PRISON REFORM TRUST

Police, Crime, Sentencing and Courts Bill

Prison Reform Trust briefing for the second reading in the House of Lords on 14 September 2021

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. This briefing focuses mainly on the provisions of Part 7 of the Bill on sentencing and release. It also focusses on a key omission the Bill – the opportunity presented by the legislation to reform the indeterminate sentence of Imprisonment for Public Protection (IPP).

If you have any questions about this briefing, please contact:

Mark Day, Head of Policy and Communications, Prison Reform Trust
mark.day@prisonreformtrust.org.uk | 020 7689 7746

Alex Hewson, Senior Policy and Communications Officer, Prison Reform Trust
alex.hewson@prisonreformtrust.org.uk | 020 7689 7738

Introduction

This Bill continues the long legacy of inflationary sentencing proposals in England and Wales begun in the 1990s. Far from being the simplification of sentencing claimed, the Bill adds to the piecemeal and confusing history of sentencing legislation of which the government claims to be so critical. It does so without a coherent philosophy to underpin its approach, and guarantees the continuation of general sentence inflation which has played a large role in destroying the capacity of both prison and probation services to deliver the rehabilitative goals which the government claims to promote.

This risk is acknowledged by the government's own Impact Assessment (IA) of the sentencing proposals, which state that:

The longer time spent in custody resulting from abolishing automatic halfway release, SOPC reforms, and reforms to discretionary life sentencing could lead to prison instability as offenders serving the same sentence arriving at different times will face different release points. There is also a risk of having offenders spend longer in prison and a larger population may compound overcrowding (if there is not enough prison capacity), while reducing access to rehabilitative resources and increasing instability, self-harm and violence (paragraph 43).[1]

Furthermore, the IA acknowledges that there is

… limited evidence that the combined set of measures will deter offenders long term or reduce overall crime. Therefore, the combined effect of all the measures proposed

[1] Ministry of Justice (2021) Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures—Impact assessment, London: Ministry of Justice

cannot be described as a cost or benefit due to limited evidence to indicate the direction or magnitude of change (paragraph 77).[2]

The IA estimates that the combined impact of the provisions for adults will result in "a total increase in the adult prison population of around 700 offenders in steady state by 2028/29 although this impact will begin to be felt from 2021/22 with just over 200 additional prisoners."[3] However, previous government estimates of the impact of sentencing legislation have proved unreliable. For instance, the sentence of imprisonment for public protection (IPP), which was introduced by the Criminal Justice Act 2003, was estimated to result in an increase of just 900 additional prisoners; but was given to a total of 8,711 individuals prior to its abolition.

The latest prison population projections, which factor in proposals contained in the Smarter Approach to Sentencing white paper,[4] estimate that prison numbers will increase by 20,000 to 98,700 by 2026.[5] The prison service is emerging out of an under reported operational crisis as a result of the Covid-19 pandemic. At a time when it should be focused on recovery, the Bill will increase prison numbers and add to pressures of overcrowding, making it harder to achieve a safe and purposeful regime focussed on rehabilitation.

To accommodate the projected increase in the prison population, the government has announced that it will build a total of 18,000 new prison places by the mid-2020s. These will be met with the construction of two 1,680 place prisons HMPs Five Wells and Glen Parva which are due to open in late 2021 and 2023, respectively and the construction of four new prisons; the expansion of a further four prisons; and refurbishment of the existing prison estate.[6] However, these plans need to be seen in the context of the struggles of previous governments to meet much more modest prison building targets. A programme to build 10,000 cells by 2020, announced by the government in 2015, delivered just 206 spaces by its original deadline.[7]

The majority of the proposals in the Bill relating to serious and violent offences either rely on no evidence to support the claims made for them; or use such evidence as there is selectively and in a way that misleads. Several of its sentencing proposals, for both adults and children, are plainly inspired by exceptional individual cases and fall into the worst category of reactive policy making which has bedevilled the law in this area for several decades.

We have particular concerns regarding Clause 109 which creates a new power for the Secretary of State to refer high-risk offenders to the Parole Board in place of automatic release. Parliament is invited to take on trust that the application of these powers will be rare, but the criteria on the face of the Bill are broad and there is no mechanism to guard against the abuse of executive power in a matter which properly belongs wholly within the remit of a court. **We hope Peers will use the opportunity of the second reading debate to raise concerns about this clause and support amendments in committee to mitigate its worse impacts.**

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[2] Ministry of Justice (2021) Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures—Impact assessment, London: Ministry of Justice
[3] Ibid.
[4] Ministry of Justice (2020) A Smarter Approach to Sentencing, London: Ministry of Justice
[5] Ministry of Justice (2020) Prison Population Projections 2020 to 2026, England and Wales, London: Ministry of Justice
[6] House of Commons written question 121212, 7 December 2020 and House of Lords written question HL10423, 1 December 2020
[7] https://www.telegraph.co.uk/news/2020/09/11/government-accused-staggering-failure-206-10000-new-prison-places/

We note the distinction the government makes between the treatment of more serious offences, particularly those of a sexual or violent nature, and other offending. For less serious offending, the white paper preceding the Bill recognised that prison generally reduces the likelihood of people desisting from crime, undermining all the factors—employment, accommodation, family relationships—which contribute to that process. Those elements of the white paper seemed to recognise the importance of an approach which deals with the complexity of the issues which give rise to offending in individual cases, and recognises that the public is best protected when a person is helped to live a crime free life altogether. The evidence to support that approach, much of it compiled by the Ministry of Justice itself, is solid and persuasive.[8]

In relation to the treatment of young adults, by contrast, both the white paper and the Bill ignore evidence which the government has previously acknowledged as persuasive. And specific proposals on the treatment of children fail in key respects to observe the policy test which the white paper itself sets, that the welfare of the child should be the primary consideration. The treatment in the overarching equality statement accompanying the Bill of the discriminatory impacts of its proposals for people with protected characteristics, and Black, Asian and Minority Ethnic individuals in particular, falls far short of the duties placed upon it by law.

We largely welcome proposals to reform criminal records disclosure and provisions to enable the piloting of problem-solving courts. The provisions on out of court disposals will need careful scrutiny, particularly for their equality impacts. Likewise, provisions on community sentencing will need close consideration to ensure they do not increase the likelihood of individuals, particularly those with learning disabilities, being unnecessarily breached and recalled to custody.

Imprisonment for Public Protection (IPP)

Despite significant concerns we have relating to the majority of the provisions of the Bill, it nonetheless represents an opportunity to mitigate the detrimental impact of the indeterminate sentence of Imprisonment for Public Protection (IPP) – described by Lord Brown in the foreword to a recent PRT research report on IPP recalls as “the greatest single stain on our criminal justice system”.[9] **We hope Peers will use the second reading debate to highlight concerns regarding the ongoing injustice faced by thousands of people serving IPP sentences and their families, with a view to supporting amendments for reform in committee.**

The IPP was introduced through the Criminal Justice Act 2003 and intended to apply to dangerous people convicted of violent and sexual offences who did not merit a life sentence. People would serve a minimum term in prison (their tariff), during which time they would undertake work to reduce the risk they posed. Once their tariff expired, the Parole Board would review their case. They would only be released when their risk was considered manageable in the community.

[8] Ministry of Justice (2013) Transforming Rehabilitation: a summary of evidence on reducing reoffending, London: Ministry of Justice

[9] Edgar, K, Harris, M and Webster, R (2020) No life, no freedom, no future: the experience of prisoners recalled under the sentence of Imprisonment for Public Protection, London: Prison Reform Trust

People released on an IPP remain subject to recall indefinitely. If they are returned to prison, they must remain there until the Parole Board is satisfied that custody is no longer necessary for public protection. Ten years after their initial release, they can apply to have their licence terminated.

Soon after the introduction of the IPP problems with the sentence emerged. In practice, the IPP was often given to people convicted of low-level offences. The criminal justice system was ill-equipped to deal with the large number of people receiving IPPs. There were insufficient spaces on offending behaviour programmes for people to reduce their risk of reoffending and the Parole Board was over-stretched, meaning people remained in prison long after their tariff expired.

The criteria for the IPP were tightened in 2008, and the sentence was abolished in 2012 by the Legal Aid, Sentencing and Punishment of Offenders Act. However, people sentenced to an IPP continue to face the same release requirements, remain on licence indefinitely, and are subject to indefinite recall.

A total of 8,711 IPP sentences were issued. On 30 June 2021 there were still 1,722 people in prison serving an IPP.[10] Almost all (96%) people still in prison serving an IPP sentence have passed their tariff expiry date—the minimum period they must spend in custody and considered necessary to serve as punishment for the offence. 269 people are still in prison despite being given a tariff of less than two years—most of these (207 people) are still in prison over a decade after their original tariff expired.[11]

There remains a growing problem of IPP recall. On 30 June 2021 there were 1,332 people back in prison having previously been released – an increase of 213% in the past six years.[12] Those recalled must again convince the Parole Board that they are safe to be re-released. Recalled IPP prisoners who were re-released between July 2019 and June 2020 had spent on average 18 and a quarter months in prison post-recall.[13]

PRT's research report on IPP recalls found that IPP prisoners' life chances and mental health were both fundamentally damaged by the uniquely unjust sentence they are serving. Arrangements for their support in the community after release did not match the depth of the challenge they faced in rebuilding their lives outside prison. Risk management plans drawn up before release all too often turned out to be unrealistic or inadequately supported after release, leading to recall sometimes within a few weeks of leaving prison, and for some people on multiple occasions. The process of recall also generated strong perceptions of unfairness.

One recalled IPP prisoner interviewed for the report said:

"So long as I'm under IPP I have no life, no freedom, no future. I fear IPP will force me to commit suicide. I have lost all trust and hope in this justice system...Each day I

[10] Table 1.9a, Ministry of Justice (2021) Offender management statistics quarterly: January to March 2021, London: Ministry of Justice
[11] Table 1.9b, Ministry of Justice (2021) Offender management statistics quarterly: January to March 2021, London: Ministry of Justice
[12] Table 1.9a, Ministry of Justice (2021) Offender management statistics quarterly: January to March 2021, London: Ministry of Justice; and Table 1.9a, Ministry of Justice (2016) Offender management statistics quarterly: January to March 2016, London: Ministry of Justice
[13] Edgar, K, Harris, M and Webster, R (2020) No life, no freedom, no future: the experience of prisoners recalled under the sentence of Imprisonment for Public Protection, London: Prison Reform Trust

feel more and more fear and dismay and I am starting to dislike life...I have to suffer in prison in silence. Accept it or suicide. That's my only options left."

Ultimately, the most comprehensive way in which the injustice faced by people serving IPPs could be addressed would be to make the abolition of the IPP sentence apply retrospectively. This would require a process of judge-led reviews of individual IPP cases; a phased programme of releases, with properly resourced preparation, and post release support plans for all those affected. We do not underestimate the significant legal and political challenges involved in retrospective abolition. We would also support amendments at committee to improve the process for reviewing the licences of people serving IPP sentences in the community. Currently, individuals serving IPP sentences in the community are entitled to a review by the Parole Board to consider whether or not to terminate the IPP licence 10 years after their first release. The review process depends on the individual themselves applying to the Parole Board for a review. Options for reform might include amendments to reduce for qualifying period for a licence review and to make the review process automatic.

The remainder of the briefing highlights concerns relating to specific provisions of the Bill:

Part 7—Sentencing and Release

Clause 101: Minimum sentences for particular offences

This clause, which seek to limit the discretion of sentencers with the knowledge and the full facts of a case before them, is at odds with the government's own evidence. Its recent research on the most effective responses to prolific offending shows that reconviction rates for prolific offenders are lower when agencies persist with the use of community sentences rather than resorting to custody— and the positive impact is even more marked for people with mental health issues.[14] The government's own research on the management of behaviour in prisons also recognises that providing support and positive encouragement is a more effective tool than threatening people with ever more serious consequences.[15]

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

Clause 102: Whole life order as starting point for premeditated child murder

Although the Court of Appeal has upheld the principle of the whole life tariff, it is nonetheless subject of legal controversy and potential ongoing dispute between the national and European courts. We question the rationale for further expanding its use, and particularly the logic of making it the starting point for the offence of premeditated child murder. This will unnecessarily tie the hands of judges in reaching the appropriate sentence in what may be particularly troubling and complex cases. For instance, cases involving a mother murdering a new-born baby, when the mother

[14] Hillier, J. and Mews, A. (2018) Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?, London: Ministry of Justice
[15] HM Prison & Probation Service (2020) Incentives Policy Framework, London: Ministry of Justice

may be suffering from post-natal depression or another mental health condition, which might contribute to causing her to commit such a serious offence.

Clause 103: Whole life orders for young adult offenders in exceptional cases

This clause is the first of several that fly in the face of evidence on maturity which the government has previously accepted and promised to take into account in its policy concerning young adults in the criminal justice system.[16]

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

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

Clause 104: Starting points for murder committed when under 18

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

Clause 105: Sentences of detention during Her Majesty's pleasure: review of minimum term

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

There is legal precedent for extending a welfare-based approach into adulthood, which this provision seems to undermine. In R(Smith) v Secretary of State for the Home Department [2005] UKHL 51; [2006] 1 AC 159, the House of Lords considered the progress in prison of those who have committed murder as children. The judgment affirmed the need for the punishment term to be kept under review, even into adulthood. Baroness Hale outlined that "an important aim, some would think the

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

most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity." (Smith, paragraph 25).

Clause 106: Life sentence not fixed by law: minimum term

This clause—effectively requiring courts to set longer tariffs in discretionary life sentence cases—is described as a necessary consequence of the change to the release point in longer determinate sentences for sexual and violent offences. Although not stated, it is highly likely also to be a reaction to another single high-profile case in which defendants were convicted of manslaughter, the punishment was disapproved of in the press, but a government sponsored appeal on the grounds that the sentence was unduly lenient was rejected.

Clauses 107 and 108: Increase in requisite custodial period

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

The principal benefit claimed is public confidence in the criminal justice system, but again no evidence is presented to support the premise that harsher sentencing increases public confidence. The conclusion of relevant research in this area has for over two decades been that the public is poorly informed about the actual severity of existing sentencing.[17]

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

Clause 109: Power to refer high-risk offenders to Parole Board in place of automatic release

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

The government has prayed in aid public protection in the face of a terrorist threat to allow retrospective sentencing; to introduce parole consideration for some terrorist offenders—and then to rule it out for others.[18] Now it cites it as the justification for executive sentencing, radically changing the nature of a sentence mid-stream on the basis of alleged behaviour that post-dates not just the original offence, but the trial that the offence brought about.

[17] 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
[18] Terrorist Offenders (Restriction of Early Release) Act 2020

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

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

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

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

Although an appeal process is built into the provision, it is not clear what rights the prisoner will have under the appeals process, including whether they will be granted full rights of disclosure.

Parliament is invited to take on trust that the application of these powers will be rare, but the criteria on the face of the Bill are broad and there is no mechanism to guard against the abuse of executive power in a matter which properly belongs wholly within the remit of a court. **We hope Peers will use the opportunity of the second reading debate to raise concerns about this clause and support amendments in committee to mitigate its worse impacts.**

Chapter 2: Community sentences

Clause 125: Supervision by responsible officer
Clause 127: Power for responsible officer to vary curfew requirements etc

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

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

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

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

Part 8—Youth justice

As we highlight earlier in our briefing, we have serious concerns with the implications of Clause 103, Clause 104 and Clause 105 which introduce a raft of punitive and unevidenced measures. Their introduction risks undermining our compliance with a number of articles of the UN Convention on the Rights of the Child (UNCRC), including Article 3, Article 6, Article 9, Article 19, Article 37 and Article 40.

We are not aware of any evidence that being "tough" with children helps to achieve any of the objectives this paper sets for the youth justice system, but a good deal of evidence that it may do the reverse, both reducing the prospects of a reduction in reoffending and doing harm to children who have often been traumatised by such an approach before entering the criminal justice system.[19]

We welcome the addition of a new statutory duty for courts that requires them to consider the welfare and best interests of the child when applying the sets of conditions that must be met in order to remand to custody, including that the court must be of the opinion that the prospect of a custodial sentence is "very likely", rather than the lower threshold of it being a possibility. In contrast to the previous two clauses, this measure will strengthen our compliance with the same UNCRC articles.

Part 10—Management of offenders

Chapter 1: Serious Violence Reduction Orders (SVROs)

This section of the Bill introduces a new civil order in the Sentencing Code, the Serious Violence Reduction Order. This is the latest in a line of recent civil orders, which can be imposed on a lower standard of proof, but allow for a period of imprisonment of up to two years following a breach of an order's terms. As with the recent introduction of similar civil orders, such as the Knife Crime Prevention Order (KCPO) and the Domestic Abuse Protection Order (DAPO), we object to a policy under which civil orders imposed on a balance of probabilities can, if breached, result in a criminal conviction and even imprisonment without a criminal process in relation to the original, alleged offending behaviour.

In the case of the SVRO, this is particularly important given the extremely widely drawn circumstances in which it can be applied. An SVRO could lawfully be imposed where a person does not use or have possession of an offensive weapon during the commission of an offence; and in cases where more than one person is involved, it would only require that a person "ought to have known" that another person was in possession.

Part 11—Rehabilitation of offenders

We welcome the steps the government has taken in the Bill towards a more progressive regime for the disclosure of criminal records. We refer Peers to Unlock for a more detailed analysis of the provisions of this section of the Bill.

Discrimination — Equality Impact Assessment

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

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

The treatment in the overarching equality statement accompanying the Bill of the discriminatory impacts of its proposals for people with protected characteristics falls far short of the duties placed upon it by law. In particular, there are a significant number of measures contained within the Bill which are likely to perpetuate the inequalities highlighted in the government's independently commissioned review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System.[20] It also chooses to gloss over the impact these provisions will have in relation to the protected characteristics of both age and race. Those consequences are very likely to be that the disproportionate and growing representation of black children and young black men in custody will increase, reflecting the systematic bias disclosed by the Lammy report and which the government is supposedly committed to tackling. Consistent with other proposals under the White Paper, a lack of data is presented in the Equality Statement as the absence of discrimination.

[20] 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