

## SENTENCING BILL

### EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

#### Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Sentencing Bill (“the Bill”). It has been prepared by the Ministry of Justice. On introduction of the Bill in the House of Commons, the Secretary of State for Justice (the Rt Hon Alex Chalk KC MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
2. The Bill is a targeted legislative vehicle that ensures tougher sentences for those convicted of the worst murders and promotes the use of alternative rehabilitation methods in the community through limiting use of potentially counter-productive short sentences of immediate custody and expanding the use of home detention curfews.
3. The Government considers that clauses of, or Schedules to, the Bill which are not mentioned in this memorandum do not give rise to any human rights issues. The Convention rights raised by provisions in the Bill are prohibition on torture, inhuman or degrading treatment or punishment (Article 3); liberty and security of person (Article 5); fair trial (Article 6); no punishment without law (Article 7); private and family life (Article 8); and discrimination (Article 14).

#### Convention article analysis

##### **Clause 1 (*mandatory life sentences: whole life orders*)**

4. Clause 1 makes amendments to the framework for the imposition of whole life orders (WLOs) on offenders convicted of murder. The measure creates a new duty on the court to impose a WLO in specified circumstances, unless there are exceptional circumstances relating to the offence (or the combination of the offence and one or more offences associated with it), or the offender, which justify not making a WLO. This new duty applies to all cases for which a WLO is currently the starting point (that is, the cases currently listed in paragraph in paragraph 2(2) of

Schedule 21 to the Sentencing Act 2020) and, in addition, cases of a single murder involving sexual or sadistic conduct (currently subject to a 30-year starting point).

5. The new measure will apply to all offenders aged 21 or over at the time the offence is committed, who are sentenced after commencement. This includes those who have committed murder prior to the enactment and commencement of the legislation, but not yet been convicted and/or sentenced.
6. Articles 3, 5, 7 and 14 are relevant to this measure.

### Article 3

7. WLOs engage Article 3. WLOs are compatible with Article 3 provided there is a prospect of release and possibility of review. Offenders who receive a WLO as a result of this measure will continue to be eligible for release on exceptional compassionate grounds by the Secretary of State under section 30 of the Crime (Sentences) Act 1997. The Government therefore considers this measure to be compatible with Article 3 (*Hutchinson v. UK* [2016] ECHR 021 at [42]; *R v McLoughlin* [2014] EWCA Crim 188).

### Article 5

8. The provisions may result in more offenders receiving WLOs. This potential increase in deprivation of offenders' liberty engages Article 5. Detention of convicted murderers, however, falls within Article 5(1)(a) which permits the lawful detention of a person after conviction by a competent court. The provision also retains judicial discretion by virtue of the "exceptional circumstances" exclusion and need for judicial interpretation of the scope and application of the categories of case for which the court will be required to impose a WLO, unless there are exceptional circumstances. Therefore, it does not give rise to a risk of arbitrary detention. For these reasons, the Government considers this measure to be compatible with Article 5.

### Article 7

9. This measure has retrospective effect as the changes are to apply to those persons who may have committed offences before commencement but who have not yet

been charged, convicted or sentenced. Article 7, however, is not breached as the only penalty that may be imposed before and after commencement remains a life sentence (*Coeme and Others v Belgium* (2000), *R v Uttley* [2004] UKHL 38).

#### Article 14

10. Article 14, read with Article 5, is potentially engaged because it may give rise to a situation where offenders sentenced after commencement are treated less favourably than those sentenced prior to commencement. Offenders cannot, however, compare themselves to those sentenced under a different sentencing regime (see at [68]) and in any event any resulting discrimination would be justified (*Minter v UK* (2017) 65 EHRR SE6; *R v Docherty* [2016] UKSC 62). The Government therefore considers this measure to be compatible with Article 14.

#### **Clauses 2 to 5 (*Special custodial sentence for sex offenders of particular concern*) and Clause 7 (*Removal of early release for certain sex offenders*)**

11. These clauses bring those who commit serious sexual offences, but do not receive life or an extended sentence, into the mandatory sentence for offenders of particular concern (“SOPC”). The measures also alter the release point of offenders who receive an extended determinate sentence (“EDS”) or a SOPC. In both cases, instead of being referred to the Parole Board at the two-thirds point of the requisite custodial term, offenders will serve the entire term in custody before being released on licence. For offenders under the age of 18 years, the sentencing provision will only apply to offences committed on or after commencement. For adults, it will apply where the conviction for the offence occurs on or after commencement. The release provisions will apply to offenders who may have committed offences prior to commencement of the provisions where the sentence for the offence is imposed on or after commencement.

#### Article 5

12. Article 5 is engaged because offenders who meet the statutory criteria will be detained, or will potentially be detained, in prison for a longer period of time until

the end of their custodial term. However, the detention will be in accordance with the sentence of imprisonment imposed by the court.

13. The whole of a determinate sentence of imprisonment is the punishment/penalty imposed by the court for the commission of an offence. Per *R (Whiston) v SOS for Justice* [2014] UKSC 39 and *Brown v UK* (Application No. 986/04, 26 October 2004), the whole of the custodial period of an extended sentence is the penalty part of the sentence and any detention during that period is therefore in accordance with Article 5(1)(a). Prisoners may, consistently with the Convention, be required to serve the entirety of the sentence passed, if that is what the domestic law provides. Detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The Government is therefore satisfied that Article 5 is engaged by these provisions but not breached.

#### Article 7

14. Although Article 7 is engaged, as some adult offenders will be affected who have committed the relevant serious sex offences but not yet been sentenced, there is no breach of Article 7. This is because these new provisions have retrospective effect but do not form part of the offender's "penalty" within the meaning of Article 7. This is the approach conventionally taken for application of sentencing and release changes, to ensure consistency.

15. Removal of the potential of early release for offenders subject to EDS and SOPC which for some will have retrospective effect does not constitute the imposition of a harsher penalty. Release provisions are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 - *Uttley v UK* (Application No. 36946/03). When the nature and purpose of a measure relate to a change in the regime for early release, this does not form part of the 'penalty' within the meaning of Article 7. The Supreme Court also affirmed this position in *R v Docherty* – that the release conditions applied to a sentence are not part of the "penalty" for the purposes of Article 7.

16. Prior to these clauses having effect the only available sentence for children would be a Detention and Training Order which carries a maximum term of 2 years. Therefore, for offenders who are aged under 18 the Government is applying the SOPC to offences committed after commencement only with fully prospective application, thus avoiding any potential Article 7 infringement.

#### Article 14

17. Article 14 is engaged as, coupled with Article 5, the proposals will provide for different treatment in relation to the release of prisoners serving analogous sentences. However, the type of offending is not analogous, and any differential treatment is justified by the nature and consequences of the offending.

18. We recognise that there may be groups with certain protected characteristics who will be over-represented in the cohort – for instance, rape can only be committed by men. However, offenders will be subject to these measures due to the seriousness of the offence for which they have been convicted rather than as a result of the personal characteristics or status of the offender (*Gerger v Turkey* (Application No. 24919/94)). As such they do not have protected “status”.

19. The Government considers that there is objective justification to treat serious sexual offenders differently than other offenders, given the unique nature of serious sex offences, the significant amount of public interest and concern relating to these offenders at present, and the need to improve confidence that the justice system appropriately addresses and punishes these types of offending. The measures are focusing on those offenders whose offending is the most serious.

20. In terms of youth offenders, punishment does not form a part of the youth justice principles but instead the focus is on preventing further offending. As such those serving custodial sentences for these offences are subject to relatively short terms or may receive community sentences. These new measures are justified because sufficient time is required to properly address the attitudes and behaviours that has led to the serious sexual offending – additional time is necessary for supervision, therapy and interventions.

21. Decisions of this nature relating to early release of offenders have been found by the Courts to be an appropriate matter for Parliament to deal with by adjusting early release measures to ensure public confidence is not undermined – see *Re: Findlay v Secretary of State for the Home Department* [1985] AC 318 at 333 and *R (Young) v Governor of HMP Highdown and SSJ* [2011] EWHC 867 (Admin) at [27]. Given the wide margin of appreciation afforded to States in the arena of penal policy where the proportionality test of ‘manifestly without reasonable foundation’ test is afforded to objective justification (*R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26 [160]-[162]), it is considered these changes to sentencing and release measures are objectively justified.

22. It is therefore the Department’s position there is no unlawful interference with Article 14.

**Clause 6 (*Duty to impose suspended sentence order for sentences of 12 months or less*)**

23. Clause 6 introduces a presumption in favour of suspending short sentences of custody of one year or less. In passing sentence, if a court is of the view that a custodial sentence of 12 months or less is appropriate, it should suspend the sentence unless there are exceptional circumstances justifying the imposition of immediate custody. Additionally, the court need not suspend the sentence when dealing with an offender who has breached a court order, commits further offences whilst on licence or subject to post-sentence supervision, or the court considers that making the order would put an individual at a significant risk of harm. Where an offender is in custody at the time of sentence in respect of another matter (including where an offender is remanded in custody in another matter), it may be that it is inappropriate for a court to impose a suspended sentence order, so the presumption does not apply. Again, where the offender’s time spent remanded in custody or subject to a qualifying curfew means that, if the offender receives a sentence of immediate custody, they will be released following the sentencing hearing, it may be that a suspended sentence order is inappropriate, so the presumption does not apply. Where the presumption does not apply, the court

should continue to consider whether it may be appropriate to suspend the sentence by reference to the current sentencing guidelines.

24. The new measure will apply to all offenders aged 18 or over who are convicted after commencement. This includes those who have committed offences prior to the commencement of the legislation.

#### Article 7

25. The measure has retrospective effect as the changes are to apply to those persons who may have committed offences before commencement but who have not yet been charged, convicted or sentenced. However, despite having retrospective effect, the clause does not contravene Article 7, since it will not lead to anyone being sentenced to a harsher penalty than could have been imposed at the date of the commission of their offence.

26. The court has recognised the principle that, where a more lenient maximum sentence is in force at the time of sentence than at the time of the offence (see *R v Docherty* at [54]), the court is limited to the more lenient maximum sentence. Again, this principle is not engaged as the measure does not affect the maximum sentence or type of sentence available to the court.

#### Article 8

27. Supervision pursuant to a suspended sentence order will potentially engage the right to respect for private and family life, as guaranteed by Article 8. Per Article 8(2), such an imposition is justified because suspended sentences have the legitimate aim of crime prevention. Supervision is one way in which the Government takes steps to protect the public from crime and keep the public safe. Where supervision does engage Article 8, it represents a proportionate interference with an offender's rights under Article 8 in realising this aim. Moreover, the interference with a person's right to respect for private and family life is less severe than the interference that would be caused by a sentence of immediate custody, which is more likely to have been imposed under the current framework.

#### Article 14

28. Those sentenced prior to the entry into force of this measure may consider that their Article 14 rights, taken together with their Article 5 rights, are engaged on the basis they have been treated less favourably than those sentenced after the entry into force of the Act when receiving an immediate custodial sentence of one year or less.

29. In *R v Docherty*, the Court addressed a comparable situation, concluding firstly that it was doubtful that an Applicant would fall into 'other status' for the purpose of determining a discrimination claim, and second that in any case different treatment caused by a change in criminal law was clearly justified (see [63]). Accordingly, any different treatment that would occur due to the change in sentencing procedure would be justified.

**Ministry of Justice**  
**14 November 2023**