Howard League for Penal Reform

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Police, Crime, Sentencing and Courts Bill
Howard League for Penal Reform's committee stage briefing

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1. About the Howard League for Penal Reform

Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

2. Scope of this briefing

This briefing provides some general comment on the overall tenor of the Bill's punitive approach, before focussing on individual clauses within our sphere of expertise, primarily in Parts 7-11. Our comments are based on evidence gathered by the charity. This briefing also sets out an amendment on the use of remand to custody for a person's own protection or own welfare tabled by Debbie Abrahams and Jackie Doyle-Price, co-chairs of the All-Party Parliamentary Group on Women in the Penal System.

3. The tenor and message set by the punitive provisions of the Bill

The overall tenor and message of the Bill is extremely punitive and sets a worrying precedent in terms of illiberal leadership. The trend towards harsher punishment and longer sentences is not based on research evidence and is a political response to a small number of unusual and high-profile cases. As the government's factsheets explain, the focus is on supposed public perceptions rather than the rights of either victims or the accused and convicted (Home Office, 2021a).[1]

The Bill will exacerbate other punitive trends which are currently underway. The prison population was already projected to increase sharply by 2026, due to the recruitment of 20,000 additional police officers (Ministry of Justice, 2020).[2] New performance measures for policing may also bring more people into the criminal justice system: the National Chair of the Police Federation of England and Wales has warned against "a return to a damaging, target-driven culture" such as that of the early 2000s, when people were unnecessarily criminalised for petty offences (Dearden, 2021). The provisions in the bill will increase the prison population even further.

[1] https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-release-of-serious-offenders-factsheet; https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-sentence-lengths-for-serious-offenders-factsheet

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938571/Prison_Population_Projections_2020_to_2026.pdf

The sentencing provisions of the Bill will significantly increase the amount of time that people who are convicted of serious offences spend in prison. This will be hugely costly (the average overall cost of a prison place was £44,650 in 2019/20) and will make it harder for children and adults in prison to maintain hope and work towards a law-abiding future in the community (Ministry of Justice, 2020).[3] It will also reduce the amount of time that people spend under supervision in the community as they readjust to life outside prison. These provisions are likely to increase the risk of reoffending and will do nothing to reduce crime more generally: there is little, if any, evidence that longer custodial terms have a deterrent effect (Nagin, 2013).[4]

The government is aware that these proposals are not supported by research evidence. Eight days before the publication of the Bill, in response to a written question about the deterrent effect of sentences, the Parliamentary Under Secretary of State for Immigration Compliance and Justice explained that "harsher sentencing tends to be associated with limited or no general deterrent effect" (Philp, 2021).[5] Similarly, the impact assessment acknowledges that there is "limited evidence that the combined set of measures will deter offenders long term or reduce overall crime" (Ministry of Justice, 2021a).[6]

As the impact assessment explains, an increase in the prison population is likely to compound overcrowding, instability, self-injury and violence (Ministry of Justice, 2021a).[7] Longer sentences will also strain social and family ties, which are essential for maintaining the mental health of people in prison and reducing their risk of reoffending on release (Farmer, 2017).[8]

3. Clauses of concern

Clause 2: Increase in penalty for an assault on an emergency worker

The proposal to double the sentence length for assaults on emergency workers may penalise people who are in mental health crisis or have experienced trauma. Ongoing research on girls in the criminal justice system suggests that many of the low-level violent offences committed by girls are minor assaults on a police officer. These offences must be understood in the context of the high levels of trauma experienced by girls in the criminal justice system: coercive contact from police officers can be retraumatising (Goodfellow, 2021).[9] The Howard League is aware of evidence that women are being arrested when they are showing signs of distress or have been victims of crime. Evidence collected by five police forces shows that police were arresting women who were visibly distressed or when concerns had been raised about their welfare (Howard League, 2021).[10]

Clause 46: Criminal damage to memorials

This clause increases the maximum sentence for damaging a memorial to a ten-year prison sentence, regardless of the monetary damage. The impact assessment acknowledges that there are no monetisable benefits to this option and that it is unlikely to reduce vandalism rates, as "the evidence of the existence and scale of any deterrent effects is weak". It also explains

[3] https://www.gov.uk/government/statistics/prison-performance-statistics-2019-to-2020
[4] https://www.jstor.org/stable/10.1086/670398
[5] https://questions-statements.parliament.uk/written-questions/detail/2021-02-19/155490#
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967787/MOJ_Sentencing_IA_FINAL_2021.pdf
[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967787/MOJ_Sentencing_IA_FINAL_2021.pdf
[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642244/farmer-review-report.pdf
[9] See Pippa Goodfellow's presentation about her ongoing doctoral research on girls and young women in the criminal justice system, available at https://www.youtube.com/watch?v=kd9oEBozmlQ
[10] https://howardleague.org/wp-content/uploads/2021/05/APPG-on-Women-in-the-Penal-System-briefing-3-FINAL.pdf

that the changes are in response to demonstrations in the summer of 2020 (Ministry of Justice, 2021).[11] This is a reference to the Black Lives Matter protests which followed the murder of George Floyd in the US. There is a risk that harsher sentences for anti-racist protesters will exacerbate the existing racial disproportionality in the criminal justice system: as the Lammy Review pointed out in 2017, there is greater disproportionality in the number of Black people in prison in the UK than in the US (Lammy, 2017).[12]

Clauses 61-63: Unauthorised encampments

There is a risk that the clauses about trespass and unauthorised encampments will entrench or worsen ethnic disproportionality in the criminal justice system. Though only 0.1 per cent of the UK population is from a Gypsy, Roma or Traveller background, five per cent of men in prison and nearly ten per cent of children in custody are from these backgrounds. The prison inspectorate has noted that this is the worst disproportionality in the youth justice system (Her Majesty's Inspectorate of Prisons, 2020; Her Majesty's Inspectorate of Prisons, 2021).[13]

The creation of a new trespass offence is opposed by the police forces which would be responsible for enforcing them. In a 2018 consultation response, the National Police Chiefs' Council and Association of Police and Crime Commissioners stated that "[t]he lack of sufficient and appropriate accommodation for Gypsies and Travellers remains the main cause of incidents of unauthorised encampment" and that no new trespass offence was needed (McCormick and Munro, 2018).[14]

Clause 100: Minimum sentences for particular offences

This clause is designed to make it harder for courts to pass sentences which are below the minimum custodial sentence for certain repeat offences, including Class A drug trafficking (for adults) and offences which involve a bladed article (for children and adults). There is a danger that this will limit courts' discretion to pass lower sentences where it is appropriate to do so. It also risks reversing the overwhelmingly positive reduction in the number of children and young adults in custody over the last decade (Bateman, 2020).[15]

The clause could prevent courts from giving a lower sentence to a child or young adult who has committed repeat offences after being criminally exploited. National Referral Mechanism statistics point to worryingly high levels of criminal exploitation, including exploitation within county lines drug supply: there were more than 5,000 referrals for suspected criminal exploitation in 2020, and more than 1,500 for county lines exploitation specifically (Home Office, 2021).[16] The clause would affect young adults who have a history of drug trafficking offences linked to exploitation and who may still be exploited in their early adulthood. It would also affect children and young adults who commit offences which involve a bladed article as a result of exploitation.

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[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967766/MOJ_Criminal_Law_IA_FINAL_2021.pdf

[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

[13] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/10/HMI-Prisons_Annual-Report-and-Accounts-2019-20-WEB.pdf; https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/02/CYP-report-2019-20-web.pdf

[14] https://surrey-pcc.gov.uk/wp-content/uploads/2018/06/GRT-submission.pdf

[15] https://thenayj.org.uk/cmsAdmin/uploads/state-of-youth-justice-2020-final-sep20.pdf

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970995/modern-slavery-national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf

There is no evidence that harsher sentencing will reduce crime which involves a bladed article: an evidence review carried out by the College of Policing found that there was no research evidence about the impact of prison sentences on knife crime and warned that prison sentences in general increase reoffending for children. The review concluded that multi-agency approaches which target the root causes of serious violence are most likely to work (College of Policing, 2019).[17]

Clauses 101 and 102: Whole life order as a starting point for premeditated child murder and whole life orders for young adults in exceptional cases

There are very limited grounds for reviewing whole life orders in the UK: currently, the only stated reason for review is a terminal illness and nobody on a whole life tariff has been released. In these circumstances, the expansion of whole life orders to young adults means that young adults subject to these orders will have virtually no hope of ever being released. The Howard League has worked with the Transition to Adulthood (T2A) Alliance to highlight the distinct needs of young adults in the criminal justice system.[18] Scientific evidence shows that young adults are still developing into their mid-twenties, as well as the legal consensus that there is no "cliff edge" at 18. Young adults are still developing their decision-making and impulse control skills, that they are more susceptible to peer pressure, and that they are maturing rapidly. As the Justice Committee has noted, young adults are the most likely age group to "grow out of crime" (Howard League, 2020).[19] This evidence has been widely accepted by the judiciary (Emanuel et al, 2021).[20]

Whole life orders not only remove the motivation for young adults to change but are likely to pose a significant management problem to prison authorities who will not have the usual means to encourage positive behaviour in terms of progress and the possibility of eventual release.

Clause 103: Starting points for murder committed when under 18

The proposed "sliding scale" of starting points for children who commit murder will give older children sentences closely approximating those for adults. The sliding scale implies that older children are less vulnerable and more culpable and that a 17 year old is on the cusp of fully-grown adulthood. However, scientific evidence suggests that adolescence is best understood as a phase of life which extends from around age 10 to age 24 and that young people continue to develop rapidly throughout this period, including in ways which affect their culpability for offences (Sawyer et al, 2018).[21] Children's charities have pointed out that the lack of service provision for 16 and 17 year olds can leave them especially vulnerable: for example, they may fall through the gaps of social care and housing provision and are at particular risk of exploitation (Murphy and Williams, 2020; Pona et al, 2015).[22]

The increase in starting points will increase the number of children who transfer to the adult estate (currently at over 300 each year) and reduce the number of children who can benefit from leaving care services in the community as young adults.[23]

Clause 104: Sentences of detention during Her Majesty's pleasure: review of minimum terms

[17] https://whatworks.college.police.uk/About/News/Pages/Knife-crime.aspx
[18] https://howardleague.org/legal-work/sentencing-young-adults/
[19] https://t2a.org.uk/wp-content/uploads/2020/12/JudgingMaturity2020.pdf
[20] https://howardleague.org/wp-content/uploads/2021/03/CLR_Sentencing_young_adults.pdf
[21] https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(18)30022-1/fulltext
[22] http://www.crae.org.uk/media/128481/Not-in-care-not-counted-June-2020.pdf; https://www.basw.co.uk/system/files/resources/basw_15811-1_0.pdf
[23] Answer to FOI 200118002

The sentence of detention during Her Majesty's pleasure reflects the lesser culpability of children who commit murder and their greater capacity for change. As Baroness Hale explained in *R v Secretary of State for the Home Department ex parte Smith* [2002] UKHL 51, children who have committed murder are treated differently from adults both because they are less blameworthy and in order to "promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity" (§25).

The clause amends the sentence so that minimum term reviews are based on age at sentencing, rather than age when the offence was committed. This approach was rejected in *R v Smith* as contrary to the purpose and rationale of the sentence. As Lord Bingham stated in his judgment:

> The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation. (§12)

In its legal work, the Howard League has found that minimum term reviews are infrequent but important: they offer a rare source of hope and can powerfully motivate young people to make and maintain positive change.

Clause 105: Discretionary life sentences

This clause amends the minimum term to two thirds rather than one half the notional determinate term of the appropriate sentence. The apparent rationale for this appears to be to bring it in line with the later release dates in respect of certain offences attracting four years or more for adults and seven years or more for adults, as well as the parole eligibility date for those serving extended determinate sentences. However, this ignores the extent to which the nature of the discretionary life sentence differs from determinate sentences. In contrast with the determinate serious sentences, a person serving a discretionary life sentence will be liable to detention until the day he or she dies and there is no automatic release date. The blanket increase in the punitive period therefore cannot be grounded in protecting the public as that is covered by the jurisdiction of the Parole Board: it is simply a hike in the punitiveness and there is no evidence to justify this in terms of reducing long-term harm or increasing public safety.

Clause 106 and 107: Increase in requisite custodial period for people who have committed certain offences

These clauses increase the requisite custodial term for people who commit certain violent, terrorist or sexual offences to two-thirds rather than half of their sentence. This will reduce the amount of time which people who have committed serious offences spend under the supervision of probation services in the community, which is likely to undermine public safety rather than helping to keep victims and the public safe. Though there is no single model of probation supervision, a rapid evidence review across jurisdictions and models suggests that community supervision in itself reduces reoffending – unlike time in prison, which increases reoffending rates (Smith et al, 2018; Jonson, 2010).[24] This is important for victim confidence.

Clause 108: Power to refer high-risk offenders to Parole Board in place of automatic release

[24] https://journals.sagepub.com/doi/full/10.1177/0264550518796275; https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=ucin1285687754&disposition=inline

This clause allows the Secretary of State to refer people who are eligible for automatic release to the Parole Board if the Secretary of State believes that they will pose a significant risk in the community. Contrary to all other referrals to the Parole Board to determine initial release, the referral will no longer be based on the sentence which they have been given which includes an assessment of risk by a court.

It is unclear how the executive will decide whether someone poses a significant risk and what, if any, due process will adhere to that decision given that it will result in a prolonged period in custody. The only other example that the Howard League is aware of where the executive can require that a person serving a fixed is not released at the point of release that flows as a consequence of the original sentence is the option to apply for late release in the case of a child serving a Detention and Training Order. However, this requires an application to court which enables an element of due process, disclosure and the possibility of effective participation. It is unclear why, if this aspect of the Bill is to be implemented, there would not be a parallel mechanism in place to ensure fairness.

This provision also raises a number of practical concerns. First, it gives rise to the possibility that people who have been deemed dangerous by the Secretary of State will be released without any supervision in the community. Second, it may result in referrals to the Parole Board at a late stage in the sentence which mean that there will be insufficient time for the person and those responsible for their sentence plan to prepare for an effective hearing in a meaningful way or may impose a huge and unanticipated additional drain on resources.

Clauses 125 and 126: Curfew requirements and conditions

This clause increases the maximum daily hours for a curfew, allowing decision makers "to target what could be considered 'leisure days' for more punitive hours than is currently available to them" (House of Commons, 2021: 28).[25] It also doubles the maximum length of a curfew period. These changes may increase technical breaches of licence conditions and do not take into account the research evidence about desistance from crime. The evidence about desistance shows that it requires "relationships, connections and networks that facilitate positive change", particularly reciprocal relations which are characterised by solidarity and mutual help (McNeill et al, 2012; Weaver and McNeill, 2014).[26] Similarly, a recent review of the literature on experiences of electronic monitoring notes that – in comparison to custody – electronic curfews can promote desistance by allowing people to maintain their existing social networks and providing opportunities for them to extend these networks (Fitzalan Howard, 2020).[27] Strict restrictions on "leisure days" could prevent people on licence from building the positive social relationships which would help them to desist from crime.

Clause 126, which allows responsible officers to vary electronically monitored curfew conditions without going to court, increases the already significant power which probation and Youth Offending Team staff have over people under their supervision without the safeguards afforded by the court process.

Clauses 132, 133 and 134: Detention and Training Orders

The proposed changes to Detention and Training Order are predicted to increase the steady state of children in custody by up to 50 children by 2023/24, costing the government between £38.6m and £61.4m.[28] The Howard League has previously raised doubts about the effectiveness of the Detention and Training Order, which vastly increased the number of

[25] https://publications.parliament.uk/pa/bills/cbill/58-01/0268/en/200268en.pdf
[26] http://eprints.gla.ac.uk/67399/1/67399.pdf; https://journals.sagepub.com/doi/10.1177/0093854814550031
[27] https://onlinelibrary.wiley.com/doi/epdf/10.1111/hojo.12351?saml_referrer
[28] https://publications.parliament.uk/pa/bills/cbill/58-01/0268/MOJ_Sentencing_IA_FINAL_2021.pdf

children coming into custody when it was introduced (Howard League, 2015).[29] There is a real risk that the progress in reducing the number of children in prison over the last ten years will be reversed by this provision.

The rationale behind the change appears to be to enable sentencers to take into account real time spent on remand rather than being restricted to sentences of particular lengths of four, six, eight, ten, 12, 18 and 24 months. However, the current system allows sentences to factor time spent on remand into the overall decision on sentence, which should result in the time being rounded down to reflect the distinct approach to children and the need to restrict custody to the shortest appropriate period for children. In line with this, a small amendment to require sentences to round down to take into account time on remand would be more effective in achieving these objectives.

Clause 135: Youth Rehabilitation Orders

This clause expands the use of electronic monitoring for children on Youth Rehabilitation Orders and the length of sentences where children will be subject to electronic monitoring. Research evidence suggests that this will work best if electronic monitoring is used as an alternative to custody, rather than for people who would pose a low risk in the community without intensive supervision. The Howard League's work with children in the criminal justice system indicates that electronic monitoring can be a gateway to custody rather than an alternative to it (Howard League, 2016).[30]

Longitudinal research shows that justice-involved young people are still developing the psychosocial skills which allow them to fully understand the consequences of their actions, resist peer pressure and control impulses up to the age of 25 (Steinberg et al, 2015).[31]

This has implications for compliance with curfew conditions. Statistical analysis by the Ministry of Justice shows that the older someone is, the less likely they are to breach the conditions of a community order with punitive requirements (Ministry of Justice, 2014).[32]

Clause 137: Temporary release from Secure Children's Homes

This clause only applies to children who have been sentenced. To that extent, it will create a disparity between children who are in Secure Children's Homes and children who are in Secure Training Centres. The Secure Training Centre Rules (Rule 5) allow children who are on remand to be temporarily released, whereas the new statutory release provision excludes children who are on remand. Unless children on remand in secure children's homes and schools, there is a risk that this will undermine the "seamless service" between custody and the community which the Government envisions for secure schools.[33]

Clause 138: Secure 16 to 19 Academies

This clause provides a legal basis for the "secure school" model of youth custody: it allows academies to provide secure accommodation for their pupils if they have been approved to do so and establishes that running a secure academy is to be treated as fulfilling the charitable

[29] https://howardleague.org/wp-content/uploads/2016/04/Letter_to_Michael_Gove_-_youth_justice.pdf
[30] https://howardleague.org/wp-content/uploads/2016/05/They-couldnt-do-it-to-a-grown-up.pdf
[31] https://www.courts.ca.gov/documents/BTB24-2M-5.pdf
[32] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295645/community-orders-with-punitive-requirements.pdf
[33] Ministry of Justice (2018), *Our Secure Schools Vision*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712904/secure-schools-vision.pdf

purpose of "advancement of education" under s3(1) of the Charities Act 2011. In April 2020, the Charity Commission noted that "the proposed purposes of secure schools, as we understand them, do not wholly fall within the descriptions of purpose in s3(1) of the Charities Act 2011" and that "we do not think the operation of a secure school can be exclusively charitable". In November 2020, the Howard League wrote the Secretary of State outlining the concerns that locking children up does not fall within charitable objectives.[34] The proposal compounds this issue.

Clause 163: Rehabilitation of offenders

The severe impact of the childhood criminal record system in England and Wales, which is extremely punitive by international standards, is well recognised (Sands, 2018).[35] This clause will help people who committed offences as children to move on successfully turn their lives around and grow out of offending behaviour. However, the rehabilitation period and filtering rules for people who offend as children currently exclude those who turn 18 before conviction. This is likely to affect a growing number of people, given the huge backlog in court cases in the wake of Covid-19 (Crest Advisory, 2020).[36] It also fails to correlate the rehabilitation period with the nature and circumstances of the crime that was committed. This can be achieved easily by making the "relevant date" the last date of the offence. This is the relevant date in a number of other legislative provisions and would result in a more proportionate and fairer system.

4. Amendment on removing remand for own protection

The Howard League acts as secretariat to the All-Party Parliamentary Group on Women in the Penal System, which is conducting an inquiry into reducing the imprisonment of women. Last year, the Howard League published an All-Party Parliamentary Group briefing on provisions which allow judges and magistrates to remand an adult to prison for their "own protection" or to remand a child to prison for their "welfare". The White Paper itself suggested reforms to remand for own protection but this has not been included in the Bill. These provisions are out of sync with the positive changes to the use of remand for children in the Bill. The briefing argued that this power is outdated and wrong and that the provisions must be repealed. Prison is in no way safe and people in crisis need treatment and care, not punishment (Howard League, 2020).[37]

The APPG's co-chairs Debbie Abrahams and Jackie Doyle-Price have tabled the following amendment to the Bill:

> To move the following Clause—
>
> **Custody for own protection or own welfare**
>
> (1) The Bail Act 1976 is amended as follows.
>
> (2) In Part 1 of Schedule 1 (Defendants accused or convicted of imprisonable offences) omit paragraph 3.
>
> In Part 1A of Schedule 1 (Defendants accused or convicted of imprisonable offences to which Part 1 does not apply) omit paragraph 5.

[34] https://howardleague.org/wp-content/uploads/2020/11/Letter-to-Robert-Buckland-about-charity-and-imprisonment.pdf
[35] https://howardleague.org/blog/a-childhood-criminal-record-is-for-life/
[36] https://b9cf6cd4-6aad-4419-a368-724e7d1352b9.usrfiles.com/ugd/b9cf6c_e16b3e351b12430bb79cd6a2830f88f3.pdf
[37] https://howardleague.org/wp-content/uploads/2020/10/APPG-For-their-own-protection-FINAL.pdf

In Part 2 of Schedule 1 (Defendants accused or convicted of non-imprisonable offences) omit paragraph 3."

Member's explanatory statement

This new clause would repeal the power of the criminal courts to remand a defendant into custody for their own protection (or in the case of a child, for their own welfare) pending trial or sentence.

Howard League for Penal Reform
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