionality and individualisation.[45]

Clause 100 and Schedule 11 of the Bill would change the law so that for these offences a court is required to impose a custodial sentence of at least the statutory minimum term unless there are **exceptional** circumstances that relate to any of the offences or to the offender

38 Section 313 of the Sentencing Act 2020
39 Section 314 of the Sentencing Act 2020
40 Section 315 of the Sentencing Act 2020
41 Section 312 of the Sentencing Act 2020
42 For details of reductions in sentence for a guilty plea see: Sentencing Council, Reduction in sentence for a guilty plea: Definitive guideline, March 2017
43 Ministry of Justice A Smarter Approach to Sentencing, September 2020, para 82
44 A research and engagement charitable incorporated organisation dedicated to developing expert and public understanding of sentencing in England and Wales
45 Sentencing Academy, Response to publication of the White Paper: A Smarter Approach to Sentencing, September 2020

which would make it unjust to do so. Judges would therefore still have a discretion to depart from the minimum.

This change would apply to offences committed on or after the commencement of the provisions. The court would continue to apply a reduction for an early guilty plea, not below 80% of the minimum.

This change would also apply to sentences received by 16 and 17 year olds for the following offences, both of which have a minimum sentence of a 4 month detention and training order (DTO):

- A "second strike" possession of a knife or offensive weapon
- threatening a person with a blade or offensive weapon in public.

The Explanatory Notes state that these changes will align the criteria used for these offences with that used in relation to certain offences involving firearms where the court must impose a minimum sentence unless the court is of the opinion that there are "exceptional" circumstances which relate to the offence or to the offender which would justify not doing so.[46]

Statistics

The only sentencing data available on knife offences is for the offence of 'possession of a knife or offensive weapon'.[47] In 2019:

- 20% of people sentenced for this offence (around 2,300 people) had 1 prior conviction for the same offence,
- 7% (around 800 people) had 2 prior convictions for the same offence, and
- 6% (around 700 people) had 3 or more prior convictions for the same offence.[48]

In 2019, over 50% of people convicted of burglary had 3 or more previous cautions or convictions for the same offence. Of the 420 of these individuals receiving a custodial sentence, 58% received a sentence of 3 years or more (or 28.8 months in the case of a guilty plea). Around 19% received a sentence of one year or less.[49]

There are no equivalent statistics available for drug trafficking offences.

2.2 Life sentences

Whole life order for premediated murder of a child

The Bill, as proposed in the White Paper, would provide for the "starting point" when setting the term of a life sentence for the premeditated murder of a child to be a whole life order. The Government, in the White Paper set out its reason for this change:

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46 Explanatory Notes, para 98

47 Offensive weapon excludes firearm and includes any article made or adapted for use for causing injury to a person, or intended by the person having it with him for such. Examples include: a swordstick, a hollow walking-stick or cane containing a blade.

48 Ministry of Justice, Criminal justice statistics quarterly: October to December 2019, Offending histories table A6.5

49 Ministry of Justice, Criminal justice statistics quarterly: October to December 2019, Offending histories table A6.4

> We believe that it is only right that such offenders who commit the most serious offence against those who are the most vulnerable in society should potentially receive the harshest possible punishment.[50]

A whole life order means that the offender will spend the rest of their life in prison with no possibility of release by the Parole Board. The current circumstances where a whole life order is the starting point are:

- the murder of two or more persons where each murder involved a substantial degree of premeditation, the abduction of the victim prior to the killing, or sexual or sadistic conduct;
- the murder of a child following abduction or involving sexual or sadistic motivation;
- the murder of a police officer or prison officer in the course of his or her duty;
- murder committed for the purpose of advancing a political, religious, racial or ideological cause; and
- murder by an offender who has previously been convicted of murder.[51]

Clause 101 would add the murder of a child if it involves a substantial degree of premeditation or planning, to the list of circumstances in which a whole life order is the starting point.

As with the other situations in which a whole life starting point is set out in legislation, judges would have a discretion to depart from the starting point and instead impose a minimum term where they consider this to be just.

There are no statistics on convictions for homicide by the age of the victim. Between 2009/10 and 2018/19, there were 544 recorded crimes of homicide in which the victim was aged under 16.[52] Some of these recorded crimes might have been committed in previous years.

Whole life order for young adult offenders in exceptional circumstances

Clause 102, as proposed in the White Paper, would allow judges to impose a whole life order on offenders aged 18 to 20 when the offence was committed in exceptional circumstances. Currently a whole life order can only be imposed on offenders aged 21 or over when they committed the offence. The court would be able to impose a whole life order only if it considered that the seriousness of the offence (or combination of offences) is exceptionally high even by the standard of offences that would normally attract a whole life order for an offender aged 21 and over.

Starting points for murder committed when a child

A person who commits murder as a child is sentenced to Detention at Her Majesty's Pleasure (DHMP) rather than life imprisonment as an adult

50 Ministry of Justice A Smarter Approach to Sentencing, September 2020, para 67
51 Section 322 and Schedule 21 of the Sentencing Act 2020
52 ONS, Homicide in England and Wales, Appendix Table 4

would be. As with a life sentence, a minimum term or tariff is set by the judge. Currently there is only one tariff starting point for offenders convicted of murder committed when under the age of 18, a starting point of 12 years.

The White Paper explained that the Government believes the "significant gap" between the starting points for children and young adults is unfair to the families of victims. The Government stated that, unlike the adult system, which has a range of starting points, the single 12 year starting point for children does not account for the seriousness of the crime, or reflect the different developmental stages that children go through between the ages of 10 and 17. In the White Paper the Government proposed two age groups, ages 10-14 and ages 15 and 17.[53]

Clause 103 would replace the 12-year starting point with a series of different starting points. There would be three levels based on the age of the child and three levels based on the seriousness of the offence linked to the starting points for adult offenders.

Age of offender when offence committed	**Starting point for an offender aged 18 would be 30 years**	**Starting point for an offender aged 18 would be 25 years**	**Starting point for an offender aged 18 would be 15 years**
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years`
14 or under	15 years	13 years	8 years

Between 2010 and 2019, 161 under-18-year-olds were sentenced for murder. No information is available as to how long the tariffs were in these cases or how long these individuals typically serve in prison before release, if they are released. For all individuals, of all ages, sentenced to mandatory life imprisonment the average time served in custody among those who are released is around 17 years.[54]

Detention at Her Majesty's Pleasure - Review of minimum term

A person sentenced to DHMP can apply to the High Court for a review of the length of their minimum term at the half way point. The review will determine whether the minimum term should be reduced because of exceptional progress made in custody. If the application is unsuccessful the person can currently apply every two years until the tariff expiry date.

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53 Ministry of Justice A Smarter Approach to Sentencing, September 2020, para 324

54 Ministry of Justice, Offender management statistics quarterly: October to December 2019, Table A3.3. This is the average (mean) across those released in the years 2015 to 2019.

The White Paper explains that the existence of reviews is "an important part of ensuring that the tariff remains appropriate as children change and develop as they mature". However, the Government states, that continuing reviews can be extremely distressing for the families of victims. The White Paper therefore proposed to reduce the number of reviews an offender is entitled to after they turn 18.

Clause 104 would establish the minimum term review process in legislation. It would provide that an eligible prisoner, being a prisoner sentenced to DHMP when under 18, could apply for a review once they have served half of the minimum term of their sentence.

Those who were already age 18 or over at sentencing would not no longer be eligible for any minimum term review. The Government says this is because "their age and maturity will have been taken into account at their sentencing".[55]

An eligible prisoner could apply for a further review once two years have passed since the previous application was determined. However, they could only apply for that further review if they are under the age of 18 when they make the application.

The application for review would be made to the Secretary of State who would consider the application and, unless they decide the application is frivolous or vexatious, would refer it to the High Court.

Life sentence not fixed by law, setting the minimum term

The Bill, as proposed in the White Paper, would change the way the minimum term of a life sentence is calculated where it is imposed for an offence other than murder.

A life sentence can be imposed for an offence where the maximum sentence is life imprisonment, such as rape or robbery. The judge will set a minimum term that the offender must serve in prison before being eligible to apply to the Parole Board for release.

Currently the minimum term that must be spent in prison is usually calculated as half of a notional determinate sentence length the offender would have received if a life sentence had not been imposed. This reflects the fact that prisoners serving a standard determinate sentence have generally been release automatically at the half way point of their sentence.

Clause 105 would require courts to base the minimum term on a starting point of at least two thirds of a notional determinate sentence length. The Government, in the White Paper, said that this change would align the eligibility for release of offenders serving a discretionary life sentence with the release arrangements of offenders who, following recent changes, now have to serve two thirds of their sentence before being eligible for release.

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55 Police, Crime, Sentencing and Courts Bill 2021: youth custodial sentences factsheet, 10 March 2021

Also, the Counter-Terrorism and Sentencing Bill, would require that the most serious terrorist offenders given a determinate sentence serve the whole of their custodial term before they can be released. Clause 105 would therefore require, in such cases for the starting point for the minimum term to be the whole of the custodial term for that notional determinate sentence.

The changes would apply to any sentence that is imposed after the provision comes into force, including in respect of offences committed before the provision comes into force.[56]

2.3 Release on licence

Changes to release – certain violent and sexual offenders

The Government has recently made changes to the law on the release of prisoners sentenced for sexual or violent offences. The Release of Prisoners (Alteration of relevant proportion of Sentence) Order 2020,[57] moved the automatic release point for offenders who have committed a specified violent or sexual offence, for which the maximum penalty is life imprisonment, and who receive a standard determinate sentence of **seven years or more.** For these offenders the release point was moved from the halfway point to the two thirds point of their sentence.

As proposed in the White Paper, **Clause 106** would change the release point for offenders sentenced to a standard determinate sentence of **between four and seven years** for any of the sexual offences already specified and to some (but not all) of the specified violent offences.[58] The automatic release point would be moved from the halfway to the two thirds point of their sentence.

This change would apply to offenders sentenced on or after the day on which this clause comes into force.

Clause 106 would also replace The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, putting the provisions of the order into primary legislation.

The Sentencing Academy criticised the earlier change made by the 2020 order and this proposal in the White Paper, stating that "proportionate sentencing is not well-served by a system in which identical sentence lengths have a significantly diverging impact in practice".[59]

Changes to release – certain offenders on SOPC

A Sentence for Offenders of Particular Concern (SOPC) can be imposed on offenders who have been convicted of certain terrorist offences and one of two child sex offences.[60] Currently offenders who are serving a

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56 Explanatory Notes, para 778
57 Effective from 1 April 2020
58 Manslaughter, soliciting murder, attempted murder and wounding/causing grievous bodily harm with intent
59 Sentencing Academy, Response to publication of the White Paper: A Smarter Approach to Sentencing, September 2020
60 Rape or sexual assault by penetration of a child under 13

SOPC for a child sex offence can apply to the Parole Board for release at the half way point of their sentence.

In 2020 the law was changed so that those serving a SOPC for a terrorism offence could not apply to the Parole Board for release until they had served two thirds of the sentence.[61] Prior to this change these offenders could apply to the Parole Board at the halfway point of their sentence.

Clause 107, as proposed in the White Paper, would change the law so that offenders serving an SOPC for a child sex offence would also be required to serve two thirds of their sentence before they can apply to the Parole Board for release. This change would apply to offenders serving a SOPC imposed after commencement of the provision.

The Government says this change is being made:

> … in order to achieve consistency between all offenders serving the sentence itself, regardless of the offence committed, and to achieve consistency with the release arrangements that are in place for other serious offenders.

Power to refer high risk offenders to Parole Board

The White Paper also proposed a new power to enable the Secretary of State for Justice to refer to the Parole Board any prisoner serving a standard determinate sentence, who would normally be released automatically at a certain point in their sentence, but who is deemed to present a terrorist or other significant danger to the public. The Parole Board would then assess whether it is safe to release the offender or whether they should serve their full sentence in prison.

This new power is intended to address situations where:

- An offender is serving a sentence with automatic early release for a non-terrorism related offence but is assessed to present a terrorist threat; or
- An offender did not meet the threshold for the imposition of a sentence with a Parole Board decision on release, but who presents a significant danger to the public.

Clause 108 would implement these proposals, inserting a new clause into the Criminal Justice Act 2003. The Secretary of State would be able to exercise the power if they believed on reasonable grounds that the release of the prisoner would pose a significant risk of serious harm to the public by committing murder or certain 'specified' offences (mainly of a violent, sexual or terrorist nature). The new clause would provide for a notification procedure, requiring the Secretary of State to give notice to the prisoner of his/her intention to refer to the Parole Board and explaining the effect and reasons for the referral and the prisoner's right to make representations. The notice could be revoked by the Secretary of State if he or she no longer believes the offender would pose a significant risk of harm to the public if released.

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[61] Terrorist Offenders (Restriction of Early Release) Act 2000

A prisoner would be able to apply to the High Court if their automatic release date is passed and their release has been delayed for longer than is reasonably necessary for the Secretary of State to carry out the referral to the Board. The High Court must revoke the notice if it finds there has been unreasonable delay. The Secretary of State would be able to cancel a referral to the Parole Board, and must do so if they no longer consider the prisoner to pose a significant risk to the public.

The Board must not direct release unless it is no longer necessary for the protection of the public that the prisoner should be confined. The new clause would provide that where the Parole Board does not release a prisoner following a referral from the Secretary of State, the Secretary of State must then refer the prisoner to the Parole Board again within a year and then annually.

The Government says that this new power builds on the change made by the Terrorist Offenders (Restriction of Early Release) Act 2000, to provide that those convicted of terrorist or terrorist-connected offences serving standard determinate sentences could not be released before the end of their sentence without the approval of the Parole Board. This new power, it says, is intended to ensure that prisoners who become dangerous or are identified as dangerous in prison following conviction and sentencing are not subject to automatic release before the end of their sentence. The Explanatory Notes confirm that there will be no provision for holding an offender in custody beyond the end of the sentence handed down by the court.[62]

The Sentencing Academy has said that "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". The Academy also notes that the offenders concerned will be released at the end of their sentence with no licence conditions or supervision.[63]

General commentary on changes to release

Overall, on the proposals in the White Paper to further reform release arrangements, the Sentencing Academy concludes that it is a case of "sentence inflation by the backdoor" and will result in "the most complex set of release arrangements ever seen in this jurisdiction". The Academy questions whether "these labyrinthine release arrangements will further public confidence".[64]

Andrew Ashworth argues that the changes proposed to the release point for certain offenders may be seen as sentence increases, since they lengthen the custodial element in these sentences and asks whether these will protect the public more than supervised release on licence.[65]

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62 Explanatory Notes, para 116
63 Sentencing Academy, Response to publication of the White Paper: A Smarter Approach to Sentencing, September 2020
64 Sentencing Academy, Response to publication of the White Paper: A Smarter Approach to Sentencing, September 2020
65 Centre for Crime and Justice Studies, Smarter Sentencing?, 5 October 2020

Power to make provision for reconsideration and setting aside of Parole Board decisions

Clause 109 would expand the rules the Secretary of State may make concerning proceedings of the Parole Board.

Clause 109 would also allow the Secretary of State to make rules requiring or permitting the Parole Board to make provisional decisions. The Explanatory Notes set out the background:

> The power for the Board to make provisional decisions currently only exists in secondary legislation. The lawfulness of that approach was tested in the High Court and while the Government successfully defended the claim, Clause 109 will now put this question beyond doubt by making specific provision for the Parole Board to be able to make provisional decisions and reconsider those decisions.[66]

Clause 109 would allow the Secretary of State to make rules conferring a power on the Parole Board to set aside its decisions and directions in certain circumstances. The Explanatory Notes set out the current position that this clause is intended to remedy:

> The courts have recently found that there is no power in the current legal framework for the Parole Board to re-open a case where they have made a decision, other than under the terms of the reconsideration mechanism which the Government introduced in the Parole Board Rules 2019. However, the scope of that mechanism was deliberately restrictive to ensure it was within the power set out in primary legislation to make rules. This means that there is the potential for the Secretary of State to be required by legislation to release a prisoner at the direction of the Parole Board, even where the parole decision may be based on a clear mistake in fact or law. In that situation the only recourse available is to apply to the High Court for the decision to be set aside, which is a costly and time-consuming process.[67]

A new provision, inserted by clause 109, would allow for rules to be made for the Parole Board to set aside a decision or direction where:

- A decision is made either to release or not release and the Parole Board determines that its decision or direction resulted from a clear mistake of law or fact.
- A decision is made to release, and the Parole Board determines it would not have made the direction if either:
  - information that was not available to the Board when the direction was given had been so available; or
  - a change in circumstances relating to the prisoner that occurred after the direction was given had occurred before it was given.

Clause 109 would provide that the decision to set aside a direction to release could not apply where the prisoner has already been released from prison in accordance with that direction.

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66 Explanatory Notes, para 122
67 Explanatory Notes, para 120

Responsibility for setting licence conditions for fixed term prisoners

The Government states, in the Explanatory Notes, that:

> The current system for setting and varying licence conditions for fixed-term prisoners is complex and confusing for practitioners to apply correctly and the statutory provisions on responsibility for setting licence conditions are inconsistent across different determinate sentence types. This creates an environment where confusion and administrative mistakes can occur.[68]

The amendments that would be made by **clause 110** are intended to create a "clear, consistent and logical split in responsibility for licence conditions for determinate sentence prisoners".

The Governments factsheet explains:

> Changes to the provisions for licence conditions will clarify the Parole Board is only responsible for setting or varying licence conditions where it directs initial release or, for some prisoners, release after recall and not where release occurs automatically or at the discretion of the Secretary of State. This will be clearer and more straightforward to operate than the current system where responsibility for licence conditions is tied to the sentence rather than which body affects the release.[69]

Where a prisoner is released executively or automatically at the end of their custodial term by the Secretary of State, with no Parole Board direction, responsibility for the licence will fall to the prison service. Setting and varying licence conditions for indeterminate sentence prisoners will remain entirely the remit of the Parole Board.

Repeal of uncommenced provisions for establishment of recall adjudicators

The Criminal Justice and Courts Act 2015 introduced provisions which allowed for the creation of recall adjudicators.[70] The provisions were added as Government amendments in the Lords at report stage of the Bill that became the 2015 Act. These provisions have not been commenced, having been found to be unnecessary, and **clause 111** would repeal them.

Release at direction of Parole Board after recall – fixed term prisoners

Clause 112 would make changes to the law on the recall and re-release of recalled prisoners serving determinate (fixed term) sentences.

Offenders who are released from prison on licence to continue serving their sentence under supervision in the community can be recalled to prison if they fail to comply with the conditions in their licence. There are two types of recall for prisoners serving a determinate sentence who breach their licence conditions. The first is a "fixed term recall" (for 14 or 28 days) after which the offender is released automatically to

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68 Explanatory Notes, Para 123

69 Police, Crime, Sentencing and Courts Bill 2021: parole and licence conditions factsheet, 10 March 2021

70 Criminal Justice and Courts Act 2015 Explanatory Notes, Section 8, Recall adjudicators

continue serving the sentence on licence. The second type of recall is a "standard recall", which means the offender is liable to be held in prison until the end of the sentence unless the Parole Board decides to release them earlier. An offender subject to a standard recall is referred to the Parole Board automatically after 28 days. If the Parole Board does not release them, their case will be reviewed annually until the end of the sentence.

Clause 112 would set out in legislation that the Parole Board will apply the same 'public protection' release test as it applies in all other parole cases when considering the re-release of recalled fixed-term prisoners that is, that the Parole Board must be satisfied that the prisoner's detention is no longer necessary for the protection of the public. The Parole Board already applies this test in these cases,[71] but this is not currently specified in the law.

Clause 112 would also make other minor changes. It would

- remove the current provision which allows the Parole Board to direct release of a fixed-term prisoner on a specified future date
- provide that, in a case where a recalled determinate prisoner has less than 13 months remaining on their sentence, there is no requirement on the Secretary of State to make the further annual referral to the Parole Board
- remove the requirement for a recall case to be referred to the Parole Board to consider re-release even where another sentence is being served from which release is not yet possible.

Power to change test for release of fixed term prisoners following recall

Clause 113 would provide a power for the Secretary of State to amend, by order, subject to the affirmative procedure, the test for recalled fixed-term prisoners. This would replicate the power the Secretary of State has to amend the release test in other parole cases (excluding life sentences).

Clauses 113 would also make similar provisions for a power to amend the test that the Secretary of State applies when deciding whether a 'fixed term recall' may be appropriate and when deciding whether to re-release a recalled prisoner,

Release at direction of Parole Board - timing

Clause 114 would amend the law so that the Parole Board would no longer be able to direct 'immediate' release. Instead, the Secretary of State would be required to give effect to the direction as soon as it is reasonably practicable in all the circumstances. The Government sets out its reason for this change in the Explanatory Notes:

> The reason for these changes is that in practice, decisions described as requiring 'immediate release' are unhelpful and unnecessary. They create false expectations because the release of a prisoner can never take place immediately following a direction

[71] The Parole Board for England and Wales, Guidance to members on LASPO Act 2012 – test for release, Revised Guidance – December 2013

by the Parole Board due to the need to make necessary arrangements for the licence conditions the Parole Board stipulates the prisoner must be subject to on release (for example, a requirement to reside in an approved premises).[72]

2.4 Driving disqualification extension

When a court imposes a driving disqualification with a custodial sentence, it must also impose an appropriate extension period to ensure that part of that disqualification is not subsumed by time spent in custody.

England and Wales

Clause 115 would make changes to the law so that the length of the extension period required, when a driver disqualification is imposed with a custodial sentence, takes account of the new release points for various offenders resulting from recent and forthcoming legislative changes.[73]

The Explanatory Notes state that these changes are "necessary to ensure those in receipt of a driving disqualification and a custodial sentence will not have a significant part of that disqualification subsumed by time spent in custody.[74]

Scotland

Clause 117 and Clause 118 would amend the equivalent driving disqualification provisions as they relate to Scotland. These provisions would extend to England and Wales and Scotland but apply to Scotland only.

2.5 Minor amendments

Clauses 119-123 would make amendments concerning:

- Calculation of the period before release or Parole Board referral where multiple sentence are being served
- Application of release provisions to repatriated prisoners
- Sentences and offences in respect of which polygraph conditions may be imposed[75]
- Weapons-related offences
- Application of provision about minimum terms to service offences

For details see the Explanatory Notes.

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72 Explanatory Notes, para 134

73 The Terrorist Offenders (Restriction of Early Release) Act 2020, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 and changes that would be made by the Counter-Terrorism and Sentencing Bill

74 Explanatory Notes, para 137

75 See also: Police, Crime, Sentencing and Courts Bill 2021: parole and licence conditions factsheet, 10 March 2021

3. Part 7, Chapter 2: Community Sentences

3.1 Supervision by a Responsible Officer

Probation staff supervise offenders released from custody and those sentenced to a community sentence or suspended sentence order. Not all community sentence orders or suspended sentence orders provide for a general power of supervision for the length of the order. Unless these orders contain a Rehabilitation Activity Requirement (RAR) legislation currently only provides for supervision in connection with the requirements imposed in the order.

The White Paper explains that in practice this means that a probation practitioner who may wish to supervise an offender who has completed all of their requirements, but whose order has not expired, may not have the power under current legislation to do so unless the order contains a RAR. The White Paper sets out that supervision unconnected to requirements might be warranted where the Responsible Officer (the probation practitioner) feels supervision is necessary to address issues that arise post-sentencing and are not strictly related to the requirements or where the offender's level of risk to the public has increased.

The Explanatory Notes state that **Clause 124** would rectify the current "lack of clarity in legislation around a Responsible Officer's ability to instruct an offender, who is subject to a community order or a suspended sentence order, to attend supervision appointments" by clarifying the scope of supervision powers available to Responsible Officers.[76]

Clause 124 would therefore give Responsible Officers the power to compel offenders serving a community or suspended sentence order to attend supervision appointments for the purposes of ensuring the offender complies with rehabilitative requirements or where public protection concerns exist. Offenders subject to these orders would be subject to a duty to comply with any instruction given by a Responsible Officer in accordance with this new power. The offender would be liable to breach proceedings if they do not comply.

The new power would apply only to community orders or suspended sentence orders made on after the clause comes into force. It would apply until the end date specified on the community order, or until the end date of the supervision period on the suspended sentence order has been reached.

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[76] Explanatory Notes, para 144

3.2 Increase in daily curfew hours and curfew requirement period

Currently a curfew can be included as a requirement in any community order or suspended sentence order and can last for up to 12 months. The White Paper stated that the Government would legislate to increase the maximum period for which electronic monitoring of curfews can be used from one to two years. Curfews can currently be imposed for up to 16 hours each day.

Clause 125 would increase this maximum daily curfew to 20 hours. However, the maximum number of hours which may be imposed in any week will remain the same at 112 hours. The is intended to give sentencers flexibility, for example to impose longer curfews at weekends.

Clause 125 would also provide for the maximum period of a curfew requirement to increase from 12 months to two years. The Government states in the Explanatory Notes that this change "will increase the punitive weight of a curfew requirement, but also has the potential to support rehabilitation by providing a longer period during which some of the positive effects of curfew could be established".[77]

These changes to maximum daily hours and maximum period would only apply to those convicted on or after this clause comes into effect.

Clause 125(6) would give the Secretary of State the power to amend limits for certain community requirements, such as the curfew requirements, by regulations.

3.3 Responsible officer power to vary curfew requirements

Currently, any changes to a curfew, however small, must be approved by the court. **Clause 126** would allow the Responsible Officer (the probation practitioner) to vary curfew requirements in two respects:

- a shift in start and/or end times of the curfew periods within a 24-hour period; and
- a change to the residence of the offender as set out in the order.

The Explanatory Notes give the Government's reasons for this change:

> This legislative change seeks to reduce the burden on the courts, freeing up time for other matters and saving probation resource by reducing the volumes of papers prepared for court and court visits. There will also be advantages for offenders, allowing for variations where typically there are alterations to work hours or location that make compliance impossible, or where an offender's curfew residence address needs to be changed in a timely way.[78]

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77 Explanatory Notes, para 150
78 Explanatory Notes, para 153

3.4 Removal of attendance centre requirements

Clause 127 would removal the Attendance Centre Requirement from the list of requirements that can be imposed as part of a community order or suspended sentence order. The Government says in the Explanatory Notes this is because attendance centre requirements are rarely used. **Schedule 12** makes consequential amendments.

Based on data from 2010 to 2019:

- Around 1,000 people per year have an attendance centre requirement as part of a community order (around 0.6% of those sentenced to community order).
- Around 250 people per year have an attendance centre requirement as part of a suspended sentence order (0.3% of those who are on suspended sentence orders).[79]

3.5 Problem solving courts

Background

The Government has explained what it means by a problem solving court (PSC):

> PSCs are an active and dynamic path to justice providing robust rehabilitation and support to offenders who can be both prolific and vulnerable. It places judges and magistrates at the centre of sentencing, rehabilitation and compliance, alongside a multi-disciplinary team ranging from probation and health professionals, to police and broader service providers.
>
> The overarching principle is that there will be consistent judicial oversight, reviews, rewards with incentives and sanctions that focus on supporting offenders to address the problems that drive their offending behaviour.[80]

In June 2014, the Justice Committee published *Crime reduction policies: a co-ordinated approach?*, in which it discussed the development of problem-solving courts in England and Wales:

> The extension of community courts was a priority for the previous Government, which had established pilots of specialist drug courts, mental health courts and domestic violence courts, and planned to extend problem-solving approaches to all magistrates' courts. We saw examples of these in operation at the Star Court in Houston, Texas and Stockport Magistrates' Court, Greater Manchester […].
>
> The Centre for Justice Innovation and Criminal Justice Alliance pointed to a growing evidence base about the value of problem-solving courts, particularly from the US. This does not appear to have amounted to anything in England and Wales, despite the success of some of the pilots and the support of magistrates.

In 2016 the Secretary of State for Justice and the Lord Chief Justice established a joint working group to examine models of problem-solving

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79 Ministry of Justice, Offender management statistics quarterly: October to December 2019, Probation table A4.8

80 Police, Crime, Sentencing and Courts Bill 2021: rehabilitation factsheet, 10 March 2021

courts and advise on the feasibility of possible pilot models to be taken forward in England and Wales in 2016 to 2017.

The Ministry of Justice stated in the group's terms of reference that its objectives for problem-solving courts were to:

- achieve offender behaviour change through a model of judicially supervised rehabilitative programmes;
- encourage innovation in the use of judicial disposals and improve compliance with the orders of the court;
- deliver a swifter and more certain response to crime and to reduce reoffending.[81]

The White Paper gives the conclusions of the 2016 working group:

> A new model that more closely resembles international best practice by incorporating a core set of elements should be tested here, including:
>
> - entry via a guilty plea (with the exception of domestic abuse cases);
> - regular reviews of progress;
> - oversight throughout by a single judge; and
> - graduated sanctions and incentives, including the imposition of short custodial stays for non-compliance before continuing on the programme, and judicial power over breach decisions.

The Working Group also concluded that the court should have the ability to use frequent and random drug testing and testing for alcohol misuse and each court should have a court co-ordinator and accessible multi-disciplinary service provision.

In the White Paper the Government said it intended to pilot enhanced problem-solving court models in up to five courts, targeted at repeat offenders who would otherwise have been sent to custody.

The White Paper referred to the success of the problem-solving approach demonstrated in in the Family Drug and Alcohol Court (FDAC) for parents in family court proceedings. It also referred to models developed locally, giving the example of Greater Manchester, which runs a PSC-type approach for women as part of a local Whole System Approach to vulnerable women in the criminal justice system.

It also referred to an evidence review published by the Centre for Justice Innovation in 2016.[82]

The White Paper recognises that there have been trial of aspect of problem solving approach in England and Wales in the past but states that "the full gamut of traditional problem-solving court components" has never been fully established here and "Where some elements have been integrated into previous initiatives, evaluations were either limited in scope or did not take place".

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81 Gov.uk, Problem-solving court working group: terms of reference, 11 February 2016
82 Centre for Justice Innovation, Problem-solving courts: an evidence review, 2016

The White Paper stated that there would be three areas of focus for the pilots:

- substance misuse, as this was the traditional focus of problem solving courts;
- female offenders because of the high proportion of female offenders in receipt of short prison sentences and the promising outcomes of the Manchester women's problem-solving court model; and
- domestic violence perpetrators, where the Government says certain adaptations to the model are likely to be required.

The Bill takes forward the elements of these proposals that require primary legislation:

- giving the court a power to regularly review community and suspended sentence orders and to initiate breach proceedings at a review hearing;
- expand the power to test for illicit substances outside the provisions of Drug Rehabilitation Requirements; and
- enable the court to impose short custodial penalties for non-compliance.

The Bill would enable the new measures to be implemented in certain courts, for offenders who meet the particular eligibility criteria. The Government has said the policy intention is to conduct a limited initial pilot, but that the legislative changes would allow for the potential to enable the pilot to be rolled out to further courts in the future, and also allow for the pilot measures to be made permanent after the end of the pilot period.[83] The existing provisions would continue to operate in other courts and for offenders who are non-eligible for these measures.

Special procedure relating to review and breach

Clause 128 introduces **Schedule 13** which would make provision for courts to have powers to review community and suspended sentence orders and to commit an offender to custody for breach of a community or suspended sentence order. This clause and schedule form the legislative basis of the problem-solving court approach.

Schedule 13 would allow for a community order or suspended sentence order within the pilot to be subject to periodic review and make provision for what is to happen at a review hearing:

- after considering the progress report the court would be able to amend the community order requirements or any provision of the order relating to those requirements;
- the court would be prohibited from making certain amendments of the community order requirements unless the offender expresses willingness to comply; and
- the court would be able to amend the community order to provide that subsequent reviews are to be held on the papers.

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83 Explanatory Notes, para 161

Where the court forms the opinion that the offender is making satisfactory progress before a review hearing is held, it would be able to dispense with a review hearing. It would also be able to amend the community order to provide that subsequent reviews can be held on the papers, and without a review hearing.

Schedule 13 would create an additional power for magistrates' courts dealing with a community order or suspended sentence order under the pilot, being the power to commit the offender to prison for a period not exceeding 28 days where there has been a breach of a community requirement of the order.

Drug testing requirement

Clause 129 and **Schedule 14** would enable the courts involved, to impose drug testing requirements as part of community and suspended sentence orders.

The court would only be able to impose drug testing requirements where the following two conditions are met:

- substance misuse must have contributed to the offence to which the relevant order related or is likely to contribute towards further offending behaviour; and
- the Secretary of State must have notified the court that arrangements for implement drug testing requirements are available in the offender's home local justice area.

3.6 Duty to consult on unpaid work requirements

Clause 130 would create a duty on the organisation responsible for the management and delivery of unpaid work requirements, the probation service, to consult with key stakeholders on the delivery of unpaid work carried out by offenders as part of a community sentence. The provision inserted by clause 130 would require the probation provider to consult annually with prescribed persons to be defined in regulations by the Secretary of State.

The Government points to a similar duty in place in Scotland and expresses hope creating one in England and Wales will improve links between probation officials and communities.[84]

Based on data from 2010 to 2019:

- Around 52,000 people per year have an unpaid work requirement as part of a community order (around 32% of those sentenced to community order).
- Around 21,000 people per year have an unpaid work requirement as part of a suspended sentence order (28% of those who are on suspended sentence orders).[85]

84 Explanatory Notes, para 163-4
85 Ministry of Justice, Offender management statistics quarterly: October to December 2019, Probation table A4.8

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