

# Sentencing during the pandemic: What are the options?

## *Background*

As jury trials begin to recommence and Crown Courts are starting to return to life, questions about what impact, if any, the coronavirus pandemic should have on the imposition of custodial sentences are becoming more pertinent. At the start of the coronavirus outbreak, concerns were rightly expressed about the impact the virus could have in prisons if measures were not put in place to mitigate the risk of transmission. In early April 2020, the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 were introduced to facilitate the early release of prisoners within two months of their release date who met the criteria set out by the Secretary of State for Justice.<sup>1</sup> At the time of its introduction on 7 April 2020, it was thought that around 4,000 prisoners may be eligible for ‘Coronavirus Restricted Temporary Release’ under this scheme;<sup>2</sup> however, by 11 May 2020, only 78 prisoners had been released early (52 released as part of the temporary release scheme and 26 on compassionate grounds).<sup>3</sup>

Despite the very limited use of Coronavirus Restricted Temporary Release, the prison population has declined during the lockdown period: on the Friday before the lockdown was introduced – 20 March 2020 – the prison population stood at 83,525 and this had fallen to 79,645 by 12 June 2020. The reduced workload of the courts during this period has restricted the number of new entrants into prison even if very few prisoners have been released early under the new scheme.

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<sup>1</sup> To be eligible, prisoners must: (i) be assessed as having a low or medium risk of serious harm; (ii) not be eligible for Multi-Agency Public Protection Arrangements management on release; (iii) not be serving a sentence of any length for any of the violent or sexual offences specified in Schedule 15 to the Criminal Justice Act 2003, or other certain violent and sexual offences; (iv) not be serving a sentence of four or more years’ imprisonment for certain ‘possession of weapon offences’; (v) be within 61 days of their conditional release date; (vi) have already served at least half the custodial term to which they were sentenced; (vii) not be serving a fixed-term or standard recall; (viii) not be identified as posing a risk of domestic abuse or a concern related to child safeguarding; and (ix) not be assessed as posing a risk to national security if released. The same restrictions apply to children and young people who must also not be serving a sentence for certain drug offences.

<sup>2</sup> Justice Committee, ‘Summarised note of meeting with the Lord Chancellor’ (7 April 2020). Available at: <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/correspondence/200407-Justice-Committee-meeting-Robert-Buckland-note1.pdf>.

<sup>3</sup> *Hansard* HL Deb 19 May 2020 c 4013W. Under section 248 of the Criminal Justice Act 2003, the Secretary of State for Justice has the power to release at any time a fixed-term prisoner on licence if satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds.

The spread of coronavirus through the prison estate has perhaps not been as significant as initially feared, although these numbers are likely to be influenced by the relatively limited testing regime in place. By 11 June 2020, 492 prisoners had tested positive for COVID-19 (across 80 different prisons); 961 prison staff had tested positive for COVID-19 (across 105 prisons); and 27 Prisoner Escort and Custody Services staff had tested positive for COVID-19. However, in order to reduce the transmission of the virus, prisoners have been subject to a restricted regime, including the suspension of all visits and the cancellation of recreational activities such as using the gym, going to worship or visiting the library.<sup>4</sup>

The current conditions in prisons has been held to be a relevant factor at sentencing. On 30 April 2020, in a judgment handed down by the Lord Chief Justice, the Court of Appeal held that:

*‘The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.*

*Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended.’<sup>5</sup>*

Whilst this seems to be a clear direction to sentencers from the Lord Chief Justice, a number of practical questions remain to be resolved. This briefing sets out these questions and reviews the possible options which courts could adopt in the coming weeks, and possibly thereafter in the event that a second or subsequent wave of infections significantly affects prison conditions.

## ***Options and Issues***

There are two principal ways in which sentencing practice and prison policy may be affected by the global pandemic. Firstly, through application of existing sentencing principles which may be interpreted more widely to encompass the adverse effects of the pandemic on prison conditions. Secondly, by executive action, for example through sweeping actions such as temporary prison amnesties which result in the release of large numbers of prisoners or changes to prison release mechanisms. This note is restricted to the first strategy.

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<sup>4</sup> Ministry of Justice, ‘Coronavirus (COVID-19) and prisons’. Available at: <https://www.gov.uk/guidance/coronavirus-covid-19-and-prisons>.

<sup>5</sup> *Attorney General’s Reference (R. v Manning)* [2020] EWCA Crim 592 at paras. 41-42. A similar principle had been noted in relation to conditions in overcrowded prisons in *R. v Seed and Stark* [2007] EWCA Crim 254: ‘In particular, when considering the length of a custodial sentence, the court should properly bear in mind that the prison regime is likely to be more punitive as a result of prison overcrowding’ (at para. 5).

The existence of a highly-communicable virus necessarily triggers a wide range of additional restrictions on prison facilities. In general, these restrictions entail more restrictive conditions on prisoners and their visitors. These restrictions may take many forms: visitors' access may be restricted or prohibited entirely; access to programmes, therapies, treatments and so on, may all be significantly curtailed or removed altogether. Recreational opportunities and facilities are also likely to be affected. These (and many other) restrictions will render a prison sentence more onerous than a similar sentence served without any such restrictions. The harsher prison conditions as a result of the restrictions should therefore result in judicial consideration of the nature and quantum of sentence as, for example, a period in custody imposes more severe treatment on the prisoner than the same period at a time where those restrictions are not in place. This is a widely accepted principle of sentencing, as was recognised by the Lord Chief Justice in his evidence to the Justice Select Committee on 22 May 2020.<sup>6</sup> In this respect, the pandemic is an example of a potentially wide range of circumstances which may affect the experience of a sentence of imprisonment. Finally, other common law jurisdictions have recognised the relevance of the COVID-19 pandemic for determining sentence.<sup>7</sup>

An exceptional change in the restrictions imposed upon prisoners therefore represents a potential factor to be considered by courts. Two options suggest themselves. First, if prison conditions are directly relevant to the severity of the sentence as it will be experienced by the offender, this factor may be incorporated directly into the sentencing guidelines. Sentencing factors in the Definitive Guidelines appear at Steps 1 and 2 of the guidelines' methodology. Factors appearing at Step 1 may be regarded as 'primary' factors – they relate to harm and culpability, the two principal components of a proportional sanction. Factors which appear at Step 2 are relevant to sentencing but of lesser importance. Step 2 factors include issues unrelated to harm or culpability – such as 'offender is a sole or primary caregiver'. Adverse prison conditions could be included in the list of Step 2 factors. Alternatively, since prison conditions do not affect harm or culpability, there could be an additional step in the methodology. Once a court has determined the fit and proportionate sentence it could deduct any time or amend the sentence to the degree appropriate to reflect the change in circumstances. This 'last look' step could consider any such external factors which may be relevant to the sentencing decision.

### *Duration of Terms of Immediate Imprisonment*

During a sustained period of more restricted conditions, if immediate custody is imposed, it might be for a shorter period than would otherwise be the case. In jurisdictions where pretrial detention conditions are significantly harsher than post-sentence imprisonment, courts often award enhanced credit for time served pre-trial. This is analogous to the situation under the pandemic. For example, an 18 month sentence might be reduced to some degree to reflect its increased onerousness.

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<sup>6</sup> Justice Committee, Oral evidence: *Coronavirus (COVID-19): The impact on prison, probation and court systems*, HC 299.

<sup>7</sup> Canada: see *R. v Hearn*, 2020 ONSC 2365 (CanLII); several African countries grant amnesties in response to overcrowded prisons or prisons with exceptionally degraded conditions and many US states have amended release eligibility provisions which will affect the time served in prison.

The Lord Chief Justice's decision in *Manning* leaves a number of questions unanswered. First, it leaves the question of the extent of the reduction to the individual sentencing judge. How are courts to assess the conditions in the prison estate without evidence, and how are they to know how long the conditions will pertain? Secondly, should there be a uniform approach, for example, a 10% reduction to the sentence, or a set number of months, applied to all cases irrespective of whether the sentence imposed is 10 months or 10 years? Alternatively, should there be a graduated approach, with those receiving longer sentences receiving less of a reduction than those receiving shorter sentences?

### *Changing the Nature of the Sanction Imposed*

The existence of the pandemic in open society and the prison estate might also justify a shift to an alternate disposal instead of immediate imprisonment. It may be appropriate to impose a different sentence on an offender who otherwise would receive a term of immediate custody. This is a more exceptional measure than merely making a reduction to the term of immediate imprisonment. When prison conditions are sufficiently exceptionally restrictive, the replacement sanction might be a Suspended Sentence Order, rather than a fine or a Community Order. The shift from immediate custody to significantly less severe sanctions should be avoided, save in exceptional cases, in order to preserve the principles of parity with other offenders and proportionality to the seriousness of the offence. If this occurs, a court should ensure some comparable equivalence in terms of the impact on the offender. This may mean a longer period of suspension or more intensive requirements than otherwise would be the case. The idea is to ensure that the suspended sentence is roughly equivalent in severity to the term of immediate custody which it is replacing. The offender is being spared imprisonment – for reasons related to prison conditions – not being spared punishment.

### *Deferring or Adjourning Sentencing*

This is the most effective way of temporarily reducing admissions to prison without affecting normal sentencing levels. Deferring sentence would only affect cases in which the custody threshold has been passed, and the offender is a likely candidate for immediate imprisonment. Examination of the relevant sentencing guidelines will guide the court and the parties as to the relevance of deferral as this will indicate the likelihood of the necessity of the imposition of an immediate custodial sentence. The sentencing hearing could be deferred or adjourned for a specific period and reviewed on application by either party. Under current legislation, this is limited to six months. Once sentencing takes place, if a term of immediate custody is imposed, the offender should be awarded some credit for the period between conviction and sentencing. Sentencing deferral may take one of two forms: the sentencing hearing could take place, with the sentence imposed and then deferred. Or the sentencing hearing itself could be deferred. The latter seems preferable: at the deferred hearing the parties could provide updated reports (for example, regarding the offender and any Victim Personal Statement that may have been submitted).

## *Concluding Thoughts*

Whether to amend, defer/adjourn, or activate sentencing is a matter for the court's discretion. However, in order to promote a uniform approach, guidance and information is necessary. It may come from several sources. The Court of Appeal and the Sentencing Council could offer guidance as to the application of principles which guide the deferral decision, and indeed more generally with respect to the determination of sentence. The prison estate should provide timely information about the current state of institutions. Taken together, the guidance and the information on prison conditions should assist courts in determining how marked a departure from accepted practice current conditions represent. The prison estate should also indicate as soon as conditions return to normal in order to permit deferred or suspended sentencing hearings to proceed. Armed with this information, courts can make an informed decision about whether – and how – the sentence should be modified to reflect the change in prison conditions. The Sentencing Council or the Ministry of Justice could post this information on their websites.