



Professor Penney Lewis
Criminal Law Commissioner
Law Commission
52 Queen Anne's Gate
London
SW1H 9AG

27th April 2020

Dear Penney,

THE SENTENCING CODE – GOVERNMENT'S FINAL RESPONSE

Further to my predecessor's letter to Professor David Ormerod QC of 21 May 2019 which provided the Government's interim response to the Law Commission's Report on the Sentencing Code (Law Com No. 382), I am writing to provide the Government's final response.

Since the Government issued its interim response, in which we accepted the main recommendation of the Report to bring forward the accompanying draft legislation, we have introduced both the Sentencing (Pre-consolidation Amendments) Bill and the Sentencing Bill to parliament. We look forward to the enactment of the Sentencing Code in the near future.

I would like to thank the Law Commission for the enormous effort that has gone into producing the Report and accompanying legislation, and for the close working with my department throughout the course of the Sentencing Code project. Our consideration of the remaining recommendations made in the Report are set out as follows.

Recommendation 2. "We recommend that the power to make a hospital order, currently in section 37 of the Mental Health Act 1983 as modified by section 5A of the Criminal Procedure (Insanity) Act 1964 is redrafted (with modifications) into the 1964 Act so that all three powers available to a court under section 5A are contained within the 1964 Act."

The Mental Health Act 1983 ("1983 Act") provides the safeguards for patients detained under hospital orders as well as other orders throughout that Act. The 1983 Act also contains a number of interdependent provisions, including those that are tied to the hospital order, for example the power under section 41 to impose a restriction order in addition to a hospital order, where it is necessary to do so to protect the public from serious harm.

Transferring the power to make a hospital order to the Criminal Procedure (Insanity) Act 1964 ("1964 Act") would require that Act to cross-reference back to the 1983 Act in order for all other relevant and corresponding orders to be clearly available, and for the safeguards provided by the 1983 Act to continue to apply to patients made subject to a hospital order under the 1964 Act. The Government does not consider this approach to be practically advantageous, both in terms of access to powers related to sentencing mentally disordered defendants, or ease of understanding.

More widely, sentencing powers under the 1983 Act have been considered by the independent review of the Mental Health Act, which published its final report in December 2018. We are considering the review's recommendations and will be publishing a White Paper in response to the review in due course. As outlined in the Queen's Speech, we intend to bring forward new mental health legislation when parliamentary time allows.

Recommendation 3. "We recommend that the minimum sentence provisions contained in section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 are amended so as to allow a reduction for a guilty plea to the extent that the final sentence is no less than 80% of the prescribed minimum term, so as to bring them into line with the minimum sentence provisions contained in the Powers of Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 1988 and the Prevention of Crime Act 1953."

The introduction of the minimum sentence provisions contained in section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 were intended to send a clear message to offenders that carrying prohibited weapons would not be tolerated and would attract a suitably tough penalty. The government of the day considered that a reduction in sentence for a guilty plea that took a sentence below the minimum term should not apply in these cases, although a guilty plea reduction would still be available more generally to offenders in such cases.

Given recent increases in gun crime and the Government's determination to tackle it robustly through its Serious Violence Strategy, the Government considers that a reduction in sentence for a guilty plea that would take a sentence below the minimum term should continue not to apply in such cases.

We continue to keep firearms law and minimum sentencing provisions under review to ensure the courts have the powers they need to deal appropriately and proportionately with offenders.

Recommendation 4. "The Government should include warrants and adjournments for previously imposed orders with a particular focus on the places to which a child or young person may be remanded or held, in its ongoing review of the provisions regarding remand."

Once that review is complete the Government should consider amending the Sentencing Code to include general provisions which ensure a consistent approach in these areas."

The Government believes that custodial remand should only be used where necessary, and, on 23 July 2019, we publicly committed to undertake further work to consider the use of remand for children. We aim to identify options to reduce numbers of children on remand where appropriate, while ensuring victims and the public are protected. We recognise the need for a comprehensive, effective and clear youth remand framework, and we will include remand provision for warrants and adjournments for previously imposed orders within the scope of our ongoing remand review. We will fully consider this issue before deciding on next steps.

Recommendation 5. "We recommend that the Government consider whether the word "child" or an analogous phrase should be used when referring to persons convicted under the age of 18 in future legislation, and whether the Sentencing Code should be amended to adopt such language."

The Government is clear that under 18s are different to adults and it is important to take that into account during sentencing. We would be happy that, where possible, future Ministry of Justice legislation should refer to persons under the age of 18 as "children". When we are in a position of amending or creating legislation, we will consider this approach in conjunction with other government departments.

Recommendation 6. “We recommend that the Government review whether regulations under paragraph 35 of Schedule 1 to the Criminal Justice and Immigration Act 2008 should be made to allow courts periodically to review youth rehabilitation orders.”

The Government has no current plans to implement paragraph 35 of Schedule 1 to the Criminal Justice and Immigration Act 2008. We believe that current statutory provisions provide a good amount of flexibility in a Youth Rehabilitation Order (“YRO”), particularly as YROs can already be brought back to court for amendment by youth offending teams.

Recommendation 7. “The Government should exercise the powers under sections 85, 86 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend the text of references to an offence punishable on summary conviction by a fine or maximum fine of £5,000 or more to reflect the effect of sections 85 and 86 of that Act.”

Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“2012 Act”) removed limits on fines of £5,000 or more on summary conviction, and modified powers to create offences which are punishable on summary conviction by a fine with a limit of £5,000 or more so that they are punishable by a fine of any amount.

As mentioned in the Report, section 85 of the 2012 Act requires the text of each reference in existing legislation to an offence punishable on summary conviction by a fine of £5,000 or more to be read as a fine of any amount. The Magistrates’ Court Sentencing Guidelines clearly set out that the maximum level 5 fine for offences committed after 13 March 2015 is now unlimited. Therefore, the Government believes it is highly unlikely that a court would fail to identify the existence and effect of section 85 of the 2012 Act. We also note that the Sentencing Code includes a signpost to that section and a summary of its effect (contained in clause 122 of the draft Sentencing Code Bill as published in November 2018), which will provide further clarity in this area.

We do not consider amending all such references across existing legislation in line with this recommendation to be necessary or proportionate to the relatively minor benefit that such a change would deliver.

Recommendation 8. “We recommend that the distinction in nomenclature between imprisonment (for offenders aged 21 or over at conviction) and detention in a young offender institution (for offenders aged 18 to 20 at conviction) for the purposes of imposing a determinate custodial sentence be removed so that sentences for both age groups are expressed as “sentences of imprisonment”. This sentence of imprisonment should continue to be served in different institutions depending on the offender’s age.

We further recommend that the distinction in nomenclature between those aged 18-20 and 21 or over for the purposes of imposing life sentences (under common law, sections 224A, 225, 226 and 269 of the Criminal Justice Act 2003) be similarly streamlined, resulting in the sentence available under each of the relevant provisions being labelled “life imprisonment”. Again, these sentences should continue be served in different institutions, depending on the offender’s age.”

There is currently a statutory distinction between young adult offenders (aged 18 to 20 years old) and adult offenders (aged 21 or over). Under the current legal framework, young adults cannot be sentenced to imprisonment or committed to prison for any reason. This distinction was originally conceived to offer extra protection and support to young adults because of their relative youth and immaturity. The Government has acknowledged that young adults are a cohort with distinct needs relating to their maturity and has committed to developing approaches that recognise and respond to their particular needs. We are continuing to consider the utility of the current legal framework for detention of young adults and the

changing landscape of the prison estate and the evidence on young adults' maturity, most of whom are currently held in institutions that are dually designated as both young offender institutions and prisons. We are therefore not minded to adopt the Law Commission's recommendations on this issue at this time.

Recommendation 9. "We recommend that the Government replace the phrase "fixed by law" with a more transparent statutory phrase, such as "the mandatory life sentence for murder" or "murder, or offences punishable as murder"."

"Fixed by law" is a long-standing and well-understood phrase and the Government is not aware that its use causes any confusion. As murder is the only offence which attracts a mandatory life sentence, we are concerned that making such a change would result in a list of 'mandatory' sentences which include murder, rather than murder existing on its own as it does currently under the *sui generis* category "fixed by law". As such, we are not minded to make this change and intend to retain the status quo.

Recommendation 10. "We recommend that the Government examine whether the definition of mandatory sentence requirement contained in clause 399 ought to include reference to sentences for special custodial sentences for offenders of particular concern (under clauses 265 and 278)."

A special custodial sentence for certain offenders of particular concern ("SOPC") only applies where the court imposes a sentence of imprisonment on an offender aged 18 or over for a specified terrorism or sexual offence, and certain conditions are met. The court would have the option to consider imposing other types of sentence in such cases, instead of a sentence of imprisonment (for example, a community order). The Government does not consider a SOPC to be a mandatory sentence and therefore does not agree that a reference to SOPCs should be included in the definition of mandatory sentence requirement in the Sentencing Code (contained in clause 399 of the draft Sentencing Code Bill as published in November 2018).

Recommendation 11. "The Government should review section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and whether the power should be exercisable by a differently constituted court."

Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 ("2000 Act") allows the Crown Court to vary or rescind a sentence or other order imposed on an offender by the Crown Court within 56 days of the date on which it was made, provided that an appeal or application for leave to appeal against such a sentence or order has not been determined.

As mentioned in the Report, the power to alter such a sentence or order under section 155 of the 2000 Act may only be exercised if the court is constituted as it was when the sentence or order was imposed. In *R v Warren [2017]* the Court of Appeal set out their view that the power under section 155 is available where the judge has made a material error in the sentencing process (for example if the court has overlooked certain statutory provisions), and should not be used to alter the nature or length of the sentence. In the interests of efficiency, the Government considers it beneficial for such an exercise to be conducted by the court as it was originally constituted, as the court will already be familiar with the full circumstances of the case before it, and will be able to focus attention on the points of law in regard to the process.

Recommendation 12. "We recommend that amendments to the Sentencing Code are enacted so that:

- 1) wherever possible, any provision which is being inserted into, or amending, the Sentencing Code should apply to all cases where the offender is convicted on or after the commencement of that provision;**

- 2) in all cases the provision being inserted into, or amending, the Sentencing Code should be drafted in such a way that the provision in the Code makes clear to what cases it applies;
- 3) the power under section 104 of the Deregulation Act 2015 is used to replace references to the day of commencement with the date on which commencement occurred;
- 4) where the commencement date is not known upon enactment the amendment is inserted in schedule 22 until such time as it is brought into force.”

The Government welcomes any measures to reduce complexity in sentencing law and agrees that a consistent and clear approach to commencement will assist the courts in determining the availability of disposals, and the extent of their powers in individual cases. We agree that it will be ideal to establish a consistent approach to ensure that the full benefits of the Sentencing Code and the “clean sweep” can be retained.

Ultimately, future changes to sentencing procedural law and the manner in which they are enacted and commenced will be a matter for the parliament of the day, ensuring that any such changes do not contravene the general common law presumption against retroactivity, and accord with human rights protections against retroactive criminalisation and retroactive punishment (in particular those provided by Article 7 of the European Convention on Human Rights).

Yours ever,

A handwritten signature in black ink that reads "Robert Buckland". The signature is written in a cursive, slightly slanted style.

RT HON ROBERT BUCKLAND QC MP