

Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019

Prison Reform Trust analysis of the Government's Impact Assessment for the House of Lords debate on 22 January 2020

Introduction

This Order, to be debated on 22 January, implements a commitment made by the Prime Minister in the summer of 2019. It represents a dramatic and profound change in the sentencing framework for serious offences, as evidenced by the forecast requirement of an additional 2,000 prison places, with a one-off capital cost of £440m and a permanent recurring annual cost of £70m at today's prices.

The original commitment was made as part of a "review" of sentencing announced at the same time.¹ This "review" was conducted as an internal Ministry of Justice exercise, without terms of reference and the content of which has never been made public. This "impact assessment" therefore represents the only source of evidence about the government's reasoning for such a profound shift in policy and the practical consequences that will flow from it.

Given the parallel commitment to a major sentencing bill later in this parliament and the expectation of a White Paper preceding it, the process by which this policy change is being implemented is plainly inadequate, and no justification is given in the impact assessment for the urgency with which it is being carried through in isolation from other sentencing proposals.

The problems created by an absence of public consultation prior to a change of this significance are exposed in the inadequacies of the accompanying Impact Assessment. The government should pause and expose its policy to proper public scrutiny in the context of its promised White Paper on sentencing more generally.

The policy objective

The justifications given for this change are:

1. To better protect the public.
2. To provide greater public confidence in:
 - sentencing; and
 - the administration of justice.
3. To bring the treatment of these people in line with the treatment of people considered dangerous and therefore serving an extended determinate sentence.

¹ Gov.uk website (2019), 'PM launches sentencing review to look at most dangerous and prolific offenders', available at <https://www.gov.uk/government/news/pm-launches-sentencing-review-to-look-at-most-dangerous-and-prolific-offenders>

1. To better protect the public

No evidence is given about the re-conviction of people currently released from these sentences. At best, the proposal can only postpone the harm caused by offending following release. But it may in fact serve to increase the likelihood of further offending. Under this proposal, the people affected will spend a shorter period under the supervision of the probation service following release, and subject to multi agency public protection arrangements. As the assessment acknowledges, incarceration also degrades the protective factors known to reduce re-offending. The evidence that reconviction rates are lower for people serving longer prison sentences relates to sentences of 4 years or more, well below the threshold at which this proposal will take effect. We are not aware of any evidence that relates to sentences of 7 years or more.

2. To provide greater public confidence

The research on public attitudes to sentencing repeatedly shows that the public imagines sentencing practice to be less severe than it actually is. It also establishes that, given the full facts of an individual case, the public tends to take a more lenient approach than sentencing courts.² The evidence cited for the opinion of victims in this assessment relates to the actual impact of a long sentence not having been clearly explained. In other words, all of the evidence on public opinion demonstrates public confusion, which is likely to be caused both by an overly complex system and a failure on the part of government and all its agencies to explain its operation.

This proposal adds complexity rather than reducing it, and will generate more confusion, not least for the victims of crimes where the sentence falls below the thresholds set by this Order. It contains no measures to improve public understanding of sentencing generally, or the constituent elements of any sentence, including the supervision and “at risk” elements which will remain.

Public confidence in the administration of justice may well be undermined, as that increased complexity leads to mistakes in sentence calculation and consequences which are difficult to explain. For example, a single incident leading to two convictions for which consecutive sentences are imposed, where neither sentence exceeds 7 years but the total period does, will not trigger the change this Order describes. Sentences falling just below the 7 year threshold similarly will not be affected, nor sentences for serious offences not covered by the Order.

In any event, the assessment cites no measure of public confidence in the administration of justice, so it is hard to see how a judgement has been reached that this measure will increase it, nor how such an impact might be assessed in the future.

3. To bring the treatment of one group of people into line with another

The assessment offers no reason for why this represents a benefit when the law currently makes explicit provision to treat some people differently precisely because they are considered “dangerous”. In other words, this provision overturns a principle of sentencing upon which the government has previously relied. At the very least, this element of its justification demonstrates a confusion in the government’s thinking. At worst, it may confuse the sentencing process more generally where the separate considerations of severity and risk are at stake.

² Hough, M. et al (2013) Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales, London: Ministry of Justice

The “options”

Only two options are canvassed: 1. do nothing; or 2. the option already announced by the government. There appears to have been no consideration of any other approach to meeting the policy objectives.

For **public protection**, options might have included better resourcing of the National Probation Service for example. A very recent report from the Chief Inspector of Probation highlights unacceptably large caseloads for staff working within this service, directly responsible for the supervision of people released from the custodial element of long sentences.³ The temporary delay of risk offered by extending the period in custody should have been measured against the longer term benefit of a permanent desistance from offending brought about by adequate support and supervision following release.

On **public confidence**, the option of informing the public more honestly and comprehensively about the current sentencing framework and practice should have been considered. Sentencing for the types of crime in question has become very much more severe since the beginning of the century, but this fact has rarely featured in the government’s public statements about the issue. People are already serving much longer in custody for similar convictions.⁴ That fact should have allowed for an assessment of whether longer custodial periods have in practice resulted in the benefits the government is seeking from this Order. The evidence in this assessment strongly implies that they have not, but no argument is put for why a further increase in the length of time in custody will achieve what previous increases have not.

The economic assessment

For reasons which are not clear, the additional costs of providing offender management in custody have not been included in this section. They are mentioned, and are easily calculable, but have been deliberately omitted. Similarly, the assessment says that a later release date and reduced licence period “could” disrupt family and other relationships and reduce opportunities for rehabilitation. In reality, these are both certain consequences for the cohort as a whole. The costs to local services of that disruption to families in particular, are omitted altogether, despite long standing evidence of the impact of imprisonment on children and the consequences of that for educational and social service provision.⁵

The government’s faith in its ability to secure employment for prisoners appears limited, despite its own employment strategy for offenders.⁶ This assessment assumes that prisoners will be released to unemployment, rather than to the employment (and liability to pay tax) which is the stated objective of the government’s own policy on the matter.

Alarming, the assessment accepts that an impact of this policy is that people will be subject to reduced support and monitoring under MAPPA arrangements.

The assessment points out that its estimate of both prison and probation costs could be an underestimate because of the complexity of the cohort. In practice, there is no uncertainty

³ HM Inspectorate of Probation (2020) An inspection of central functions supporting the National Probation Service, Manchester: HMIP

⁴ Crewe, B., Hulley, S. and Wright, S. (2020) Life Imprisonment from Young Adulthood, London: Palgrave Macmillan UK and Prison Reform Trust (2018) Bromley Briefings Prison Factfile Autumn 2018, London: Prison Reform Trust

⁵ Lord Farmer (2017) The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime, London: Ministry of Justice

⁶ Ministry of Justice (2018) Education and Employment Strategy, London: Ministry of Justice

about this—a more complex cohort is more expensive to support and supervise. No explanation is given as to why an inaccurate rather than an accurate estimate has been used.

The “evidence base”

Section E. Cost and benefit analysis

Paragraph 21

In 2016, the government announced a programme to build 10,000 additional spaces. In 2020, around 200 of those spaces have been delivered. It is curious, therefore, that the analysis assumes that the costs of providing the additional spaces will only fall in the two years prior to them being required. In practice this strange assumption will mean either that costs will be incurred sooner than assumed, or, more probably, that new accommodation will not come on stream as quickly as it will be required. The costs of inadequate accommodation leading to overcrowding and the maintenance of inadequate buildings are well documented. They extend both to financial costs (a current planned maintenance backlog of £900m) and human costs (self-harm and other violence at record highs).⁷

Paragraphs 26 and 27

It is extraordinary that the government has no view about the probable (or even the desired) impact of its plan to recruit an additional 20,000 police officers. The “working out” of the three possible scenarios shown is not included, but even the high scenario appears to reflect a relatively modest return from such a major investment in police resources.

There is no analysis of the impact of those plans on the prison population apart from the very specific cohort affected by this Order. In particular, no assumption has been made about the consequential impact for other sentencing decisions. Yet we know that other government decisions to increase the severity of punishment for more serious offending have had consequences for sentence lengths across the board, most obviously in the years following the implementation of the Criminal Justice Act 2003.⁸ The absence of any consideration in this analysis of the dilemmas this Order will create for the Sentencing Council as it considers guidelines for sentences falling below the 7 year threshold for offending that is similar in nature represents a serious omission. General sentence inflation triggered by parliamentary decisions to increase the harshness of sentencing for more serious crime is largely responsible for the historic growth in the prison population since 2003, which in turn underlies the current crisis in prison safety and decency.

Paragraph 29

The analysis excludes “contracted out” costs for HMPPS. It does not specify what these are, but if they include healthcare, education and maintenance, for example, they are considerable and readily calculable. No explanation is given for their exclusion.

⁷ House of Commons Justice Committee (2019) Prison population 2022: planning for the future, London: HM Stationery Office

⁸ Crewe, B., Hulley, S. and Wright, S. (2020) Life Imprisonment from Young Adulthood, London: Palgrave Macmillan UK and Ministry of Justice (2016) Story of the prison population 1993 to 2016, London: Ministry of Justice and earlier edition

Paragraph 35

An assumption is made that offender management costs will transfer from the community into prison. But elsewhere, savings of £8m from reduced community supervision for probation are claimed. The government cannot have it both ways.

Paragraph 36

The analysis quotes research led by Professor Ben Crewe as evidence that a longer period in custody may have a beneficial impact on the sentence's rehabilitative impact. This is a wilful misinterpretation of that research, which describes the extensive and long-lasting negative impacts of prolonged incarceration both during and after the custodial period. The implication that a longer period in custody may actually be of benefit to the prisoner is disingenuous at best. What the evidence shows, and what a chronic pattern of self-harm and violence within prisons demonstrates on the ground, is the immense harm that punishment through imprisonment causes and against which the perceived benefits of using it more need to be compared.

Paragraph 38

The assessment asserts that "crowding is not in and of itself a cause of prison violence". This flies in the face of the evidence and of multiple independent and expert assessments over the last 3 decades. Violence is endemic in the country's most overcrowded prisons, including both violence directed against other prisoners and staff, and violence directed against self.⁹ This assessment that the impacts of overcrowding result solely from its impact on staff to prisoner ratios and a shortfall in constructive activity is astonishingly complacent, and shows a disregard for the government's human rights obligations, including the right to life.

Paragraphs 39 and 40

The assessment describes as "possible" impacts on family life and reduced supervision which are at the very least probable, if not certain. The government is fully aware that its policy undermines the rehabilitative purpose of sentencing in favour of its punitive impact.

Paragraphs 41 and 42

The assessment declares that it has been impossible to quantify the costs of health and social care consequent on an increase of 2,000 people in prison, but declines to say why. Given that prison health care is centrally commissioned, and that every prison is required to have a social care needs analysis, it is hard to understand why a credible estimate of cost has not been included.

Paragraph 43

As noted earlier, the government appears to have lost faith already in the ability of its employment strategy to deliver.

Paragraph 49

As noted earlier, the evidence cited on public confidence is partial and in any event does not support the method chosen to increase victim satisfaction.¹⁰ If victims feel misled because the shape of a sentence is not explained to them, changing that shape is unlikely to make a

⁹ Ministry of Justice (2019) Safety in custody statistics: quarterly update to June 2019, London: Ministry of Justice

¹⁰ Hough, M. et al (2013) Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales, London: Ministry of Justice

difference. A more honest explanation of the shape could be expected to achieve that impact, however.

Paragraph 52

Local authority costs are more likely to be associated with supporting families during a period of incarceration than with the post-custody elements described in this paragraph.

Assumptions and risks

There is an assumption that “sentencing behaviour will not change”. As noted earlier, the evidence of the last two decades is that sentencing behaviour does change, and in the direction of greater severity across the board, as a consequence of increases required by Parliament in the severity of punishment for the most serious offences. The suggestion that judges might give shorter sentences as a consequence of the Order requires a belief that the judiciary would deliberately thwart Parliament’s express intention, and can be discounted.

Equality impacts

Paragraph 59

This paragraph states that the preferred option is not “directly discriminatory” within the meaning of the Equality Act 2010. What it fails to mention is the evidence from the associated equality assessment that the policy is quite clearly an act of indirect discrimination. Its impact is discriminatory in particular in relation to ethnicity.

This should come as no surprise. David Lammy’s 2017 report for the government explains in detail how race affects decisions at every stage of the criminal justice process.¹¹ The government in its response committed itself to a rule of “explain or change”.¹² Paragraphs 22 to 24 of the Equality Statement published with this Order fall startlingly short of that commitment. Acknowledging that the impact of this Order will fall disproportionately on Black and Asian offenders, the document simply asserts that “*we do not...consider that these overrepresentations will likely result in any particular disadvantage for offenders with protected characteristics*”. Quite how the government reaches the conclusion that spending years longer in custody does not represent a “particular disadvantage” is left unexplained. The argument that custody imposes no particular disadvantage constitutes a serious failure to analyse the impact of the proposed change on groups with protected characteristics.

On disabilities, the Equality Statement suggests that it would not be reasonable to exclude people with disabilities from the proposal. HM Government concedes (paragraph 10) that they lack data on this protected characteristic. The assurance that the policy would be proportionate is offered without evidence. There is no attempt to differentiate the impact by type of disability—sensory, physical, intellectual—as would be required in any detailed analysis of probable impacts. The Statement suggests that current support for disabilities in prison is sufficient, again, without evidence.

¹¹ Lammy, D. (2017) *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, London: Ministry of Justice

¹² Ministry of Justice (2017) *Government Response to the Lammy Review on the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, London: Ministry of Justice

Similarly, at paragraph 29 of the Equality Statement, the government concludes that this discriminatory impact will have no impact on fostering good relations between groups with different protected characteristics. Given that this measure will, on this analysis, worsen rather than improve the over-representation of Black and Asian communities in the prison population as a whole, it is hard to see any justification for that conclusion.

Conclusion

This impact assessment describes a major impact on the public finances and on the lives of the people who will serve longer in prison and the families that will suffer as a consequence. Its impact on the feelings of the victims of crime is much less clear, and given the failure of multiple previous measures to “toughen” sentencing, could reasonably be assumed to be uncertain at best. The problems created by an absence of public consultation prior to a change of this significance are exposed in the inadequacies of this document. The government should pause, and expose its policy to proper public scrutiny in the context of its promised White Paper on sentencing more generally.