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Comments on UK Government Proposals for “Smarter Approach to Sentencing”

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf

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COMMENT

Being realistic about sentencing reform



By Helen Mills

Tuesday, 13 October 2020

Helen Mills takes a look at the government’s sentencing proposals and the implications for the Centre’s current short prison sentences work.

Last month the government published *A Smarter Approach to Sentencing* setting out proposals for sentencing reform which it intends to legislate for next year. A good summary of all the proposals in the 115 page document is [here](#).

Here I offer a few themes.

Tough on law and order

Tougher sentences – well trailed in the media – AKA the public face of this White Paper. That means longer prison sentences. Policies proposed include restricting automatic early release, more restrictive criteria for sentencers to impose sentences below mandatory minimums, new mandatory minimum sentences in some cases of repeat convictions, and whole life terms in cases involving the murder of a child.

Whilst these policies are hardly a surprise - this is a government which promised longer prison sentences in both its election campaign and Queen's Speech – for anyone wondering how a toughness would fare when confronted with the realities of a criminal justice system in crisis, it's a sobering moment.

It's one thing to promise toughness when campaigning. But creating extra demands for an overstretched criminal justice system, at a time when prison conditions plumb [ever deeper lows](#) and a probation service weakened by botched reforms, risks accelerating the well-established downwards trajectory. To do so when serious investment is unlikely to happen any time soon seems reckless.

But that does seem to be the road we are on.

That may sound like catastrophising. But it's laid bare in the useful accompanying [impact assessment](#) to the White Paper. The proposed benefit of the proposals is greater public confidence in sentencing. These are weighed up against the costs of the proposals for prison and youth custody service of:

...increased population and longer times spent in custody for some offenders which may compound prison instability, self-harm, violence and overcrowding” and for those caught up in the criminal justice system and their families of “family breakdown (...) affecting prisoner mental health and subsequent reoffending risk.

By its own assessment, ‘tough on law and order’ looks a hollow strategy by which to govern.

Home Detention Order

Community sentences are to be toughened up too. A new community order is proposed, the Home Detention Order. It's one of a number of reforms aimed at extending the use of electronic monitoring. This new order would see those who do not comply with community supervision potentially subject to a “highly restrictive and lengthy” curfew.

Given that, in a [recent study](#) by the Justice Inspectorate, nearly one in three of those released from prison had no fixed abode, it's less clear how the government will ensure those subject to probation supervision have the prerequisite houses to curfew within.

Pre-sentence reports

There are plenty of proposals in addition to the headline grabbing. Some of which are welcome. The decline in pre-sentence reports is recognised, an intervention often critical to make the case for a community based sentence rather than custody.

Though there's little detail about what is being put in place to reverse this trend.

Adding to the sense of disconnect, the paper is also not without its internal contradictions.

The systemic issue identified as:

...a persistent problem for lower level offending is the failure of non-custodial sentences to deliver better outcomes and so offenders typically end up being sentenced by courts to short spells of custody after they feel they have exhausted all other options...

is forgotten six pages later when use of immediate short prison sentences for non-compliance is proposed in the planned pilots of problem solving courts.

Reforming in the current climate

Here at the Centre, colleagues and I are looking at [sentencing reform](#) options to reduce short sentences. When we began this work we had [reservations](#) about some reforms such as presumptions and bars, particularly about whether they could leverage significant change in practice and the risk that they could result in up-tariffing to longer sentences. But we also had a sincere hope of making a contribution to addressing the overuse of short sentences.

Pushing for specific sentencing reforms in the current context though seems unlikely to have an impact given the current direction of travel. That might be a depressing or pessimistic thought. But it may also be a realistic one. The challenge now is mapping out a longer-term vision in times when there is scant evidence of one.

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COMMENT

Smarter Sentencing?



By Andrew Ashworth
Monday, 5 October 2020

It is several years since a government put out a White Paper on criminal justice.

Secretaries of State for Justice have come and gone, and political debate has been consumed by Brexit, Covid-19 and other pressing issues. Now we have a White Paper, *A Smarter Approach to Sentencing*, whose title may even be said to under-state its scope. It does contain proposals for changes to the sentencing system. But it also signals the creation of legally enforceable victims’ rights, some reductions of the rehabilitation periods for criminal records, tightening the requirements for remanding young people into custody, statutory reform of out-of-court disposals, increases in the powers of the National Probation Service, and the announcement of a ‘root-and-branch review’ of the parole system.

As for the proposed changes in the sentencing system, they adopt a bifurcated approach. The White Paper announces several initiatives to replace short prison sentences with community sentences, but on the other hand the imperatives of public protection are invoked to drive the ramping-up of already long sentences. Thus since April this year an offender convicted of a serious sexual or violent offence for which the maximum penalty is life, and who is sentenced to seven years or more, must serve two-thirds in prison before release on licence, instead of a half; the White Paper now proposes to include those sentenced to four years or more in this category, releasing them only at the two-thirds point.

In effect, these may be seen as sentence increases, since they lengthen the custodial element in these sentences. Will they protect the public more than supervised release on licence? This approach is also applied to discretionary life sentences: at present the minimum term is usually calculated at half the notional determinate sentence, whereas the White Paper proposes to raise this to two-thirds, consistently with the release date for longer determinate sentences and extended sentences. The same approach is taken to Offenders of Particular Concern who have committed serious sexual offences, who will become eligible for release after serving two-thirds (not half, as now). The White Paper also proposes to add 'premeditated murder of a child' to the murders that have a starting point of a whole life order, although the judge retains a discretion to impose a lesser minimum term (for example, in mercy killing cases).

The government takes the judiciary to task for finding it unjust, in many cases, to impose the minimum custodial sentence for repeat burglary, repeat drug dealing, repeat possession of a knife or offensive weapon etc. The White Paper speaks of changing the 'unjust to do so' criterion so as to 'raise the threshold' for cases going below the minimum sentence. No details are given of the new wording; nor how this change fits with the Secretary of State's lament that 'judges' hands are too often tied'; indeed, there is no reconsideration of the need for minimum sentences (which inevitably compromise the courts' approach to normally mitigating factors) rather than incorporating these offences into the sentencing guidelines.

Moving away from the upper track of the government's bifurcated approach, the White Paper refers to the objectives of reducing reoffending, rehabilitating offenders, reducing the number of victims and protecting communities. Short custodial sentences provide no more than a temporary respite from lower-level offending, whereas community sentences may be more effective in delivering the desired objectives.

'Those sentenced to short custody (six months or less) have an average of 65 offences, with community sentences having been tried and having failed.'

Although this part of the White Paper retains the language of public protection and 'robust punishment', it turns the spotlight on to offenders with vulnerabilities and to responsive community orders, particularly alcohol treatment requirements, drug rehabilitation requirements and mental health treatment requirements. There is a commitment to increased funding for these programmes, and a link to the Sentencing Council's recent guideline on Sentencing offenders with mental disorders, developmental disorders, or neurological impairments.

However, the White Paper also places considerable emphasis on electronic monitoring and on more flexible (and extended) curfews, and it proposes a ‘house detention order.’ This would be a new order, using GPS tagging technology and severely restricting liberty, available only for offenders who have not previously been to prison and who would otherwise have received custody on this occasion. This renewed emphasis on community sentences would be accompanied by greater use of pre-sentence reports (PSRs): ‘we will invest in additional staff at courts to support more, higher-quality PSRs for more cases’. New approaches to PSR delivery will be piloted.

There are many more proposals in this White Paper. It refers briefly to the objective of ‘relieving demand on prison places’, but the proposals on the upper track will increase demand, not relieve it. Reducing the use of custody for young offenders is described as a success. The fixed lengths of detention and training orders for young offenders are to be abolished, but the release date from longer custodial sentences (7 years plus, for serious violent offences) is to be increased to two-thirds. There are proposals for increasing the starting points for minimum terms in murders committed by young offenders: the White Paper refers to ‘a more gradual shift to adult sentences,’ but sadly there is no separate reference to young adult offenders in this or most other contexts.

This is a White Paper that is full of proposals, but sometimes rather short on supporting reasons.

Andrew Ashworth is an Emeritus Professor of Law at Oxford University, and author of *Sentencing and Criminal Justice*.