

REDUCING THE USE OF SHORT CUSTODIAL SENTENCES

Andrew Ashworth and Rory Kelly¹

In its White Paper *A Smarter Approach to Sentencing* (2020) the government proposed more severe sentences for violent and sexual offenders, tighter mandatory minimum sentences, more whole life starting points for murder, and other up-tariffing in the name of “public protection.”² The Police, Crime, Sentencing and Courts Bill 2021 includes provisions on all these matters, and their rationale needs careful scrutiny.

The White Paper also proposed a re-structuring of community sentences and a reduction in short custodial sentences. Thus:

While short custodial sentences may punish those who receive them, they often fail to rehabilitate the offender or stop reoffending. Evidence suggests that community sentences, in certain circumstances, are more effective in reducing reoffending than short custodial sentences. A Ministry of Justice 2019 study found that sentencing offenders to short term custody with supervision on release was associated with higher proven reoffending than if they had instead received community orders and/or suspended sentence orders.³

This leads on to proposals to re-vamp Community Sentence Treatment Requirements, promising more resources to increase the use of mental health, drug and alcohol treatment requirements,⁴ and more robust community sentences,⁵ with a funded pilot study to improve the delivery of pre-sentence reports.⁶ Developments along these lines would be particularly welcome for women offenders. Thus:

over three quarters of women sentenced to custody receive sentences of fewer than 12 months. Importantly, we know that custody can be particularly damaging for women, and outcomes are poorer for women than men. Rates of self-harm for women in custody are nearly five times higher than those of men. Almost 60% of assessed female offenders have experienced domestic abuse, with coercion a factor in some women’s offending. Women in custody are also twice as likely as men to report suffering from anxiety and depression, and more likely to report symptoms indicative of psychosis. Custody also results in significant disruptions to family life, with women more likely than men to be primary carers for dependent children, and this leads to an increased risk of intergenerational offending.⁷

¹ University of Oxford and UCL Faculty of Laws respectively. Our thanks to Lyndon Harris for comments on an earlier draft.

² Ministry of Justice, *A Smarter Approach to Sentencing* (2020 CP 292).

³ *ibid* para 96.

⁴ *ibid* para 118.

⁵ *ibid* para 123.

⁶ *ibid* paras 156-158.

⁷ *ibid* para 401.

The government's *Female Offender Strategy* (2018) is making slow progress,⁸ but it is evident that the policy of reducing the use of short custodial sentences – which was a key element in the 2020 White Paper – would improve the position of many women offenders.

However, the White Paper's policy of reducing the use of short prison sentences has not been carried over explicitly into the 2021 Bill, unlike the provisions on increased sentence severity. This is a missed opportunity: the White Paper sets out strong arguments in favour of reducing the use of short custodial sentences, as the two quotations above demonstrate, but there are no provisions in the Bill to implement such policies. Our purpose in this paper is to show how the policy of replacing short custodial sentences can be framed in statutory form.

1. THE ALLURE OF A PRESUMPTION

In 2010, similar concerns over short-term sentences led the Scottish Parliament to prohibit custodial sentences of three months or less “unless the court considers that no other method of dealing with the person is appropriate”.⁹ A review of the presumption in 2015 demonstrated that sheriffs thought it had had little impact in practice because custody was already a last resort.¹⁰ The review proceeded to comment:

Had the original six-month limit stood, the direct impact of the presumption might have been greater; but the fact that sentences of three months or less are already used relatively rarely is a key factor here.¹¹

The review also reported a national survey in which 24 of 72 sheriffs strongly agreed or agreed that the presumption made it more likely they would impose a community rather than a custodial sentence.¹² By comparison, 40 of 72 sheriffs reported the presumption had little or no impact and 20 reported the presumption had led them to impose slightly longer sentences on some offenders. We will return to this last point in the next section.

In 2019 the presumption was extended to apply to sentences of 12 months or less.¹³ Again, the rationale behind this extension was to allow offenders to serve an appropriate sentence in the community whilst promoting rehabilitative and wider preventive aims.¹⁴ The Scottish government was also mindful of the particular benefit this amendment would likely have for women offenders who are more likely to receive short custodial sentences than men.¹⁵

There may be some allure then in amending the 2021 Bill in line with the Scottish model of a presumption against short term sentences: this is a recent legislative step taken in response to similar, or the same, policy objectives. Yet even if the problems are the same, this does not necessitate that the solution can or should be the same too. We will next outline previous

⁸ Ministry of Justice, *Female Offender Strategy* (2018 Cm 9642).

⁹ Criminal Procedure (Scotland) Act 1995, s. 204(3A).

¹⁰ Scottish Government, *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* (2015) Paras 7.23-7.32.

¹¹ *ibid*, para 7.26.

¹² *ibid*, tbl 7.4.

¹³ 1995 Act amended by the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019/236 (Scottish SI), art. 2.

¹⁴ Scottish Government, “Policy Note: the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019”.

¹⁵ Scottish Government, “Equality Impact Assessment, Results: Extension of the Presumption against Short Periods of Imprisonment” p.5.

legislative approaches of relevance in England and Wales before turning to issues with fitting a presumption into the current sentencing regime. As will be seen, a presumption is not the ready-made solution it may at first appear.

2. PREVIOUS LEGISLATIVE APPROACHES

The problem of short-term prison sentences is not a new one. When the power to suspend a prison sentence was introduced into English law for the first time in the Criminal Justice Act 1967, courts were required to suspend every prison sentence of 6 months or less (subject to a few exceptions). One of the aims of this requirement was to reduce the use of short prison sentences: courts were instructed to decide whether or not a sentence of immediate imprisonment was necessary, then to decide its length, and then to comply with the 1967 Act by suspending the sentence if it was for 6 months or less. However, this approach was not a great success, because some courts that were looking to impose an immediate sentence of 4 or 6 months began to impose sentences that were slightly longer than the 6 months that required mandatory suspension – a sentence of 7 months or, most disrespectfully, a sentence of 6 months and a day.

When the suspended sentence was liberated by the Criminal Justice Act 2003 (it had previously been restricted to cases where “exceptional circumstances” were found), its use increased sharply. Taking the figures for males aged 21 and over, the number of suspended sentences in 2003 was 2,093. In 2006, the first full year of the new law, the number was 25,253; this number increased through 33,101 in 2012 to a peak of 43,140 in 2016. However, many observers believed that the sharply increased numbers of suspended sentence orders in the years from 2006 to 2016 showed that the courts were not applying the law faithfully, i.e. not reserving suspended sentences for offenders who would otherwise have gone to prison immediately.¹⁶

The history of the suspended sentence shows that mandatory suspension aimed at lowering the severity of sentences may have the opposite effect.¹⁷ As stated above, there is also some evidence from Scotland that the previous presumption against sentences below three-months gave rise to the same issue, with 20 of 72 sheriffs either agreeing or strongly agreeing that the presumption “has led me to give some offenders slightly longer sentences than I would otherwise have done”.¹⁸ In addition, the risk of such “sentence creep” has been recognised by the Australian Law Reform Commission as a “key concern” when considering the abolition of short-term sentences of imprisonment.¹⁹ One real danger then of introducing a presumption against short sentences in the 2021 Bill is that it could lead to more severe sentences. This would be the antithesis of its rationale.

3. A PRESUMPTION AND A THRESHOLD?

¹⁶ See more fully, Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (7th edn, Hart 2021) pp.230-233.

¹⁷ As recognised by AE Bottoms in his seminal article: “The Suspended Sentence in England 1967-1978” 21(1) BJC 1.

¹⁸ Scottish Government, *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* (2015) tbl 7.4.

¹⁹ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017) paras 7.160-7.166.

In Scotland, there is only the presumption against short term sentences and not an additional statutory custody threshold.²⁰ Transplanting a presumption into English and Welsh law may cause conceptual headaches and would likely necessitate appellate consideration of the interaction of the presumption and the threshold. The custody threshold is set out in section 230(2) of the Sentencing Code. It provides:

- (2) The court must not pass a custodial sentence unless it is of the opinion that—
 - (a) the offence, or
 - (b) the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

How then would a presumption against short sentences interact with the threshold? The underlying issue is the order of applying the provisions. It would seem odd to apply the presumption against short sentences before applying the threshold. In such a scenario, the judge would have to reach a decision against an immediate custodial sentence before establishing that such sentences were even on the table. The more logical order may be to first consider the custody threshold and then, if the case passes the threshold, to apply the presumption against short sentences. Yet this approach might also lead to problems. In a borderline case deserving of custody, the judge would first say the threshold had been crossed. In so doing they would by necessity have concluded a community order could not be justified. The judge would then have to consider a presumption that may result in a community order, which the court has already decided is unjustified. What is more, in practice, applying the threshold before the presumption may undermine the point of the presumption because the sentencing judge would already have come to a view on the most appropriate sentence. The threshold and the presumption appear to have functions too similar to fit easily together. The complexities of fitting a presumption into our current regime and the risk that it may lead to some longer sentences are good reasons to seek an alternative means to promote the use of community sentences over short-term imprisonment.

4. RECONFIGURING THE STATUTORY TEST FOR CUSTODIAL SENTENCES

If not a presumption against short sentences, how could the 2021 Bill be amended so as to promote the reduction of short custodial sentences? What we favour is amendment to s.230 of the Sentencing Code.²¹ First, subsection 2 would be amended to read:

- (2) The court must not pass a custodial sentence unless it is of the opinion that—
 - (a) the offence, or
 - (b) the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence [reserving prison as a punishment for the most serious offences].

This additional text in brackets reflects the Sentencing Council guideline on “Imposition of Community and Custodial Sentences” (hereinafter, the Imposition guideline), bringing the

²⁰ See, Neil Hutton, “Articulating the Custody Threshold” (2019) 82 Law and Contemporary Problems 1, 8.

²¹ For discussion of an alternative, withdrawn, amendment, see Police, Crime, Sentencing and Courts Bill, HC Deb 22 June 2021, cols 669-703.

rationale for the provision into plain view.²² It would reaffirm that the primary consideration when appraising whether the custody threshold has been crossed is the seriousness of the present offence, not previous convictions.²³ Previous convictions may have some relevance if they speak to the seriousness of the offence at hand, but they should not be used as a free-standing justification for crossing the custody threshold. The added text would also emphasise that imprisonment is the most severe sentence available in England and Wales. Short periods in custody should not be seen as an inevitable response to a person with a history of relatively minor offending.²⁴

We also propose adding a new s. 230(2A) along the lines of:

(2A) If the court imposes a custodial sentence of less than 6 months, it must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and, in particular, why a community order with a curfew requirement could not be justified.

This proposal is freestanding: it could be adopted even if one did not accept the proposed addition to s. 230(2). The proposed subsection would fit neatly into the 2021 Bill and would align to its policy rationale. The White Paper sought to make community orders more “robust” to promote both their punitive and rehabilitative capacity.²⁵ Clause 126 of the 2021 Bill would increase the total possible hours of curfew per day from 16 to 20 (but would set a weekly limit of 112 hours) and would increase the total period for which curfew may apply from 12 months to two years. In its explanatory notes, the government accepts that both amendments would increase the punitive bite of community orders.²⁶ When more severe alternatives to custody are available, the threshold for custody must be taken to have risen.

The proposed subsection would offer a number of advantages. First, it would focus the sentencer’s mind on the possibility of more severe sentences in the community. This would militate against the risk of more severe community orders replacing less severe community orders as opposed to replacing short sentences of imprisonment. The proposal would thus align to the government’s goal of reducing the use of short-term periods of imprisonment where a community sanction would be more appropriate. Secondly, if enacted, the proposal would provide an important opportunity for the Sentencing Council to revisit its Imposition guideline. We discuss the guideline in the following section.

The proposed duty would be capped to stop unnecessary discussion of the threshold where a case definitely crossed it. Why six months? One approach would be to apply the new s. 230(2A) to all sentences up to and including 12 months. That might be thought too ambitious (cf. the Scottish experience above) as a beginning. To apply the duty to sentences of up to 3 months would be too unambitious, since it would provide a relatively straightforward means of avoiding the statutory principles – by imposing an immediate custodial sentence of 4 months. Even the most enthusiastic appellate scrutiny of 4-month sentences might fail to rein in courts minded to circumvent the principles. The most suitable beginning would be to apply s. 230(2A)

²² (2016) p 7.

²³ See generally, Julian Roberts and Lyndon Harris, “Reconceptualising the Custody Threshold in England and Wales” (2017) 28 Criminal Law Forum 477.

²⁴ Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (7th edn, Hart 2021) pp.305-306.

²⁵ Ministry of Justice (n 2) paras 123-150.

²⁶ Explanatory notes to the Police, Crime, Sentencing and Courts Bill, paras 147-149.

to sentences of up to and including 6 months. This would encompass a substantial proportion of cases in the magistrates' courts, as well as a significant number in the Crown Court. However, it is important to emphasise that nothing in the proposed provisions prevents a court from imposing a sentence of 3, 6, or 12 months (as the case may be). The re-drafted statutory test and the principles attempt to shape the approach of judges and magistrates to these important decisions in light of wider proposed reform, but they leave a considerable margin of judicial discretion.

5. CONSEQUENCES FOR THE IMPOSITION GUIDELINE

Amendment to the custody threshold would necessitate changes to the Sentencing Council's Imposition guideline on custodial sentences. This should be seen as an opportunity as opposed to a burden. It is an opportunity for further crystallisation of the process of applying and crossing the threshold.²⁷ It is also an opportunity for the refinement of the substantive principles that should inform decisions on the cusp of custody. The present guideline does already include some appropriate principles to clarify the threshold and limit the inappropriate use of custody. These include, for offenders on the cusp, custody should not be imposed where this would have an impact on a defendant which would make a custodial sentence "disproportionate to achieving the aims of sentencing".²⁸ To these it may be added that a community sentence with a drug or alcohol requirements may be an appropriate alternative to a short or moderate custodial sentence when the offender is dependent on or has a propensity to misuse drugs or alcohol. This would align to the rehabilitative aspiration of the 2021 Bill and would reflect the current theft guideline.²⁹ Another principle is that it is not necessary to escalate from one community order range to the next most severe range: the appropriate range should be determined by the seriousness of the current offence. "As another example, the guidelines could reaffirm the position that previous convictions should not necessarily "result in an upwards adjustment" of custodial sentences. Otherwise, as the Council has recently put it, there is the risk of sentence inflation owing to the presence of the statutory aggravating factor regarding previous convictions."³⁰ This reaffirmation would reflect the approach the Council takes in the same guideline to the decision to impose a community order.³¹ Of course, the form of any amendment to the guideline would be contingent on the passage of the Bill. Clear principles would be of real value to sentencing judges in shaping their approach to an amended custody threshold.

6. CONCLUSIONS

We finish, as we started, by recalling the 2020 White Paper's support for arguments in favour of reducing the use of short custodial sentences. There are other arguments – such as prison overcrowding, which is particularly injurious during the Covid 19 pandemic – but we can conclude with two quotations from the White Paper: "Often, a well-structured community order can have a greater impact than a very short term of custody" and "We need to improve

²⁷ Ashworth and Kelly (n 16) pp. 222-224.

²⁸ Imposition guideline, p.7.

²⁹ Sentencing Council, "Theft Offences Guideline" (2015) p. 6.

³⁰ Sentencing Council, "Burglary Offences Consultation" (2021), p. 12, noting that "over half of those convicted for burglary in 2018 had three or more previous convictions or cautions for the same offence."

³¹ Imposition guideline p.3.

community-based orders to end the cycle of repeat low-level offenders that often leaves judges with no choice but to impose a custodial sentence".³² The reference to repeat, low-level offenders recalls the Justice Committee's statement, that:

we are disappointed at the Government's apparent acceptance of the use of short custodial sentences for repeat offenders. There is no evidence that a short prison term will tackle recidivism.³³

It seems from the 2020 White Paper that the present government agrees with this argument. To this it should be added that the opposition has voiced support in Public Bill committee for reconsideration of the custody threshold with a view to reducing the use of short-term imprisonment.³⁴ The proposed amendments to the 2021 Bill, particularly if supplemented with reform to the Imposition guideline, may go some way to limit the use of short-term custodial sentences.

³² Ministry of Justice (n 1) p. 36 and para 148 respectively.

³³ House of Commons, *Towards Effective Sentencing* (Justice Committee 2008) para. 107.

³⁴ Police, Crime, Sentencing and Courts Bill Deb 22 June 2021, cols 669-703.