Police, Crime, Sentencing and Courts Bill

BRIEFING: POLICE, CRIME, SENTENCING AND COURTS BILL GROUP MEETING ON ADULT SENTENCING MEASURES

PURPOSE OF MEETING: a group discussion focussing on the Ministry of Justice's adult sentencing measures in the Police, Crime, Sentencing and Courts (PCSC) Bill, which the Lrod Chancellor will chair. He is aware that a number of groups with interest in the criminal justice system have written to him and his ministerial team regarding the Bill and would welcome the opportunity to discuss the points you have raised. He would like to consider:

1. The measures that target those very serious violent and sexual offenders
2. Those that will make community sentences more effective
3. Their ongoing commitment to reducing reoffending.

This is a meeting to discuss the measures already before Parliament, rather than to bring forward new proposals.

Introduction

In our briefing for the second reading we confirmed our support for a number of the measures in the Bill, including:

- The commitment to criminal record disclosure reform
- The piloting of problem-solving courts
- Increasing the threshold for custodial remand of children

Overarching points:

- the Bill represents a continuation of general sentence inflation which has played a significant role in increasing the prison population and impacting on the capacity of both prison and probation services to deliver rehabilitation. This is despite the lack of evidence that increased sentence lengths are effective, both in terms of deterrence or in respect of reoffending.
- By European standards, our sentencing is already heavily biased towards imprisonment, and this legislation will further entrench longer sentencing.

- Although there are commitments towards community sentencing, this does not negate the fact that the more serious end of offending has seen a continuation of what seems to be an unending stretching of sentence length
- a number of the proposals contained in the Bill risk further entrenching race inequality in the criminal justice system. The impact on people from Black and Minority Ethnic backgrounds is recognised by the Government in its equality impact assessment but it justifies the unequal impact of these changes as a 'proportionate means of achieving the legitimate aim of protecting the public'. However, it provides no evidence or reasoning in support of this claim, and so without an evidential basis to support the position that increasingly punitive sentencing deters crime or reduces reoffending we believe that the disproportionate impact of these changes cannot be justified.
- We are pleased that the Bill commits to further investment in community sentences, but in order to ensure that such sentences become the default option, we urge the Government to restrict the use of ineffective short sentences, focusing instead on the root causes of offending. By failing to address the root causes of crime, there will be more victims and crime, and more people stuck in an endless cycle of reoffending.

Discussion topics:

1. **The measures that target very serious violent and sexual offenders**

Minimum sentences for particular offences

For some serious offences the law provides minimum custodial sentences (generally for repeat offences, such as a third conviction for domestic burglary). These minimum sentences are not technically mandatory, but are a mandatory consideration that the court must make before passing a sentence. Courts have the discretion not to impose the minimum when it considers that there are particular circumstances pertaining to the offender and/or the offence which would make it unjust.

A large proportion of repeat offenders do not receive the minimum custodial sentence. In order to aim to reduce the occasions in which the court could depart from the minimum term, the Government is proposing to change the threshold for passing a sentence below the minimum term for offences including:

- a third class A drug trafficking offence (7 years minimum);
- a third domestic burglary (3 years minimum);
- a repeat offence involving a weapon or bladed article (6 months minimum);
- threatening a person with a weapon or bladed article (6 months minimum).

- The changes will also apply to 16- and 17-year-olds who receive a 4-month detention and training order ("DTO") for a repeat offence involving a weapon or bladed article or threatening a person with weapon or bladed article.

These changes will also align the criteria with that used for offences involving firearms that **the court must impose an appropriate custodial sentence of at least the minimum term unless the court is of the opinion that there are "exceptional" circumstances which relate to the offence or to the offender which would justify not doing so**.

Comment: this changes the threshold for passing sentences below the minimum term for certain repeat offences, and seems to do so on the basis that judicial discretion is being exercised inappropriately, as 'a large proportion' don't get the minimum term. Judicial discretion is important, the judiciary carry out an important function in weighing the facts of each case and taking all the circumstances into account in arriving at the appropriate sentence. The very fact that a large number of people don't receive the minimum custodial sentence demonstrates the importance of judicial discretion and the fact that it is working to provide justice which is tailored to the circumstances. Restricting/fettering judicial discretion is harmful for the exercise of the independent judicial function and its inappropriate to fetter just to get the result you want!

Whole life order as a starting point for premeditated child murder

Comment: Populist policy, but not sure there's much we would say (although people convicted of the most serious crimes have the lowest reoffending rates). The legal status of a whole life order (WLO) has been found to be compliant with Article 3 of the European Convention on Human Rights (the right not to be subjected to inhuman or degrading treatment or punishment) because there is, at least in theory, a release mechanism open to prisoners serving a WLO as the Secretary of State for Justice has the power to release any life sentence prisoner on compassionate grounds in 'exceptional circumstances'.

Whole life orders for young adult offenders in exceptional cases

WLO will be able to be imposed on those aged 18 to 20 in exceptional and serious circumstances.

Comment: this is introduced specifically to cover the Manchester Arena bomber (who was aged 20). Government acknowledges that maturity is an important factor in sentencing, and accepts the growing evidence on maturity which shows that young adults, particularly males, are still maturing until the age of 25. The starting point for sentencing of those aged 18-25 should be a nuanced approach that is closer to sentencing for children. The evidence on maturity is also not reflected in the clause which proposes that whole life tariffs can be given to 18 year olds. It's desperately sad that we should be able to sentence an 18 year old to spend the rest of their life in prison, rather than trying to look at what went wrong in this young person's life and how to fix it.

Life sentence not fixed by law: minimum term

Discretionary life sentences may be imposed where a serious offence (such as manslaughter, rape or grievous bodily harm with intent) has been committed. When imposing such a sentence, the court must set a minimum term (tariff) that must be served in full in custody before the prisoner can be considered for release by the Parole Board. Clause 105 will change the way in which the starting point for discretionary life sentence minimum terms are calculated so that there is greater consistency across the sentencing framework as it applies to serious offences.

Comment: this is keeping consistency with other sentencing (and consistency is a good thing), and so there are just general inflationary sentencing points here.

Release on licence

Abolishing automatic halfway release for certain serious offenders

Background:

- Standard release provisions are set out in section 244 of the Criminal Justice Act 2003 ("CJA 2003"), which before 2020 provided in all cases that offenders in receipt of a standard determinate sentence ("SDS") for any offence would be automatically released from their sentence at the half-way point and they would then serve the remainder of their sentence on licence in the community. The Government's 2019 manifesto committed to "end automatic halfway release from prison for serious crimes".
- In February 2020, this halfway release requirement was changed for terrorist offenders in receipt of an SDS, by the Terrorist Offenders (Restriction of Early Release) ("TORER") Act 2020, so they would instead have to serve two-thirds of their sentence before the Parole Board would consider if they were safe for early release. This legislation was brought forward in an emergency timescale following the terror attacks in London Bridge and Streatham.
- In relation to non-terrorist offenders, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) ("ROPARPS") Order 2020 came into force on 1 April 2020. This Order ensured that offenders who receive an adult SDS of 7 years or more, for an offence that attracts a maximum life sentence, must serve two-thirds in custody before they are automatically released on licence for the remainder of the sentence.

The Bill:

- now expands on this: offenders sentenced to an adult SDS of between 4 and 7 years for certain serious violent and sexual offences (where that offence attracts a maximum penalty of life) will be required to serve two-thirds of their sentence in custody instead of half.

- The release provisions that are set out in section 244 of the CJA 2003 also apply to section 250 sentences (standard determinate sentences for youths). This Bill changes the automatic release from half-way to the two-thirds point for those who receive a section 250 sentence of seven years or more for certain serious violent and sexual offences (where that offence attracts a maximum penalty of life).

The explanatory notes say that the clauses are required 'to ensure that the proportion of the sentence served in custody reflects the gravity of the offence committed, and to address concerns about the current automatic halfway release of offenders who have committed very serious violent and sexual offences.'

Comment: extending the automatic release point from half- to two-thirds of the sentence will have a disproportionate impact on, Men, people with a Black or Black British ethnicity as well as younger adult offenders (aged 18-24) and offenders over the age of 50. Government in its equality impact assessment justifies the unequal impact of these changes as a 'proportionate means of achieving the legitimate aim of protecting the public'. However, it provides no evidence or reasoning in support of this claim, and so without an evidential basis to support the position that increasingly punitive sentencing deters crime or reduces reoffending we believe that the disproportionate impact of these changes cannot be justified.

Extending the time that some people convicted of some offences spend in custody does not, arguably achieve the aims of the white paper of providing a simpler and more coherent sentencing structure, but takes sentencing for some offences to a harsher level, and so adjusts the harshness of those sentences in isolation, without giving proper consideration to how that fits into an overall scheme of punishment.

Power to refer high-risk offenders to the Parole Board in place of automatic release

Background:

- Offenders who are assessed as dangerous by the sentencing court may be sentenced to an extended determinate sentence and may only be released before the end of their custodial term if the Parole Board assess they no longer pose a public protection risk.
- The Government introduced emergency legislation after the terrorist attack in Streatham in February 2020, the TORER Act 2020, to ensure that those convicted of terrorist or terrorist-connected offences serving standard determinate sentences could not be released before the end of their sentence without the approval of the Parole Board.

The Bill extends this approach by introducing a new power for the Secretary of State to prevent the automatic early release of prisoners serving an SDS who are identified as a significant public protection concern while they are imprisoned. This measure will ensure

that prisoners who become dangerous or are identified as dangerous in prison following conviction and sentencing are not subject to automatic release before the end of their sentence. They will instead be assessed by the Parole Board who will determine if they can be safely released on licence before this point. There will be no provision for holding an offender in custody beyond the end of the sentence handed down by the court.

This will provide greater consistency in the release arrangements for serious and dangerous offenders, ensuring they cannot be released early without first being referred to the Parole Board for an assessment of their risk to the public, thereby providing a greater degree of public protection.

Comment: this is arguably 'punishment in advance' because if you are identified as becoming dangerous you can be held for longer. This is the wrong focus to take, we should instead be concentrating on what needs to be one to ensure that people in prison get the rehabilitative help they need, not looking at what to do when that fails. (bit of a weak argument). It's a slippery slope towards holding people without trail (bit melodramatic). Also wonder if there is a risk of this being a badge of honour for some?

Increase in requisite custodial period for certain other offenders of particular concern

Background: A Sentence for Offenders of Particular Concern ("SOPC") must be imposed where there is a conviction for a specified offence (certain terrorist offences and the two most serious child sex offences - rape of a child under 13 and sexual assault of a child under 13) but the offending is not deemed serious enough to attract a life sentence and where the court assesses that the offender is not dangerous and therefore does not require an extended determinate sentence. Under this sentence, an offender may be considered for early release (at either the halfway or two-thirds point of the custodial term) by the Parole Board. If not released early, they must be released at the end of their custodial term to serve a further period of 12 months on licence. The TORER Act 2020 moved the earliest release point for terrorist offenders sentenced to a SOPC from halfway to two-thirds.

The bill: will change the earliest release point for all remaining offences which attract a SOPC (those specified child sex offences), bringing them into line with those terrorist offenders who receive a SOPC. This is in order to achieve consistency between all offenders serving the sentence itself, regardless of the offence committed, and to achieve consistency with the release arrangements that are in place for other serious offenders. This change will ensure that all those who receive a SOPC can only be released, at the earliest and at the discretion of the Parole Board, after having served two-thirds of their custodial term rather than half of the term as at present. The change will also ensure that all those who receive a SOPC are brought into line with the two-thirds release point that applies to other serious offenders. It will align, in particular, with the changes being made in this Bill to require certain serious sexual and violent offenders who receive an SDS of 4 years or more to serve

two-thirds instead of half their sentence in custody. The measure will amend section 244A of the CJA 2003.

Comment: this is levelling up the custody times between two different types of offending that might get a SOPC and so nothing of particular note.

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

Background: there is no power in the current legal framework for the Parole Board to re-open a case where they have made a decision, other than under the terms of the reconsideration mechanism which the Government introduced in the Parole Board Rules 2019. The bill provides that the rules the Secretary of State may make may confer a power on the Parole Board to set aside its own release decisions administratively on application from the Secretary of State without the need for a judicial review of the decision by the High Court.

Comment: none

Community Sentences

Increases in maximum daily curfew hours and curfew requirement period

Currently, a community order or suspended sentence order may specify a maximum of 16 hours curfew per day, Clause 125 will increase the daily maximum to 20 curfew hours per day, whilst maintaining the seven-day period maximum of 112 hours. The purpose of this change is to allow for a curfew to have a greater impact on specified days.

At present, a curfew can be imposed for a maximum of 12 months, this will be increased to two years. Will increase the punitive weight of a curfew requirement, but also has the potential to support rehabilitation by providing a longer period during which some of the positive effects of curfew could be established, such as deterring criminal associates.

Comment: We welcome a renewed focus on community sentences, proven to be more effective at reducing reoffending than short prison sentences. We believe that there is a balance to be struck between improving judicial confidence in community sentences whilst not creating community sentences which are too onerous and therefore setting people up to fail. Repeat and prolific offenders often lead lives characterised by histories of trauma, substance misuse and/or mental health issues and therefore it can be difficult for some people in this situation to comply with very restrictive community orders. The lengthening of curfews and extension of sentence lengths may therefore not prove effective for this group.

There is additional work to be done to ensure that the judiciary is aware of community options and can see when they work. We can acknowledge that the CSTR pilot sites (and the extension of those sites) have a significant role to play in improving judicial confidence.

Tough on crime government rhetoric has an impact on the public's perceptions of sentencing, and the judiciary is not immune from this.

Problem-Solving Courts

Background: Historically elements of a problem-solving approach have been trialled separately across England and Wales. For example: Liverpool Community Justice Centre, Family Drug and Alcohol Courts, and Greater Manchester's female-focused approach.

The Government has committed to piloting 'Problem-Solving Courts' in up to five locations in a way that incorporates previously tried problem-solving approaches. Many of the elements needed to run a problem-solving court approach based on best practice already exist; for instance, the ability for the sentencer to order a detailed pre-sentence report and in some cases to review an individual's progress during the sentence. However, some legislative changes are necessary to ensure that the recommendations made by the 2016 Working Group can effectively be put into practice and to ensure that a thorough evaluation can take place:

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

Comment:

- We believe that judicial involvement in community sentences is an important plank in creating judicial confidence, and that the collaborative nature of problem-solving courts with bespoke sentencing catering for individual needs together with progress monitoring can encourage participation and compliance.
- Concerned about any extensions of powers to test for illicit substances outside the provisions of DRRs as testing within DRRs is the right place for this to be (ie where treatment and support is available) and extending testing is potentially further expanding the CJS into what should be a medical issue. The Bill just says: 'Schedule 14 amends the Sentencing Code to make provision for a drug testing requirement in community orders and suspended sentence orders' so presumably you could be breached for failing a drugs test or failing to take a test? Not sure this is all that valuable.
- Really don't like the court being given the power to impose short custodial penalties for non-compliance as these are exactly what we are trying to avoid – they will be disruptive, counter-productive and should not be in place in a community order where the purpose is to get someone to move away from criminality not to become

entrenched in the justice system. I don't know what evidence there is to suggest that short custodial penalties would be effective.

Unpaid Work consultation duty

Clause 130 will create a new statutory duty requiring probation officials to consult key local and regional stakeholders on the design and delivery of Unpaid Work. Improving the quality of placements by better understanding community needs, has an important role to play in the rehabilitative process and will support offenders to make more effective reparation to local communities for the damage caused by crime.

Comment: not sure if we've got anything to say about this? It feels like solving the issue of making unpaid work effective needs more than a statutory duty to consult locally (although that seems like a good step)

that can be presented by release on a Friday.

Serious Violence Reduction Orders

SVROs can be made:

- if the court is satisfied on the balance of probabilities that a bladed article or offensive weapon was used by the offender in the commission of the offence, or that the offender had a bladed article or offensive weapon with them when the offence was committed
- if the offender convicted of the offence did not use the weapon or have the weapon with them, but another person used a bladed article or offensive weapon, or had a bladed article or offensive weapon with them when the offence was committed, and the offender knew, or ought to have known, that would be the case.

The introduction of SVROs is a further civil order, which can be imposed on the lower civil standard of proof (the balance of probabilities), but allow for a period of imprisonment of up to two years upon breach. We object to SVROs as they can result in a criminal conviction and even imprisonment without a criminal process in relation to the original, alleged offending behaviour.