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# Sentencing Bill: Second Reading

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## *Howard League Briefing*

*The Howard League for Penal Reform is a charity working for less crime, safer communities and fewer people in prison. Established in 1866 and named after the prison reformer John Howard, the charity was at the forefront of the campaign to abolish capital punishment and helped to create the probation service. Today, through research, campaigning and legal work, and with the support of our members, including members in prison and their families, we promote solutions that deliver better justice and minimise the harms of prison, for prisoners, victims and society at large.*

The Sentencing Bill contains measures in relation to:

- Whole Life Orders (WLOs)
- Serious Sexual Offences Sentencing and Release Arrangements
- Extending Home Detention Curfew (HDC) eligibility
- A presumption to suspend custodial sentences of 12 months or less

This Howard League briefing takes each of these measures in turn. Broadly speaking, we welcome those measures that will help to address the crisis in prison capacity in England and Wales, and question whether those measures which will increase pressure on prison places are necessary or justified. We are also concerned about the lawfulness of provisions which seek to implement more punitive sentencing measures retrospectively.

### Clause 1: Whole life orders

The Bill will mandate courts to impose a WLO in cases for which a WLO is the starting point, unless the court considers that there are exceptional circumstances to justify not imposing a WLO. The Bill will also extend the scope of the WLO provisions to provide that any murder involving sexual or sadistic conduct will fall within the WLO regime, rather than limiting this to murders involving two or more people where there is sexual or sadistic conduct (as is currently the case).

WLOs are the starting point for sentencing only in cases of "*exceptionally high seriousness*". They are intended to apply only in the rarest of cases – fewer than five were imposed in 2022, according to the Bill's Impact Assessment (MoJ, 2023). It is an extraordinary act to incarcerate a person for the rest of their life, with only the remotest chance of release, raising both profound legal and moral questions. The justification and impact of an expansion of the scope of these provisions should be subject to anxious scrutiny by Parliamentarians.

In the view of the Howard League, it is not necessary to extend the WLO regime in the manner proposed by the Bill. WLOs are already available to the courts for the most exceptional and serious crimes, including for those where a whole life term is not the starting point. The categories provided in Schedule 21 for which a WLO should be the starting point is non-exhaustive (as was made explicit by Lord Justice Fulford when he imposed a WLO on Wayne Couzens, following the kidnap and murder of Sarah Everard). Judicial discretion is already a feature of the regime.

While the Impact Assessment for these provisions suggests that the principal policy intention is to protect the public "*by ensuring that the most dangerous offenders are not released from prison",* this is already achieved by the minimum term order for murder, which requires that a person convicted of murder serve their tariff and, even then, is released only if the Parole Board is satisfied that detaining them is no longer necessary for the protection of the public. If a person convicted of murder is released, they are subject to a life licence and can be recalled to prison if they are ever thought to be a risk to the public. Public protection is not a legitimate justification to extend the exceptionally draconian WLO regime, which is intended to be a last resort.

Significantly, WLOs make irrelevant a person's potential rehabilitation, depriving them of their humanity and denying their capacity for change. That all sentences should leave space for rehabilitation and eventual release, even in the most serious of cases of murder, is a fundamental principle articulated in such decisions of the European Court of Human Rights (ECHR) as *Vinter v UK* (ECHR, 2013), *Trabelsi v Belgium (2013)* and *Murray v The Netherlands (2016)*. As Judge Power-Forde observed in *Vinter*:

"*The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading*."

It should be noted that the Police, Crime, Sentencing and Courts Act 2022 introduced controversial provisions to enable judges to impose WLOs on young adults aged 18 to 20, where the seriousness of the offence was "*exceptionally high*" even by the standards of the offence that would result in a WLO being given to a person aged 21 or over. The Howard League provided robust evidence that such an extension was inappropriate, not least because young adults subject to these orders will have virtually no hope of ever being released (arguably in breach of the fundamental principle articulated by the ECHR above) and because the expansion of the WLO regime to capture this group ignored evidence that young adults are the most likely age group to "*grow out of crime*" (Howard League, 2021). For the reasons given, the Howard League considers that the WLO regime should never have been extended to include this young adult cohort and would encourage any Parliamentarians to take the opportunity to revisit this as the Bill progresses.

Comments on the implementation provisions relating to these changes is provided below, in the section on retrospectivity.

**Clauses 2 to 5 and 7: Sentencing & release of serious sexual offenders**

Clauses 2 to 5 extend the scope of the Sentence for Offenders of Particular Concern (SOPC) regime, adding rape and other serious sexual offences to the range of offences to which the scheme applies. This means that if a court does not hand down a life sentence or extended determinate sentence (EDS) for such offences, it must instead impose a SOPC. A SOPC comprises a fixed custodial term and an extended licence period of one year.

In addition to broadening the reach of the SOPC regime, the Bill (in Clause 7) also removes the possibility of early release on licence for individuals sentenced under the SOPC regime or subject to an EDS. In both cases, individuals will serve the entire term in custody before being released on licence, rather than being referred to the Parole Board at the two-thirds

point of their custodial term to be considered for early release. These amendments apply to children, as well as adults.

The Howard League is opposed to the extension of the SOPC regime and to the removal of the possibility of early release for those sentenced under the SOPC regime or to an EDS, particularly as these changes relate to children.

The stated policy objective is that the public "*feels and is protected*" from individuals who would fall within the scope of these amended provisions. However, there is no evidence provided by the government to support this position and, indeed, the Impact Assessment acknowledges that the changes carry a risk that the public will be *less safe* as a consequence of the changes, noting that "*a reduced licence period for some cohorts may also reduce opportunities for rehabilitation in the community, leading to higher reoffending rates due to less time spent in the community undergoing post-custody rehabilitation activity from the probation service*" (MoJ, 2023).

Releasing individuals automatically at the end of their sentences also undermines public safety by removing the opportunity for Parole Board scrutiny of proposed release plans. The Parole Board considers evidence from a range of professionals about plans for managing risk and can direct statutory agencies to strengthen any proposed release plan. The proposal that all individuals are released automatically without this scrutiny may result in high-risk individuals being released homeless or to unsuitable accommodation.

The proposed changes also remove a key incentive for individuals to comply with their sentence plan and engage in rehabilitation, which again gives rise to an increased risk of reoffending.

These changes will inevitably add to the population pressures on the already struggling prison system, which – as of 1 December 2023 – is just 1,034 places away from exceeding the estate's Useable Operational Capacity (MoJ, 2023b). The Ministry of Justice's best estimate is that these changes will require an additional 1,500 prison places by March 2034 (MoJ, 2023). The government also anticipate this will be a costly measure, with their Impact Assessment warning "*additional prison capacity will need to be constructed which is estimated to cost the prison service a total minimum of £1.153 billion over the next 40 years"* and that the net present cost over the same period is estimated to be over £3 billion as a best-case scenario (MoJ, 2023).

The Howard League is particularly concerned that the proposed amendments will apply to children. The principal aim of the youth justice system is to prevent offending, including reoffending, by children and young people (Crime and Disorder Act 1998). It is well established that children should spend the shortest period of time in custody, that regard should be given to their welfare, and that their best interests should be a primary consideration. The proposed amendments undermine each of these principles.

The government's Impact Assessment acknowledges the increased risk of reoffending as a result of spending longer in custody and having a short period on licence to support transition into the community. There is an additional consequence for children who remain in custody beyond their 18th birthday. Care-experienced children are overrepresented in the children's custodial estate. Children who are released from custody when they are under 18 are entitled to significant social care support, including the provision of suitable accommodation and financial, emotional and practical support. This support is essential for long term resettlement and public safety. However, this reduces significantly when children turn 18, and further still when they turn 21. This has not been taken into account by the government in its Impact Assessment.

The proposals do not take into account the distinct needs and characteristics of children, including the well-established principle that children may change and develop in a shorter period of time than adults (*R v. Lang & 12 others* [vLex, 2006]).

The government's Impact Assessment acknowledges that the amendments to EDS and SOPC sentences mean that children will have to complete their sentence in the adult estate. The government's own guidance on transitions acknowledges that this move *'involves a significant change in environment, regime and peer group for those in custody and can be unsettling for many young people who may be particularly vulnerable during this stage of their custodial journey…'* (MoJ, 2022). This is clearly not in the best interests of any child.

**Retrospectivity**

Clauses 1, 2, 4, 5 and 7 of the Sentencing Bill seek to impose various changes retrospectively i.e. so they apply to adults who have not yet been sentenced when the legislation comes into force. Article 7 of the ECHR unconditionally prohibits the imposition of a penalty that is heavier than the maximum penalty applicable at the time a criminal offence was committed. As the Supreme Court recently held in *Morgan and others (Respondents) v Ministry of Justice (Appellant) (Northern Ireland) [2023] UKSC 14*, the guarantees enshrined in Article 7 ECHR are "*essential elements of the rule of law*". The Howard League is particularly concerned that Clauses 1 and 7 as currently drafted offend this cardinal protection, notwithstanding the government's claims to the contrary in the ECHR memorandum accompanying the Bill.

**Clause 6: Home Detention Curfew**

HDC allows some people to be released early from prison to serve the remaining part of their prison sentence at home, or another approved address. The Sentencing Bill seeks to extend HDC eligibility from people serving standard determinate sentences of under four years, to four years or over. It will also replace the lifetime ban on access to HDC for those who have previously failed to comply with their HDC curfew conditions, instead excluding only those who have not complied with their curfew in the two years prior to the start of their existing sentence.

HDC is an important mechanism to ensure people who can be safely managed in the community are released at the earliest opportunity. The effective use of HDC can have a meaningful impact on the prison population at time when resources are scarce. HDC can also enable more people to get support from family, friends and key services, in order to rebuild their lives and move on. Earlier this year, the Howard League wrote to the Secretary of State for Justice, Alex Chalk KC MP, to offer constructive suggestions on how the Ministry of Justice could mitigate the overcrowding crisis. Improving HDC was one of several ideas that we raised.

The Howard League therefore welcomes these proposals. However, it is important that both prison and probation practitioners are provided with sufficient resources and capacity to efficiently manage this process, and that suitable accommodation is available so that HDC can be effectively implemented.

**Clause 8: Short prison sentences**

The Bill will introduce a presumption in favour of a suspended sentence for custodial sentences of 12 months or less. The Howard League has long campaigned for a step away from short prison sentences and supports this change.

The ineffectiveness of short prison sentences has been long understood. In 2019, the Ministry of Justice's own research found that sentences under 12 months without supervision on release were associated with higher levels of reoffending than community orders (MoJ, 2019). If someone needs support to move away from non-violent crime, they will have better access to the services that can help them if they are being supervised in the community. This in turn will increase public confidence by driving down reoffending rates and help people to feel safer in their homes.

A move away from such short sentences will also provide some respite for prisons facing an unprecedented increase in the prison population. As referenced above, the prison estate is in close danger of exceeding full capacity. The prison population is projected to reach up to 106,300 by March 2027 – an increase of 21 per cent (MoJ, 2023c).

Reducing the use of short sentences will lessen the churn of people going in and out of some of the most overcrowded, local prisons. At the same time, it should be acknowledged that on any given day, the proportion of those on short sentences is a relatively small part of the overall prison population. Just over five per cent of people in prison are currently serving sentences of less than 12 months (MoJ, 2023a).

By contrast, as of 30 September 2023, the largest percentage increases in the sentenced prison population were seen in those recalled to prison, the number of people serving determinate sentences of twelve months to less than five years and those serving an Extended Determinate Sentence. This is precisely why the Howard League is concerned that other measures in this Bill will add to the inflationary pressures on the prison population at this time.

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