SENTENCING ACADEMY

Response to publication of the White Paper: *A Smarter Approach to Sentencing*

On 16 September 2020, the Ministry of Justice published a White Paper, *A Smarter Approach to Sentencing*, outlining the Government's proposed sentencing reforms.[1] Many of the proposals were trailed in the media in the days beforehand and the emphasis was on the measures designed to 'toughen up' sentencing for the most serious offences. The White Paper itself is a more nuanced document, the substance of which does not entirely match the pre-publication rhetoric. In this response, we consider the key sentencing proposals, with a particular focus on their likely practical effects.

In advance of publication of the White Paper, the Secretary of State for Justice, Robert Buckland, noted in a column for *The Sun on Sunday* that: 'Sentences are too complicated and often confusing to the public — the very people they are supposed to protect'[2] and the complexity of sentencing is a theme to which he returns in his Foreword to the White Paper. There is little to be found in this White Paper that suggests a simplification of sentencing; if anything, with further amendments being made to release arrangements for some offences, the introduction of various new starting points for children convicted of murder and a proposed more tailored approach to non-custodial sentences, sentencing is likely to become more rather than less complex. This is not, in itself, a bad thing: an effective and principled sentencing system is preferable to a simple one. However, it is important to note this issue before any of the individual proposals are considered.

Protecting the Public from Serious Offenders

The proposals contained in the first chapter of the White Paper were the ones most widely trailed in advance of publication: the unifying theme of these proposals is longer periods in custody for various types of offenders, ostensibly for the purposes of 'public protection'.

Abolishing halfway release for certain serious offenders

Earlier this year, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 moved the automatic release point for offenders who have committed a specified sexual or violent offence, for which the maximum penalty is life imprisonment, and who receive a sentence of seven years or more from the halfway point of their sentence to two-

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf.
[2] https://www.thesun.co.uk/news/12655019/tougher-criminal-justice-system/.

thirds. In a move that will only add to the complexity of sentencing, the White Paper proposes extending this provision to offenders sentenced to between four and seven years for any of the sexual offences already specified but only to *some* of the specified violent offences: it will apply only to manslaughter, soliciting murder, attempted murder and wounding/causing grievous bodily harm with intent.

The Sentencing Academy expressed concerns about the reforms earlier this year and the proposal to extend this provision exacerbates our concern. Proportionate sentencing is not well-served by a system in which identical sentence lengths have a significantly diverging impact in practice: two nine year sentences should carry the same penal weight; it should not mean six years in custody for one offence and four-and-a-half years in custody for another. The decision to exclude some violent offences from this proposal makes the system yet more perplexing: how can a seven year sentence for kidnapping justify four years and eight months in prison when a six year sentence for the same offence merits three years? The person sentenced to seven years will serve more than 50% longer in custody than the person sentenced to six years.

A new power to prevent automatic early release for offenders who become of significant public protection concern

It is proposed that a new power should be introduced to enable the Secretary of State for Justice to refer to the Parole Board any prisoner who would ordinarily be released automatically during their sentence but who is deemed to present a terrorist or other 'significant danger' to the public. These prisoners would have to serve their full sentence in custody if the Parole Board does not assess them as safe to release before the expiry of their sentence.

It is understandable that the Government wishes to introduce a safeguard against the automatic early release of a prisoner deemed to pose a significant public protection risk. However, giving the Secretary of State for Justice the power to intervene in the management of an individual offender's sentence gives rise to concern about undue political interference in the sentences of individual offenders. We urge greater consideration of the implications of this proposal – and whether the Secretary of State for Justice is the right person to whom to hand this power – before it is taken forward. There are also significant concerns that someone who has served their full sentence due to being deemed too dangerous to release earlier will ultimately be released at the end of their sentence with no licence conditions or supervision.

Whole Life Orders

The ambit of the 'whole life' starting point for certain murders is to be widened to include the murder of a child that involves a substantial degree of premeditation or planning. This is perhaps a more modest proposal than the pre-publication reports had suggested and it is right that the White Paper notes the gravity of imposing a Whole Life Order: 'Given the potential severity of this punishment, we believe that it is appropriate to continue to impose a high threshold regarding the behaviour that would potentially attract the sentence' (p. 30). The requirement for a substantial degree of premeditation or planning should, in practice, significantly reduce the number of offences for which the highest starting point applies.

The other amendment to Whole Life Orders appears to be a late addition to the White Paper following the recent sentencing of Hashem Abedi.[3] The Government is proposing to remove the prohibition on the imposition of a Whole Life Order on an offender aged 18 to 20 at the time of the offence. It is notable that in the almost 17 years since the sentencing regime for murder was overhauled by the Criminal Justice Act 2003 this is the first occasion that such a consideration has arisen. This reform will have little impact in practice and we note that the Government is proposing to take the less punitive of the two possible options. At present, the whole life starting point does not apply to those aged 18 to 20 at the time of the offence (the 30 year starting point applies to this age group for an offence normally attracting the whole life starting point) and this will continue to be the case. This is a decision of some significance as this provides an important safeguard against the imposition of a Whole Life Order on someone in this age group. Instead, the White Paper proposes 'a narrow and focused change that will give judges the option to impose a [Whole Life Order] for these offenders in extremely exceptional cases where this is thought to be warranted' (p. 31). Presumably, therefore, the 30 year starting point for the most serious offences will continue to apply for this age group and it will take some truly exceptional aggravation for a Whole Life Order to be imposed.

Longer tariffs for discretionary life sentences

The proposal to amend the way in which minimum terms for discretionary life sentences are calculated had not featured in the pre-publication reports and therefore came as something of a surprise. At present, a minimum term is usually calculated as one-half of the notional determinate sentence length if a life sentence was not being imposed (therefore a 20 year determinate sentence would be the equivalent of a 10 year minimum term as the minimum term has to be served in full whereas the 20 year determinate sentence, until recently, would have in all cases resulted in automatic release after 10 years).

The White Paper proposes amending this so that a minimum term is calculated as two-thirds the length of an equivalent determinate sentence. This amendment would solve a problem of the Government's own making. Recent changes to release arrangements have meant that certain categories of offenders now have to serve two-thirds of their sentence in custody, rather than one-half, before release and this left the eligibility for release from a discretionary life sentence in an anomalous position of potential release at the equivalent of the halfway stage of a determinate sentence.

It is noted later in the White Paper that: 'The new approach for adults also includes the option for the court to set a tariff using a calculation of half of the determinate sentence where appropriate' (p. 90). This is a somewhat peculiar approach: whether the minimum term is set at one-half or two-thirds the calculation of the appropriate determinate sentence should be a matter of law, not judicial discretion. Where a shorter sentence is merited, that should come about via a reduction in the notional length of the determinate sentence and not by a change in the calculation method.

[3] Hashem Abedi was sentenced to life imprisonment with a minimum term of 55 years on 20 August 2020 following his conviction on 22 counts of murder for his involvement in the Manchester Arena bombing in 2017. As he was under the age of 21 at the time of the offence, the judge had no power to impose a Whole Life Order.

Increasing the time those convicted of sexual offences serving a SOPC must spend in prison

The Sentence for Offenders of Particular Concern (SOPC) was introduced in 2015 and applies to offenders convicted of one of two child sexual offences[4] or certain terrorist offences.[5] At present, different release arrangements apply to those convicted of a specified terrorist offence, who must serve two-thirds of the sentence before they can apply to the Parole Board for release, to those convicted of one of the two child sexual offences, who can apply to the Parole Board for release at the halfway point in the sentence.[6] It is proposed that all offenders serving this sentence must serve two-thirds of their sentence in custody before they can apply to the Parole Board for release. Whilst this will rationalise the release arrangements for this sentence, it does so by increasing its severity. If public protection is the key concern in these cases then referral to the Parole Board before release provides an adequate safeguard.

Repeat offenders

The White Paper proposes, in an unspecified way, to raise the threshold required for a sentencing court to impose a sentence below the minimum sentence Parliament has legislated for in the case of four offences.[7] These sentences might be considered to be 'presumptive' minimum sentences rather than mandatory sentences as there is provision for courts to impose a lower sentence where it finds particular circumstances that would make the minimum sentence unjust. However, the White Paper states that: 'We will seek to reduce the occasions in which the court would depart from the minimum custodial sentence, with the aim of reducing the prospect that the court would depart from the minimum term' (pp. 33-34).

The White Paper provides no detail on how it intends to 'raise the threshold for passing a sentence below the minimum term for repeat offences' (p. 33). We reserve judgement until the specific criteria for achieving this objective are provided. We would however counsel strongly against any substantive changes to these mandatory sentences. At present, the regime is quite clear, and courts have been applying the criteria without difficulty. If a court decides to impose a lesser sentence because the legislative minimum 'would make it unjust to do so under all the circumstances', Parliament should not try and pre-empt this exercise of judicial discretion. At the very least, the Government should undertake or commission research into the ways that courts have exercised their discretion in this regard. Until, and unless, the Government can demonstrate that judges have been excessively indulgent, or that the provisions are misfiring in some way, amendments are unnecessary and inappropriate. To date, the Government has offered no such demonstration. The proposal is tantamount to saying sentences for X offence are too low, without knowing what the average sentence is, and without offering any reason why that sentence is too low, or what an appropriate sentence would be.

The Sentencing Academy considers mandatory sentences of any form to be an unnecessary part of the sentencing system as sentences should be crafted based on the harm and culpability present in each individual offence. Mandatory sentences undermine the key principles of

[4] Either the rape or sexual assault by penetration of a child under the age of 13.
[5] The full list of applicable offences is contained in Schedule 18A to the Criminal Justice Act 2003.
[6] This anomaly was introduced earlier this year when the Government legislated to increase the proportion of the sentence that those convicted of a specified terrorist offence must serve in custody.
[7] These are: "third strike" importation of class A drug (seven years minimum); "third strike" domestic burglary (three years minimum); "second strike" possession of a knife or offensive weapon (six months minimum); and threatening a person with a blade or offensive weapon in public (six months minimum).

proportionality and individualisation. Although there is no detail as to how the Government will seek to make this area more prescriptive for sentencing judges, it is not a move we welcome.

Summary

The proposed continuation of recent reforms to release arrangements for certain offenders is a case of sentence inflation via the back door and will result in the most complex set of release arrangements ever seen in this jurisdiction. Rather than making the sentencing system more transparent and understandable it has created even more inconsistencies. In a sentencing system that is built on proportionality it is difficult to see how longer sentences for more serious offences does not eventually filter all the way down to greater use of custody for less serious offences.

The White Paper states that the purpose of these reforms is to 'further protect the public and ensure that we have a system in which people can have full confidence' (p. 25). It is not obvious how they will do either in practice. If we take, for example, the proposed abolition of halfway release for certain serious offenders it can be said to further protect the public in only the loosest of senses (from the period between halfway and two-thirds). Someone serving a sentence of four years' imprisonment for certain offences will no longer be released automatically after two years in custody but will instead be released automatically after two years and eight months. Does that protect the public in the long run? The White Paper does not offer any evidence to suggest how it will do so. In any case, if an offender convicted of any of these offences is deemed to pose a significant risk to the public they should not be sentenced to a determinate sentence in the first place – much greater public protection is available through the imposition of an extended determinate sentence or a life sentence. Public protection is better served by changing the *type* of sentence and not simply moving the date of automatic release.

It is also unclear how these labyrinthine release arrangements will further public confidence in sentencing. How do we explain why a six-and-a-half year sentence for an offence attracts automatic release at the halfway stage whilst a seven year sentence for the *same offence* means that release comes at the two-thirds stage? The latter being justified on the grounds of protecting the public and improving confidence, neither of which are apparently being undermined by the halfway release of the offender sentenced to six-and-a-half years. Again, no evidence is provided to support the proposition that public confidence will be improved by this scenario.

If the Government wishes to make sentencing more comprehensible and accessible to the public we will have to wait to see what initiatives it is going to introduce to explain exactly why two sentences of the same length do not necessarily mean both offenders will be released at the same point. Why is it, for example, that someone sentenced to five years' imprisonment for some offences will be released before someone sentenced on the same day to four years' imprisonment for another offence? Public confidence is unlikely to be well-served by a hodgepodge of release arrangements that even professionals may struggle to fully comprehend.

Supervising Offenders in the Community

The Sentencing Academy supports the view expressed in the White Paper that: 'Community sentences can and should be tailored to address the individual needs and problems that contribute to reoffending, as well as to punish offenders and provide reparation to the community. While short custodial sentences may punish those who receive them, they often fail to rehabilitate the offender or stop reoffending. Evidence suggests that community sentences, in certain circumstances, are more effective in reducing reoffending than short custodial sentences' (p. 37).

Whilst we find much to support in the proposed approach to community sentences, ensuring that sufficient resources are in place and that the Government is sufficiently committing to promoting alternatives to short custodial sentences will be as important as the specific measures proposed. As the White Paper itself notes, Mental Health Treatment Requirements, Drug Rehabilitation Requirements and Alcohol Treatment Requirements have long been available as conditions that can be attached to community orders or suspended sentence orders; the problem is that they are rarely used in practice. The White Paper highlights the need to 'win back the confidence of the judiciary and the public in our delivery of community sentencing' (p. 6) and it is important to emphasize that sentencers must be confident that these services are available in their locality in order to be able to include them as a requirement attached to a community order or suspended sentence order. One point which may assist in regaining this confidence is for Parliament to stop the constant amendment of what is inevitably a complex community sentence regime.

House Detention Order

We welcome some form of high-end supplement to improve the ambit of community orders. Most western jurisdictions now operate a home confinement, community custody or virtual imprisonment sanction. These have the potential to safely hold offenders accountable without necessitating imprisonment. The proposed HDO appears to be a stand-alone sanction for offenders who have not responded to community sanctions. In other words, it will replace some high-end community orders. Used in this respect the HDO may reduce reoffending in some high likelihood of failure cases of offenders serving community orders. Further reflection will be needed once the details of the HDO have been fleshed out. In any event, it seems clear that the HDO will not overlap with the custodial caseload: the White Paper states that 'courts would not be able to use these sentences for people who would have otherwise received a custodial sentence' (p. 49). We believe there is scope for a robust, stand-alone sanction along the lines proposed by the White Paper, but one which would also be available to courts in cases which might otherwise attract a term of custody. Such a proposal would be consistent with similar sanctions in other jurisdictions, such as the Community Corrections Orders in Australia.

Deferred sentencing

The Sentencing Academy welcomes the reference to deferred sentencing and encourages greater reflection and research into this element of the sentencing regime. We are of the view that a greater percentage of sentences could be deferred, providing offenders with a limited opportunity to take some necessary rehabilitative and reparative steps. At present, the primary focus of deferred sentencing is to permit the possibility of a restorative resolution to the case. A much wider application of the deferred sentencing provisions may be appropriate. Again,

this is a topic for which more research is a priority; there is almost no empirical research upon the use and effects of the current provision.

Reducing Reoffending

Reducing reoffending represents the most pressing challenge at present. Since most offenders are sentenced to a non-custodial sentence, efforts to suppress reoffending should focus on this part of the caseload. We urge the Government to conduct or commission research with a view to determining the most effective requirements of community orders in terms of preventing reoffending or encouraging desistance. When imposing a community order, courts in England and Wales may choose to impose any or all of up to 15 conditions or requirements such as a curfew, a residence requirement or an unpaid work requirement. When crafting the sentence courts attempt to individualise the restrictions imposed, with a view to determining the most effective combination in terms of reducing reoffending. This determination is assisted by counsel and by advice from probation services. Ultimately, however, the conditions imposed are likely to reflect the court's experience and intuitions about which conditions are most useful or effective. Courts are to a large degree sentencing in the dark in this respect, and focused research to establish which requirements, or combinations of requirements, are most effective in terms of reducing recidivism is urgently needed. The findings from this research would then need to be communicated to the courts, through the definitive sentencing guidelines issued by the Sentencing Council.

Youth Sentencing

The Sentencing Academy welcomes the significant decline in the use of custodial sentences for children over the past decade but recognises that there are occasions where custody is a necessary last resort.

Moving the release point for the most serious violent and sexual offences

The White Paper proposes an increase in the proportion of a custodial sentence some children will have to serve in custody to follow recent changes in relation to adult offenders. Children who receive a sentence of seven years or more for serious sexual offences (with a maximum penalty of life imprisonment) or the most serious violent offences (listed in the White Paper as attempted murder, soliciting murder and manslaughter) will be required to serve two-thirds of the sentence in custody rather than the current one-half. Although the threshold for this change in release arrangements is higher than it is for adults this is still a significant change and if public protection is the primary concern it may have been more appropriate to have included the option of release through the Parole Board from the halfway stage and automatic release only after two-thirds. This would better reflect the changing level of risk posed as children mature.

Discretionary life sentence tariff calculation

The imposition of a discretionary life sentence on a child is rare. The White Paper notes that only seven such sentences were imposed on children between 2015 and 2019 (p. 89). The Government is proposing an extension of its plans in relation to adult discretionary life

sentences, whereby a minimum term will be calculated at two-thirds and not one-half the notional length of the appropriate determinate sentence, to also include children. The White Paper also proposes to allow courts the flexibility to calculate the minimum term on the basis of one-half the notional determinate sentence, a consideration that may be particularly relevant in relation to younger children. As noted above, this approach makes little sense as the relationship between the length of a minimum term and a determinate sentence should be fixed, with adjustments to the appropriate minimum term coming via amending the notional determinate sentence length and not the calculation method.

Tariff starting points for murder

At present, there is only a single starting point – 12 years – applicable to all children convicted of murder. The White Paper proposes introducing more nuance into this approach, with the starting point depending on whether the offender is in the 10-14 years or 15-17 years age bracket at the time of the offence and also on the circumstances of the particular offence. Under the new framework there will be four different starting points applicable to each age bracket and, it should be noted, of the eight new starting points being introduced, six are in excess of the current 12 years (ranging between 13 years and 20 years) and only two are below 12 years (an 8 year and a 10 year starting point where the murder is not accompanied by any statutory aggravating factor).

The White Paper states that this change: 'will give the sentencing system greater flexibility to factor in the seriousness of the crime while still reflecting the relative immaturity and developmental stages of children, and will create a fairer system that will ensure the families of victims can feel that justice has been done' (p. 93). However, although a single starting point currently applies to all children, the sentencing framework provides a great deal of flexibility to take account of relevant aggravating and mitigating factors to enable the court to craft an appropriate minimum term. By making the starting point more prescriptive, the system will be less rather than more flexible with the final sentence being guided to a greater degree by the statutory starting point. Further, the proposals are based on chronological age being an accurate proxy for maturity, which is highly relevant to culpability. We believe that a better approach is to allow the sentencing judge to make an assessment of the offender's maturity and culpability without needing to circumvent further prescriptive measures.

Tariff reviews for murder

Someone convicted of murder that was committed when they were a child is sentenced to Detention at Her Majesty's Pleasure rather than life imprisonment, and the one key distinguishing feature of this sentence is that the offender may apply to the High Court from the halfway stage of their sentence for a tariff review. If they can show they have made exceptional progress in custody a modest reduction can be made to the minimum term length which will allow them to apply to the Parole Board for release at an earlier date. If the application is unsuccessful, further applications can be made every two years until the expiry of the minimum term.

The Sentencing Academy welcomes the White Paper's acknowledgement that: '[t]he existence of reviews is an important part of ensuring that the tariff remains appropriate, as children change and develop as they mature' (p. 94). Prior to the reforms to murder sentencing introduced in 2003, keeping the tariff length under review was an essential part of the

management of all offenders convicted of murder, including adults, with modest downward adjustments available where exceptional progress was made in custody.

The White Paper proposal is a relatively modest one, seeking to restrict the number of reviews available to a single review at the halfway stage of the sentence (unless they are still under the age of 18 at this point – in which case subsequent reviews will be available until they turn 18). Whilst we regret this restriction, there is some force in the Government's view that continuing reviews are likely to be traumatic to the victim's family. The White Paper also notes that: '[c]ontinuing reviews provide very little practical benefit for offenders' (p. 94). This is an empirical question to which we do not know the answer without a systematic review of the outcomes of subsequent High Court tariff reviews.

We are, however, concerned that the White Paper appears to give an inaccurate account of the current availability of tariff reviews. It states that: '[o]ffenders who are given life sentences for murders committed over the age of 18, or those who commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews, reflecting the fact that adults do not go through the same accelerated development and maturation that children do. Our new system will be based on this principle' (p. 94). Whilst offenders over the age of 18 at the time of the offence are not entitled to reviews, those who commit murders as children but are not sentenced until they are over 18 are, at present, entitled to reviews. The imposition of the sentence of Detention at Her Majesty's Pleasure is determined by the age at the time of the offence and not the age at sentencing and therefore currently those sentenced having reached the age of 18 who have been convicted of a murder committed before that age are entitled to reviews and it is important that these reforms are not premised in part on a mischaracterisation of the current regime.

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