House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People

Sixth Report of Session 2021–22

Report, together with formal minutes relating to the report

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Joint Committee on Human Rights

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The Police, Crime, Sentencing and Courts Bill includes provisions which would change how children and young people are sentenced by the courts when found guilty of some serious offences, including some offences involving weapons such as knives. The overall effect of the provisions is likely to be an increase in the length of time children who commit serious crimes will spend in prison. However, new provisions on remand should reduce the number of children who are held in custody whilst awaiting trial or sentencing.

The Government says that their legislation aims to ensure that the most serious violent offenders spend time in prison that matches the severity of their crimes, protects victims and the public from harm, will give the public confidence, and will tackle repeat and prolific offenders. The UK's human rights commitments to children under the United Nations Convention on the Rights of the Child (UNCRC), however, emphasise the importance of children's prison sentences being "used as a measure of last resort and for the shortest appropriate period of time". Sentences should be individualised to their circumstances, with the focus on rehabilitation and the welfare of the child rather than on punishment. We are concerned that some of the measures in the Bill are difficult to reconcile with these commitments. In particular, we recommend:

- the provisions of the Bill which limit judicial discretion to deviate from mandatory minimum sentences for certain crimes involving weapons committed by those aged 16 and 17, to only where there are "exceptional circumstances" that "would justify not doing so" instead of "particular circumstances" that "would make it unjust", should be removed from the Bill;

- that the provisions that would introduce gradients for tariff starting points for sentences to Detention during Her Majesty's Pleasure depending on age and seriousness of the offence be amended so that no tariff is longer than the current 12-year period; the only changes should be towards shorter tariffs for the youngest children in some limited circumstances;

- that the Government should seek to identify changes in the process of Detention during Her Majesty's Pleasure tariff reviews that could lessen the distress caused to the families of victims. They should not remove the possibility of a reduction in the tariff beyond the half-way point for those who committed relevant crimes as children.

The Government have themselves identified that there is a likelihood the provisions will have a disproportionate impact on Black and minority ethnic children, who are already disproportionately represented in the youth justice system. Article 14 of the European Convention on Human Rights, incorporated into UK law through the Human Rights Act 1998, provides a right not to be discriminated against in the enjoyment of other convention rights, including the right to liberty and security under Article 5 ECHR. Discrimination may be justified, but only where the difference of treatment pursues a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Government's aim as identified in their ECHR memorandum, to protect the public, is a legitimate one. But

the extent to which the measures will achieve this was contested by witnesses, leaving questions about its compatibility with the ECHR. It is unfortunate that the Government have noted the unequal effect the measures in the Bill will have without providing any measures to mitigate it. One action could be to introduce recording of proceedings in the Youth Court to better allow sentencing decisions to be reviewed and, if necessary, challenged on the grounds of discrimination.

The Bill proposes extending whole life orders, in exceptional circumstances, to offenders aged 18 to 20 at the time of the offence. Whole life orders are the most severe sentences that can be handed down by the criminal courts. They are reserved for the most heinous murders and to offenders aged over 21. The current system, relying on the Secretary of State to interpret 'exceptional circumstances' and 'compassionate grounds' compatibly with Article 3 offers only the tiniest possibility of release and incentive to reform. The Government should not seek to extend these sentences to 18 to 20 year olds.

Other changes in the Bill are, however, welcome. In particular the changes to the use of remand in Clause 132 which aim to encourage courts to impose custodial remand only where absolutely necessary, while ensuring the public remains safe, will have a positive effect. They are in keeping with the principle in the UNCRC that custody be a measure of last resort and for the shortest appropriate period of time. The introduction of a statutory duty to consider the welfare and best interests of the child is particularly welcome, as is the requirement for courts to provide reasons when they remand a child to custody. The Government should carefully monitor the remand of children from different ethnic backgrounds to ensure that the intended reduction in the use of remand benefits them equally.

The UK has ratified the UNCRC but has not incorporated its provisions into UK law. We recommend that the Government should now do this to make these rights more accessible and enforceable for children in the UK.

1 Introduction

The Police, Crime, Sentencing and Courts Bill 2021–22

1. This report considers the changes that will be made to sentencing and remand for children and young people under Parts 7 and 8 of the Police, Crime, Sentencing and Courts Bill (the Bill). The provisions in the Bill extend and apply to England and Wales only, apart from a few exceptions.[1] The measures discussed here apply only to England and Wales. While Part 7 of the Bill also addresses the sentencing of adults, children and their rights, including in the criminal justice context, are protected separately under the United Nations Convention on the Rights of the Child (UNCRC). We are concerned here with the Bill's compatibility with the UNCRC and the Human Rights Act 1998, which incorporates the European Convention on Human Rights into UK law.

2. The Explanatory Notes accompanying the Bill explain that the purpose of the provisions on sentencing is to:

> "- ensure that the most serious violent and sexual offenders spend time in prison that matches the severity of their crimes, protects victims and gives the public confidence;
>
> - tackle repeat and prolific offenders through robust community sentences which punish and also address offenders' needs."[2]

Sentencing of children and young people

3. The UK has long recognised that children should be treated differently to adults in the justice system.[3] Both the Children Act 1989 and the UNCRC define a child as anyone who has not yet reached the age of 18.[4] The age of criminal responsibility in England, Wales, and Northern Ireland is 10, while in Scotland it is 8.[5]

4. When sentencing, judges must follow the guidance issued by the Sentencing Council unless it is in the interests of justice not to do so. The Sentencing Council is an independent, non-departmental public body which produces the sentencing guidelines, in consultation with the Lord Chancellor, the Justice Select Committee and others. The Council released Guidance on Sentencing Children and Young People in 2017.[6] While "punishment" is one of five considerations guidelines require a court to factor into a sentencing decision when dealing with an adult, it is not explicitly mentioned in the guidelines on sentencing a

1 The measures that will affect other parts of the UK are set out in the Explanatory Notes to the Bill: Explanatory Notes to the Police, Crime, Sentencing and Courts Bill, [Bill 40 (2021–2022)- EN] p 42–43

2 Explanatory Notes to the Police, Crime, Sentencing and Courts Bill, [Bill 40 (2021–2022) - EN] p 7

3 For example, section 44 of the Children and Young Persons Act 1933 requires all courts to have regard to the welfare of children, although this Act uses the term 'children' to refer to under-14s and the term 'young persons' to refer to under 18s).

4 Children Act 1989, section 105; UNCRC, Article 1

5 Children and Young Persons Act 1933, Section 50; Criminal Justice (Children) (Northern Ireland) Order 1998, Article 3 and Criminal Procedure (Scotland) Act, Sections 41 and 41A(1)-(2). NB in Scotland the age of criminal *prosecution* is 12; children aged 8–11 do not appear before a criminal court but their case may go to a Children's Hearing (a legal tribunal that decides what is best for a child or young person who has a problem).

6 Sentencing Council, Sentencing Children and Young People, 1 June 2017

child.[7] The emphasis is instead placed on preventing offending by children and, expressly, on the welfare of the child. The Sentencing Council Guidance explains why children should be treated differently to adults by the criminal justice system:

> "Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour."[8]

The youth justice context

5. The systemic response to offending by children has undergone significant change over the past decade. The number of proven offences committed by children has fallen by around 75%, from 198,400 in 2009–10 to 49,100 in 2019–2020 (years ending March).[9] The 49,100 proven offences in 2019–20 were committed by just over 19,000 individual children, 82% fewer than 10 years previously. The most common category of proven offence children now commit is "violence against the person". Knife and offensive weapons offences committed by children fell substantially between 2009–10 and 2013–14 but have since risen by 46%, resulting in an overall decrease of 5% since 2009–10.[10] 97% of offences committed by children involving a knife or offensive weapon were for possession, while 3% were for threatening with a knife or offensive weapon.[11] Over recent years, there has been significant attention paid to youth knife crime and calls for a policy response.[12] Some measures in this Bill are aimed at offences involving weapons, including blades.

6. There has been a reduction in the number of children in custody over the last decade. The average number of children in custody at any one time over 2019 -2020 was 68% lower than 10 years before.[13]

7 Sentencing Council, Sentencing Basics, [Accessed 25 August 2021]
8 Sentencing Council, Sentencing Children and Young People, 1 June 2017
9 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 22. A proven offence is one for which a child receives a caution or sentence.
10 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 26
11 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 26
12 See for example: "*Knife crime investigation: Primary school boy, aged 7, took knife to London class*", Evening Standard, 22 July 2021; "*The teenagers who are getting away with knife crime: Seven blade-carrying yobs as young as 13 walk free from courts in just one week*", Daily Mail Online, 10 March 2021, "*Knife crime hits a ten-year high in England and Wales*", The Times [Paywall], 16 January 2021
13 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 2

Sentencing children and human rights

The United Nations Convention on the Rights of the Child

7. The United Nations Convention on the Rights of the Child (UNCRC) was adopted by the General Assembly of the United Nations in 1989 and ratified by the UK Government in 1991. Its 54 articles cover the civil, political, economic, social, and cultural rights of children. It has been ratified by more countries across the world than any other human rights treaty in history. Successive UK governments, including the current one, have made clear their commitment to the UNCRC.[14]

8. The UNCRC is binding on the UK as a matter of international law, but it has not been incorporated into domestic law.[15] This means that children whose rights under the UNCRC are violated cannot bring a claim in a domestic court to enforce those rights or obtain a remedy. Neither does the UNCRC framework provide an international court to which claims can be brought. The third optional protocol to the Convention does provide for a right to make a complaint to the UN Committee on the Rights of the Child, the expert body that oversees the operation of the Convention.[16] Despite a recommendation to do so from the Joint Committee on Human Rights in 2015, the UK has not ratified this protocol.[17]

9. The following articles of the UNCRC are particularly relevant to the issues raised by youth justice and sentencing child offenders:

a) Article 3 embodies one of the four core principles of the UNCRC. It requires the best interests of the child be "a primary consideration" in any actions taken by state and private bodies whose work and decisions impact on children and the realisation of their rights, including the courts.

b) Article 37 concerns criminal justice. It requires that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed". It also states that every child should be treated "in a manner which takes into account the needs of persons of his or her age". It requires that detention of a child "be used only as a measure of last resort and for the shortest appropriate period of time".

c) Article 40 also concerns criminal justice. It requires that every child "be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights

14 See, for example, Vicky Ford MP, Parliamentary Under Secretary of State for Children and Families: HC Deb, 1 March 2021, col 18, "The Government are fully committed to protecting and promoting children's rights; it is such an important issue. We strongly believe in the principles laid down in the UN convention on the rights of the child, which a Conservative Government ratified 30 years ago, in 1991…"

15 In Wales, the Rights of Children and Young Persons (Wales) Measure 2011 places a duty on Ministers to have due regard to the UNCRC when developing or reviewing legislation and policy (see https://gov.wales/childrens-rights-in-wales). The Scottish Parliament has voted to pass the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which would incorporate the UNCRC into Scottish law.

16 Office of the High Commissioner for Human Rights, Optional Protocol to the Convention on the Rights of the Child on a communications procedure; Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011 entered into force on 14 April 2014

17 Joint Committee on Human Rights, Eighth Report of Session 2014–15, *The UK's compliance with the UN Convention on the Rights of the Child*,HC 1016 / HL Paper 144, para 38

and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".[18]

10. Alongside the UNCRC itself, the UN Committee on the Rights of the Child issues documents known as General Comments to assist signatories in their implementation and interpretation of the UNCRC. These are not legally binding, but they are authoritative interpretations of the obligations and standards in the UNCRC. General comment No. 24 (2019) addresses children's rights in the justice system.[19]

The European Convention on Human Rights

11. The European Convention on Human Rights (ECHR), incorporated into domestic law through the Human Rights Act 1998, guarantees rights for adults and children alike. The vast majority of its provisions do not contain specific protections, or limitations on rights, in respect of children.[20] However, the case law of the European Court of Human Rights (ECtHR), drawing on international and European human rights treaties, has underlined children's need for special protection due to their vulnerability. The ECtHR also seeks to interpret the rights under the ECHR compatibly with the rights guaranteed under the UN Convention on the Rights of the Child.

12. The following Articles of the ECHR, in particular, are potentially engaged when sentencing a child:

- Article 5 - the right to liberty and security - prohibits arbitrary detention but permits the lawful detention of a person after conviction by a competent court. The ECHR does not prohibit States from subjecting children convicted of a criminal offence to imprisonment, but the ECtHR has recognised that the imprisonment of children should be a measure of last resort and for the shortest appropriate period of time, consistent with the UNCRC.

- Article 14–the right not to be discriminated against in the enjoyment of other Convention rights (including Article 5 and 8) - prohibits discrimination in respect of imprisonment, including on grounds of race or ethnicity. Discrimination may be justified, but only where the difference of treatment pursues a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[21]

13. In a case in which a difference in treatment between adult and child offenders was challenged, the ECtHR stated that it "considers that when young offenders are held

18 UNICEF, United Nations Convention on the Rights of the Child, (ratified 20 November 1989)

19 United Nations, Convention on the Rights of the Child, 18 September 2019

20 An exception is Article 5 ECHR, which expressly allows for the lawful detention of 'minors' for the purpose of educational supervision or to bring them before the competent legal authority.

21 Although direct discrimination on racial grounds has been recognised by the ECtHR as being especially egregious, so that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures" (DH and others v Czech Republic [GC], App.No. 57325/00, 13 November 2007, at para 176)

accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation."[22]

Our inquiry

14. The Bill was introduced to the House of Commons on 9 March 2021. We launched our inquiry on 15 March 2021. The Bill has passed its House of Commons stages and had its second reading in the House of Lords on 14 September. We received a large number of submissions in response to our call for evidence, covering a variety of different aspects of the Bill including its provisions on youth justice. We are grateful to the witnesses who have provided oral and written evidence to the Committee on the Bill.

15. We have previously reported on other matters in relation to the Bill:

- *Children of mothers in prison and the right to family life* (May 2021);
- *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)* (June 2021) and
- *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments* (June 2021).[23]

We have also written to the Secretary of State regarding the provisions on the bill related to access to electronic communications.[24]

22 Khamtokhu and Aksenchik v. Russia [GC], 2017, §§ 69–88

23 Joint Committee on Human Rights, First Report of Session 2021–2022, *Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill*, HC 90 / HL Paper 5; Second Report of Session 2021–22, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill*, Part 3 (Public Order), HC 331 / HL Paper 23); and Fourth Report of Session 2021–22, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments*, HC 478 / HL Paper 37

24 Letter to Victoria Atkins MP, Parliamentary Under-Secretary of State (Minister for Safeguarding), regarding Chapter 3 of the PCSCB, dated 21 July 2021

2 Custodial sentences and remand for children

16. The Bill contains measures that would increase the length of time children would spend in custody for certain offences. Policies that change the length of time children will spend in custody engage human rights; the UNCRC states that detention of a child "must be a measure of last resort and for the shortest appropriate period of time".[25] This is a requirement that is obviously open to wide interpretation.

Mandatory minimum sentences

17. Mandatory sentencing operates on the principle that where a certain offence is committed an automatic mandatory minimum custodial sentence is justified. This is irrespective of the particular circumstances of the offender, the manner in which the offence occurs, or the victim affected. The law sets out minimum custodial sentences that must be handed down by the court for a small number of specific offences such as drug trafficking and some offences involving a weapon or bladed article. Currently, the court can deviate from the mandatory minimum sentence when it is of the opinion that there are "particular circumstances which relate to the offence or to the offender" which would make it "unjust" to apply the minimum term. This preserves a balance between the legislative intention to impose a particular custodial sentence and ensuring that the courts are able to impose a sentence that meets the requirements of justice in the case before them.

18. Clause 101 of the Bill would allow the court to diverge from mandatory minimum sentences only where there are "exceptional circumstances" that relate to the offence or the offender which would make it unjust to apply the minimum sentence.[26] This raises the threshold from the current standard of "particular circumstances", which is undefined in legislation and open to judicial interpretation. The term "exceptional circumstances" is not defined in the Bill or explained in the Explanatory Notes, although "exceptional circumstances" are the criteria already used for offences involving a firearm.

19. The change would apply to sentences received by children aged 16 and 17 years old for certain offences involving knives or other offensive weapons:

a) a repeat offence involving possession of a weapon or bladed article in a public place or on education premises,[27]

b) or any offence of threatening someone with a weapon or bladed article in a public place or on school premises.[28]

The minimum sentence for children convicted of these offences is a four-month detention and training order (i.e. a custodial sentence).

25 UNICEF, United Nations Convention on the Rights of the Child, (ratified 20 November 1989). NB the UNCRC has not been incorporated into domestic law - see para 8 above.

26 These clause numbers used here are those for Bill as introduced to the House of Lords as HL Bill 40 in the 2021–22 Session: Police, Crime, Sentencing and Courts Bill, [HL Bill 40 (2021–22)]

27 Sentencing Act 2020, section 315

28 Sentencing Act 2020, section 312

20. The Government's 2020 White Paper, *A Smarter Approach to Sentencing,* (the White Paper) had stated that the Government would 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".[29] The White Paper continues:

> "Whilst we are raising the bar for courts to depart from giving the minimum sentence for these serious crimes, they retain the ability to do so where the circumstances warrant it. The courts will continue to take the child's welfare and needs into consideration when deciding on the most appropriate sentence."[30]

21. The Sentencing Council Guidelines are clear that the interests of justice are best served by courts exercising discretion when deciding on the sentence for a child: "(W)hile the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused."[31] This allows the complex needs of many children who interact with the criminal justice system to be appropriately considered in sentences. We heard about the difficult circumstances of such children from Hazel Williamson, Head of the Association of Youth Offending Team Managers. She referred to a report by Dr Alex Chard, *Punishing Abuse,* which was commissioned by the West Midlands Combined Authority in collaboration with the Office of the Police and Crime Commissioner.[32] The report looked at 80 children known to the Youth Justice system:

a) 71 of the 80 children had been abused;

b) almost half had witnessed domestic violence;

c) over 30% of them had witnessed, or been a victim of, child sexual exploitation;

d) 79% were diagnosed with a physical, mental, neurodivergent or learning disability;

e) over 50% had been referred to child and adolescent mental health services. Hazel Williamson told us that this "is five times more than is found in the general population of children;"[33]

f) Over 90% had at some point been a child in need, a child in need of protection or a child in the care of the local authority.

22. The limitation on judicial discretion proposed by the Bill also comes at a time when there is growing awareness of child criminal exploitation: The Children's Society estimates that there are 4,000 children being criminally exploited in London alone.[34] In these cases, the line between criminal and victim can be blurred.

29 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 85
30 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 87
31 Sentencing Council, Sentencing Children and Young People, 1 June 2017
32 West Midlands Combined Authority, West Midlands Police Crime Commissioner, Punishing Abuse: Children in the West Midlands Criminal Justice System, February 2021
33 Q11
34 The Children's Society, County lines and child criminal exploitation, [last accessed 25 August 2021

23. Claudia Sturt, Chair of the Youth Justice Board, which is responsible for overseeing the youth justice system in England and Wales, explained why she felt the standard of "exceptional" was inadequate:

> "I recognise that under these provisions sentencers can depart from minimum terms in exceptional circumstances, but very clearly what we are being offered here is a default position to impose them, and that is what most sentencers will do unless they regard age, vulnerability and maturity as exceptional. It is difficult to envisage that being the case, because those are the common factors within this cohort. Only if we understand the circumstances that lead an individual child to offend can we hope to prevent a repeat of that kind of behaviour, and minimum sentences do not lend themselves well at all to that approach. You may have an example where perhaps a child has been groomed, exploited or even coerced into carrying a knife. Do we consider those factors to be exceptional, because they are not unusual?"[35]

24. The General Comment from the Committee on the Rights of the Child has already strongly advised against applying mandatory minimum sentences to children.

> "Mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort and for the shortest appropriate period of time. Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede proper application of international standards."[36]

25. The changes in Clause 101 could make it more difficult to interpret mandatory minimum sentences compatibly with the guidance from the Committee on the Rights of the Child, because it would be harder for courts to adjust their sentences to the child in front of them than under the existing "particular circumstances" provision.

26. Raising the threshold at which the court can take into account the individual circumstances of each child offender risks undermining the principle put clearly by the Sentencing Council that sentencing should be 'individualistic and focused on the child or young person, as opposed to offence focused.'[37] Dr Janes described the limiting of judicial discretion as "inherently incompatible" with the 'best interests principle' - the legal duty that the best interests of the child be a primary consideration in any action by a state body including a court.[38] These principles reflect international standards and are fundamental protections of the rights of the child.

27. **Clause 101 would allow a court to diverge from imposing a minimum custodial sentence for certain crimes involving weapons committed by those aged 16 and 17 only where there were "exceptional circumstances". This increase in the limitation on judicial discretion conflicts with the need for sentencing decisions to be individualised**

35 Q6
36 United Nations, Convention on the Rights of the Child, 18 September 2019
37 Sentencing Council, Sentencing Children and Young People, 1 June 2017
38 Q6

and for the welfare of the child to be a primary consideration. Custody must remain a measure of last resort. *Clause 101 of the Bill should be amended so that no children will be affected by its provisions.*

Changes to Detention during Her Majesty's Pleasure

28. Detention during Her Majesty's Pleasure (DHMP) is the sentence imposed on someone who commits murder when aged 10 to 17. It is effectively a life sentence, as the offender serving a DHMP sentence will never be released from prison if a parole board does not consider it safe for them to be released. After a set number of years that must be served in prison (the tariff), an individual sentenced to DHMP is eligible for periodic reviews of whether they are safe to be released. When someone sentenced to DHMP is released, they will be subject to licence conditions. If they go on to break any of the conditions imposed on them, they could be returned to detention. Between 2017 and 2019 there were 101 DHMP sentences handed down, all of which went to boys.[39]

29. Claudia Sturt recognised the devastating impact murder has on the families of victims:

> "The first thing I would like to acknowledge is that the grief suffered by bereaved families as a result of crime can be absolutely devastating. No sentence, no matter how long, is guaranteed to relieve the pain of losing a loved one. Of course, victims' families deserve the greatest possible empathy, compassion and space to work through a multitude of complex thoughts and feelings that they necessarily will have, and they should receive professional support to help them process and recover from the trauma of their loss."[40]

30. Clause 104 of the Bill introduces a range of starting points for tariffs for children sentenced to DHMP. When setting the tariff period, the court must first allocate a starting point, then consider any aggravating or mitigating factors, plus the effects of the defendant's previous convictions, any plea of guilty, and whether the offence was committed on bail. Currently, the starting point for the courts when setting the tariff is 12 years for children of all ages–the Bill proposes changes to this starting point depending on the age of the child. The changes would closer align starting points for older children with equivalent offences for adults whilst reducing them for younger children. It also introduces variation based on the severity of the offence, as already exists for adults. The table below sets out the new starting points:

39 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021

40 Q20

Table 1: Tariff starting points for those sentenced to DHMP under the PCSC Bill

Age of offender when offence committed	Starting point for an offender aged 18 or over would be 30 years	Starting point for an offender aged 18 or over would be 25 years	Starting point for an offender aged 18 or over would be 15 years
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years
14 or under	15 years	13 years	8 years

Source: Commons Library, Police, Crime, Sentencing and Courts Bill: Part 7 - Sentencing and release, Briefing Paper Number 9161, 12 March 2021

31. Most children sentenced to DHMP are in the older age brackets and would face longer tariffs as a result of these changes, although some younger children may receive shorter tariffs.[41] Of the 101 DHMP sentences between 2017 and 2019, 59% went to those aged 15 to 17; 39% went to those aged 18 to 20 (the offence having been committed when they were under 18); and only 2% went to those aged 12 to 14.[42]

32. The White Paper explains that the purpose of changing the DHMP tariffs is because:

> the fixed 12-year starting point for children does not account for the seriousness of the crime, nor does it reflect the different stages of development children go through between the ages of 10 and 17.[43]

33. Article 1 of the UNCRC is, however, clear that "a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". We received evidence from the Transition to Adulthood alliance that the changes to the tariffs "represent a worrying trend in reversing distinctions between the youth and adult justice systems and undermines international obligations."[44]

34. A 17-year-old, a week before they turn 18, is likely to have more concept of responsibility than an 11-year-old. However, courts can already take this into account in their sentencing decisions: the White Paper acknowledges that "courts can set a tariff higher or lower than the starting point based on aggravating or mitigating factors, such as: maturity; behaviour toward the victim; or the presence of learning disabilities or other health concerns."[45] The Sentencing Council guidelines explain that: "When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."[46]

35. The Youth Justice Board told us that they opposed the introduction of a gradient based on age in Clause 104, because it:

> "does not treat them (the children) as individuals and does not take into account their childhood or developmental stage; it treats them as if they are adults … That is at odds with the convention, which very clearly defines

41 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021
42 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021
43 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, p 33
44 Transition to Adulthood Alliance (PCS0330)
45 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, p 33
46 Sentencing Council, Sentencing Children and Young People, 1 June 2017

> that a child is anyone under the age of 18. There is no sliding scale below the age of 18 at which it is acceptable to treat somebody as more or less of a child; it is everybody under the age of 18."[47]

36. Furthermore, the Committee on the Rights of the Child has in the past recommended that all forms of life imprisonment, including indeterminate sentences, for those below the age of 18 at the time of the commission of the offence be abolished.[48] Concluding observations on the UK were issued by the Committee on the Rights of the Child in 2016–2017 which included a recommendation that the UK should:

> "Abolish the mandatory imposition of life imprisonment for children for offences committed while they are under the age of 18"[49]

37. The Alliance for Youth Justice's verdict on the change to tariffs was that they are:

> "entirely in contrast to the CRC's Concluding Observations to the UK which urged the government to abolish these sentences, with the CRC's General Comment highlighting how "life imprisonment makes it very difficult, if not impossible, to achieve the aims of reintegration.", and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment finding that: "Life imprisonment and lengthy sentences… are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child."[50]

38. **Life sentences for children have been criticised by the Committee on the Rights of the Child, whose interpretation of the UNCRC, while not legally binding, is authoritative. Increasing the length of time children must spend in custody before they can be considered for release can only be seen as making DHMP even less aligned to the rights in the UNCRC. *The Bill should be amended to remove any tariff starting points above the current 12 years.***

39. **Courts already have discretion to consider the different developmental ages of children and reflect this in the tariffs they hand down for DHMP. Mandating courts in legislation to treat older and younger children differently focuses too much on age, and not enough on maturity or circumstance. It brings tariffs for older children so close to those faced by adults that the distinction between a child and an adult risks being lost. However, we accept the imposition of shorter tariff periods for the youngest offenders as a step towards the recommendations of the UNCRC. *The increases to tariff starting points based on age should be removed from the Bill.***

Minimum term review for those sentenced to DHMP

40. Individuals serving DHMP may apply for their tariff to be reviewed. Previously, any individual serving a DHMP sentence could apply to the High Court for a review of the length of their tariff at the half-way point of the tariff period, and every two years after that if the initial application was unsuccessful. This policy was changed in February 2021 so that those sentenced when over 18 would no longer qualify for any review of their tariff.

47 Q14
48 CRC/C/GC/24 para 81.
49 CRC/C/GBR/CO/5
50 Alliance for Youth Justice (PCS0392)

Tariff reviews can result either in the minimum term being reduced, or it remaining the same. Fewer than 10% of those sentenced to DHMP take up the option of the additional review.[51] The Howard League explained in written evidence:

> "young people can only have their minimum term reduced if they have a significant change in maturity and outlook, if continued detention would seriously undermine their development in ways which cannot be mitigated in prison, if there is new evidence about the circumstances of the offence or if they have made exceptional progress in prison."[52]

41. Clause 105 of the Bill puts the existing DHMP tariff review policy into statute. It also changes the current policy to reduce the opportunities for those sentenced to DHMP when aged under 18 to have the length of their tariff reviewed:

a) Someone under 18 at the time of sentencing still qualifies for a review half-way through their tariff.

b) Only those still under 18 two years after an unsuccessful review at the halfway point could apply for a further review (the additional review).

42. The age of criminal responsibility is 10 in England, Wales and Northern Ireland, and 8 in Scotland. It is theoretically possible, but it would be exceedingly rare, for anyone to commit a murder, be sentenced to DHMP, and still be under 18 two years after the halfway point of their tariff so as to qualify for the additional review. Dr Janes told us that she "cannot imagine a circumstance, if this provision is implemented, where someone would get a second bite of the cherry, as it were."[53] The effect of this clause is therefore to reduce the frequency of reviews of minimum terms and all but remove the possibility of a review beyond the half-way point.

43. The Government has argued that this is a fairer system because it recognises that "offenders who were sentenced to DHMP as children but have since turned 18 in custody are now adults and have passed the age where significant development occurs, while still accounting for the fact that they were children and still maturing when the crime was committed, and they were sentenced".[54] The Howard League for Penal Reform disagreed with this rationale. They referred us to the judgment of Lord Bingham in a case concerning the right to a minimum term review for a young adult who had received a DHMP sentence for a murder committed four months before her eighteenth birthday. Lord Bingham had concluded that:[55]

> "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

51 Ministry of Justice, Impact Assessment: Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures, 11 December 2020, p 11

52 Howard League for Penal Reform (PCS0396)

53 Q8

54 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 330

55 Howard League for Penal Reform (PCS0396)

> rehabilitation. It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age"[56]

44. The changes are also intended to limit the distress the review process can cause victims' families, who are contacted every time a review is initiated, and to provide them with greater certainty.[57] Claudia Sturt did not support the changes and suggested alternatives that could lessen the distress caused to families without removing the reviews. She told us:

> "An example might be to establish with bereaved families how often they wish to be contacted and then to provide them with periodic updates rather than updates triggered by processes. In that way we can take into account their preferences for frequency. We need to make sure that contact with those families is high quality, empathetic and honest, because those are the factors that will help to promote healing for those families within this process, but I feel very strongly that removing opportunities for review of tariff lengths is not the solution to dealing with the grief and distress of bereaved families."[58]

45. **The Government should seek to identify changes in the process of DHMP tariff reviews that could lessen the distress caused to the families of victims. A child who commits an offence was still a child when they did so, even if they reach the age of 18 whilst awaiting sentence or in custody. DHMP sentences should remain under continuing review. *The Government should return to permitting the possibility of a reduction in the tariff at the half-way stage and beyond for those who committed relevant crimes as children.***

Changes to time spent in custody

46. Clause 107 would change the custodial period for children serving sentences of detention of over seven years when sentenced under section 250 of the Sentencing Act 2020. The Bill would require children serving these sentences to spend two-thirds of their sentence in custody, rather than half as is the case now, with the rest of their sentence spent on licence in the community.[59] Sentences of detention under section 250 allow for a child to be sentenced to a custodial term up to the maximum that would be available in respect of an adult offender for the relevant offence. They are available in respect of offences that, if committed by an adult, would be punishable with a sentence of 14 years imprisonment or more and in respect of certain sexual and firearm offences, where the courts consider neither a youth rehabilitation order nor a detention and training order is suitable.

47. The ECHR Memorandum on the Bill, explains the Government's reason for the change is to ensure:

56 R v Secretary of State for the Home Department ex parte Smith [2002] UKHL 51

57 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 330

58 Q20

59 While being monitored in the community they can be recalled to prison if they do not comply with strict licence conditions.

> "that serious sexual and violent offenders serve sentences that truly reflect the severity of their crimes–helping to protect the public and giving victims confidence that justice has been served."[60]

48. The Sentencing Council Guidelines reflect that "the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish".[61] This guidance reflects Article 40 of the UNCRC, which emphasises "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

49. The UNCRC is clear that detention must be a "measure of last resort and for the shortest appropriate period of time." A policy to increase the length of time children spend in custody requires proper justification. The reason set out in the ECHR memo, quoted above, refers to public protection but the Youth Justice Board told us that they:

> "believe there are likely to be risks associated with increasing the time spent in custody and reducing the amount of time monitored and support in the community. These are likely to adversely impact on positive outcomes and public protection."[62]

50. The White Paper also argued that, "(S)pending longer in custody also means that those who commit offences will have more time to focus on rehabilitative interventions and education, as well as longer to prepare for life in the community".[63] Contrary to this argument, we heard that spending longer in custody hinders reintegration into society. The Transition to Adulthood Alliance, for example, said:

> "Increasing the custodial portion of the sentence has a corresponding impact on shortening post-sentence probation supervision which will impact on young adults particularly detrimentally. This makes no sense for rehabilitation because: there will be less time to build stability in employment, accommodation and relationships which are known to have the greatest impact on subsequent offending"[64]

51. Similarly, Hazel Williamson, told us this would worsen reoffending rates:

> "The longer children spend in custody, the less chance they have of that opportunity to reintegrate into society… We know that for children truly to reintegrate they need that support and time out in the community with specialist providers who can support them to meet all their physical and psychological needs."[65]

52. We also heard that increasing the time child offenders spend in prison means more children will reach adulthood while in custody and will be transferred to the adult estate. As Dr Janes told us:

60 Home Office, Ministry of Justice, JCHR Memorandum: Police, Crime, Sentencing, and Courts Bill, 9 March 2021, p 2
61 Sentencing Council, Sentencing Children and Young People, 1 June 2017
62 Youth Justice Board (PCSC0402)
63 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 308
64 Transition to Adulthood Alliance (PCS0330)
65 Q14

> "Lots of children who are on these serious sentences, who will have been out of circulation and who will be coming back into society with a determinate sentence, will now find that they are transferred to the adult estate, where they lose lots of the personal, social and emotional support that they were entitled to as children and, when they come out, they will not have that scaffolding around them of social care support, either at all or for as long as they ought to, which is not good for the children, and it is not good for anybody."[66]

53. The Youth Justice Board also fear that, rather than supporting children:

> "increasing the length of time a child spends in custody may instead serve to remove a sense of hope and cement a pro-criminal sense of identity. These factors are likely to contribute to increased likelihood of re-offending upon release."[67]

54. Finally, Dr Janes also told us how she feared the reduction in the length of time offenders are monitored in the community could lead to a loss of confidence from victims because:

> "it is really important, particularly from a victim perspective—knowing that, once a person is out, they are being properly supervised and managed."[68]

55. The argument for reducing the amount of time children spend in custody is strengthened when the conditions in the youth estate are poor, and the harmful consequences for children significant. A recent report from Crest Advisory, a criminal justice strategy and communications consultancy, drawing on the experiences of practitioners and experts found that "the safety and overall quality of youth custodial institutions has declined dramatically over the last decade".[69] In June this year, it was announced that all children would be removed from Rainsbrook Secure Training Centre after an Ofsted inspection found appalling conditions there. This included children being kept in their rooms for up to 23.5 hours a day.[70] In August 2021 an inspection of Chelmsford Young Offenders Institution found concerningly similar conditions, with "many prisoners locked in their cell for almost 23 hours a day. This reflected the COVID-19 restrictions, but even in 2018 many prisoners were locked in their cell for 22 hours a day."[71] The number of self-harm incidents in youth custody also increased by 35% last year alone, to around 2,500.[72] The Youth Justice Board expressed the view that:

> "Sentencing children to longer periods in custody in environments where they may feel unsafe is difficult to reconcile with promoting their dignity or worth as specified under Article 40 nor Article 37(b) [of the UNCRC]."[73]

66 Q8
67 Youth Justice Board (PCSC0402)
68 Q7
69 Crest Advisory, Manon Roberts, Gemma Buckland, Harvey Redgrave, *Examining the youth justice system: What drove the falls in first time entrants and custody, and what should we do as a result?*, November 2019, p 7
70 Ofsted, Rainsbrook Secure Training Centre: Monitoring Visit, 26 January 2021, p 1
71 See the Urgent Notification letter concerning HMP and YOI Chelmsford from HM Chief Inspector of Prisons to Lord Chancellor, dated 26 August 2021
72 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 2
73 Youth Justice Board (PCSC0402)

56. **It is particularly important that for serious child offenders, there is a clear focus on rehabilitation and reintegration into society. Clause 107 is likely to shift the focus towards punishment. This may well be counter-productive in reducing reoffending. *Children sentenced to detention under section 250 of the Sentencing Act 2020 should, as they do now, spend half the sentence in custody and half being monitored in the community to support their reintegration into the community.***

Remand

57. Clause 132 would change the use of remand. In relation to children, 'remand to custody' (generally referred to as 'remand') is when a child who has been accused of a crime is sent to youth detention accommodation while awaiting trial or sentence, rather than being released on bail or looked after in local authority accommodation.[74] The Explanatory Notes to the Bill state that the changes "aim to encourage courts to impose custodial remand only where absolutely necessary, while ensuring the public remains safe."[75] This addresses a number of issues identified in the White Paper: that unnecessary exposure to custody on remand has detrimental impacts on children; that, in contrast to the reduction in the numbers of children in prison following sentence, there has been a recent *increase* in the number of children held on remand; and that two thirds of remanded children do not go on to receive a custodial sentence, which suggests that many children are being remanded to custody unnecessarily and not in keeping with the 'last resort' principle in the UNCRC.[76]

58. Clause 132 would tighten the existing legal tests that must be met before a child can be remanded to custody.[77] These tests already impose a high threshold, requiring *inter alia* that remand is necessary to protect the public from death or serious personal injury or to prevent further imprisonable offences and either

a) that the child is charged with a particularly serious offence;[78] or

b) that they have a real prospect of receiving a custodial sentence and have a recent history of absconding or committing offences while on bail or remand.

59. Clause 132 would make the following changes:

a) No child would be remanded into custody unless the court considers that the prospect of the alleged offence resulting in a custodial sentence is 'very likely';

b) The court must also be satisfied that the risk posed by the child cannot be managed safely in the community; and

74 The presumption is that children who cannot be released on bail will be remanded into local authority accommodation, in accordance with section 92 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

75 Explanatory Notes to the Police, Crime, Sentencing and Courts Bill, [Bill 40 (2021–2022) - EN], para 167

76 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292, September 2020, para 368 et seq

77 Legal Aid, Sentencing and Punishment of Offenders Act 2012, chapter 3. Clause 132 would introduce changes in respect of criminal proceedings (Clause 132(3)-(4) and equivalent changes to extradition proceedings (5)-(6). In this report we are focusing on the changes to criminal proceedings but the points made apply equally in respect of extradition.

78 A violent, sexual or terrorism offence or an offence punishable in the case of an adult with imprisonment of 14 years or more (section 98(3) LASPO Act 2012)

c) When considering whether the offender has a history of absconding or committing offences while on bail or remand, the court must be satisfied that the history is both recent *and significant* and whether it is relevant in the circumstances.

d) A new statutory duty is also imposed on the court to consider the welfare and best interests of the child when deciding whether to remand them to custody. This reflects the welfare principle set out in Article 3 UNCRC and section 44 of the Children and Young Persons Act 1933 and promotes a 'child first' approach to decision-making.

60. The Youth Justice Board in evidence to the Public Bill Committee stated that they "welcome the proposal that there be a statutory duty for the court to consider the child's welfare and best interests when applying the prospect of custody test."[79] Similarly, in evidence to us Pippa Goodfellow considered the changes a "really welcome move in the right direction" although she wished the changes had gone further.[80]

61. **We welcome the changes to remand made under Clause 132. They aim to divert children from custody where possible and are in keeping with the principle in the UNCRC that custody be a measure of last resort and for the shortest appropriate period of time. The introduction of a statutory duty to consider the welfare and best interests of the child is particularly welcome, as is the requirement for courts to provide reasons when they remand a child to custody.**

Disproportionality

62. There are high rates of ethnic disproportionality in the youth justice system, most starkly for Black children, as summarised by Youth Justice Board:

> "Ethnic disproportionality is seen at many stages of the YJS (youth justice system). The proportion of Black children arrested has been steadily increasing over the last ten years. While the number of FTEs (first time entrants) from a Black background has decreased compared with ten years ago, the proportion they comprise of all child FTEs has increased, from 9% to 16%. The proportion of Black children given a caution or sentence has doubled over the last ten years and the proportion of Black children on remand in youth custody has increased to over a third."[81]

63. A similar increase in disproportionality has been seen in the use of custody. In March 2010 28% of children in custody were from Black, Mixed, or Asian and other background. In March 2020 this proportion had increased to 52%.[82] The Government recognise that disproportionality is a significant problem. In their December 2017 response to the Lammy Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System ('the Lammy Review') they committed to

79 Public Bill Committee on the Police, Crime, Sentencing and Courts Bill, col 81

80 Q9

81 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 5.

82 Youth Justice Board, Ministry of Justice, Youth Justice Statistics 2019/20, 28 January 2021, p 42;
This compares to general population statistics of 86% white, 7.5% Asian, 3.3% Black, 2.2% Mixed/Multiple ethnic groups and 1.0% Other ethnic groups: Office for National Statistics, 2011 Census Data, [last accessed 26 August 2021]

embedding a programme of work to address racial disparity in the criminal justice system (including the youth justice system). The most recent update on this programme was published in February 2020.[83] Despite these efforts, the disproportionality in the criminal justice system has worsened since the Lammy Review, as David Lammy noted in evidence to us as part of our inquiry in to 'Black people, racism and human rights' in 2020.[84]

64. The Government has nevertheless indicated that the changes that will be made by the Police, Crime, Sentencing and Courts Bill will disproportionately penalise those groups that are already overrepresented in the youth justice system. The Equalities Impact Assessment which accompanied the Bill stated that the Government "believe that children who are older, Black, Asian, and Minority Ethnic (BAME) and male are more likely to be affected".[85] The Government argue the Bill will disproportionately affect those from minority backgrounds "because they are over-represented in the youth justice system".[86]

65. The changes in the Bill focus on the most serious offences and those involving weapons, including knives. Analysis by the Youth Justice Board found that, compared to white children, those from all minority ethnic groups "are convicted of offences with a higher average severity" and "offences that are more likely to involve a knife".[87] The difference is most stark for Black children. Crucially, the report found that while Black children are more likely to be sentenced for offences that attract harsher sentences, this did not account for why Black children receive more custodial and harsher sentences than white children to the extent that they do:

> "Unlike for other minority ethnic groups, the differences in demographics and offence-related factors, and practitioner-assessed factors cannot fully explain why Black children receive fewer first-tier outcomes and more custodial sentences. Black children are between 2 and 8 percentage points more likely than White children to receive a custodial sentence when controlling for all available variables. Demographics and offence-related factors, along with practitioner-assessed factors halve the original size of the disproportionality but we could not identify the factors, other than ethnicity, that can explain the remaining level of disproportionality."[88]

66. Article 14 ECHR protects against discrimination in the enjoyment of other ECHR rights, such as the right to liberty (Article 5 ECHR) and the right to respect for private and family life (Article 8 ECHR), on grounds including race or ethnicity. This includes indirect discrimination; where a measure that applies more widely has a particularly negative effect on a particular group. Any measures that will unequally affect different groups in the enjoyment of their ECHR rights will only be lawful if they represent a proportionate means of achieving a legitimate aim.

83 Ministry of Justice, Tackling Racial Disparity in the Criminal Justice System: 2020 Update, February 2020
84 Oral evidence taken on 6 July 2021, HC (2020) 559, Q1
85 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021
86 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021
87 Youth Justice Board, Ethnic disproportionality in remand and sentencing in the youth justice system, 21 January 2021, p 8
88 Youth Justice Board, Ethnic disproportionality in remand and sentencing in the youth justice system, 21 January 2021, p 61

67. The ECHR Memo that accompanied the Bill summarised the purpose of the changes as ensuring the sentencing and release framework "takes account of the true nature of crimes":

> "It must be robust enough to make sure the worst offenders spend as much of their time behind bars as possible, in order to protect the public from harm; but agile enough to give offenders a fair start on their road to rehabilitation."[89]

68. Protecting the public from harm is a legitimate aim. Realising this aim would justify proportionate interferences with human rights, including the freedom from discrimination in the enjoyment of other rights (Article 14 ECHR). In their written evidence to us EQUAL raised doubts over how effective the changes will be at increasing public safety:

> "The government argues that the proposals set out in the PCSC bill, although indirectly discriminatory, are justified on the basis that the proposals are "a proportionate means of achieving a legitimate aim" which in this case is increasing public safety …
>
> … The government's own research found, longer custodial sentences have an adverse impact on an individual's mental health, sense of hope and attitude which may have a negative effect on their rehabilitation and resettlement. Moreover, the government have conceded that there is no evidence that increasing the length of time in custody and reducing time on licence in the community will in fact act as a deterrent. Instead, the government have attempted to justify longer times in prison by arguing that whilst in custody the individual is prevented from committing crime, which is arguably a short-term approach in direct contrast with the rehabilitative principles that underpin our criminal justice system."[90]

69. If the Government implemented measures designed to mitigate the effect of the Bill's changes on minority ethnic groups, there could be a greater chance of avoiding discrimination or at least ensuring that any discrimination would be proportionate to the legitimate aim of protecting the public from harm, in compliance with Article 14 ECHR. But the Government appears to have accepted the disproportionate impact of these provisions of the Bill on ethnic minorities without indicating any specific steps to address these disparities. This was a view expressed in written evidence from EQUAL:

> "the government's equality statements set out ample evidence to suggest that the proposals will increase racial disparities… yet despite this, there is no mitigation provided."[91]

Claudia Sturt similarly flagged the lack of mitigation measures, saying she was "particularly concerned that, although the Government's own impact assessment identified that these measures would impact Black, Asian and minority-ethnic children disproportionately, they decided to override that without apparently any mitigations in place."[92]

89 Home Office, Ministry of Justice, JCHR Memorandum: Police, Crime, Sentencing, and Courts Bill, 9 March 2021, p 2
90 EQUAL (PCS0349)
91 EQUAL (PCS0349)
92 Q13

70. **The Government is right that the existing racial disproportionality in the youth justice system is a serious issue that must be addressed. In this context, it is unfortunate that the Government have noted the unequal effect the measures in the Bill will have without providing any measures to mitigate it.**

Recording proceedings in youth courts

71. Our witnesses suggested that recording proceedings in the youth court could assist in identifying instances and trends of unequal treatment on racial grounds within the youth justice system. This would also allow for decisions around prosecution, remand, and sentencing to be challenged more effectively. Danielle Manson, a barrister at Garden Court Chambers, thought this "would help us to address this perceived elephant in the room in relation to race, and that would be a transparent and positive way forward."[93] Claudia Sturt described herself as "astonished to hear that currently youth court proceedings are not recorded. It seems such an obvious thing that should be happening."[94]

72. We asked the Lord Chancellor about recording decisions in youth courts and he noted the potential benefits:

> "Progressively, we have seen an increase in recordings. It all helps with regard to an accurate and agreed account of what happened in sometimes very important proceedings. I will undertake to look at that very carefully because I appreciate the seriousness very often of proceedings in the youth court."[95]

73. **We welcome the Lord Chancellor's undertaking to look at how recordings in youth courts could be taken forward. This would allow for remand, prosecution, and sentencing decisions that raise concerns of racial discrimination to be challenged more effectively. *The Government should introduce mandatory recording of proceedings in the youth courts so that decisions can be effectively scrutinised and challenged where necessary.***

Negative impact of the disproportionate use of remand

74. The use of remand falls disproportionately on those from ethnic minority backgrounds, so these groups should benefit from the proposed changes in this area.[96] However, as the Government has acknowledged, the fall in the youth custody population over the last decade has "disproportionately benefitted White children".[97]It is extremely important that this trend is not replicated as the number of children remanded into custody is reduced. As the Youth Justice Board explained: "Disproportionality in remand decisions, in some

93 Q4
94 Q12
95 Q13
96 Youth Justice Board analysis found that "Black children also appear more likely to be remanded into custody compared to White children. Demographics and offence-related factors do not entirely explain this disproportionality." Youth Justice Board, Ethnic disproportionality in remand and sentencing in the youth justice system, 21 January 2021, p 61
97 Home Office, Youth measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, 13 May 2021

cases, translates into disproportionality in sentencing, even when controlling for the nature of the offence. For example, being remanded into custody increases the likelihood that a custodial sentence will be imposed."[98]

75. **Measures intended to reduce the use of remand should reduce the number of children from all ethnic backgrounds being unnecessarily placed in custody.** ***The Government should carefully monitor the remand of children from different ethnic backgrounds to ensure that the intended reduction in the use of remand benefits them equally.***

98 Youth Justice Board, Ethnic disproportionality in remand and sentencing in the youth justice system, 21 January 2021, p 61

3 Whole life orders

76. Whole life orders are the most severe sentences that can be handed down by the criminal courts. They are reserved for the most heinous murders and to offenders aged over 21. Other life sentences require a prisoner to serve a minimum term, after which they may be released after assessment by the Parole Board (but only if their imprisonment is no longer necessary to protect the public). Once released, a life prisoner remains subject to recall for the rest of their lives. Under a whole life order there is no minimum term set by the judge. An offender sentenced to a whole life order will spend their entire life in prison and, as the government website confirms, is "never considered for release."[99] The only possibility of being released before death is the Secretary of State's power to release a prisoner subject to a whole life order in exceptional circumstances on compassionate grounds (where the prisoner is terminally ill, incapacitated, paralysed or suffering from a severe stroke and where continued imprisonment would reduce life expectancy).[100]

77. The ECHR compatibility of whole life orders for offenders aged over 21 has been confirmed by the Grand Chamber of the European Court of Human Rights (ECtHR), after dialogue between domestic courts and Strasbourg. In 2013 in the case of Vinter v United Kingdom, the Grand Chamber found that whole life orders were incompatible with the prohibition on inhuman and degrading treatment (Article 3 ECHR.)[101] This was because the Court recognised "clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved." Thus the whole life order was not compliant with Article 3 because it did not allow for any meaningful review to establish whether the prisoner had been rehabilitated to such an extent that there was no longer justification for continued imprisonment on legitimate penological grounds (such as punishment, deterrence, public protection and rehabilitation).

78. A few years later, in Hutchinson v UK, the ECtHR reconsidered the position and concluded, in agreement with the domestic Court of Appeal, that in fact whole life orders did not violate Article 3. This was because the possibility of release on compassionate grounds–if read compatibly with Article 3 ECHR, as required by the HRA–extended to the possibility of a prisoner showing such exceptional rehabilitation that imprisonment was no longer justified on penological grounds.[102] The Secretary of State's power has, however, never been exercised in this way.

79. The Bill proposes extending whole life orders, in exceptional cases, to offenders aged 18 to 20 at the time of the offence. While these offenders are not children, we were referred in evidence to recognition by the Lord Chief Justice and the Court of Appeal that reaching the age of 18 does not represent "a cliff edge" for the purposes of sentencing - "[f]ull maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays."[103] We also note that in 2018 the Justice Committee similarly concluded:

99 Gov.UK, Types of Prison Sentences, [last accessed 26 August 2021]
100 See section 30, Crime (Sentences) Act 1997 and Prison Service Order 4700
101 Vinter v United Kingdom, ECHR 9 July 2013
102 Hutchinson v United Kingdom, ECHR 17 January 2017
103 See R v Clarke and others [2018] EWCA Crim 185 at para 5

> "In our view there is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development… Dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood. They typically commit a high volume of crimes and have high rates of re-offending and breach, yet they are the most likely age group to stop offending as they 'grow out of crime'."[104]

80. Dr Janes explained to us that life sentences prevent offenders who continue to pose a risk being released, but with a whole life order: "You take away from a young adult the right to hope and the right to change."[105] We also note that removing the chance of eventual release removes the greatest incentive for reform and rehabilitation.

81. Only the most serious offenders, who have committed appalling crimes, will ever face the prospect of a whole life order. Nevertheless, removing from a 20, 19 or even 18-year-old offender the possibility that reform and rehabilitation might one day result in a chance of freedom would violate the prohibition on inhuman or degrading treatment under Article 3 ECHR. The current system, relying on the Secretary of State to interpret 'exceptional circumstances' and 'compassionate grounds' compatibly with Article 3 offers only the tiniest possibility of release and incentive to reform.

82. **While the ECtHR has concluded that whole life orders for offenders aged 21 and over do not violate Article 3 ECHR, we are concerned about the implications of extending these sentences to offenders aged 18 to 20. The courts and the Justice Committee have accepted that turning 18 is not a cliff-edge. Young offenders aged between 18 and 20 are still maturing and have significant potential to change. Extending to this age group a sentence that makes the prospect of ever being released vanishingly unlikely comes perilously close to the Article 3 threshold. It also runs counter to positive recent recognition of the need to treat young adult offenders as a category distinct from older offenders. *The minimum age for imposing a whole life order, even in exceptional circumstances, should not be dropped below 21.***

104 Justice Select Committee, Seventh Report of Session 2016–17, *The Treatment of Young Adults in the Criminal Justice System*, HC 169, at para 24. See also Justice Select Committee, Eighth Report of Session 2017–19, *Young Adults in the Criminal Justice System*, HC 419

105 Q7

4 Incorporation of the UNCRC

83. The United Nations Convention on the Rights of the Child (UNCRC) has not been incorporated into domestic law. While the Scottish Parliament has voted to incorporate the UNCRC into Scottish law, this has not yet taken place. This means that any policy, or action by a limb of the state that is contrary to the obligations in the UNCRC cannot be directly challenged on this basis in a UK court. Furthermore, unlike in respect of the ECHR where even without incorporation an application could be made to the European Court of Human Rights, there is no international court to which claims for breach of the UNCRC can be brought.[106] This lack of an international court emphasises the impact of non-incorporation on enforcing the rights of the child.

84. We asked the Lord Chancellor about incorporation of the UNCRC in July 2021. He responded that:

> "I think that in essence it is unnecessary. We have in our domestic legislation very robust protections and safeguards for children that go well beyond the provisions within the convention. We are signatories to it. Article 4 of the convention says that the way in which the rights are to be enforced is a matter for the signatory state. That could be done via legislation if it chooses to do so, but not always. It is important to remember how far we have come with legislation on children and remind ourselves that we have some of the most rigorous safeguarding procedures in the world … "[107]

85. Although we agree that the UK has come a long way in protecting children, we heard of clear benefits of incorporating the UNCRC. Dr Janes explained how the current process of enforcing children's rights is made more difficult by the lack of incorporation:

> "Rights are, of course, only any good if they can be enforced. … At present, we have to do this sort of legal dance, whereby we have to find an article of the European Convention on Human Rights that bites and we then have to interpret it through the lens of the UN Convention on the Rights of the Child. That is too convoluted and, just as to incorporate would send out the right message, this sends out the wrong message."[108]

86. Pippa Goodfellow thought that incorporation would have symbolic as well as practical benefits:

> "As recently as 2018, the then Under-Secretary of State for Children and Families spoke about the Government's commitment to the UNCRC and the pride in having signed it. If that is the case, the question for the Government is why they would not want to sign something that they have pride in our having signed up to. It would send a really positive message to children, and it would give all those who are working in the best interests of children additional tools and mechanisms by which they could make sure that their rights were upheld."[109]

106 As mentioned in para [8] above, the third optional protocol to the Convention does provide for a right to make a complaint to the UN Committee on the Rights of the Child, but the UK has not ratified this protocol.

107 Oral evidence taken on 14 July, HC (2021–22) 548, Q13

108 Q10

109 Q10

87. We have previously looked at whether the Government should incorporate the UNCRC into domestic law. In 2015, the Joint Committee on Human Rights reported on the UK's compliance with the UNCRC.[110] At that time the Government's position was essentially the same as it is now - that the UK's laws and policies were strong enough to comply with the Convention. Concerns were also raised at the potential complexity of incorporation.[111] Nevertheless, we came to the view that:

> "Ideally, we would like to see the United Nations Convention on the Rights of the Child incorporated into UK law in the same way that the European Convention on Human Rights has been incorporated by means of the Human Rights Act. However, we are mindful that these two Conventions differ considerably in how they are framed and in the mechanisms which exist to support them internationally. In practical terms more must be done to realise the aims of the United Nations Convention on the Rights of the Child through legislation and through policy. The Modern Slavery Bill shows this can be done in a particular policy area. If such a dedicated focus on children's rights were manifest in legislation and policy across the board, much of the debate about incorporation versus non-incorporation would become an irrelevance …"

88. ***We recommend that the UNCRC be incorporated into UK law.***

110 Joint Committee on Human Rights, Eighth Report of Session 2014–15, *The UK's compliance with the UN Convention on the Rights of the Child*, HC 106 / HL Paper 144

111 Joint Committee on Human Rights, Eighth Report of Session 2014–15, *The UK's compliance with the UN Convention on the Rights of the Child*, HC 106 / HL Paper 144, para 33

Conclusions and recommendations

Custodial sentences and remand for children

1. Clause 101 would allow a court to diverge from imposing a minimum custodial sentence for certain crimes involving weapons committed by those aged 16 and 17 only where there were "exceptional circumstances". This increase in the limitation on judicial discretion conflicts with the need for sentencing decisions to be individualised and for the welfare of the child to be a primary consideration. Custody must remain a measure of last resort. *Clause 101 of the Bill should be amended so that no children will be affected by its provisions.* (Paragraph 27)

2. Life sentences for children have been criticised by the Committee on the Rights of the Child, whose interpretation of the UNCRC, while not legally binding, is authoritative. Increasing the length of time children must spend in custody before they can be considered for release can only be seen as making DHMP even less aligned to the rights in the UNCRC. *The Bill should be amended to remove any tariff starting points above the current 12 years.* (Paragraph 38)

3. Courts already have discretion to consider the different developmental ages of children and reflect this in the tariffs they hand down for DHMP. Mandating courts in legislation to treat older and younger children differently focuses too much on age, and not enough on maturity or circumstance. It brings tariffs for older children so close to those faced by adults that the distinction between a child and an adult risks being lost. However, we accept the imposition of shorter tariff periods for the youngest offenders as a step towards the recommendations of the UNCRC. *The increases to tariff starting points based on age should be removed from the Bill.* (Paragraph 39)

4. The Government should seek to identify changes in the process of DHMP tariff reviews that could lessen the distress caused to the families of victims. A child who commits an offence was still a child when they did so, even if they reach the age of 18 whilst awaiting sentence or in custody. DHMP sentences should remain under continuing review. *The Government should return to permitting the possibility of a reduction in the tariff at the half-way stage and beyond for those who committed relevant crimes as children.* (Paragraph 45)

5. It is particularly important that for serious child offenders, there is a clear focus on rehabilitation and reintegration into society. Clause 107 is likely to shift the focus towards punishment. This may well be counter-productive in reducing reoffending. *Children sentenced to detention under section 250 of the Sentencing Act 2020 should, as they do now, spend half the sentence in custody and half being monitored in the community to support their reintegration into the community.* (Paragraph 56)

6. We welcome the changes to remand made under Clause 132. They aim to divert children from custody where possible and are in keeping with the principle in the UNCRC that custody be a measure of last resort and for the shortest appropriate

period of time. The introduction of a statutory duty to consider the welfare and best interests of the child is particularly welcome, as is the requirement for courts to provide reasons when they remand a child to custody. (Paragraph 61)

7. The Government is right that the existing racial disproportionality in the youth justice system is a serious issue that must be addressed. In this context, it is unfortunate that the Government have noted the unequal effect the measures in the Bill will have without providing any measures to mitigate it. (Paragraph 70)

8. We welcome the Lord Chancellor's undertaking to look at how recordings in youth courts could be taken forward. This would allow for remand, prosecution, and sentencing decisions that raise concerns of racial discrimination to be challenged more effectively. *The Government should introduce mandatory recording of proceedings in the youth courts so that decisions can be effectively scrutinised and challenged where necessary.* (Paragraph 73)

9. Measures intended to reduce the use of remand should reduce the number of children from all ethnic backgrounds being unnecessarily placed in custody. *The Government should carefully monitor the remand of children from different ethnic backgrounds to ensure that the intended reduction in the use of remand benefits them equally.* (Paragraph 75)

Whole life orders

10. While the ECtHR has concluded that whole life orders for offenders aged 21 and over do not violate Article 3 ECHR, we are concerned about the implications of extending these sentences to offenders aged 18 to 20. The courts and the Justice Committee have accepted that turning 18 is not a cliff-edge. Young offenders aged between 18 and 20 are still maturing and have significant potential to change. Extending to this age group a sentence that makes the prospect of ever being released vanishingly unlikely comes perilously close to the Article 3 threshold. It also runs counter to positive recent recognition of the need to treat young adult offenders as a category distinct from older offenders. *The minimum age for imposing a whole life order, even in exceptional circumstances, should not be dropped below 21.* (Paragraph 82)

Incorporation of the UNCRC

11. *We recommend that the UNCRC be incorporated into UK law.* (Paragraph 88)

Declaration of interests

Lord Brabazon of Tara

No relevant interests to declare

Lord Dubs

No relevant interests to declare

Lord Henley

No relevant interests to declare

Baroness Ludford

No relevant interests to declare

Baroness Massey of Darwen

President, Brook Advisory Centres

Patron, Bedfordshire University Unit on Child Trafficking

Member, The Lady Taverners

Lord Singh of Wimbledon

No relevant interests to declare

Formal minutes

Wednesday 15 September 2021

Hybrid Meeting

Members present:

Harriet Harman MP, in the Chair

Lord Brabazon of Tara	Baroness Massey of Darwen
Joanna Cherry MP	Angela Richardson MP
Lord Dubs	Lord Singh of Wimbledon
Florence Eshalomi MP	
Lord Henley	

Draft Report (*Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill: (Parts 7 and 8) Sentencing and Remand of Children and Young People*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 88 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Sixth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 20 October at 2.40pm.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 30 June 2021

Pippa Goodfellow, Director, Alliance for Youth Justice; **Dr Laura Janes**, Legal Director, Howard League for Penal Reform; **Danielle Manson,** Barrister, Garden Court Chambers — Q1–10

Claudia Sturt, Chief Executive Officer, Youth Justice Board; **Hazel Williamson,** Chair, Association of Youth Offending Team Managers — Q11–22

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

1 Alliance for Youth Justice (PCS0392)

2 EQUAL (PCS0349)

3 Howard League for Penal Reform (PCS0396)

4 Transition to Adulthood Alliance (PCS0330)

5 Youth Justice Board (PSC0402)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62

Number	Title	Reference
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 (HC 518) HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 (HC 901) HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317