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: Government Response to the Committee's Sixth Report

Eighth Special Report of Session 2021–22

Special Report

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Joint Committee on Human Rights

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Eighth Special Report

The Joint Committee on Human Rights published its Sixth Report of Session 2021–22, Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People (HC 451/HL 73) on 23 September 2021. The Government response was received on 10 December 2021 and is appended below.

Appendix: Government Response

Letter from Victoria Atkins MP, Secretary of State

Ministry of Justice, 13 July 2021 I would like to thank the Committee for its legislative scrutiny report on Parts 7 and 8 of the Police, Crime, Sentencing and Courts (PCSC) Bill covering the sentencing and remand of children and young people.

The Government's response to the report's recommendations is part of this letter.

We are satisfied that the provisions in this Bill are compatible with all articles of the European Convention on Human Rights (ECHR). The measures in the Bill will not affect these fundamental principles. Our sentencing regime allows for independent judicial discretion and individual assessments of the particular circumstances of the case to inform the minimum term set for any given individual, and this has been held to be compatible with the ECHR. We have published a memorandum which sets out our ECHR analysis of the Bill as a whole.

I would like to note that in this Bill we are not only making changes to custodial sentences and remand, but we are also strengthening community sentences. We believe that, wherever possible, children who offend should be managed in the community as it is more beneficial for their rehabilitation. The Bill includes measures intended to increase courts' and the public's confidence in community sentences as a robust alternative to custody by providing courts with the tools they need to deliver stronger community sentences, supporting the welfare of the child while ensuring the public is protected.

We also have an ambitious vision to transform the youth custodial estate. Secure schools are a government manifesto commitment and will be schools with security rather than prisons with education. They will have education, wellbeing and purposeful activity at their heart in order to improve outcomes and reduce reoffending.

There is a separate and distinct sentencing framework for children, and when sentencing children, the courts must take into account two statutory considerations: the principal aim of the youth justice system, which is to prevent offending by children and young people, and the welfare of the child. Although custody should always be a last resort for children, there are some cases where it is necessary. Where the threshold is met for a custodial sentence, we are ensuring in the Bill that the courts have the tools they need to pass appropriate sentences that properly reflect the culpability of a child and the seriousness of their offending, and that work fairly.

The measures in the Bill retain judicial discretion to give the most appropriate sentence taking into consideration the welfare of the child and the individual circumstances, and custody will remain a last resort for children. However, it is key that the public feel protected by our criminal justice system, even where the offender is a child.

The following response outlines the Government's consideration of the recommendations made in the report. The response has been structured to the subheadings in the Committee's list of 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)

This clause will retain the judiciary's discretion to give the most appropriate sentence. They will continue to take into consideration the welfare of the child and the individual circumstances surrounding the case, and custody remains a last resort for children.

Applying minimum sentences to 16- and 17-year-olds recognises the increased maturity and development of this age group compared with younger children. Though a custodial sentence remains a last resort, we believe that for older children who commit these particular offences, it should be mandatory for the court to consider carefully whether a custodial sentence is appropriate.

Those aged 16 or 17 are already subject to minimum sentencing provisions if convicted of threatening someone with a weapon or bladed article, or a repeat offence involving a weapon or bladed article. With this clause we are seeking to raise the bar for courts to depart from the minimum sentence only in exceptional circumstances. This is to reflect the seriousness of these offences and the risks posed to others. This will also create greater consistency in the statutory provisions on minimum sentences which apply to other offences. This change does not mean that all 16- and 17-year-olds will receive the minimum sentence. The courts will retain the discretion not to apply the minimum where there are exceptional circumstances which relate to the offender or the offence which would justify doing so.

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)

Life sentences for children are rare and are only given for the most serious offences. As set out in the Sentencing Act 2020 and agreed by Parliament, a life sentence known as Detention at Her Majesty's Pleasure (DHMP) must be given to children convicted of murder.

The starting points for considering the amount of time that must be served in custody before the Parole Board can consider release are just that – starting points. The actual minimum term set is imposed by the judiciary and is not fixed in legislation.

We are replacing the current 12 year starting point for all children with a range of starting points that take the child's age at the time of the offence and the seriousness of the murder, into account. This is to reflect the different stages of development that a child goes through and to recognise that a 10 year old is very different to a 17 year old. The different categories of murder are to reflect that murder can vary in severity and we believe it is right that starting points should also reflect this.

The court will continue to take the individual circumstances of a case into account and can give a minimum term that is higher or lower than any given starting point. A sentencing regime which allows for individual assessments of the particular circumstances of the case to inform the minimum term set for any given individual has been held to be compatible with the ECHR.

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)

The court does already scale sentences for age, maturity and severity of offence but the limitations of a fixed 12-year starting point do not reflect the seriousness of murders committed by children very close to the age of 18 who could receive a much shorter sentence than offenders only a few months older.

We want a youth justice system that recognises the differences between children from age 10 through to 17 which is why we are introducing a sliding scale which sees lower starting points for younger children in some cases and higher starting points for older children or those who commit the most serious murders.

For the oldest of children, who are the closest in age to an adult, we believe it is right that they should have the highest starting points. Nevertheless, children continue to be treated differently from adults and have their own youth justice system. The courts always take a child's age and maturity into consideration when deciding on the most appropriate sentence and have the freedom to diverge from starting points as appropriate for the case at hand.

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)

We recognise that the minimum term review process can be distressing for the families of victims. They are contacted every time an offender applies for a review and are given the opportunity to provide a new Victim Personal Statement, a process which in many cases causes them to relive the circumstances of the crime and feel as though they have to advocate again for justice for their loved one. This is why we believe the changes we are making to the process will lessen the distress to victims' families.

Under the measures in this Bill, children who are sentenced to DHMP will continue to be eligible for a review at the halfway point of their minimum term. The right for this has developed through case law. It recognises the unique needs of children and the fact that they develop and mature at a faster rate than adults. The review is an important part of confirming that the minimum term remains appropriate or determining if a reduction should be made.

However, they should only be eligible for a further review if they are still a child at that time. This is because children have the greatest capacity to demonstrate the significant changes to maturity and outlook that the review considers. As such the opportunity for multiple reviews would relate only to younger children at time of offending, as they are more likely to be under the age of 18 at the time a further review could take place. We believe this is the right approach.

Those who commit murder as a child but are sentenced as an adult have already had their age and maturity taken into consideration. Adults who commit murder are not entitled to reviews and so this Bill ensures that all offenders who are an adult at sentencing are treated equally.

The process we are enshrining in legislation will better reflect what case law has established and will ensure that the minimum term review policy benefits those for whom it was intended – children, rather than adults.

It is important to remember that we are talking about the most serious offence someone can commit – murder. The minimum term set by the judge takes into consideration a child's age and maturity at the time of the offence, and it reflects the seriousness of this offence. It should therefore be served except in exceptional circumstances.

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)

When sentencing children, the courts must take into account two statutory considerations: the principal aim of the youth justice system, which is to prevent offending by children and young people, and the welfare of the child. Punishment is not an aim of sentencing children. Sentencing should allow children the support they need to turn their lives around

while ensuring that the public are protected. We recognise that the reoffending rate for children is high and that is why we have brought forward measures which give the courts powers to give stronger alternatives to custody. However, where a long custodial sentence is appropriate, the time spent in custody should reflect the seriousness of the offence and protect the public. The changes to release points in clause 107 will only apply to the small cohort of children who commit the most serious offences. These are sexual offences with a maximum penalty of life and manslaughter, attempted murder, soliciting murder, and wounding with intent to cause grievous bodily harm.

Whilst in custody, children are supported to address the root causes of their offending behaviour and develop positive relationships through a range of health, behavioural and psychological programmes. They also have the opportunity to take part in educational and vocational activities which best meet their needs.

The introduction of secure schools also represents a key part of our vision for the future of youth custody. They will have education, wellbeing and purposeful activity at their heart in order to improve outcomes and reduce reoffending.

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)

We welcome the Committee's support for our proposals. We believe that enhancing the rigour of the remand decision-making process in this way will ensure that custody is truly a last resort for the child.

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)

We have considered whether there will be any disproportionate impacts from the proposals in the PCSC Bill. While some children with certain protected characteristics are over-represented across the youth justice system, the measures in the Bill have been carefully considered, weighed, and justified in the context of public protection and providing justice for victims. We do not think that any child will be disadvantaged due to a protected characteristic as a result. We will also pilot these measures and will monitor these closely including in relation to ethnicity.

In terms of mitigation, we have taken and continue to take action across the youth justice system to tackle disparities. Work in this area includes providing the tools and data to help frontline youth justice services to understand the needs of ethnic minority children, working with the Magistrates' Association to build awareness of disparity among sentencers, supporting the use of physical activity to improve outcomes for 11,000 ethnic minority children at risk of entering the criminal justice system and improving diversity and training of Youth Custody Service staff on difference and cultural needs.

The Government is taking a range of action on improving life chances and equality of opportunity overall which stands to benefit disparities, including work in developing its response to the Commission on Race and Ethnic Disparities. The Beating Crime Plan highlights work on early intervention for young people, such as the £200 million Youth Endowment Fund to improve the evidence base on what works in crime prevention and £45 million for specialist teams to support young people at risk of involvement in violence to re-engage in education.

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)

Youth court proceedings are not recorded or transcribed and it is the same for all proceedings in the magistrates' court. Audio recordings are currently only made in the Crown Court, and only when there is a right of appeal to the Court of Appeal.

The lack of a full recording in the youth court has no bearing on a child's right to appeal, which is unrestricted. Moreover, as with all appeals from the magistrates' court, the appeal is a full re-hearing with the evidence held again. As such, there is no clear need for a "comprehensive record" of initial proceedings.

The Committee's report states 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.'

However, it is not clear that recording full proceedings would address ethnicity disparities in the youth justice system. The most important part of proceedings in terms of identifying any evidence of racial discrimination is arguably the reasoning for the verdict and sentencing decision made by the court. This Government is already introducing a requirement, via clause 132 of the PCSC Bill, to record reasoning for youth remand decisions. In addition, there are already legislative provisions requiring that reasons for specific decisions be recorded in the court's register, including the reason for imposing a custodial sentence, remanding in custody or imposing bail conditions. Criminal Procedure Rule 24 also already requires justices' legal advisers to ensure that "an adequate record is kept of the court's decisions and the reasons for them". As a result, reasons for verdict are recorded and stored with the court papers.

There is no single quick fix to tackling racial disparities in the criminal justice system but as explained in our response to recommendation 7, the Government is taking a range of action on disparities directly in the youth justice system and more broadly on opportunities to address issues upstream.

There is also particular sensitivity of proceedings involving children. Youth courts have robust reporting restrictions in place, are not open to the public, and are meant to be less formal, to encourage the child's engagement with the process. Currently anyone including the media and victims, on payment of the appropriate fee to the transcription provider, can obtain a transcript of Crown Court proceedings as these are held in public.

Introducing audio recording across magistrates' courts – especially if recordings were to be made accessible, as is the case for Crown Court proceedings – would introduce the risk of sensitive information being disclosed and, in turn, risk undermining each of these safeguards.

We therefore do not believe that it is necessary or appropriate to introduce a recording requirement for youth courts at this time.

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)

Courts already collect information on all defendants, including the age, ethnicity and sex of children, in the Court Proceedings Database. The forthcoming departmental review of the use of custodial remand for children should help identify and address any racial disparity in remand decisions, for example by encouraging scrutiny processes in local areas to review routinely remand outcomes and monitor remand trends. We believe that the proposal in the PCSC Bill requiring the courts to provide and record a detailed justification for their decision to remand a child to custody will also aid transparency by ensuring that the reasoning behind remand decisions is articulated clearly.

The MOJ is continuing to work with the Youth Custody Service (YCS), the Youth Justice Board (YJB) and Her Majesty's Courts and Tribunals Service (HMCTS) to gain a better understanding of trends on remand. HMCTS is designing a new digital case management system which, when operational, will deliver better data capture and reporting.

Whole life orders

10. ***While the ECHR 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)

Currently, whole life orders (WLO) may only be imposed on offenders aged 21 or over. It is the most severe form of punishment available to the court and provides no prospect of parole for the rest of the offender's life (except possibly on compassionate grounds). We recognise, however, that there may be some rare cases where it may be appropriate to impose a WLO on younger adults who are aged 18-20.

The Bill makes it clear that in order for a person aged 18-20 to receive a whole life order, the seriousness of the offence or offences committed must be exceptionally high, even by

the standards of offences which would normally result in a whole life order. We anticipate this discretion will be exercised extremely rarely and the expectation is still that offenders aged under 21 will not receive a WLO.

This clause continues to allow for judicial discretion. Judges will likely be dealing with highly serious and unusual circumstances and so it is vitally important that judicial discretion remains in place to ensure that they are able to give sentences that are appropriate in all cases.

Incorporation of the UNCRC

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

Protecting vulnerable children is a priority for this government and the legal protection for vulnerable children in England is recognised as being amongst the strongest in the world.

The UNCRC is an international agreement setting out the civil, political, economic, social, and cultural rights of every child, regardless of their race, religion or abilities. We strongly believe in the principles laid out in the UNCRC, which we ratified in 1991. It is not standard practice in the UK for international treaties to be incorporated into domestic law. If a change in the law is needed to enable the UK to comply with a particular treaty, the Government introduces legislation designed to give effect to that treaty.

Our existing domestic legislation already gives effect to the UNCRC and safeguards the rights of children in this country, without the need for further incorporation. We have taken action to strengthen and enhance legislation, including the Children Acts of 1989 and 2004, secondary legislation and statutory guidance, to promote children's welfare.

Article 4 of the UNCRC recognises that implementation of the rights in the Convention may comprise of legislative, administrative and other measures, and recognises that it is for state parties to decide how best to implement the UNCRC.

We regularly report to the UN Committee on the great work we have been doing across the UK to implement the UNCRC and promote children's rights. We will be submitting our next report to the UN committee in 2022.