The Crime (Sentences) Bill [Bill 3 of 1996-97]

Research Paper 96/99

1 November 1996

The Crime (Sentences) Bill is designed to implement a number of proposals set out in the White Paper *Protecting the Public - The Government's Strategy on Crime in England and Wales* [Cm 3190] which was published in March 1996. This paper sets out the background to the proposals and summarises the main provisions of the Bill. The Bill is principally concerned with England and Wales. Provisions concerning the treatment of mentally disordered offenders in England and Wales and Scotland are dealt with in Library Research Paper 96/100 on the *Crime (Sentences) Bill and the Crime and Punishment (Scotland) Bill: Provisions for mentally disordered offenders.* Statistical information in this Paper has been provided by Rob Clements of the Library's Social and General Statistics Section.

Mary Baber
Home Affairs Section

House of Commons Library

CONTENTS

I Sentencing

A. Current Sentencing Guidance

Under current sentencing arrangements the sentence imposed on an offender in a particular case is entirely a matter for the judge, although he or she must keep within such maximum sentences as may be set out in the statute for the particular offence concerned. The modern structure of statutory maximum penalties of imprisonment originated in the consolidating statutes of 1861 including the *Offences Against the Person Act 1861*. The penalties chosen at that time largely followed the periods previously chosen as fixed sentences for transportation and were set too high to influence the daily practice of the courts. Maximum penalties are seen as having been designed to cater for the worst possible offence. They have had little effect on the question of what should be the appropriate period of imprisonment for the majority of cases which come before the courts. Instead a "tariff" has been established by the Court of Appeal, guiding judges on the range of penalties imposed for offences for which the statutory maximum penalties are high. This tariff is not to be found in any official publication, although D A Thomas' loose-leaf compendium *Current Sentencing Practice* can be regarded as virtually authoritative.

The range of sentences set out in the tariff tends to be well below the statutory maximum for a particular offence. Simple increases in the statutory maxima do not automatically lead to stiffer sentences being imposed in individual cases. This could only be done by the imposition of statutory minimum sentences. A number of other countries have these, but they have tended not to find favour here because of the extent to which they would take the sentencing process out of the hands of the judiciary. Many commentators have observed that minimum sentences would be likely to cause as many if not more injustices than they would cure, in that they would reduce opportunities for judges and magistrates to take account of the circumstances of individual cases and defendants when passing sentence. These commentators often point to the controversial introduction and subsequent repeal of the system of unit fines created under the *Criminal Justice Act 1991* as an example of the problems which can arise when a system which reduces judicial discretion in sentencing matters is put into practice.

Commentators also refer to the very large and still expanding prison population in the United States as evidence of the potential cost, in human and financial terms, of the imposition of measures which reduce or remove judicial discretion. Mandatory sentencing guidelines have been introduced for prisoners convicted in the federal courts in the USA and parole has been abolished for federal prisoners. Mandatory sentencing guidelines have also been introduced in some states in the USA, and mandatory minimum sentences and automatic life sentences for repeat offenders have also been introduced, most notoriously under the "three strikes and you're out" provisions introduced in California. These measures have often been introduced with the stated aims of ensuring greater consistency in sentencing and responding to public concern about the very high levels of violent crime in the USA. Critics have stated that their inflexibility has resulted in consistency at the expense of justice, with large numbers of

offenders receiving long sentences for small-scale drug dealing and other relatively minor offences, such as the offender reported as having been sentenced to life imprisonment for stealing a pizza under California's "three strikes and you're out" law. It has been argued that the "three strikes" provisions have caused serious backlogs and delays in the criminal justice system, with fewer offenders pleading guilty or participating in plea-bargaining. It has also been reported that they have had a greater impact on non-violent than on violent crime, and that a disproportionate number of offenders sentenced under these provisions are black.

A number of European countries, with legal systems based on civil law rather than common law, impose minimum sentences for certain offences, but do not have prison populations as large as that of the United States, or indeed that of the United Kingdom.

As far as this country is concerned, successive governments have upheld the view that the sentence imposed in an individual case should be determined by the judge from the range of penalties available. The only general offence for which a mandatory sentence of imprisonment is currently specified is murder, for which the mandatory penalty is life imprisonment. The Government's view of minimum sentences for certain drugs offences was set out in a Written Answer on November 3rd 1994 by the then junior minister at the Home Office, Michael Forsyth, as follows:[1]

> **Mr. Gallie:** To ask the Secretary of State for the Home Department what plans he has to set minimum jail sentences for those who sell category A drugs; and if he will make a statement.
>
> **Mr. Michael Forsyth:** None. The courts should be left to determine appropriate sentences in individual cases. The maximum penalty for supplying category A drugs is life imprisonment. We look to the courts to pass very long prison sentences in the most serious cases.

The formal channels of influence over sentencing decisions such as the Judicial Studies Board, which organises training seminars for judges, and the Court of Appeal, have in recent years been attempting to encourage greater consistency in sentencing. It is, after all, inconsistencies in sentencing which have often contributed to public dissatisfaction with the operation of the criminal law in this area. The Court of Appeal has issued decisions from time to time which are specifically referred to a "guidelines" for future use. (The guidelines on sentencing for rape in *R v Billam (1986)* 1 WLR 349 resulted in marked increases in sentencing levels for rape). However, even these "guidelines" do not deprive the judge of his discretion over the sentence which is ultimately imposed. The Court of Appeal has always been wary of giving the impression that its decisions are to be regarded as absolutely

---

[1] HC Deb Vol 248 c1334 (W) 3.11.1994

authoritative and has often stressed that each case depends on its own facts.

Lay magistrates receive guidance about sentencing and other matters from the justices' clerks who serve their courts. The Magistrate's Association has produced *Sentencing Guidelines* for those criminal offences which frequently come before magistrates' courts. The introductory chapter points out, however, that the guidelines are only starting points for discussion of individual sentences, not finishing points and that

"The responsibility for the sentence is that of the justices and it is they who must assess each case judicially having regard to

a) the circumstances of the particular offence and

b) the circumstances of the particular offender."

Sections 35 and 36 of the *Criminal Justice Act 1988* enable the Attorney-General in certain circumstances to refer to the Court of Appeal, with the leave of that Court, a case in which it appears to him that the sentencing of a person by the Crown Court has been unduly lenient. The Court of Appeal may then quash the original sentence and substitute another, which may be more severe than the original, but must be within the range of sentencing options which would have been available to the original court. The cases which may be referred to the Court of Appeal are those involving

a) offences triable only on indictment (that is, triable only by a judge and jury at the Crown Court.)

b) offences of indecent assault on a woman or a man, threats to kill, cruelty to persons under 16, or attempts or incitements to commit any of these offences,

c) cases of fraud which have been tried on indictment following a transfer to the Crown Court under Section 4 of the *Criminal Justice Act 1987,* or following the preferment of a voluntary bill of indictment after the dismissal of a charge under Section 6 of the 1987 Act.

In the majority of cases it has dealt with under this procedure the Court of Appeal has increased the sentence handed down by the Crown Court. The Court of Appeal has, however, noted that it will not intervene unless it is shown that there is some error in principle in the judge's sentence with the result that public confidence will be damaged if the sentence is not altered.[2]

---

[2] Att-Gen's Reference (No. 5 of 1989) (*R v Hill - Trevor*) 90 Cr App R. 358. See also Att-Gen's Reference (No. 4 of 1989) 90 Cr App. R.366

B. The Sentencing Framework

The *Criminal Justice Act 1991* set out a framework for sentencing practice which incorporated a number of significant changes in the approach to be taken by the courts in sentencing offenders. The seriousness of the offence is the main focus of the decision-making process under the sentencing provisions set out in the Act. The 1991 legislation was also intended to lead to the greater use of community-based sentences, which would restrict the liberty of the offender without the need to resort to a custodial sentence. Section 1 of the 1991 Act, as amended by the *Criminal Justice Act 1993,* provides that where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law (such as the penalty for murder) the court may not pass a custodial sentence on an offender unless it is of the opinion:

a) that the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence; or

b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.

Section 2 of the *Criminal Justice Act 1991,* which was also amended by the *Criminal Justice Act 1993,* set out the criteria to be used by the courts in determining the length of custodial sentences imposed for offences other than those, such as murder, for which the sentence is fixed by law. The criteria are as follows:

(2) The custodial sentence shall be-

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

"Sexual offence" and "violent offence" are defined by Section 31(1) of the 1991 Act, as amended by Section 168 and Schedule 9 of the *Criminal Justice and Public Order Act 1994.* The definition of "sexual offence" is limited to certain specified offences, including rape and other offences under the *Sexual Offences Act 1956,* but is not restricted to sexual offences against children and young persons. It is set out as follows:

"sexual offence' means any of the following-

(a) an offence under the *Sexual Offences Act* 1956, other than an offence under section 30, 31 or 33 to 36 of that Act;
(b) an offence under section 128 of the *Mental Health Act* 1959;
(c) an offence under the *Indecency with Children Act* 1960;
(d) an offence under section 9 of the *Theft Act* 1968 of burglary with intent to commit rape;
(e) an offence under section 54 of the *Criminal Law Act* 1977;
(f) an offence under the *Protection of Children Act* 1978;
(g) an offence under section I of the *Criminal Law Act* 1977 of conspiracy to commit any of the offences in paragraphs (a) to (f) above;
(h) an offence under section 1 of the *Criminal Attempts Act* 1981 of attempting to commit any of those offences;
(i) an offence of inciting another to commit any of those offences;

The offences created by these earlier Acts are described on p.49-50.

The definition of "violent offence" is more general, referring to any offence "which leads, or is intended or is likely to lead to a person's death or to physical injury to a person, and includes an offence which is required to be charged as arson (whether or not it would otherwise fall within this definition)".

The power to impose a sentence longer than is commensurate with the seriousness of the offence replaced a power under Sections 28 and 29 of the *Powers of Criminal Courts Act 1973* to impose extended sentences of imprisonment on persistent offenders, which was abolished by Section 5(2) of the *Criminal Justice Act 1991*.

In his book *Acts of Abuse: Sex Offenders and the Criminal Justice System*,[3] Adam Sampson suggests that the use by the courts of their power under the Criminal Justice Act 1991 to impose longer sentences on people convicted of sexual offences could result in an adverse judgment by the European Court of Human Rights (ECHR) because, while sentences of preventive detention are not illegal as such under the terms of the European Convention on Human Rights, the ECHR has previously held that recidivist offenders who are given such sentences are entitled to periodic reviews by a "court" to determine whether or not they are still dangerous. The right to periodic review of a person's detention is set out in Article 5 (4) of the European Convention, which provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"

Thomas's *Current Sentencing Practice* contains a summary of the statutory provisions and judgments of the Court of Appeal on the sentencing of violent and sexual offenders. This

---

[3] (1994) p60

includes the following summary of case-law on the circumstances in which the court should, or should not impose a longer than normal sentence:[4]

A court should not pass a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b) for a violent offence unless there is evidence in the offender's record or elsewhere which indicates that he will otherwise commit further violent offences in the future which will result in serious harm

A court should not pass a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b) for a sexual offence unless there is evidence in the offender's record or elsewhere that he will otherwise commit further sexual offences in the future which will result in serious harm

A court passing a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b) should balance the need to protect the public with the need to ensure that the sentence is not out of all proportion to the nature of the offending

A court may pass a longer than normal sentence even though the offender is a danger to only one person, or to a small group of persons
A longer than normal sentence should not be passed on an offender if the sentence which would be commensurate with the seriousness of his offence contains an element for the protection of the public

Where two offenders are jointly convicted, and the court is of the opinion in the case of one offender but not the other that a longer than normal sentence is necessary to protect the public from serious harm from him, the court may pass a longer than normal sentence on one offender and a commensurate sentence on the other

A longer than normal sentence may be imposed on an offender who has no significant previous convictions, if there is other evidence on the basis of which the court forms the opinion that a longer than normal sentence is necessary to protect the public from serious harm from him

An offender may qualify for a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b), notwithstanding that he does not qualify for a sentence of life imprisonment

The full text of these provisions and judgments can be found in Part A of Volume 1 of *Current Sentencing Practice*, a copy of which is available in the Library. Archbold's *Criminal Pleading, Evidence and Practice* also summarises the case-law on this aspect of the 1991 Act[5]

Procedural requirements concerning the imposition of custodial sentences are set out in

---

4 Vol 1 Quick Contents Guide p502/1

5 1995 Edition Vol 1 p.709-710 and Fourth Supplement to the 1995 Edition p.104-107

Section 3 of the 1991 Act, as amended by Section 168 and Schedule 9 of the *Criminal Justice and Public Order Act 1994*. Section 4 of the 1991 Act imposes additional requirements in the case of mentally disordered offenders.

The imposition on an offender convicted of a violent or sexual offence of "such longer term.....as in the opinion of the court is necessary to protect the public" is a mandatory requirement under Section 2(2)(b) of the 1991 Act. It may extend to the imposition of a custodial sentence for an indeterminate period, such as a discretionary life sentence, provided that this is also the maximum penalty provided for the offence in question.[6] A number of serious violent and sexual offences, such as attempted murder, manslaughter, wounding with intent to do grievous bodily harm, robbery, rape and attempted rape, have a maximum penalty of life imprisonment, as do the offences of aggravated burglary and arson.

Thomas's *Current Sentencing Practice* contains the following summary of the judgments of the Court of Appeal concerning the circumstances in which a discretionary life sentence may be appropriate, with particular reference to mentally disordered offenders:[7]

> A sentence of life imprisonment should not be imposed unless the offender is subject to a mental condition or personality defect which makes it probable that he will commit grave offences in the future if he is not subject to confinement for an indefinite period
>
> It is the normal practice for a judge to consider medical evidence before imposing a life sentence, but he may do so without such evidence in exceptional circumstances
>
> A sentence of life imprisonment may be imposed on an offender who is not suffering from a mental disorder or other condition defined by the Mental Health Act 1983, s.l, provided that there is evidence that he is likely to commit grave offences in the future
>
> A sentence of life imprisonment may be imposed on an offender if there is evidence that he is likely to commit grave crimes in the future, even though his condition is unlikely to improve with treatment
>
> A sentence of life imprisonment may be imposed on an offender who has been convicted of offences which would not justify determinate sentences of comparable effective length, if the evidence of a propensity to commit grave offences in the future is particularly strong
>
> Where a sentence of life imprisonment has been properly imposed for the protection of the public, it is not necessarily open to objection on the ground that the indeterminate nature of the sentence is itself hindering the treatment of the offender, where the prospects of successful treatment are in any event

---

6 *Criminal Justice Act 1991* Section 2(4)

7 Quick Contents Guide p.528-529

tenuous

A sentence of life imprisonment should not be imposed in a case where a determinate sentence proportionate to the gravity of the offence will provide a sufficient measure of protection for the public

Where an offender is sentenced to life imprisonment on conviction for murder, he should not be sentenced to life imprisonment for any other offence for which he is sentenced on the same occasion, unless he satisfies the usual criteria for a discretionary life sentence

Where an offender is sentenced to life imprisonment for the protection of the public and for his own benefit, it is not correct practice to impose disproportionately long fixed term sentences on other counts so as to restrict the power of the Secretary of State to release the offender

If a judge has a sentence of life imprisonment in mind, he should tell counsel and give him a chance to deal with the matter specifically before imposing the sentence

Where an offender is suffering from a mental disorder which is susceptible to treatment and a place is available in a special hospital, the court should not impose a sentence of life imprisonment with the intention of preventing the release of the offender by the Mental Health Review Tribunal

When an offender who has been released on licence from a sentence Of life imprisonment is convicted of a further offence of violence, a further sentence of life imprisonment should not be imposed unless the usual criteria for the imposition of a sentence of life imprisonment are satisfied

The fact that an offender is already subject to a sentence of life imprisonment imposed on an earlier occasion does not mean that a further sentence of life imprisonment is necessarily wrong in principle, if the criteria for the imposition of a sentence of life imprisonment are satisfied in relation to the latest offence

C. The Use of Imprisonment

The use of imprisonment

In 1995 in England and Wales, 79,200 offenders were sentenced to immediate custody[8] by the courts. Of these, 59,900 had been sentenced for indictable offences, 6,000 for summary non-motoring offences and 13,200 for summary motoring offences. Of those sentenced for indictable offences, 20,200 were sentenced in magistrates' courts and 39,700 in the crown courts.

[8] Unsuspended imprisonment, detention in a young offender institution or partly suspended sentence (abolished in September 1992).

Looking first at sentencing for indictable offences in magistrates' courts, immediate custody represented only 8.8% of all sentences (20,200 cases in all). The most popular sentence in magistrates courts was the fine, accounting for 37.4% of all sentences, followed by absolute or conditional discharges (23.4%). The numbers sentenced to immediate custody have risen in recent years after falls in the 1980s: in 1990 only 11,300 - 4.4% of all those sentenced for indictable offences in magistrates' courts - were given immediate custody whereas in 1985, for example, the number was 30,800 (8.7% of the total).

In the crown courts, immediate custody was the most common sentence imposed for indictable offences. In 1995, 39,700 offenders (55.7% of all those sentenced) were given custodial sentences. The proportion sentenced to immediate custody has risen substantially in recent years: in 1990 the figure was 43.0% (36,800 offenders). In 1985 it was 53.1% (47,400 offenders).

Overall, the number of offenders given immediate custody for all offences (indictable and summary) at all courts was 79,200 in 1995, the highest figure since 1985. The proportionate use of immediate custody for indictable offences at all courts was the highest figure for 16 years, at 19.9%[9].

D. The Objects of Sentencing and the Effectiveness of Penal Sanctions

In a 1975 case[10] Lord Justice Lawton set out what he called "the classical principles of sentencing" in very clear terms:

> What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
>
> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the

---

[9] 1995 figures provisional. Sources: Home Office Statistical Bulletin 16/96 pages 1,9,10 and Table 7.1; Criminal Statistics England & Wales 1985 (Cm 10) Table 7.1.

[10] *R v Sargeant* (1975) 60 Cr App R 74

court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come, in the opinion of this Court, when those who indulge in the kind of violence with which we are concerned in this case must expect custodial sentences.

But we are also satisfied that, although society expects the courts to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time, which is what this sentence is likely to do. We agree with the trial judge that the kind of violence which occurred in this case called for a custodial sentence. This young man has had a custodial sentence. Despite his good character, despite the excellent background from which he comes, very deservedly he has bad the humiliation of hearing prison gates closing behind him. We take the view that for men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time.

I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.

We come now to the element of prevention. Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period. This case does not call for a preventive sentence.

Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future.

The *Sentence of the Court - A Handbook for Magistrates* published in 1995, expands on the four elements described in this case by setting out what it describes as the six traditionally recognised objects of sentencing:

i) punishment;

ii) reparation (including financial compensation to a victim);

iii) protection of the public;

iv) deterrence;

v) reflecting proper public concern;

vi) rehabilitation.

The rehabilitative ideal in sentencing was somewhat undermined by a view, initially put forward in the 1970's[11] that no penal treatment was effective in rehabilitating offenders and thereby reducing recidivism. The information and data on which this "nothing works" argument was based was criticised by some commentators and researchers while others have sought to rebut the argument on more general grounds. A review of the literature on the effectiveness of sentencing published by the Home Office Research and Planning Unit in 1976 drew the following conclusions from the results of research on the effectiveness of different sentences in fulfilling rehabilitative aims by reducing recidivism :[12]

> Reviewers of research into the effectiveness of different sentences or ways of treating or training offenders have. unanimously agreed that the results have so far offered little hope that a reliable and simple remedy for recidivism can be easily found. They have pointed out that studies which have produced positive results have been isolated, inconsistent in their evidence, and open to so much methodological criticism that they must remain unconvincing. The main criticisms, which are substantial ones, centre around questions as to the comparability of the samples (that is, whether influences other than the treatment are accounting for differences in outcome) and inconsistencies in standards of failure. It has seemed, therefore, that longer sentences are no more elective than short ones, that different types of institutions work about equally as well, that probationers on the whole do no better than if they were sent to prison, and that rehabilitative programmes - whether involving psychiatric treatment, counselling, casework or intensive contact and special attention, in custodial or non-custodial settings have no predictably beneficial effects. The comparative advantages of other types of sentences remain, unfortunately, largely untested. Martinson's conclusions, based upon a great number of investigations into a wide range of treatment and training, were so pessimistic that publication of his review was delayed for three years.

This apparent failure of research to demonstrate the corrective value of

---

[11] by R. Martinson and others: *Effectiveness of correctional treatments - a survey of treatment evaluation studies* - Lipton, D., Martinson, R. & Wilks, J. 1975. Praeger Publishers, Springfield MA. and *"What works ? - questions and answers about prison reform"* - Martinson, R 1974 The Public Interest, Spring Issue, 23

[12] *The Effectiveness of Sentencing: A Review of the Literature* - S.R.Brody Home Office Research Study No 35 p 37-38

rehabilitation as a sentencing aim has nevertheless had one refreshing consequence. It has seen the rejection of reconviction as the sole criterion of success, and a growing concern for evaluation according to other standards. A noticeable trend has been a readiness to justify non-custodial or semi-custodial sentences in preference to imprisonment or incarceration, on the grounds that they cost very much less to implement,' and decrease at the same time the risk of psychological and practical harm to the offender. As 'softer' sentences have apparently no worse effect on recidivism and still offer the chance of less tangible if as yet unknown advantages, they are seen as preferable by all schools of thought except perhaps the retributivist.

But is a pessimistic outlook entirely substantiated by the results of research? To the researcher, the subject is by no means closed. Just as methodological deficiencies and flaws in carrying out experiments make any results dubious, so they make unacceptable any assurances that corrective changes cannot be induced. Since the beginning of the present decade, and therefore not included in previous reviews, research has been continuing, and if it has not found any more positive results, at least there has been progress in understanding of the complexities to be faced. The climate of opinion in America seems lately to have become a little more optimistic. Adams, for example, writing in 1974, suggested that correctional research "is doing as well as can be expected under the circumstances" and compared the productiveness of evaluation in correctional research favourably with that in industry or medicine. He has recently prepared a 'guide' (Adams 1975), in which he critically evaluates correctional research and indicates how it might be put to better use in the future. What has emerged more clearly is a recognition that simple comparisons between different sentences, no matter how carefully carried out, cannot be expected easily to find differences in effect.

The review summarised research on different types of custodial and non-custodial treatment, including different institutional programmes. It described the results of research on time spent in custody and on the effectiveness of custodial versus non-custodial sentences and set out some criticisms of research as follows:[13]

Time in custody

Of nine studies, five found that length of time served appeared not to affect reconviction, two that longer periods in prison had no adverse effects, and the others that different types of offenders were affected in different ways. The various samples studied were far from homogeneous, covering offenders of all ages and of all degrees of custodial experience. Nor is it simply length of prison sentence that has been investigated. Mueller and Jaman were really looking at the effects of acceptance or rejection for parole, and Weeks was more concerned with the overall regimes than merely with time spent in the different institutions. The Florida study dealt with unique circumstances. Where differences were demonstrated, they cannot be accepted as generally applicable in view of the doubts about the comparability of the samples and the particular circumstances of the

[13] ibid. p39-41

experiments. It can be concluded that there is no evidence that longer custodial sentences produce better results than shorter sentences.

Custodial or non-custodial sentences

The results are somewhat conflicting, and seemingly dependent on the criminal experience of the offenders. The danger that the better risks are selected for probation makes any findings favouring non-custodial sentences rather suspect, even when every care is taken to control extraneous influences. The Provo results, which provided the clearest evidence for the superiority of probationary sentences, were regarded sceptically by the authors because they believed that unforeseen circumstances early in the experiment meant that the samples were not properly matched to start with. If this is true, the same doubts apply equally, or more so, to other less carefully-planned investigations. The other major study the Community Treatment Project, which also found that juvenile offenders under intensive community supervision did better than similar youths who went to an institution, has been strongly criticised on the grounds that the difference in outcome merely reflects a more lenient attitude on the part of the authorities to subsequent misdemeanours committed by the experimental subjects.

In Britain, straightforward comparisons have been made between offenders sentenced to an institution or released under probationary supervision. In America, things are not so simple: most of the control subjects are released quite early in their sentences and spend the rest of the period on parole, which in practice closely resembles probation. So, in a way, American studies have been more concerned with variations in the quality or intensity of community supervision.

The major implication of research findings in this aspect of sentencing is again that different types of offenders respond in different ways to the various treatments applied to them. The deterrent value of other non-custodial sentences, like fines or suspended sentences, warrants further study.

SOME CRITICISMS OF RESEARCH

Although, as has been seen, it is not too difficult to criticise most of the empirical evidence suggesting that certain types of sentences or treatments are more effective than others, it cannot necessarily be said that the differences in outcome which have been found are not real ones. The same can be said, perhaps with greater force, about those studies-the majority-which failed to show that different ways of disposing of convicted offenders made any difference to their chances of offending again. Some of the methodological issues which have been raised in criticism of studies purporting to show differential outcomes particularly issues concerned with comparability of samples and measures of success and failure@an also be used to explain (though never completely) why other research has failed to show any differences. There are two other considerations which appear to be the most crucial in this respect, the first dealing with questions about treatment assumptions, and the second referring to the demonstration of so-called interaction effects, the matching of appropriate treatment to different types of offenders.

The 1976 Home Office review explained references to the deterrent value of sentences as follows:[14]

> As for the deterrent value of sentences, there are two purposes. The first is to deter an individual offender from further delinquency and can be observed on occasions when a severe sentence is deliberately awarded instead of a more lenient but equally applicable one, to 'teach a lesson'. The other is by making sure that justice is seen to be done, to make it clear by example that crime does not pay. It is assumed that the fear of incurring the stigma of a court appearance, the discomfort of prison or the inconvenience of financial loss will ensure self-control in most people whose consciences might otherwise lapse. This is known as general deterrence.

Much research has been undertaken into the individual deterrent effect of sentences. The conclusion has invariably been reached that it is hard to show any effect that one type of sentence is more likely to have than any other in reducing the rate of re-offending, which tends to be high for all types. Longer custodial sentences have not generally been found to produce better results than shorter ones as far as individual deterrence is concerned. The general deterrent effect is very hard to measure. It tends to be seen as operating only for premeditated criminal acts committed by people making rational calculations as to the likelihood of their being apprehended, the sentence they will be given (which may depend on the charges which are brought against them) and the profits they will make from their crime. The general consensus emanating from the research in this area has been that it is the probability of arrest and conviction that is likely to deter would-be offenders, rather than the possibility of severe penalties being meted out to them.

A Home Office Research Study entitled *Taking Offenders out of Circulation,* published in 1980, noted that:[15]

> The studies reported here have shown that it is no easier to measure the crime preventive effect of imprisonment in absolute terms than it is to judge the deterrent or rehabilitative value of any sentencing decision. However, with regard to imprisonment at least, it is possible to say what would be the consequences in numerical terms of adopting various sentencing policies, and for practical purposes, this sort of information is useful enough.
>
> There is now almost unanimous agreement that less rather than more use should be made of prisons. One of the main purposes of this report was to try to assess whether by sending fewer people to prison, or by keeping them there for shorter periods, their opportunities to commit crime would be substantially greater. Making use of what data were available, it seems safe to say that the effect on the recorded crime rate would be negligible. It was estimated that were remission increased from one third to one half for adult

---

[14] ibid. p.2

[15] Home Office Research Study 64 1980 p35-37

male prisoners (excluding lifers), convictions would increase by only 1.2 per cent per year, while if the time served by each offender was reduced by four months (or his actual sentence reduced by six months), convictions would increase by 1.6 per cent. Either policy would substantially reduce the prison population: increased remission would have reduced the total time offenders spent in prison by 25 per cent; six months off every sentence by 40 per cent. In practice, other policies to reduce the length of time offenders spend in custody might be preferred, such as increased use of parole. But the general point remains from the evidence that a small amount of increased crime has to be balanced against the real economic and social savings that could be made by quite modest changes in the current use of imprisonment.

This relative imbalance in saying and costs derives, of course, from the fact that most offenders are not sent to prison, so that those who are contribute only very minimally to overall crime rates. This means that even though changes in policy would probably be without much harmful effect, it cannot be said that imprisonment as such is without preventive effect. Analysing the data in another way, it becomes apparent that imprisonment does to some significant extent curtail the criminal activities of those who are locked up. The number of people appearing before the courts, from whom the present samples were drawn, would have been reduced by about 17 to 25 per cent had each of them, for his immediately prior offence, been sentenced to 18 months in custody. One might assume from this rather stark statistic that were ostensibly much harsher sentencing policies adopted, there would be a noticeable reduction in crime. It is,of course, difficult to be very precise about its extent, because,it is impossible to assess the effects of other circumstances which would prevail under such a gross system. For instance, if certainty of imprisonment was matched by certainty of detection, it is very likely that more people would think twice about committing an offence, and so there would be fewer offenders to be dealt with, anyway. On the other hand, one cannot be sure whether incarceration really prevents crime or just delays its inevitable commission until the offender is released. The courts would have to contend, too, with the very natural grievances which mandatory sentences would certainly promote, and which might impel many who felt themselves unjustly treated to continue in a life of crime. However, if in an attempt to preserve some scale of fair punishment, more serious offenders were given even longer sentences, the preventive effect might be considerably enhanced.

There is no need to do more than to speculate about these possibilities, because in practice a sentencing policy which relied on imprisonment to an extent which noticeably lowered the incidence of crime by keeping known offenders out of the way would be unthinkable for other reasons, not the least of which is the intolerable burden it would place on the prison system. Mandatory 18 month prison sentences for all offences, for example, would probably increase the time spent by offenders in prison by something like four to seven times the present length. To put it briefly, there is no practical way in which the potentially preventive function of prisons can be significantly exploited as a general principle.

There is a certain amount of evidence, however, to suggest that prisons could be used more efficiently, by taking maximum advantage of their

preventive usefulness while ensuring that their resources are not wasted. This could be done by the more careful selection of the people who are sent there. While the failure rate of ex-prisoners is certainly very high, it is true also that substantial numbers never return. Home Office statistics show that of all males discharged from custodial institutions, almost half are not re-convicted within two years (the crucial period); and almost a third of the prisoners in the samples used in the present analysis had not been in trouble again after five or six years. Obviously no preventive gains are achieved by imprisoning these people. Even if their 'success' indicates that they were genuinely deterred by the experience which seems unlikely, in most cases, from what we know from research into deterrents - the same result could almost certainly be obtained by shorter periods in custody. Those who are not re-convicted are distinguished above all by the brevity of their criminal records, and other things being equal, the utmost discretion should be exercised when imprisonment is being considered for people like these.

Sometimes, of course, other things are not equal. A short record is not always a trivial one, and this raises the question of the serious or dangerous offender, for whom the possibility of causing serious harm is a more urgent consideration than the statistical likelihood of his doing so. The importance of prisons as places for the confinement of persons who represent grave risks to public safety has recently been given much prominence. The second part of the report concludes, however, that undue emphasis on this aspect of prevention is probably misguided, in that while quite a lot of people may occasionally behave recklessly or violently, the idea of the 'dangerous offender' as a criminal type is something of an illusion. In the first place, there exist neither any satisfactory legal definitions, nor any scientific measures, by which he can be reliably identified. In practice, assessments of dangerousness are no more than subjective expectations about the likelihood of any offender causing serious personal injury in the future. As these expectations naturally rely very heavily on knowledge of past behaviour, it is obviously an advantage to have the fullest possible accounts of offenders' histories and circumstances before coming to any decisions about them, but even so, no-one has been able to predict accurately more than half the time, and seldom as often as that. Most 'expert' predictions seem to be right for only one out of three individuals. The number of criminals who are recognised immediately as a 'public danger' and are promptly put away for an indefinite term is very small indeed, and their prolonged incarceration means that it is never possible to test the accuracy of the judgements made about them. But the 52 'dangerous' prisoners in the sample described in this report who had been judged, from detailed reports about them, to be capable of wantonly causing death or serious bodily harm fulfilled this prophecy so infrequently that even if all of them had been confined for an extra five years, only nine really serious assaults would have been prevented. And within the same period, an equal number of serious attacks were perpetrated by ex-prisoners who had previously shown no indications at all of dangerous tendencies, and for whom there could have been no justification for prolonged detention.

The infrequency of really serious crimes of violence, their apparently generally random quality and the rarity of anything like a genuinely 'dangerous type' offers little encouragement for a policy which aims to

> reduce serious assaults by selective incapacitation of those with violent records. Violence is not necessarily repetitive, and even when it is, it is not usually so extreme that its prevention would justify locking people up indefinitely. The public is already as well protected as it can expect from serious danger. The results, of course, do not discourage a proper lack of caution or suggest that personal experience or judicial intuition are not important. Indeed, there is every indication that these qualities will remain the best alternative to an enormously increased, very costly and largely unprofitable use of detention.

As this extract suggests, there was a growing consensus during the 1980s and early 1990s about the need to reduce the use of imprisonment and restrict it to those categories of offender from whom the public needs to be protected. A number of factors, such as the very high cost of keeping offenders in prison, doubts about the effectiveness of imprisonment as a means of lowering the crime rate and the fact that a considerable proportion of crimes are committed by young offenders, for whom custodial sentences are considered to involve an increased risk that they will go on to lead lives of crime, resulted in increased interest in finding effective alternatives to imprisonment and in the wider question of social crime prevention, including initiatives aimed at diverting young people from criminal careers through early intervention.

The Green Paper *Punishment, Custody and the Community*[16], published in 1988 and the 1990 White Paper *Crime, Justice and Protecting the Public*[17] which set out proposals for the sentencing framework duly implemented in the *Criminal Justice Act 1991*, reflected this consensus. The White Paper stated that[18]:

> 2.6 Reforming offenders is always best if it can be achieved. It is better that people should exercise self-control than have controls imposed upon them. This needs self discipline and motivation. Many offenders have little understanding of the effect of their actions on others. Compensation and community service can bring home to offenders the effect of their behaviour on other people. The probation service tries to make offenders face up to what they have done, to give them a greater sense of responsibility and to help them resist pressure from others to take part in crime. Voluntary organisations have a long tradition of helping offenders to turn away from crime.
>
> 2.7 It was once believed that prison, properly used, could encourage a high proportion of offenders to start an honest life on their release. Nobody now regards imprisonment, in itself, as an effective means of reform for most prisoners. If there is continued progress against overcrowding in prisons, the recent reforms should enable better regimes to be developed, with more opportunities for education, and work, and so a greater chance of turning the

---

[16] Cm 424
[17] Cm 965
[18] See above p

lives of some inmates in a positive direction. But however much prison staff try to inject a positive purpose into the regime , as they do, prison is a society which requires virtually no sense of personal responsibility from prisoners. Normal social or working habits do not fit. The opportunity to learn from other criminals is pervasive. For most offenders, imprisonment has to be justified in terms of public protection, denunciation and retribution. Otherwise it can be an expensive way of making bad people worse. The prospects of reforming offenders are usually much better if they stay in the community, provided the public is properly protected.

2.8 Deterrence is a principle with much immediate appeal. Most law abiding citizens understand the reasons why some behaviour is made a criminal offence, and would be deterred by the shame of a criminal conviction or the possibility of a severe penalty. There are doubtless some criminals who carefully calculate the possible gains and risks. But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.

2.9 The Government's proposals therefore emphasise the objectives which sentencing is most likely to meet successfully in whole or in part. The first objective for all sentences is denunciation of and retribution for the crime. Depending on the offence and the offender, the sentence may also aim to achieve public protection, reparation and reform of the offender, preferably in the community. This approach points to sentencing policies which are more firmly based on the seriousness of the offence, and just desserts for the offender.

In a report on "Recidivism and Imprisonment" published in a 1994 Home Office Research Bulletin Ros Burnett, from the Centre for Criminological Research at Oxford University, noted that the results of interviews conducted with a group of recidivist offenders who had been convicted of offences concerning property and were nearing release from prison suggested that a wish to avoid further imprisonment was critical in decisions not to reoffend. The report also noted that while the fact that non-custodial penalties had had very little impact on this particular group of recidivist offenders, the same could not be assumed to be true of other property offenders who had not experienced custody.[19] In a study for the Home Office on "The Dynamics of Recidivism", which has not been published but was referred to by the Home Secretary, Michael Howard, during a debate on his sentencing proposals on June 19th 1996, Ros Burnett apparently found on the basis of interviews with prisoners that "Avoidance of imprisonment was the most frequently mentioned reason for not wanting to re-offend"[20]

---

[19] "Recidivism and imprisonment" - Ros Burnett Home Office Research Bulletin No.36

[20] HC Deb Vol 279 c892 19.6.1996

The White Paper *Protecting the Public* published in March 1996, setting out the proposals which the *Crime (Sentences) Bill* is designed to implement, states that:[21]

> 1.12. The Government firmly believes that prison works. First, by taking offenders out of circulation it prevents them from committing yet more crime. The majority of crimes are committed by a relatively small number of criminals. Research has suggested that between three and 13 offences could be prevented for each convicted domestic burglar imprisoned for a year.
>
> Second, prison protects the public from dangerous criminals.
>
> Third, prison-and the threat of prison-acts as a deterrent to would-be criminals.
>
> Finally, time spent in prison can be used to rehabilitate offenders, for example by improving their training or education. The most recent reconviction rates show that criminals sent to prison are no more likely to reoffend than those given community sentences - a recent survey based on a sample of 1992 cases showed reconviction rates within 2 years of 51% for those released from prison, 55% for those who received a community sentence and 58% for those who received a probation order.

This extract suggests that it is the Government's view that "prison works", not in the sense that it might make convicted prisoners less likely to re-offend than those given other penalties such as community sentences, but that it "works" in the sense that it satisfies the objects of public protection and crime prevention through the incapacitation of offenders, at least as far as offences committed outside prisons are concerned.

E. Public Attitudes to Sentencing

Commentators often refer to the widely-held belief that the courts are much more lenient in sentencing offenders than the general public would like. Polls and surveys generally suggest that there is public demand for "tougher" punishment. A number of research studies in this country and abroad have, however, suggested that the image of a straightforwardly harsh public needs some qualification. In a paper published in the November 1996 issue of the *Criminal Law Review* Andrew Ashworth from the School of Law at King's College, London and Michael Hough, Professor of Social Policy at South Bank University make the following observations about public attitudes to sentencing:[22]

> On the face of it, there is plenty of evidence to point to widespread

---

[21] Cm 3190 p3-4

[22] [1996] Crim LR 780

public dissatisfaction with sentencing. In general, polls and surveys reveal a punitive public. Support for capital punishment has run at between 65 per cent and 75 per cent, depending on the precise wording of the question, for many years; and a poll carried out for the *Daily Mail* found 92 per cent of a random sample supporting "tougher sentences for criminals, especially persistent criminals". However, several research studies carried out mainly in the 1980s suggest that there is a need to qualify the picture of a public which is straightforwardly punitive. Responses to questions pitched at a very general level, such as "Are court sentences tough enough?" certainly *did* show a clear majority favouring tougher sentences; but when asked about suitable punishments for individual cases of specific types of crime, people's preferences tended to reflect the range of sentences actually imposed by sentences. Although this research was limited, it was fairly consistent with work carried out in several other industrialised countries, notably Australia, Canada, the Netherlands and the United States.

The authors go on to suggest that the most obvious explanation for those divergent findings lies in the lack of information which people have about crime and about sentencing practice. They point to studies which, show that people systematically understand how much the courts actually use imprisonment.

They note that the few studies which have asked victims how they would like to see "their" offender punished have failed to find evidence of widespread vindictiveness and that on balance, victims' views have tended to be consistent with those of the general public. In recommending that the publication of better and more meaningful information about sentencing be made a priority the authors state that:[23]

To construct sentencing policy on this flawed and partial notion of public opinion is irresponsible. Certainly, the argument is hard to resist that public confidence in the law must be maintained. It is also hard to resist the proposition that public confidence in sentencing is low and probably falling. However, since the causes of this lie not in sentencing practice but in misinformation and misunderstanding, and (arguably) in factors only distantly related to criminal justice, ratcheting up the sentencing tariff is hardly a rational way of regaining public confidence.

This is not to deny that there is political capital to be made, at least in the short term, by espousing sentencing policies which have the trappings of tough, decisive action. However, the underlying source of public cynicism will not have been addressed; and once politicians embark on this route, they may be committing themselves long-term to a treadmill of toughness, "decisiveness", and high public expenditure. The political costs of withdrawing from tough policies, once embarked on, may be too high for politicians of any hue to contemplate. The United States serves as an example.

---

[23] [1996] Crim LR 786

F. The Crime (Sentences) Bill: Mandatory and Minimum Custodial Sentences

Part I of the *Crime (Sentences) Bill* is designed to introduce automatic life sentences for people convicted on more than one occasion of one or more of a number of specified offences. It is also intended to introduce mandatory minimum sentences on people convicted of more than two Class A drug trafficking offences or more than two domestic burglaries.

Automatic Life Sentences

Under Clause 1, the court will be required to impose a life sentence on a person convicted of a serious offence committed after the commencement of this provision who, at the time when that offence was committed, was 18 or over and had been convicted in any part of the United Kingdom of another serious offence, though not necessarily the same offence as that with which he has subsequently been convicted. The earlier offence may have been committed before the commencement of this provision. Offenders sentenced under these provisions will be considered to be serving discretionary rather than mandatory life sentences,[24] which will have a bearing on the procedures used in determining when and whether they should be released.

In the White Paper *Protecting the Public* the Government describes the "key elements" of how this provision is intended to work:[25]

- any previous convictions for relevant offences will count as qualifying convictions, including convictions as a young offender, convictions prior to commencement and convictions which are 'spent' under the Rehabilitation of Offenders Act 1974;

- the automatic life sentence must be imposed where the second conviction relates to an offence which was committed after commencement. The offender must also have been at least 18 years old at the time of that offence. The second conviction must also relate to an offence which was committed after the offender was convicted for a previous qualifying offence. An offender with no previous convictions who was convicted of two qualifying offences at the same court appearance would not therefore be liable to an automatic life sentence:

- the two qualifying convictions need not relate to the same offence, or type of offence. One conviction for a violent offence and one conviction for a sexual offence would suffice. Serious sexual offences, such as rape, are also inherently violent offences;

---

[24] see Clause 1(4)
[25] Cm 3190 p48

- the procedures governing tariff and release in these cases will be the same as those which currently apply to the discretionary life sentence (which are set out in the Criminal Justice Act 1991). This means that the trial judge will specify the tariff to be served for retribution and deterrence. At the end of that period the Parole Board will determine whether it is safe to release the offender. Ministers will play no part in this process;

- the court will also have discretion not to pass the automatic life sentence in genuinely exceptional cases. This is intended to allow for occasional quite unforeseeable circumstances where it would plainly be unjust and unnecessary to impose the life sentence. But it should be emphasised that this provision will be designed to cover only genuinely exceptional cases. The court will be required to explain what were the exceptional circumstances which justified some other sentence in place of a life sentence; and

- if released, an offender who has served an automatic indeterminate sentence will remain,.on licence and subject to recall for the rest of his or her life.

The "Serious Offences"

Clause 1(5) of the Bill provides that an offence committed in England and Wales will be a "serious offence" for the purposes of Clause 1 if it is one of the following offences:

(a) an attempt to commit murder, a conspiracy to commit murder or an incitement to murder;

(b) an offence under section 4 of the Offences Against the Person Act 1861 (soliciting murder);

(c) manslaughter;

(d) an offence under section 18 of the Offences Against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent);

(e) rape or an attempt to commit rape;

(f) an offence under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13);

(g) an offence under section 16 (possession of a firearm with intent to injure), section 17 (use of a firearm to resist arrest) or section 18 (carrying a firearm with criminal intent) of the Firearms Act 1968; and

(h) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Act.

An offence committed in Northern Ireland will be a "serious offence" for the purposes of Clause 1 if it is one of the following offences, set out in Clause 1(7):

(7) An offence committed in Northern Ireland is a serious offence for the purposes of this section if it is any of the following, namely-

(a) an offence falling within any of paragraphs (a) to (c) of subsection (5) above;

(b) an offence under section 4 of the Criminal Law Amendment Act 1885 (intercourse with a girl under 14);

(c) an offence under Article 17 (possession of a firearm with intent to injure), Article 18(1) (use of a firearm to resist arrest) or Article 19 (carrying a firearm with criminal intent) of the Firearms (Northern Ireland) Order 1981; and

(d) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Order.

The offence of attempted murder in England and Wales and Northern Ireland requires proof of nothing less that an intention to kill and is harder to prove in this respect than the offence of murder, for which a person must have intended to kill or to cause serious bodily harm.

The definition of the offence under Section 18 of the *Offences Against the Person Act 1861* of wounding or causing grievous bodily harm with intent has, like the definitions in the 1861 Act of other non-fatal violent offences[26], been much criticised by the judiciary, legal academics and the Law Commission for its complicated, obscure and old-fashioned language, technical complexity and unintelligibility to the layman or average juror. In a report on *Legislating the Criminal Code:Offences Against the Person and General Principles*[27] the Law Commission noted that the need for extensive judicial interpretation had effectively turned Sections 18, 20 and 47 of the 1861 Act into common law crimes, the content of which is determined by case-law and not by statute. This, the Commission noted was unsatisfactory, both because the extent of these important offences ought to be determined by Parliament, and because, on a more practical level , there were needless hazards in directing a jury on the basis of judicial pronouncements rather than a clear statutory text.

The Law Commission recommended that Sections 18, 20 and 47 of the 1861 Act be replaced by three offences of intentionally causing serious injury to another, recklessly causing serious injury to another and intentionally or recklessly causing injury to another an offence of assault

---

[26] such as assault occasioning actual bodily harm and causing grievous bodily harm

[27] Law Com No. 218

and a number of other more specific offences involving violence. The definition of "injury" proposed by the Law Commission was "a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition or b) impairment of a person's mental health" The report, which is part of the Law Commission's long-term project to update and consolidate the criminal law in a criminal code, has not been implemented.

An offence committed in Scotland will be a "serious offence" for the purposes of Clause 1 if it is one of a number of qualifying offences, set out in a new Section 205A of the *Criminal Procedure (Scotland) Act 1995*, which is to be inserted by Clause 1 of the *Crime and Punishment (Scotland) Bill 1996/97*. The "qualifying offences" are as follows:

1. Culpable homicide.

2. Attempted murder, incitement to CO@t murder or conspiracy to commit murder.

3. Rape or attempted rape.

4. Sodomy or attempted sodomy where, in either case, one party does not consent.

5. Assault, where the assault-

   (a) is aggravated because it was carried out to-

      (i) the victim's severe injury; or

      (ii) the danger of the victim's life; or

   (b) was carried out with an intention to rape or to ravish the victim.

6. Robbery, where at some time during the commission of the offence, the offender had in his possession a firearm or an imitation firearm.

7. Any Offence committed by contravention of-

   (a) section 16 (possession of a firearm with intent to endanger life or cause serious injury);

   (b) section 17 (use of firearm to resist arrest);or

   (c) section 18 (possession of a firearm for purpose of committing an offence listed in Schedule 2), of the Firearms Act 1968.

8. Lewd, libidinous or indecent behaviour or practices towards a child.

9. Any offence committed by contravention of section 5(1) of the Criminal Law (Consolidation)(Scotland) Act 1995 (unlawful intercourse with a girl under the age of thirteen years).

All of the "serious offences" are currently punishable by life imprisonment.

Mandatory Minimum Sentences

Domestic Burglary

Clause 3 will require a court dealing with an offender convicted of a domestic burglary[28] committed after the commencement of this provision to impose a custodial sentence of at least three years on the offender if, at the time when that burglary was committed he was 18 or over and had been convicted in England and Wales (but not Scotland or Northern Ireland) of two other domestic burglaries, where one of those burglaries had been committed after he had been convicted of the other and where both had been committed after the commencement of this provision.

The White Paper describes how the key elements of how this provision is intended to work:[29]

- it will apply to offences of burglary or aggravated burglary of a dwelling;
- any previous convictions for relevant offences committed after commencement (but not before commencement) will count as qualifying convictions, including convictions as a young offender and convictions which are 'spent' under the Rehabilitation of Offenders Act 1974;
- the mandatory minimum sentence must be imposed where the three qualifying convictions all relate to offences committed after the new legislation has come into force. Previous convictions imposed before the legislation comes into force will not therefore 'count' as qualifying convictions. The offender must also have been at least 18 years old when he or she committed the final qualifying offence (although not necessarily the first two);
- the three qualifying convictions must relate to separate court appearances. Each of the qualifying convictions must relate to an offence committed after, the previous conviction. This means that if an offender with no previous convictions was convicted of three offences of burglary at one court appearance, or two offences at one appearance and a third on a separate occasion, that would not trigger a mandatory minimum sentence;
- where an offender is liable to a mandatory sentence, the court will be required to impose a sentence of at least 3 years. However the mandatory minimum sentence is just that: a minimum. The court will

---

[28] defined in Clause 3(5) as "a burglary committed in respect of a building or part of a building which is a dwelling"

[29] Cm 3190 p52-53

retain the discretion to impose a higher sentence in appropriate cases;

- the court will also have discretion not to pass the mandatory minimum sentence in genuinely exceptional cases. This is intended to allow for occasional quite unforeseeable circumstances where it would plainly be unjust and unnecessary to impose the mandatory sentence. But it should be emphasised that this provision will be designed to cover only genuinely exceptional cases ' it will certainly not be open to the courts to set aside the mandatory sentence merely because it is higher than the sentence they would otherwise have been minded to impose. The court will be required to explain what were the exceptional circumstances which justified setting aside the mandatory sentence; and

- if an offender who has already received a mandatory sentence is convicted of a fourth or subsequent offence, which was committed after the mandatory sentence was imposed, he or she will receive a further mandatory sentence. In such cases it may be appropriate for the court to consider imposing a higher sentence than the mandatory minimum.

Some commentators have suggested that the omission of convictions in Scotland and Northern Ireland from the previous convictions which will count towards a minimum three-year custodial sentence will encourage burglars from England and Wales to commit offences in these other jurisdictions. There are no current proposals to impose such minimum sentences on recidivist burglars in Scotland. The courts will not be required to impose minimum sentences on burglars whose previous offences occurred before the minimum penalty was implemented. This contrasts with the position concerning automatic life sentences under clause 1 and minimum sentences for drug traffickers under clause 2.

The age of burglars and the frequency of their offending

The ages of criminals are not known until they are caught so the only regular information available on the ages of burglars is based on those who are found guilty by the courts or cautioned by the police. These may not be representative of burglars as a whole, as the age distribution of those who are not caught may differ from those who are. Of the 45,800 offenders found guilty or cautioned for burglary[30] in England and Wales in 1995, 3,800 (8%) were aged between 10 and 13, 13,900 (30%) were aged between 14 and 17, 9,200 (20%) were aged between 18 and 20 and 18,900 (41%) were 21 or more[31]. 39 per cent of all those convicted for or cautioned for burglary were, therefore, below the age of 18, the youngest age for which the Bill prescribes mandatory minimum sentences for burglary. In 1994, the latest year for which figures for domestic burglary only have been published, 35% of those convicted or cautioned[32] were aged under 18[33].

---

[30] Domestic and non-domestic.

[31] Home Office Statistical Bulletin 16/96 Table 4.

[32] 25% of those convicted and 83% of those cautioned were aged under 18.

It is not at present possible to say much about the numbers of offences committed by these offenders. Burglars in different age groups may, on average, commit different numbers of burglaries; this means that the age distribution of known offenders does not necessarily reflect the numbers of offences they commit. Just because 35% of known domestic burglars are aged under 18 does not necessarily mean that 35% of burglaries are committed by people of that age, because younger offenders may carry out more, or fewer, burglaries on average than those in older age groups. Little is known about the numbers of particular offences committed by offenders although some evidence for younger people - aged 14 to 25 - is to be found in a recent Home office study of self-reported offending in England and Wales. More than half of the active offenders (52% of males and 66% of females) surveyed committed only one or two property[34] offences in the year before the survey (1992). 16% of males offenders and 25% of females committed 3 to 5 property offences, 18% of males and 3% of females committed 6 to 10 and 15% of males and 6% of females committed eleven or more[35]. More generally, however, the limited evidence that exists for all offending (not just specific offences) suggests that the rate of offending among active offenders is fairly constant through all age groups[36].

The age of burglars and the frequency of their offending

The ages of criminals are not known until they are caught so the only regular information available on the ages of burglars is based on those who are found guilty by the courts or cautioned by the police. These may not be representative of burglars as a whole, as the age distribution of those who are not caught may differ from those who are. Of the 45,800 offenders found guilty or cautioned for burglary[37] in England and Wales in 1995, 3,800 (8%) were aged between 10 and 13, 13,900 (30%) were aged between 14 and 17, 9,200 (20%) were aged between 18 and 20 and 18,900 (41%) were 21 or more[38]. 39 per cent of all those convicted for or cautioned for burglary were, therefore, below the age of 18, the youngest age for which the Bill prescribes mandatory minimum sentences for burglary. In 1994, the latest year for which figures for domestic burglary only have been published, 35% of those convicted or cautioned[39] were aged under 18[40].

It is not at present possible to say much about the numbers of offences committed by these

---

[33] Criminal Statistics Supplementary Tables.

[34] Includes theft as well as burglary.

[35] John Graham & Benjamin Bowling **Young people and crime** (Home Office Research Study 145, 1995) Table 2.5.

[36] Roger Tarling **Analysing offending** (HMSO 1993) page 56.

[37] Domestic and non-domestic.

[38] Home Office Statistical Bulletin 16/96 Table 4.

[39] 25% of those convicted and 83% of those cautioned were aged under 18.

[40] Criminal Statistics Supplementary Tables.

offenders. Burglars in different age groups may, on average, commit different numbers of burglaries; this means that the age distribution of known offenders does not necessarily reflect the numbers of offences they commit. Just because 35% of known domestic burglars are aged under 18 does not necessarily mean that 35% of burglaries are committed by people of that age, because younger offenders may carry out more, or fewer, burglaries on average than those in older age groups. Little is known about the numbers of particular offences committed by offenders although some evidence for younger people - aged 14 to 25 - is to be found in a recent Home office study of self-reported offending in England and Wales. More than half of the active offenders (52% of males and 66% of females) surveyed committed only one or two property[41] offences in the year before the survey (1992). 16% of males offenders and 25% of females committed 3 to 5 property offences, 18% of males and 3% of females committed 6 to 10 and 15% of males and 6% of females committed eleven or more[42]. More generally, however, the limited evidence that exists for all offending (not just specific offences) suggests that the rate of offending among active offenders is fairly constant through all age groups[43].

Trafficking in "Class A" Drugs

Clause 2 will require a court dealing with an offender convicted of a class A drug trafficking offence[44] committed after the commencement of this provision to impose a custodial sentence of at least seven years on the offender if, at the time when the offence had been committed he was 18 or over and had been convicted in any part of the United Kingdom of two other class A drug trafficking offences. One of those other offences will have to have been committed after he had been convicted of the other. Unlike the provisions in Clause 3 concerning burglary it will not be necessary for both of the previous offences to have been committed before the commencement of this provision. In some cases the courts may therefore be required to impose a sentence of at least seven years on a person convicted of a class A drug trafficking offence where one of the previous convictions resulting in the court being required to impose this sentence occurred before the current Bill was implemented.

---

[41] Includes theft as well as burglary.

[42] John Graham & Benjamin Bowling **Young people and crime** (Home Office Research Study 145, 1995) Table 2.5.

[43] Roger Tarling **Analysing offending** (HMSO 1993) page 56.

[44] defined in Clause 2(5) as a drug trafficking offence within the meaning of the *Drug Trafficking Act 1994*, the *Proceeds of Crime (Scotland) Act 1995* or the *Proceeds of Crime (Norther Ireland) Order 1996*, committed in respect of a drug classified as "Class A" within the meaning of the *Misuse of Drugs Act 1971*

The White Paper describes the key elements of how this provision is intended to work:[45]

- it will apply to drug trafficking offences involving class A drugs excluding simple possession and offences relating to the proceeds of drug trafficking. The principal offences covered by the proposal are therefore:

  - offences of production, supply and possession for supply of class A drugs (sections 4 and 5 of the Misuse of Drugs Act 1971);

  - an offence of assisting in or inducing the commission outside the UK of an offence relating to a class A drug which is punishable under a corresponding law (section 20 of the 1971 Act);

  - offences of importing or exporting a class A drug (section 3 of the 1971 Act);

  - offences of manufacturing or supplying certain substances useful for manufacturing controlled drugs or using a ship for illicit traffic in class A drugs contrary to the Criminal Justice (International Cooperation) Act 1990;

  - an offence of conspiracy to commit any of those offences under s.1 of the Criminal Law Act 1977;

  - an offence of attempting to commit any of these offences under s.1 of the Criminal Attempts Act 1981;

  - an offence of inciting another person to commit any of those offences, whether under section 19 of the 1971 Act or at common law; and

  - aiding, abetting, counselling or procuring the commission of any of those offences.

- any previous convictions for relevant offences will count as qualifying convictions, including convictions as a young offender, convictions prior to commencement and convictions which are 'spent' under the Rehabilitation of Offenders Act 1974;

- the mandatory minimum sentence must be imposed where the third qualifying conviction, which triggers the mandatory penalty, relates to an offence which was committed after commencement. The offender must also have been at least 18 years old when he or she committed the final qualifying offence (although not necessarily the first two);

- the three qualifying convictions must relate to separate court appearances. Each of the qualifying convictions must relate to an offence committed after the previous conviction. This means that if an offender with no previous convictions was convicted of three drug trafficking offences at one court appearance, or two offences at one appearance and a third on

---

[45] Cm 3190 p49-50

a separate occasion, that would not trigger a mandatory minimum sentence;

- where an offender is liable to a mandatory sentence, the court will be required to impose a sentence of at least 7 years. However the mandatory minimum sentence is just that: a minimum. The court will retain the discretion to impose a higher sentence in appropriate cases;

- the court will also have discretion not to pass the mandatory minimum sentence in genuinely exceptional cases. This is intended to allow for occasional quite unforeseeable circumstances where it would plainly be unjust and unnecessary to impose the mandatory sentence. But it should be emphasised that this provision will be designed to cover only genuinely exceptional cases-it will certainly not be open to the courts to set aside the mandatory sentence merely because it is higher than the sentence they would otherwise have been minded to impose. The court will be required to explain what were the exceptional circumstances which justified setting aside the mandatory sentence; and

- if an offender who has already received a mandatory sentence is convicted of a fourth or subsequent offence, which was committed after the mandatory sentence was imposed, he or she will receive a further mandatory sentence. In such cases it may be appropriate for the court to consider imposing a higher sentence than the mandatory minimum.

Some burglary and drug trafficking offences are triable either way (that is, triable by magistrates or by a judge and jury at the Crown Court). Clauses 2(4) and 3(4) of the Bill provide that where the circumstances are such that, if an offender would, if convicted of one of these offences, be required to be given a minimum sentence, the offence shall be triable only on indictment at the Crown Court.

A court convicting an offender of a "serious offence" as defined in Clause 1, or a class A drug trafficking offence or a burglary, will be required, by virtue of Clause 5, to certify that the offender has been so convicted, and this will be evidence, for the purposes of Clauses 1,2 or 3, that he has been convicted of the offence.

Under Clause 4 provides for an appeal against a mandatory sentence imposed under Clauses 1,2 or 3 where an offender successfully appeals against a previous conviction without which the sentence could not have been imposed.

Exceptional circumstances in which a mandatory sentence need not be imposed

A court will not be required to impose an automatic life sentence under Clause 1 or a minimum sentence under Clause 2 or Clause 3 if it is "of the opinion that there are

exceptional circumstances which justify its not doing so". However if the court declines to do so it will be required to say so in open court and to state what the exceptional circumstances are. The White Paper states that "this is intended to allow for occasional quite unforeseeable circumstances where it would plainly be unjust and unnecessary" to impose the life sentence or mandatory minumum sentence, as the case may be. The White Paper emphasises, however, that "this provision is designed to cover only genuinely exceptional circumstances"[46] and in relation to the mandatory minimum sentences for burglary and drug dealing states that:

> "It will certainly not be open to the courts to set aside the mandatory sentence merely because it is higher than the sentence they would otherwise have been minded to impose."[47]

Paragraph 13 of Schedule 4 of the Bill extends the Attorney-General's powers under Sections 35 and 36 of the *Criminal Justice Act 1988* to refer sentences which he considers to be unduly lenient to the Court of Appeal to failures by courts to impose life sentences as required by Clause 1 or the minimum sentences required by Clauses 2 and 3. The judgments of the Court of Appeal in these cases will provide some indication of the "exceptional circumstances" which might justify a failure to impose a life sentence or a mandatory minimum sentence in these cases.

---

[46] Cm 3190 paras 10.10, 11.3 & 12.7

[47] ibid. paras 11.3 & 12.7

II Parole and the Supervision of Prisoners After Their Release

G. Current arrangements for the early release of offenders under the Criminal Justice Act 1991

The current statutory provisions concerning parole, which apply to all prisoners sentenced after 1 October 1992, are set out in Part II of the *Criminal Justice Act 1991*. The relevant provisions are summarised in the *Report of the Parole Board for 1993* as follows:[48]

> 3. The 1991 Act introduced a new parole scheme to replace the old systems of parole and remission. Under the new Act, remission was abolished but all prisoners, including young offenders, serving sentences of less than four years are now released automatically at half sentence (unless "additional days" have been imposed for breaches of prison discipline). Adults serving less than 12 months are not subject to supervision under licence, but all young offenders and all adults serving sentences of one year to under four years are subject to a period of compulsory supervision.
>
> 4. Prisoners serving sentences of four years or more become eligible for parole after having served one half of sentence (subject to any "additional days" imposed). All such cases are considered by the Parole Board for "discretionary conditional release". Those falling into this part of the scheme but who are unsuccessful in obtaining parole are automatically released on licence at the two thirds point of sentence. Thus the "parole window" is reduced to one sixth of sentence, between the one half and two thirds points, but all prisoners are subject to a period of supervision, whether or not they are granted parole. This new discretionary conditional release scheme applies to prisoners sentenced from I October 1992; those sentenced prior to October 1992 retain their old parole eligibility dates.

Prisoners serving determinate sentences of imprisonment of more than twelve months are released on licence and are therefore subject to supervision, unless the licence is suspended or revoked, until they have served what would, but for their release, have been three-quarters of their sentence. Prisoners serving sentences of imprisonment of less than twelve months who are released early on licence in exceptional circumstances on compassionate grounds under *section 36(1)* of the *1991 Act* are subject to supervision until they have served what would have been half of their sentence, unless the licence is suspended or revoked. Where a prisoner serving a life sentence is released on licence, the licence and consequent supervision to which he or she is subject will last until the prisoner's death.

---

[48] HC 450 27 June 1994 p1

A short-term prisoner (that is, a prisoner serving a sentence of imprisonment of less than four years) who is released on licence but fails to comply with the conditions specified in the licence may be fined up to £1,000 by magistrates, who may also suspend the licence and order the prisoner to be recalled to prison for the period of the suspension.[49] Where a long-term prisoner (that is, a prisoner serving a sentence of imprisonment of four years or more) or a prisoner serving a life sentence is released on licence the Home Secretary may revoke the licence and recall the offender to prison if this is recommended by the Parole Board. The Home Secretary may also revoke such a licence on his own initiative, without the Parole Board's recommendation, if it appears to him that it is expedient in the public interest to recall such a prisoner before such a recommendation is possible[50]. The Parole Board's annual reports give details of the numbers of licences revoked and prisoners recalled under these provisions. The Board's most recent report was published in October 1996[51].

If a short-term or long-term prisoner released under Part II of the 1991 Act commits an offence punishable with imprisonment before the date on which he would, but for his release, have served his sentence in full the court which convicts him may, whether or not it passes any other sentence on him, order him to be returned to prison for any period up to a maximum of the length of the period between the date on which the new offence was committed and the date on which he would have served his sentence in full. This period may be served before and be followed by, or be served concurrently with, the sentence imposed for the new offence.[52]

Section 44 of the *Criminal Justice Act 1991* gives the courts additional powers in respect of offenders who are given determinate sentences of imprisonment for sex offences (as defined by *section 31* of the *1991 Act*). It provides that in sentencing such an offender, having had regard to the need to protect the public from serious harm, the desirability of preventing the commission of further offences and the securing of his or her rehabilitation, the court may extend the duration of the period of supervision to which the offender is to be subject after release to cover the whole of the sentence which is to imposed, rather than three quarters of it.

The Home Office publishes *National Standards for the Supervision of Offenders in the Community* jointly with the Welsh Office and the Department of Health. The most recent edition of the *National Standards* was published in 1995.

---

[49] *Criminal Justice Act 1991* s.38
[50] *Criminal Justice Act 1991* s.39
[51] *Parole Board Report for 1995 and 1995/96* HC 506
[52] *Criminal Justice Act 1991* s.40

H. Recent history of parole

Prior to the implementation of the 1991 Act all prisoners (other than lifers, for whom there were special review and release arrangements and those sentenced as juveniles for particularly serious offences under Section 53(2) of the *Children and Young Persons Act 1933*) became eligible for release on parole once they had served one-third of their total sentences (including time spent on remand) or six months after sentence, whichever was later. Between 1940 and 1987 prisoners could have one-third of their sentence remitted for good behaviour, while from 1987 until the implementation in October 1992 of Part II of the *Criminal Justice Act 1991* up to half of a prisoner's sentence was eligible for remission.[53] The 1991 Act abolished remission and set out the arrangements for early release, described in the previous section of this paper, which have applied to all offenders sentenced to imprisonment since October 1st 1992. Prisoners sentenced before that date and still in prison are dealt with under the older system The 1991 Act implemented a number of proposals and recommendations made in the report, published in 1988, of a review committee set up in July 1987 by the then Home Secretary, Douglas Hurd.[54] On the day the report was published the committee chairman, Lord Carlisle of Bucklow, made the following comments about criticisms of the then current arrangements concerning parole and remission:[55]

> "While strongly endorsing the principle that prisoners should be released under supervision as the best means of reducing the likelihood of reoffending, the Committee has concluded that many of the criticisms of the present parole system are wholly justified. The gap between what a judge says and what actually happens in practice has become too great. The system misleads the public and in some cases removes entirely the distinction between sentences of differing lengths; it creates uncertainty for prison and probation officers; it breeds cynicism among offenders; it is unduly secretive and excessively bureaucratic.

In its report, the Carlisle Committee noted that in 1940 and in 1987 remission for good behaviour had been used quite explicitly by the Home Secretaries of the day as a means of reducing demand for scarce prison places. Thus, as well as being a means of motivating and controlling individual prisoners, it had been used as a "safety-valve for the executive in times of overwhelming pressure on the prisons". The committee added that:[56]

> 45. It can also be argued persuasively (see paragraph 22) that from its inception 20 years ago parole in this country has had as much to do with reducing the overall prison population by executive means as with the rehabilitation into society of individual offenders. Instead of grasping the nettle of sentencing reform, governments have found it more convenient to allow the judges a free hand and to restrain the size of the prison population more covertly. The words of an American academic about the situation in

---

[53] This took anyone sentenced to twelve months' imprisonment or less out of the parole system

[54] Cm 532

[55] Home Office Press Notice 25.11.1988

[56] *The Parole System in England and Wales - Report of the Review Committee* Cm 532 p14

the USA could with only a little modification be applied equally well to what has happened here: 'In a system that seems addicted to barking louder than it wants [or is able] to bite, a parole system allows judges to appear draconian for the media, knowing that everything will be set quietly to rights down the road'. So to ask how effective parole has been in reducing crime and helping offenders to settle back into society is only part of the story. It can perfectly well be argued that provided it has not actually increased crime, harmed offenders or led to an increase in sentences it has still been worthwhile because it has kept the prison population a few thousand below what it would otherwise be and thus saved many millions of pounds as well as avoiding a good deal of human misery.

46. If, however, parole were merely a convenient way for the executive to smuggle people out of prison it would be impossible to avoid asking whether the same end could not be achieved by a more simple and straightforward means. If all that parole showed was that many sentences could be reduced in length without significant risk to the public the logical course would be to have shorter sentences and dispense with the cumbersome machinery necessary for a selective release system.

The committee also commented on efforts to measure the effectiveness of remission and parole and summarised the results of research on the subject:[57]

47. In the nature of things the question is a difficult one since it involves trying to compare the real with the hypothetical. It requires some assumption about what might have happened if parole had not been granted and vice versa. Although a number of research studies have been carried out none has been able, for obvious legal and ethical reasons, to conduct a controlled experiment with live cases: in other words it has not been possible to identify people who appear to constitute a similar risk and grant parole to some and not to others to see what effect parole supervision has. Researchers have had to analyse past cases and make comparisons on the basis of control groups constructed by statistical means. These techniques make it very difficult to be totally confident about cause and effect.

48. It is certainly the case that the reoffending rate for those released on parole is lower than for those denied parole. For example, a study of 3554 males serving more than 12 months from sentence who were discharged in 1977-9 showed that although, overall, 44% were reconvicted within 2 years, 34% of those granted parole had been reconvicted as against 59% of those who had been refused parole. But this lower reoffending rate is exactly what one would in any event expect: it would indeed be alarming if the figures indicated that the Parole Board and LRCs were having no success at all in separating the sheep from the goats. What the lower reoffending rate does not in itself show is that those granted parole would have been more likely to offend if they had instead, been released at a fixed point in their sentence, with or without supervision.

---

[57] ibid p14-15

49. With these caveats some conclusions can, however, be drawn from Home Office studies undertaken by Nuttall and others in 1977, the Home Office Statistical Department in 1978 and 1979, Ward in 1987 and Ditchfield earlier this year:

(a) first, it is probable that nearly 20% of people on parole reoffend while on licence. This is much higher than might be deduced from the fact that only about 5% of parole licences are revoked, about half of these for licence breaches which do not involve reoffending. The under 21s are more likely to reofend than the 21s and over;

(b) second, the overwhelming majority of offences committed on parole (71%) are less serious than the original offence and only a handful (5%) are more serious;

(c) third, although the evidence that releasing people on parole may have a significant long-term effect in preventing reoffending is not clear-cut, it is reasonably clear that parole and supervision do reduce the likelihood of reoffending in the short-term (though it is still far from clear how the release decision and the provision of supervision interact to produce this effect).

This final conclusion may seem a modest basis on which to claim that early release and supervision help to prevent crime. But there is so little in the penal system that can be said with confidence to reduce the likelihood of reoffending that even a modest success is to be welcomed.

A 1977 Home Office Research Study on *Parole in England and Wales*[58] discussed the "failure" of offenders on parole, amongst other things, and evaluated parole's success in reducing further offences. An article from a 1989 Research Bulletin from the Home Office Research and Planning Unit also summarised the results of a study on offending on parole.[59] The Oxford Centre for Criminological Research is carrying out a three-phase research project on the effects of the changes in arrangements for early release brought about by the provisions of the 1991 Act. The final results of this project will not be known for some time, but in an article in the February 1996 issue of the *Criminal Law Review* the researchers said the new criteria had already had the effect of markedly reducing the proportion of prisoners granted parole.[60] A Home Office research study of the operation of the automatic conditional release scheme under the 1991 Act suggested that it was too early to form firm conclusions about the scheme, but that attitudinal measures showed some positive changes in offenders' attitudes to offending and to victims. It said an analysis of known reoffending rates among a small sample of completed licensees indicated that these were well below expected rates, although this finding needed to be treated with caution as it was likely to reflect some under-recording.[61]

---

[58] Home Office Research Study No. 38 (1977) p65-77

[59] HORPU Research Bulletin No. 26 1989 Chapter 3

[60] "Parole Criteria, Parole Decisions and the Prison Population: Evaluating the Impact of the Criminal Justice Act 1991" - Roger Hood & Stephen Shute [1996] Crim. LR p77-87 at p 87. A full copy of this article is enclosed.

[61] *Automatic Conditional Release: the first two years* - Home Office Research Study 156 (1996)

I. The Crime (Sentences) Bill: New Arrangements for Early Release and Supervision

The 1996 White paper

In a chapter of the White Paper *Protecting the Public* entitled "Honesty in Sentencing" the Home Secretary set out the Government's plans to abolish the current arrangements for automatic early release and parole and replace them with new arrangements. Explaining why the Government considers that change is needed the White Paper said :[62]

> 9.3. It is common knowledge that offenders do not serve the term actually imposed by the court. There are complicated statutory arrangements which provide for offenders to be released automatically after serving a certain proportion of their term-in many cases only 50%. As a result the public, and sometimes even the courts, are frequently confused and increasingly cynical about what prison sentences actually mean.

The Government summarised the changes which it proposed to bring about as follows[63]

> 9.1. The Government proposes that offenders sentenced to custody should serve the full term ordered by the court. Automatic early release and parole would therefore be abolished. For the first 12 months of a sentence, or all of a sentence of less than 12 months, a prisoner would be able to earn a small discount of 6 days a month by co-operation with the prison regime. Beyond 12 months the prisoner would be able to earn 3 days by co-operation and a further 3 days each month for positive good behaviour, including hard work and effective and diligent I compliance with prison programmes related to his or her offending behaviour. After release, offenders sentenced to 12 months or more would spend a further period under supervision in the community.

The White Paper went on to set out how the Government intended the proposed changes to work:[64]

> 9.6. The Government believes that the sentence passed by the court should mean what it says. Accordingly the Government proposes that the present early release arrangements should be abolished (although the Parole Board will continue to consider cases involving the release on licence of life sentence prisoners). Instead, prisoners will have to earn early release by co-operation and positive good behaviour. No part of this will be granted as of right it will have to be earned. Behaviour will be continuously assessed throughout the sentence. This is in line with one of the recommendations

---

62 Cm 3190 p43
63 ibid. p43
64 ibid. p44

in the Learmont Report on prison security as to the positive effects on security and control in prisons if prisoners are given a clear incentive to behave well. The key elements of the proposal are as follows:

- it will apply to all offenders aged 16 or over who are convicted of an offence committed after commencement for which they receive a determinate custodial sentence;

- for the first 12 months of a sentence (or all of it if less than 12 months) prisoners will be eligible to earn early release of up to 6 days per month by co-operation;

- beyond 12 months prisoners will be able to earn 3 days a month by co-operation and a further 3 days by positive good behaviour, including hard work and effective and diligent compliance with prison programmes related to their offending behaviour;

- prisoners' behaviour will be assessed continuously throughout their sentence. Every 2 months, they will be eligible to earn a maximum of 12 days' early release from their sentence. On this basis, the maximum available remission under the earned early release scheme would be 20% of the term of imprisonment originally imposed in practice rather less because prisoners by definition could not earn any early release after they had been released;

- days which had already been earned under the new early release scheme could be taken away by the governor as a punishment for offences against prison discipline up to a maximum of 42 days for each offence, as at present;

- it is expected that judges will take into account, when passing sentence, the abolition of parole and the changes in early release arrangements. The Government does not therefore expect the proposal to result in a general increase in the period of time offenders serve in prison;

- when released under the' new arrangements, all offenders sentenced to 12 months or more will rema in under supervision for a period representing 15% of the term originally imposed, subject to a minimum of 3 months (and irrespective of whether the offender earned early release or served his or her term in full). Offenders who breach the conditions of supervision may be brought back to court, and the court will have power to return them to prison for all or part of the remainder of the supervisory period; and

- arrangements for those under 16 would be brought in line with these proposals, except that they would not be subject to a statutory scheme of earned early release.

The White Paper set the following additional proposals for change in the arrangements for taking account of time spent on remand in custody:[65]

> 9.7. Consistent with the philosophy of honesty in sentencing, the Government also proposes to introduce greater transparency into the arrangements for sentence - calculation. For example, offenders sentenced to a term of imprisonment can sometimes be released after a very short time-or even walk out of the court straight away-because of the time they have already spent in custody on remand, without this being apparent when the sentence is announced in court. The Government proposes that when dealing with a case where the defendant has been on remand in custody before his or her trial and sentence, the court should specify the date on which the sentence should be regarded as having begun, taking account of time already spent in custody on remand. In doing so, it would be open to the court to leave out any time on remand attributable to time wasting by the defendant.

Early Release

The *Crime (Sentences) Bill* will repeal the provisions in the *Criminal Justice Act 1991* setting out the current arrangements for the early release of prisoners. These will be replaced by provisions in Chapter 1 of Part II of the Bill, which are designed to implement the proposals set out in the White Paper.

Under *Clause 6* a person sentenced to imprisonment for an offence after the commencement of this part of the Bill will be released when he has served his sentence, unless the provisions in this part of the Bill apply.

Under *Clause 7* the court will give a direction that the time spent by an offender on remand in custody will count towards the sentence unless, "it is in the opinion of the court just not to give a direction" or the case falls within rules which the Home Secretary will have the power to make in respect of consecutive or concurrent sentences of imprisonment. These rules will be subject to the affirmative procedure.[66] If the court does not give a direction that the period which an offender spent in custody on remand should count towards sentence, or directs that only part of that period should count, it will be required to state in open court that the decision is in accordance with the rules or state the circumstances which have caused it to conclude that it would not be just to give such a direction.

Clause 8 gives the Home Secretary the power to release a prisoner at any time if he is satisfied that exceptional circumstances exist which justify the release on compassionate grounds.

---

[65] ibid. p45

[66] that is, they will have to be approved by both Houses of Parliament

Clause 9 of the Bill, which applies where a prisoner is serving a sentence of imprisonment of three months or more, provides that:

> **9.**(1) This section applies where a prisoner is serving a sentence of imprisonment for a term of three months or more.
>
> (2) For each initial assessment period,- the prescribed person may award the prisoner such number of early release days, not exceeding twelve, as he may determine having regard to the extent to which the prisoner's behaviour during the period has attained the prescribed minimum standard.
>
> (3) For each subsequent assessment period, the prescribed person may award the prisoner-
>
> (a) such number of early release days, not exceeding six, as he may determine having regard to the extent to which the prisoner's behaviour during the period has attained the prescribed minimum standard; and
>
> (b) such number of such days, not exceeding six, as he may determine having regard to the extent to which the prisoner's behaviour during the period has exceeded that standard.
>
> (4) Where any early release days are awarded to a prisoner, any period which he must serve before becoming entitled to be released shall be reduced by the aggregate of those days; but nothing in this subsection shall entitle a prisoner to be released on the basis of an award before the day after that on which the award is made.
>
> (5) Prison rules may-(a)require determinations ' under this section to be made at prescribed times, and to be notified to the prisoners concerned in the prescribed manner; and
>
> (b) make provision for enabling prisoners to appeal against such determinations to prescribed persons.
>
> (6) The Secretary of State may by order provide that subsections (2) and (3) above shall have effect subject to such amendments as may be specified in the order; but no amendment so specified shall reduce-(a)the number of days specified in subsection (2) or (3)(a); or
>
> (b) the total number of days specified in subsection (3).
>
> (7) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

As far as paragraph (6) of this Clause is concerned it would appear that this is not strictly speaking a "Henry VIII Clause" (which enables a minister to amend the provisions of an Act by subsequent secondary legislation). It will, however, allow the provisions to be read as if

the numbers of days specified in paragraphs (2) and (3) were to be raised or lowered (provided that they do not fall below the numbers actually specified in those paragraphs) and permit these paragraphs to be amended in other ways, through subsequent secondary legislation introduced under the negative procedure.

"Assessment period" and "initial assessment period" are defined in Clause 9(8) as follows:

(8) In this section, in relation to a prisoner-
"assessment period" means-

(a) the period of two months beginning with the day on which he was sentenced; and

(b) each successive period of two months endin before his release;

"initial assessment period" means an assessment period beginning less than twelve months after the day on which he was sentenced and "subsequent assessment period" shall be construed accordingly.

Clause 11 is designed to enable early release days to be earned and additional days to be awarded on a provisional basis to remand prisoners.

The "minimum standard" and the person who will be empowered to determine whether a prisoner has attained that standard and how many early release days he should be awarded, will be prescribed by prison rules made under section 47 of the *Prison Act 1952*. Rules requiring determinations to be made at prescribed times and notified to the prisoner in a prescribed manner, and provisions enabling prisoners to appeal against such determinations, and prescribing the person to whom such appeals may be made, will also be made under section 47 of the *1952 Act.* Rules made by statutory instrument under this section of the *1952 Act* are subject to annulment under the negative procedure rather than being subject to approval by both Houses of Parliament under the affirmative procedure. Under the current system, this is the case with a number of provisions relating to prisons, including the rules governing the awarding to prisoners of additional days in custody for disciplinary offences under Section 42 of the *Criminal Justice Act 1991*[67]. The proportions of their sentences which different types of prisoner must serve before being eligible for early release are, however, set out in primary legislation. Section 42 of the *1991 Act* will be repealed by the current Bill and replaced by *Clause 10.*

[67] which will be repealed by the Bill along with the other provisions of the 1991 Act concerning early release

Release Supervision Orders

The provisions in the Bill concerning release supervision orders apply to prisoners sentenced for offences committed after this Chapter of the Bill comes into force.

Clause 12 will require offenders serving sentences of imprisonment of twelve months or more and offenders serving sentences of less than twelve months' imprisonment who are released on compassionate grounds under Clause 8 to be subject to "release supervision orders" made by the Home Secretary, requiring them to be under the supervision of probation officers and to comply with specified conditions. The Home Secretary will be able to specify conditions requiring an offender to live at an approved probation hostel or making "such provision as is made by a curfew order" if the Parole Board so recommends after an oral hearing at which the offender was heard or represented. (Curfew orders are orders made under section 12 of the *Criminal Justice Act 1991* requiring offenders to remain for specified periods at specified places and making a person responsible for monitoring the offender's whereabouts during the specified periods. Several pilot schemes for the electronic monitoring of offenders subject to curfew orders have been undertaken by the Home Office. They are discussed in Part K of this Paper). The Home Secretary will be able to make rules[68] regulating the supervision under this Clause of any description of offenders.

The periods for which the supervision orders will be in force will be:

a) For a prisoner serving a sentence of imprisonment of twelve months or more who is released other than on compassionate grounds, a period equal to 15% of his term of imprisonment or three months, whichever is the greater;

b) For a prisoner serving a sentence of imprisonment of less than twelve months who is released on compassionate grounds, a period equal to as much of the remainder of his term as he would have had to serve had he not been released;

c) For a prisoner serving a sentence of imprisonment of twelve months or more who is released on compassionate grounds, a period equal to the aggregate of the periods set out in paragraphs a) and b).

In assessing these periods account is to be taken of any early release and additional release days awarded to the offender before his release.

---

[68] by statutory instrument under the negative procedure

Under *Clause 13* of the Bill failure to comply with the conditions of a release supervision order without reasonable excuse will be an offence punishable, on summary conviction by a fine not exceeding £1,000 or a term of imprisonment of up to six months or the remainder of the release supervision period, whichever is the shorter, or both, and on conviction on indictment by a fine or by a term of imprisonment not exceeding the remainder of the release period, or both. Under paragraph (2) of *Clause 13* it is intended that the offence should be tried summarily unless the remainder of the release supervision period is longer than six months or the act or omission which constitutes the failure to comply is itself an offence punishable with imprisonment and triable on indictment. Paragraph 4 of *Clause 13* provides that a court should not impose a sentence of imprisonment for the offence of failing to comply with a condition in a release supervision order unless:

a) it considers it expedient to do so in the interests of protecting the public from serious harm from the offender; or

b) the offender's failure to comply consisted of the commission of an offence punishable with imprisonment.

Clause 14 is intended to enable a constable to arrest without warrant a person he reasonably suspects has committed an offence under Clause 13 and to permit a justice of the peace to grant warrants authorising constables to enter named premises, with force if need be, for the purposes of searching for and arresting such a person.

Young Offenders

The provisions concerning the crediting of remand time, the awarding of early release days to convicted offenders and offenders on remand and the imposition of release supervision orders will, by virtue of *Clause 15*, apply to young offenders, subject to some modifications. In particular, it is intended that offenders who are under the age of 16, or are detained in local authority accommodation or homes provided by the Secretary of State under section 82(5) of the *Children Act 1989*, or remanded or committed to local authority accommodation and placed and kept in secure accommodation, should be entitled to the maximum number of early release days available for each assessment period under Clauses 9 and 11. Under *Clause 17*, the same entitlement will apply to accused persons who are remanded, admitted or removed to hospital under Sections 35, 36, 38 or 48 of the *Mental Health Act 1983*,and to prisoners detained in hospital under Sections 45A, 47 or 49 of the *1983 Act*. Additional provisions in the Bill concerning mentally disordered offenders are dealt with in Library Research Paper 96/100 on *The Crime (Sentences) Bill and the Crime and Punishment (Scotland) Bill: Provisions for Mentally-Disordered Offenders.*

Where offenders under the age of 22 who have been sentenced, for offences other than sexual offences, to detention in a young offenders' institution, or to detention for certain grave crimes under Section 53 of the *Children and Young Persons Act 1933* commit the offence of failing to comply with the conditions of their release supervision orders, they will be liable to a shorter maximum period of further detention of 30 days and will not be liable to an additional release supervision order in consequence of this subsequent conviction.

Sexual Offenders

In the White Paper *Protecting the Public* the Government said it considered there was a strong case for strengthening the arrangements for supervising convicted sex offenders following their release from custody. The Paper described why the Government took this view and the changes it proposed to make:[69]

8.9. The current arrangements for dealing with convicted sex offenders still leave some concerns:

- sex offenders sometimes have to he released from custody even though at the time of release they seem likely to remain an active threat;
- when sex offenders have reached the end of periods of supervision in the community, there is no way of monitoring or controlling their activities; and
- there are practical difficulties, mentioned at paragraphs 8.6 and 8.7 above, in accommodating worthwhile treatment programmes in short sentences or short periods of supervision.

8.10. The proposals in chapter 10 for automatic life sentences for those who repeat serious violent or sexual offences will obviously provide an important new safeguard. But they will not deal with all the concerns raised by this very difficult group of offenders. There is a need to improve supervision arrangements for those released from determinate custodial sentences imposed for sex offences. There may also be a need to take account of any recommendations arising from Lord Cullen's inquiry into the circumstances surrounding the tragedy at Dunblane School on 13 March 1996.

8.11. The Government is also considering suggestions that convicted sex offenders should be required by law to notify the police of any changes of address and prohibited from seeking employment which involves access to children. There are potential difficulties as well as advantages in these suggestions, which need to be considered in the context of the forthcoming White Paper on access to criminal records. The Government therefore intends to publish a consultation document very shortly canvassing the full range of measures which could improve public protection against sex offenders, including additional supervision of offenders following their

---

[69] Cm 3190 p41

release from custody.

The Government subsequently published a consultation paper setting out detailed proposals for changes in sentencing and supervision arrangements for people convicted of sexual offences against both adults and children.[70] In a Written Answer on October 25th 1996 the Home Secretary, Michael Howard, said that legislation based on proposals in the consultation paper to require paedophiles and other serious sex offenders to notify changes of address to the police would be brought forward by the Government[71] and it is expected that this will take place later this session. It had earlier been suggested that these proposals would be brought forward through a Private Members' Bill.

Clause 16 of the *Crime Sentences (Bill*) is intended to provide for the extended supervision of sex offenders following their release from custody. It will require a court sentencing an offender to a term of imprisonment in respect of a sexual offence to direct that the offender's release supervision period will be a period of 50% of the term of imprisonment or twelve months, whichever is the longer, or a longer period of up to ten years, if the court considers that a longer period is necessary for the purpose of preventing the commission by the offender of further offences and of securing his rehabilitation. The court will not have to give such a direction if it takes the view that there are exceptional circumstances which justify its not doing so. If the court takes this view it will have to say so in open court and state what these exceptional circumstances are.

The sexual offences to which *Clause 16* is intended to apply are those defined by Section 31 of the *Criminal Justice Act 1991*. These offences are listed in an annex to the consultation paper *Sentencing and Supervision of Sex Offenders* as follows:[72]

Offences under the Sexual Offences Act 1956

s1 Rape (or attempted rape)
s2 Procurement (or attempted procurement) of a woman by threats
s3 Procurement of a woman by false pretences
s4 Administering drugs to obtain or facilitate intercourse
s5 Intercourse (or attempted intercourse) with a girl under 13
s6 Intercourse (or attempted intercourse) with a girl between 13 and 16
s7 Intercourse (or attempted intercourse) with a defective woman
s9 Procurement of a defective woman
s10 Incest (or attempt to commit incest) by a man against a female
sll Incest (or attempt to commit incest) by a woman
s12 Buggery (or attempt to commit buggery)
s13 Indecency between men

---

[70] *Sentencing and Supervision of Sex Offenders* Cm 3304 June 1996
[71] HC Deb Vol 284 c14 (W) 25.10.1996
[72] Cm 3304 Annex A

s14 Indecent assault on a woman
s15 Indecent assault on a male
s16 Assault with intent to commit buggery
s17 Abduction of a woman by force for the sale of her property
s19 Abduction of an unmarried girl under 18 from her parent or guardian
s20 Abduction of an unmarried girl under 16 from her parent or guardian
s21 Abduction of a defective woman from her parent or guardian
s22 Causing (or attempting to cause) prostitution of a woman
s23 Procuration (or attempted procuration) of a girl under 21
s24 Detention of a woman in brothel or other premises
s25 Permitting a girl under 13 to use premises for intercourse
s26 Permitting a girl between 13 and 16 to use premises for intercourse
s27 Permitting a defective woman to use premises for intercourse
s28 Causing or encouraging prostitution of, intercourse with, or indecent assault on, a girl under 16
s29 Causing or encouraging prostitution of a defective woman
s32 Solicitation by a man

[Sections 8 and 18 are no longer in force]

Offences under the Indency with Children Act 1960

sl Indecent conduct towards a child under 14

Sexual Offences Act 1967

s2 Homosexual acts on merchant ships

Criminal Law Act 1977

s54 Inciting a girl under 16 to have incestuous sexual intercourse

Protection of Children Act 1978

sl Various Offences in connection with indecent photographs of children

The offences of buggery, indecency between men, solicitation by a man and homosexual acts on merchant ships may be committed in circumstances where both the accused person and the "victim" were consenting adult males. In the consultation paper the Government said:[73]

"The definition of qualifying sexual offences should be no narrower than in Section 31, bearing in mind that the extended supervision powers would be triggered only in cases where the circumstances of the offence led the courts to impose a sentence of imprisonment in the first place"

---

[73] Cm 3304 para 16

Reducing sentences to take account of the abolition of parole

In the White Paper the Government says that it does not expect the proposals for change in the arrangements for early release to result in a general increase in the period of time offenders serve in prison because courts will be expected to take the abolition of parole and the other changes in early release arrangements into account when passing sentence. The courts will thus be expected to reduce the sentence they would otherwise have handed down had the current arrangements persisted, in order to take account of the abolition of parole. The White Paper notes that this could either be achieved by a Practice Direction if the Lord Chief Justice considered such a Direction appropriate, or by a specific statutory provision.[74] The former Lord Chief Justice Lord Taylor issued a Practice Direction following the changes in the 1991 Act. This broke with the earlier principle of sentencing policy which held that sentencing decisions should be made without reference to questions of remission or parole.[75]

Clause 21 of the Bill is intended to require courts imposing custodial sentences after the commencement of the Bill on offenders other than repeat burglars or drug dealers for whom mandatory minimum sentences will be required under Clauses 2(2) and 3(2), to take into account the abolition of parole and automatic early release and impose terms corresponding to the proportions of the terms which those offenders would have had to serve before being entitled to be released under the automatic early release provisions of the *Criminal Justice Act 1991*.

J. Life Sentence Prisoners and Juveniles detained during Her Majesty's Pleasure

The current Bill will repeal the provisions in Section 34 of the *Criminal Justice Act 1991* under which the Home Secretary is required in certain circumstances to release a discretionary life sentence prisoner (a prisoner serving a life sentence for an offence for which this is the maximum penalty) on licence if the Parole Board directs that the prisoner be released. It will also repeal provisions in Section 35 of the same Act under which the Home Secretary may release a mandatory life sentence prisoner (effectively a prisoner serving a life sentence for murder) on licence after having referred the prisoner's case to the Parole Board, received a recommendation that he or she be released and consulted with the Lord Chief Justice and the trial judge if the latter is available.

In a couple of recent cases the arrangements for setting the tariff for young offenders sentenced to detention during Her Majesty's Pleasure have been criticised by the European Court of Human Rights and the Court of Appeal respectively.

---

[74] ibid. p43

[75] [1992] 1 WLR 948

On February 21 1996 the European Court of Human Rights issued judgments in the cases of *Singh v the UK* and *Hussain v UK*, which were both concerned with the detention of young offenders convicted of murder when under the age of 18 and consequently sentenced under Section 53(1) of the *Children and Young Persons Act 1933* to be detained "during Her Majesty's pleasure". The European Court held that there had been a violation of the European Convention on Human Rights in both of these cases in that, after their "tariffs" had expired (that is, the periods of detention which it was decided the applicants should serve in order to satisfy the requirements of retribution and deterrence), the applicants were unable to bring the question of their continued detention before a court with the powers and procedural guarantees satisfying Article 5(4), which provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

In answer to one of a series of Oral Questions from Lord Longford on February 28 1996, asking for the Government's response to the decision of the European Court of Human Rights in this case the Lord Advocate, Lord Mackay of Drumadoon said:[76]

> The noble Earl raises the question of how many people may be affected. My information is that in England and Wales some 235 cases are potentially affected by the judgment. While each and every one of these cases is being looked at urgently, it is likely that primary legislation will be required to set up the new procedure. In the interim, before primary legislation is passed, cases where the tariff has expired will be dealt with on an administrative basis.

The European Court ruling was concerned with the continued detention of juveniles detained during Her Majesty's pleasure after their "tariff" had expired. It was not concerned with whether or not the Home Secretary was entitled to set the tariff of juveniles sentenced to detention during Her Majesty's pleasure or with the appropriateness of the tariff imposed in a particular case. These matters were, however, raised in an application for judicial review concerning the tariffs imposed on Robert Thompson and Jon Venables, the two boys convicted of the murder of James Bulger. In this case, decided on May 2 1996, the High Court quashed the 15-year tariff imposed by the Home Secretary, holding that he had erred in applying the same practice in fixing the tariff to be served by children detained during Her Majesty's pleasure as was applied to adult prisoners subject to mandatory life sentences following convictions for murder. On July 30th 1996 the Court of Appeal dismissed an appeal by the Home Secretary against this decision and, held that the Home Secretary's decisions fixing the period which would elapse before the two child offenders were to be considered

---

[76] HL Deb Vol 569 c.1455 28.2.1996

for release were vitiated by unfairness.[77] It was reported that Robert Thompson and Jon Venables had also lodged applications with the European Court of Human Rights concerning both the setting of the tariff and the use of trial by jury in their case.[78]

Press reports in the aftermath of the High Court decision in the case involving Robert Thompson and Jon Venables stated that the Home Secretary had suggested that he would, if necessary, introduce legislation to overturn the decision.

Chapter II of Part II of the Bill makes new provision for the release of discretionary and mandatory lifers, including those, like the boys convicted of the murder of James Bulger, who were under 18 when the offence for which they received a life sentence was committed.

Clause 23 is intended to require the Home Secretary to release:

i) mandatory and discretionary life sentence prisoners who were under 18 when the offence was committed; and

ii) discretionary life sentence prisoners in respect of whom the sentencing court ordered the provisions to apply

when directed to do so by the Parole Board.

It would appear from the complex wording of Clause 23 that it is intended that the courts should give directions specifying a period of custody to be served by such prisoners to take account of the seriousness of the offence and other associated offences, if any, as well as any time spent in custody on remand. Once this period has been served the Home Secretary will be able and may be required to refer the prisoner's case to the Parole Board, which may direct his release if it is satisfied that it is no longer necessary for the protection of the public that he be confined. Paragraph (7) of *Clause 23* provides that a life sentence prisoner to whom the Clause applies may require the Home Secretary to refer his case to the Parole Board at any time -

(a) after he has served the relevant part of his sentence; and
(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference; and
(c) where he is also serving a sentence of imprisonment or detention for a term, after the time when, but for his life sentence, he would be entitled to be released;

---

[77] R v. Secretary of State for the Home Department ex parte Venables and Thompson - *Times Law Report* 7.8.1996
[78] "Howard's sentence on child killers 'unlawful'" - *Guardian* 18.4.1996

Clause 24 is intended to give the Home Secretary a power, but not a duty, to release other life sentence prisoners (that is, prisoners given life sentences for murder who were over 18 when the offence was committed and discretionary lifers in respect of whom the courts have not ordered that Clause 23 should apply) if recommended to do so by the Parole Board after consultation with the Lord Chief Justice and the trial judge if available. The Parole Board will only be able to make such a recommendation if the Home Secretary has referred the particular case, or the class of case to which it belongs, to the Parole Board for its advice. Arrangements for the release of these life sentence prisoners will be the same as those which currently apply under Section 35 of the *1991 Act.*

Clause 25 will permit the Home Secretary to release life prisoners on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds. Before exercising this power the Home Secretary will be enquired to consult the Parole Board, unless this is impracticable in the circumstances

Life sentence prisoners released on licence under these provisions will be liable to be recalled under *Clause 27* if their licence is revoked by the Home Secretary on the recommendation of the Parole Board or where it appears to the Home Secretary that this is expedient in the public interest before such a recommendation is practicable. In the latter circumstances the prisoner's case will be referred to the Parole Board, but otherwise this will only happen if the prisoner makes written representations with respect to his recall. On their return to prison recalled lifers will be informed of the reasons for their recall and of their right to make representations.

Several reports, including the *Report of the House of Lords Select Committee on Murder and Life Imprisonment,*[79] the *Report of the Committee on the Penalty for Homicide*[80] and the report of the Home Affairs Committee on *Murder: The Mandatory Life Sentence (Supplementary Report)*[81] have recommended that responsibility for setting the tariff (the period which must be served to satisfy the requirements of retribution and deterrence before a life sentence prisoner can be considered for release) and taking decisions on the release of prisoners serving mandatory life sentences for murder be taken away from the Home Secretary. (The first two of these reports also recommended that the mandatory life sentence for murder be abolished). In its response to the Home Affairs Committee's recommendation the Government said that a move to take this responsibility away from the Home Secretary would be undesirable because:[82]

---

[79] HL Paper 78 Session 1988-89

[80] a report published in 1993 of an independent inquiry commissioned by the Prison Reform Trust, chaired by the former Lord Chief Justice Lord Lane

[81] Home Affairs Committee Second Report 1995/96 HC 412

[82] The Government Reply to the First and Second Reports from the Home Affairs Committee Session 1995-96 HC 111 and HC 412 - *Murder: The Mandatory Life Sentence* Cm 3346 p1

a) it could reduce public confidence in the criminal justice system

b) it would prevent direct accountability to Parliament for decisions on length of tariff and release for murders

c) it would limit the perspectives brought to the decisions on tariff and release

d) it could signal that murder was no longer regarded as a uniquely heinous crime.

K. Alternative penalties for fine defaulters and others convicted of minor offences

Electronic Monitoring of Offenders

In a Green Paper published in July 1988 entitled *Punishment, Custody and the Community*[83] the Government asked whether it might be useful for the courts to have powers to make curfew orders, confining people to their homes at certain times. It was suggested that these could be enforced through electronic monitoring of the people who were subject to such orders. A pilot project on the use of electronic monitoring for defendants remanded on bail awaiting trial who would otherwise have been remanded in custody was carried out by the Home Office in 1989-90. This particular group was chosen for the study because electronic monitoring devices could be used as a condition of bail without the need for primary legislation, which was not the case with convicted offenders. The report of the study of the pilot project was published in 1990.[84] In the concluding chapter of the report of the study, the researchers noted that:[85]

> Magistrates and judges generally did not seem to have much confidence in the applicability of electronic monitoring as an alternative to a remand in custody, and commented on the difficulties of finding suitable candidates for it. They were willing to countenance a trial with a limited time-span, but if monitoring were to be introduced on any national basis then much greater confidence in the system on the part of both these groups would be vital.

They also made the following observations about the views of the people who had been monitored during the study:[86]

---

[83] Cm 424

[84] *Electronic Monitoring: The Trials and Their Results* - Home Office Research Study 120 p.1-16 & p.63-68

[85] Ibid., 120 p.65

[86] HORS 120 p.68

> One key point to note is that, generally, those who were monitored preferred it to custody though they also found it to be restrictive and demanding, A significant minority, however, said that they would not choose monitoring again; it was too rigorous and it would not be deducted from a custodial sentence. More knowledge for potential candidates in advance of consenting to be monitored would be helpful.

An account of the pilot study of electronic monitoring in England and Wales in 1989-90 by the researchers involved, George Mair, is set out in Michael Tonry and Kate Hamilton's 1995 book *Intermediate Sanctions in Overcrowded Times.*[87]

In a 1990 White Paper[88] *Crime, Justice and Protecting the Public* the Government announced proposals for new legislative provisions to enable the courts to make a curfew order, either as a condition of bail or as a penalty following conviction. The White Paper noted that;[89]

> Subject to the outcome of the experimental projects and on evaluation of the costs of electronic monitoring, curfews could be enforced by electronic monitoring. A separate power would be needed to enable the courts to order electronic monitoring to enforce a curfew order. Standards for the equipment and schemes of operation would have to be approved by the Secretary of State.

Provisions designed to introduce the new 'curfew order', which could be imposed as a sentence on convicted offenders who were aged sixteen or over and would require the offender to remain at a specified place for specified periods, were introduced by Section 12 of the *Criminal Justice Act 1991.* Section 13 of the 1991 Act provides that a curfew order may include requirements for securing the electronic monitoring of the offender's whereabouts during the curfew periods specified in the order. Such requirements may not, however be imposed unless the court has received official notification from the Home Secretary that electronic monitoring arrangements are available the area in which the place to be specified in the curfew order is situated, and is satisfied that the necessary provision can be made under these arrangements. Section 13 of the 1991 Act include provisions enabling electronic monitoring arrangements to be contracted-out by the Home Secretary.

---

87 p.116-120

88 decision document

89 Cm 965 para 4.23

These general provisions in the 1991 Act concerning curfew orders and the electronic monitoring of offenders subject to them have not been brought into force. They provided for the introduction of curfew orders nationally but did not, it was thought, permit either the gradual or the selective introduction of such orders. Paragraph 41 of Schedule 9 of the *Criminal Justice and Public Order Act 1994* introduced an amendment to Section 12 of the *1991 Act* which was intended to enable the curfew order provisions to be introduced and, if necessary, withdrawn in selected areas. This was to enable pilot trials involving electronic monitoring of curfew orders to be conducted in selected areas prior to their more general introduction at a later date.

Trials of curfew orders and electronic monitoring began in three different areas in July 1995, initially for a period of 9 months. On February 20th 1996 the Home Secretary announced that the trials were to be extended until March 1997 and that the number of courts which had the sentence available to them might be increased.[90] Electronic monitoring is thus currently used in certain selected parts of the country to enforce curfew orders, which are a form of sentence imposed on convicted offenders and can only be imposed as community sentences in their own right.

New provisions in the Crime (Sentences) Bill

Clause 30 of t*he Crime (Sentences*) Bill is intended to allow a court to impose a community service order or a curfew order, which could be monitored by electronic "tagging", as a penalty for fine default where the offender is aged 16 or over. Clause 31 will extend the upper age limit range for which an attendance centre order may be imposed as a penalty for fine default from 21 to 25. Clause 32 is intended to enable courts to impose community service orders or curfew orders rather than fines on persistent petty offenders aged 16 or over where the court is satisfied that the offender already has outstanding fines and would not have sufficient means to pay a further fine which was commensurate with the seriousness of the offence of which he or she has just been convicted.

These provisions are intended, amongst other things, to reduce the use of imprisonment as a penalty for fine default. They were proposed in a consultation paper on *Alternative Penalties for Fine Defaulters and Low Level Offenders* published by the Home Office in July 1996.[91] In the paper the Government said that:[92]

> 1.1 The number of fines which are written off because they cannot be enforced, and the number of defaulters who are committed to prison - nearly 20,000 in 1995 - have the net effect of frustrating the court's original intention in imposing a fine.

---

[90] Electronic Monitoring: Extension of Trials P.N. Home Office 20.2.1996

[91] Dep 3827 (3S)

[92] ibid. p1

> 1.2 The Government is keen to see whether effective alternative penalties might be developed for persistent low level offenders, for whom any fine imposed would be exceptionally difficult to enforce. It is also keen to examine measures which would have the effect of reducing the numbers of defaulters who go to prison, whilst maintaining the effectiveness of the fine enforcement process and ensuring that offenders are punished for their offences.

The paper went on to make the following observations about the conclusions of a Working Group set up by the Lord Chancellor to look at the enforcement of financial penalties:[93]

> 1.5 The Working Group has identified a case for a new penalty to deal with repeated offenders who, because of outstanding fines, do not have the means to pay a fine commensurate with the seriousness of their offences. The proposal is for an alternative penalty involving the imposition of community service or an electronically monitored curfew.

> 1.6 The Working Group has also looked at the scope for giving the courts power to make a Community Service Order (CSO) as an alternative sanction for fine default. The Magistrates' Association has already argued for such an extension of the courts' powers. Another option would be to give the courts the power to make curfew orders (supported by electronic monitoring) which are currently only available as community sentences in their own right. This paper sets out proposals for a new penalty for fine default, which would offer the courts the option of imposing community service, or a curfew, or both. Views are sought on whether this penalty should be available for default on other financial penalties, excluding civil debts.

The consultation paper added that the new powers would be tested through pilots schemes in specified geographical areas.

Clause 33 of the Crime (Sentences) Bill will abolish provisions in the *Powers of Criminal Courts Act 1973* and the *Criminal Justice Act 1991* which restrict the imposition of probation orders to those cases where the offender expresses his willingness to comply and require a court to obtain an offender's consent before imposing a community service order. Arguments for and against this proposal were set out in the 1995 Green Paper *Strengthening Punishment in the Community* [Cm 2780] and it was discussed further in the consultation paper *Alternative Penalties for Fine Defaulters and Low Level Offenders.*[94] Article 4(2) of the European Convention on Human Rights provide that

"No one shall be required to perform forced or compulsory labour"

although Article 4(3)(a) exempts from this definition

"any work required to be done in the ordinary course of detention imposed according to

---

[93] ibid. p2

[94] Dep 3827 (35) para. 2.3.6

the provisions of Article 5 of this Convention or during conditional release from such detention".

L. Comment on the Government's Proposals on Sentencing and Early Release

The proposals in the White Paper for the introduction of automatic life sentences and mandatory minimum sentences for certain repeat offences and for the abolition of the current statutory arrangements for parole so soon after their implementation provoked great controversy.

In debate in the House of Lords on the Government's proposals the former Lord Chief Justice Lord Taylor of Gosforth said that minimum sentences necessarily involved a denial of justice and criticised the evidence, including the statistics on which the changes and the justifications for them were based:[95]

> Turning to the White Paper, I venture to suggest that never in the history of our criminal law have such far-reaching proposals been put forward on the strength of such flimsy and dubious evidence. The shallow and untested figures in the White Paper do not describe fairly the problems the Government seek to address. Still less do they justify the radical solutions it proposes.
>
> But I wish to emphasise at the outset that my opposition to these proposals does not arise from any entrenched views on government policy, still less-although the press like to suggest otherwise-from any personal animosity towards the Home Secretary. I have, as he has acknowledged, supported a number of the measures he has introduced-for example, allowing juries to draw inferences from the defendant's silence, removing the requirement for corroboration, and fundamental reforms to the law of disclosure.
>
> Furthermore, I have indicated qualified support for his proposal of "honesty in sentencing"; that is to say, for a closer correlation between the sentence passed by the court and the sentence actually served. But how this is managed requires careful thought-which it has not yet received. Simply to require the Lord Chief Justice by practice direction to preside over the general reduction of sentencing levels while Government Ministers are urging tougher sentences would cast the judiciary in the role of apparently thwarting the will of Parliament. Again, to make such a reduction without sufficiently providing for rehabilitation or incentives for good behaviour would clearly be a mistake. But I leave these issues to others because my main concern centres on the policy of minimum sentences set out in the White Paper.
>
> Quite simply, minimum sentences must involve a denial of justice. It cannot be right for sentences to be passed without regard to the gravity, frequency, consequences or other circumstances of the offending. To sentence a burglar automatically to a minimum of three years' imprisonment on a third conviction is to take no account of whether he is before the court for only three offences or for 30, no account of how long has passed between those offences, whether they involved sophisticated planning or drunken opportunism, and a host of other factors. To impose a minimum sentence of seven years on those convicted for the third time of trafficking in proscribed drugs will simply fill our prisons with addicts who sell small quantities to support their own addiction.
>
> Recognising the injustice of the proposed policy, the Government have come up with a proposed palliative measure. In each of the three categories of offence serious sexual and violent offending, burglary, and drug trafficking-the White Paper now states that the court will retain the discretion to depart from the obligatory tariff in what are described as "genuinely exceptional cases". This saving clause did not feature in the original proposals for mandatory life sentences and has clearly been added to mitigate the manifest injustice of the policy. It does not do so. Simply to provide

---

[95] HL Deb c1025-1028 23.5.96

an "escape clause" for the most extreme cases of injustice will not do. It may give some reassurance and comfort to those concerned by the enormity of the provisions as propounded, but the result would be the worst of both worlds. Judges would not be bound to impose minimum sentences willy-nilly. They would be left with some discretion in exceptional cases. But what is an exceptional case? If the escape clause is construed restrictively it will have little effect. That is what happened when suspended sentences were confined to exceptional cases. They became in effect a dead letter. If, on the other hand, the escape clause is construed more broadly, it will be said that the judiciary is driving a coach and horses through the provisions of the Act and thwarting Parliament. More fundamentally, the proposal subverts the function of the court, which is to sentence according to the justice of each individual case, not to see whether it can be accommodated within a narrow exception and otherwise to take a sentence off the shelf.

The Home Secretary has pointed out that Parliament can, if it wishes, impose a regime of minimum sentences. Of course it can: there has never been any dispute about that. He also says that there would be nothing very novel about its doing so, because we already have a wide range of statutory maximum sentences.

There is a world of difference between a statutory maximum sentence, which defines the range within which a judge exercises his discretion, and a statutory minimum which prevents any proper regard being given to mitigating factors. Statutory maximum sentences assist in establishing a hierarchy of offending. They enable prosecutors to charge at an appropriate level. Thus the maximum sentence for common assault is six months, for assault occasioning actual bodily harm, five years, and for assault occasioning grievous bodily harm with intent, life. But this hierarchy in no way prevents a judge from instigating sentence in the interests of justice.

The Home Secretary also says that there is a precedent for his proposal since there is a compulsory penalty of disqualification from driving upon conviction for driving under the influence of drink and drugs. I do not think driving a car is a fundamental human right. A licence to drive is a privilege granted by the state on condition that it will be exercised responsibly and safely. Its withdrawal is not in any way analogous with being put in prison for a substantial period.

I understand the very real public concern that a tiny minority of dangerous criminals with a history of serious offending may, under existing procedures, be released when they still represent an unacceptable risk to the public. Although the numbers who fall into this category are very small, I appreciate the danger they represent and I agree that we should address that problem. One approach would be to re-examine the recommendations of the 1975 Butler Committee for a reviewable sentence, or to look at alternative regimes used in other jurisdictions. But it is not possible to justify a wholesale changeover to a regime of mandatory sentences involving (among other things) doubling the number of life sentences passed annually by the courts simply by scaremongering about this very small number of offenders who could in any event be dealt with in another way.

In announcing the publication of the White Paper in another place (and again on the radio this morning), the Home Secretary stated:

"In 1994, 217 offenders were convicted of a second or subsequent serious violent or sexual offence. All could have received a life sentence-but only 10 did".-*[Official Report,* Commons, 3/4/96; col. 389]

He did not say how many the Attorney-General had referred to the Court of Appeal as being unduly lenient. Presumably the Home Secretary thinks that he should have referred all 207. In fact, he referred only six. The problem is, therefore, nothing like so great as the White Paper makes out.

The proposed minimum sentences for domestic burglary lack any sound basis. The figures quoted in the White Paper purport to show that the courts pay insufficient regard to the problem of repeat offending and that punishment is not increased for further criminality. But the figures are woefully flawed and simply do not show that.

First of all, part of the sample taken by the Home Office relates to that period before 23rd August 1993 when the judiciary was prevented by this Government's policy under the 1991 Act from taking any account of previous convictions or of any other offences save the most recent. To criticise judges for lenient sentencing when during that period they were prevented by statute ,rom taking previous convictions into account is wholly unjustifiable.

Secondly, and contrary to what the White Paper states, even that partial and tainted sample shows that there is a significant increase in sentences for further offending: 59 per cent. of burglars received a prison sentence for their first offence; 71 per cent. for their second offence; and 75 per cent. for their

third offence. Those who had already received custodial sentences for burglary recently faced an increase of 2.5 months for a second conviction and 5.6 months for a third conviction.

Thirdly, and much the most important, the figures do not and cannot take account of the enormous variety of criminal conduct encompassed within offences of burglary. Not only do burglaries vary from the opportunistic taking of a milk bottle to the systematic looting of a lifetime's possessions, but an individual conviction can include a number of other offences taken into account. It is for that reason that judges need the ability to tailor the sentence to the offence-to make the punishment fit the crime. If there is concern that sentences for burglary are inadequate, the Attomey-General's power to refer unduly lenient sentences to the Court of Appeal should be extended to enable him to refer burglary cases.

In the past five years and within the life of this Government, there has been a spate of legislation in the field of criminal justice. In considering the present White Paper, I invite the closest attention of the House to the previous government White Paper of 1990. It merits scrutiny line by line. I quote:

"It is not the Government's intention that Parliament should bind the courts with strict legislative guidelines. Ale courts have shown great skill in the way they sentence exceptional cases. The courts will properly continue to have the wide discretion they need if they are to deal justly with the great variety of crimes which come before them".

Pausing there, I profoundly agree with that. I continue with the quotation:

"The Government rejects a rigid statutory framework on the lines of those introduced in the United States or"-

mark this, my Lords-

"a system of minimum or mandatory life sentences for certain offences"

Again, I profoundly agree. It goes on:

"This would make it more difficult to sentence justly exceptional cases. It would also result in more acquittals by juries with more guilty men and women going free unjustly as a result".

Those words are not mine. They come from a Government White Paper some five years ago. They are self-evidently wise, fair and just. I ask the noble and learned Lord the Lord Chancellor why every one of those propositions of government policy so recently propounded is now to be jettisoned and replaced by its exact opposite.

The different arguments put forward against the sentencing and early release proposals in the White Paper were set out in some detail in this debate, which included criticisms from former Conservative ministers Lord Windlesham and Lord Carlisle of Bucklow (Lord Carlisle chaired the parole review committee whose report formed the basis of the changes to parole in the 1991 Act). Many senior judges and former judges, including Lord Ackner, Lord Woolf, Lord Donaldson, and the Conservative former Lord Chancellor Lord Hailsham have also criticised the proposals, as have the Law Society and the General Council of the Bar. The Parole Board set out its detailed criticisms and its particular concern that the proposed new arrangements for the early release of prisoners serving determinate sentences will not allow for adequate assessment of the risk posed by those prisoners, in an appendix to its latest annual report.[96]

---

[96] *Parole Board Report for 1995 and 1995/96* HC 506 1995/95

Some critics of the Government's proposals have expressed concern that convicted rapists facing automatic life sentences for subsequent offences under the Government's proposals would have nothing to lose by killing their victims and thereby removing the principal witnesses to their crimes, because they would suffer the same penalty whether they committed murder or not. They have also suggested that there will be no incentive for a rapist who has a previous conviction for a "serious offence" as defined in Clause 1 to plead guilty and thereby spare his victim the ordeal of having to give evidence in court. Rapists who plead guilty are generally given reduced sentences to take account of this. A specific statutory provision permitting reductions in sentence to take account of timely guilty pleas was only recently introduced into English criminal law by section 48 of the *Criminal Justice and Public Order Act 1994.*

In a debate in the House of Commons on June 19th 1996 on the Government's sentencing proposals the Home Secretary, Michael Howard set out his view of concerns that rapists facing automatic life sentences might kill their victims:[97]

> **Mr. Elfyn Llwyd** (Meirionnydd Nant Conwy): I am sure that the Home Secretary will forgive me if I take him back to the subject of the debate. Has he had an opportunity to study what the senior judges, including Lord Justice Taylor, have said about the dangers inherent in life sentences being imposed in the manner proposed by the White Paper-the dangers to the victim himself or, more probably, herself?
>
> **Mr. Howard:** Of course I have studied that, but I do not accept the views that have been expressed because the arguments advanced in another place are arguments against any life sentence. If the hon. Gentleman accepts those views, perhaps he will tell the House whether he is against any life sentence. If that line of argument is accepted, there is an incentive for the offender to take more serious action and even to kill. The truth is that, when someone commits a rape, he is most unlikely to be in the state of mind that will lead him to make a cold and calculating decision about what his next act should be. If he is in that state of mind and makes such a cold and calculating decision, he will know perfectly well that, if caught and convicted, when the judge fixes the tariff part of the life sentence, it is likely to be a different tariff for rape than for murder. That will be something to be taken into account in planning his behaviour. If he behaves in that cold and calculating way, which is extremely unlikely, he will know that there continues to be a deterrent against further serious criminal conduct.

In the same debate the Home Secretary made the following comments about criticism of his proposals:[98]

---

[97] HC Deb Vol 279 c895-896

[98] ibid c891-892

Persistent burglars and drug dealers are a menace to society, and they should know that if they continue to offend they will go to prison for a long time. In too many cases, non-custodial sentences or very short prison sentences are imposed on burglars who have numerous previous convictions. It just cannot be right that burglars before the court for their seventh or subsequent conviction are getting average sentences of 19 months-serving perhaps 10 months. That is only a few months longer than the 15 or 16 months-serving perhaps eight months of first offenders who are sent to prison. Stiff minimum sentences will provide a real deterrent to persistent offenders and ensure that those who continue to offend receive the punishment that they so richly deserve.

I do not accept that these proposals encroach improperly on judicial independence. It has always been Parliament's responsibility to set the statutory framework for sentencing, and for judges to exercise their discretion within that framework.

It has been argued that mandatory sentences will not work because it is the certainty of conviction that deters offenders, not the severity of sentence. But improving detection rates and imposing stiffer sentences are not alternatives, they are complementary. The most effective deterrent is to have both. The police are taking action to improve detection rates in a number of ways, for example, by targeting known and persistent offenders. The Government's proposals will back that up. Bringing persistent burglars back before the courts time and time again is useless if the sentence imposed is one that they can regard as a rriinor occupational hazard in their chosen career.

Ros Burnett of Oxford university, in a study entitled "The Dynamics of Recidivism", found on the basis of interviews with prisoners that:

"Avoidance of imprisonment was the most frequently mentioned reason for not wanting to re-offend".

Under our proposals, persistent offenders will know that they will get a stiff sentence if they persist in offending.

The public rightly expect protection from serious, dangerous and persistent offenders. The proposals that I have outlined are carefully targeted at crimes of particular concern to the public-serious sex and violent offences, domestic burglary, and dealing in hard drugs. The Govermnent believe that urgent action is required to provide a real deterrent to such offenders; to punish severely those who continue to offend regardless; and above all to protect the public from their activities. The White Paper "Protecting the Public", and our new proposals for sex offenders and for making better preventive use of criminal records, are further steps towards protecting the public in that way.

Supporters of the proposals for automatic life sentences have noted that the state authorities in California have credited their "three strikes" policy with having brought about a fall in the recorded crime rate in that state. Some American commentators have questioned this claim, noting that the crime rates have also fallen in other states which do not have these provisions and that drops in crime rates can be attributed to many different factors, such as demographic changes and trends in the consumption of prohibited drugs. Crime rates in the United States are very much higher than in the United Kingdom and indeed most other European countries. (Reported rates for domestic burglary in the USA are apparently an exception to this - a feature some commentators attribute to the likelihood of an American householder having a firearm at home). The Californian Supreme Court recently ruled that the states "three strikes" law as drafted was not mandatory and newspaper reports suggest that it is likely to be redrafted by the state legislature. Statistics on sentencing in the United States are set out in the next chapter of this Paper.

M. Some relevant statistics

The prison population

The explanatory memorandum to the Bill estimates that the proposals in Parts I and II for mandatory custodial sentences and new early release arrangements would eventually result in an increase in the prison population of around 11,000, some twelve years after implementation. This will require about twelve new prisons coming on stream at a rate of one or two a year from 2001-02 onwards, and would provide 9,600 places, together with 3,00 new places to be provided by 2001-02 by building additional houseblocks at existing establishments and by rebuilding and re-opening two existing prisons.

The provisions of the Bill will, therefore, lead to a continuation of a long-term trend increase in the population in custody. The prison population of England and Wales has more than doubled since 1960 with an increase of 15 per cent in the last two years and nearly 11 per cent in the last year alone. Table 1 and the graphs which follow give the figures.

Table 2 compares the latest available prison populations in selected European countries and the United States.

Sentencing for offences affected by the Bill

The white paper gives most but not all of the available information on current sentencing patterns for the offences affected by the Bill. This section summarises the figures. Looking first at the offences for which mandatory life sentences are proposed, it is clear that relatively little use is made now of discretionary life sentences. For example, of 434 offenders convicted of rape or attempted rape in 1994, only 12 were given life imprisonment. of 217 offenders convicted of a **second** serious violent or sexual offence, ten received a discretionary life sentence.

The table below shows the proportion of all those convicted of serious violent and sex offences in 1995 who were given custodial sentences, together with the average sentence imposed, and also the average sentence imposed on those sentenced for offences carrying a maximum life sentence **who had previous convictions for such offences**[99,100].

	All sentenced in 1995		Those with previous convictions for life sentence offence
	% given custody	average sentence (years)	average sentence (years)
Attempted murder	75%	9.4	..
Threat/conspiracy to murder	75%	7.6	..
Manslaughter	89%	4.9	3.8
Wounding with intent to do GBH	83%	3.3	4.1
Robbery involving use of firearms	89%	5.9	..
All robbery	..	..	3.5
Possession of firearm with intent	61%	3.0	..
Rape/attempted rape	89%	6.5	6.8
Unlawful sexual intercourse with girl under 13	67%	2.8	..

Few figures are available on the sentences imposed on those who have been convicted three or more times for drug trafficking. A sample of those convicted in three weeks of 1993[101] showed that 55% of those convicted for the first time for such offences were given a custodial sentence with an average sentence of 32 months; 61% of those for whom this was a second conviction were sentenced to custody with an average sentence of 25 months; and 75% of those with a third or greater conviction were imprisoned with an average sentence of 30

[99] The latter data are based on a sample of those convicted of violent offences in five weeks of 1993-94 and are not strictly comparable with the other data in the table. In particular, the relatively small sample size means that the figures may not be representative

[100] Sources: Home Office (updates Fig 9 of Protecting the Public (Cm 3190)); HC Deb 6 February 1996 col 107W

[101] Those aged 21 and over convicted of indictable drug trafficking offences: unlawful production of drugs other than cannabis, unlawful supply, possession with intent to supply unlawfully and unlawful import or export. These are not exactly the offences covered by the Bill

months[102]. In 1995, 72% of those sentenced for all drug trafficking offences (regardless of number of previous convictions) were given immediate custody with an average sentence length of 44 months[103].

In 1995, 71% of those sentenced for **domestic burglary** in the Crown Court and 26% of those sentenced in magistrates' courts (49% of offenders sentenced in all courts for the offence) were given immediate custodial sentences. The average sentence imposed was 17.2 months in the Crown Court and 3.8 months in magistrates' courts, with an overall average of 13.8 months. The table below, which is based on a sample of offenders convicted in 1993 and 1994 looks at the proportions of domestic burglars sentenced to immediate custody and the average sentence lengths imposed, by number of convictions for burglary in a dwelling[104].

	Crown Court	Magistrates' courts	All courts
% given immediate custody			
First conviction	59%	15%	32%
Second conviction	71%	27%	47%
Third or subsequent conviction	75%	36%	57%
Seventh or subsequent conviction	*72%*	*39%*	*58%*
All convictions	67%	22%	42%
Average sentence length (months)			
First conviction	16.2	3.7	12.6
Second conviction	14.6	3.9	11.3
Third or subsequent conviction	18.9	4.0	14.4
Seventh or subsequent conviction	*19.4*	*4.1*	*15.1*
All convictions	16.8	3.9	13.0

References to Court of Appeal on grounds on undue leniency

[102] HC Deb 27 Feb 1996 c529-30W
[103] Home Office
[104] Based on Cm 3190 Fig 11. Additional source: Home Office

Between 1989 and 29 October 1996, the Attorney General referred 303 cases in England and Wales to the Court of Appeal on the grounds of undue leniency. Of these, 22 were subsequently withdrawn and in six leave was refused. Of the 263 cases considered to date (twelve are outstanding), the sentence was increased in 228 (87%), was unchanged in 34 and was reduced in one.

Full details of the offences involved in these cases are not readily available but, of the 281 cases referred and not withdrawn, 14 were manslaughter, one soliciting murder, 64 wounding or causing grievous bodily harm with intent, 31 rape, 74 robbery (all robberies, not just those covered by the Bill), and three unlawful sexual intercourse (all ages). Five involved conspiracy to import or supply drugs and twelve aggravated burglary or burglary with intent (not necessarily domestic burglary)[105].

Sentencing in the United States

The criminal justice system in the United States differs so much from that in this country that any comparisons between the two are virtually impossible to make. As considerable interest has been expressed in the USA, this paper presents some of the available data, the latest of which are for 1992. They cover the sentencing of those convicted of felonies[106]. Three types of sentence - prison confinement (usually for a year or more), jail confinement (usually for under a year) and probation - account for virtually all of the sentences imposed in both State and federal courts as punishment for a felony conviction.

In 1992 there were 935,303 convictions of felons in the United States. 70% of all convicted felons were sentenced to custody but the proportion varied by type of offence. For violent offences (murder, rape, robbery, aggravated assault) etc, 81% of those convicted went to prison or jail. Within this category, 97% of those convicted of murder or manslaughter, 72% convicted of aggravated assault[107], 87% of those convicted of rape and 88% of those convicted of robbery were given a custodial sentence[108]. For drug trafficking the figure was 76%, for weapons offences 69%, and for property offences (burglary, larceny, motor vehicle theft, forgery, fraud and embezzlement) 66%. For burglary alone, 75% of felons were given a custodial sentence.

Average sentence lengths in 1992 were as follows: murder/manslaughter 19.8 years; rape 10.8 years; robbery 8.4 years; aggravated assault 4.7 years; drug trafficking 4.5 years; drug possession 2.7 years; burglary 4.7 years. The average time served is about half of the

---

[105] Source: Attorney General's Chambers

[106] States vary in their definitions of a felony but, in general, a felony is a crime that has the potential of being punished by more than a year in prison

[107] Intentionally and without legal justification causing serious bodily injury, with or without a deadly weapon or using a deadly or dangerous weapon to threaten, attempt, or cause bodily injury, regardless of the degree of injury if any. Includes attempted murder, aggravated battery, felonious assault and assault with a deadly weapon

[108] Death sentences are included with prison sentences

sentence imposed in most cases[109].

[109] Data from **Felony Sentences in the United States 1992** (Bureau of Justice Statistics May 1996)

Please cut

Research Paper 96/99 **Section Code: HAS**

Title: The Crime (Sentences) Bill [Bill 3 of 1996/97]

It would greatly help to ensure that Research Papers fulfil their purpose if Members (or their staff) would fill in and return this brief pre-addressed questionnaire. Negative responses can be as useful as positive.

For your purposes, did you find this paper:

	Very useful	**Quite useful**	**Not much use**
1.	☐	☐	☐
	Too long	**The right length**	**Too short**
2.	☐	☐	☐
	Clear	**Not always clear**	**Rather unclear**
3.	☐	☐	☐

Any comments? _____

_____

_____

_____

_____

_____

_____

_____

Name ..... **MP/Assistant to** .....

(Please print)

Please fold

INTERNAL

Miss Nicola Harland
House of Commons
Department of the Library
1 Derby Gate
London SW1A 2DG

Please fold

Recent Research Papers on related subjects include:

96/100	The Crime (Sentences) Bill and the Crime and Punishment (Scotland) Bill: provisions for mentally disordered offenders	31.10.96
96/15	Controls on Knives and other Offensive Weapons	25.01.96
95/29	Investigating and reviewing possible miscarriages of justice - The Criminal Appeal Bill [Bill 57 of 1994/95]	03.03.95
95/16	Proceeds of Crime Bill 1995/95 [Bill 10]	02.02.95

Criminal Justice