***Police, Crime, Sentencing and Courts Bill*: Supporting the use of community based sentences in the place of short prison sentences.**

**Briefing ahead of Lords Committee stage from 20th October 2021**

1. **Background**
   * This document has been produced by the Centre for Crime and Justice Studies (hereafter ‘the Centre[[1]](#footnote-1)’) to assist members of the House of Lords in their consideration of support for an amendment tabled by Lord Ponsonby, to *Police, Crime, Sentencing and Courts Bill* at the Lords Committee stage (beginning October 20th 2021).
   * The purpose of the amendment is to encourage sentencers to use community based sentences rather than short prison sentences.
   * It proposes changes to the *Sentencing Act 2020* to support this aim.
   * The amendment strengthens the custody threshold as a principled starting point for reducing the current use of custody for lower level offences. We favour this over potentially ‘bolder’ measures such as a presumption against or ban on short sentences. Any measure to restrict access to short prison sentences in the current climate risks further exacerbating uptariffing to longer length prison sentences.
   * An earlier version of this amendment was tabled by Alex Cunningham MP in the Commons Bill Committee and withdrawn prior to a vote ([see col 699-704](https://hansard.parliament.uk/commons/2021-06-22/debates/0fbeb914-48ed-45e4-9619-964ae7499f17/PoliceCrimeSentencingAndCourtsBill(EighteenthSitting))).
   * The Centre has a long-standing commitment to developing evidence-based policies to sustainably reduce imprisonment. This document specifically draws on work exploring the sentencing options for reforming the use of short prison sentences, undertaken with the support of the Lloyds Bank Foundation for England and Wales. We would like to acknowledge the input of Professor Andrew Ashworth of the University of Oxford in drafting the substance of the amendment itself. Responsibility for the content of this document rests with the Centre.
2. **Proposed amendment**

**Principle aim:** To reduce the use of custody for less serious lawbreaking for which there are better responses in the community.

**Making the case**

* Reserving imprisonment for serious offences is already established in statutory terms.[[2]](#footnote-2) Despite this, in practice, people continue to be routinely imprisoned for low-level law breaking, fuelling an ‘expensive merry-go-round’ of multiple wasteful short prison sentences.[[3]](#footnote-3) Pre-pandemic [around half](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882163/Offender_Management_Statistics_Quarterly_Q4_2019.pdf) (46%) of those sentenced to custody were subject to short sentences of less than or equal to 6 months.
* The case for reform to increase the use of community based sentences in the place of short prison sentences can be made on multiple grounds: proportionality, effectiveness at reducing reconvictions[[4]](#footnote-4), morality, addressing underlying needs such as problematic drug use[[5]](#footnote-5), and ensuring better outcomes for women caught up in criminal justice processes in particular. Other considerations include value-for-money, the additional demands the chaos and churn short stays of imprisonment places on prison staff time, and deteriorating conditions in the prison estate.
* There is a basis for cross party support on this issue. The Government’s A *Smarter Approach to Sentencing* White Paper acknowledged short prison sentences offer only ‘temporary respite from offending behaviour’, ‘at best providing limited public protection, as most offenders continue to reoffend following release.’[[6]](#footnote-6) However, the government did not taken the opportunity to legislate on this matter in the Bill that followed.

The amendment proposed:

* Builds on principles already accepted in sentencing guidelines and enshrines these into legislation to better clarify the currently opaque statutory custodial threshold. Specifically it intends to better ensure:
  + Sentencers are appropriately reserving custody for serious offences by better clarifying the assessment sentencers are required to make.
  + The impact of imprisonment on dependent children is considered in the sentencing of primary carers. [[7]](#footnote-7)
* Limits the relevance of previous convictions in determining custodial sentences. For the principle of reserving imprisonment for serious offences to be met in practice, it would be helpful to separate the issue of persistent low level offending from that of serious offending. Persistence is a key driver of the current use of short term custody and needs to be tackled head on. The amendment proposed does not rule out previous convictions having some relevance if they speak to the seriousness of the offence at hand. However, they should not be used as a free-standing justification for crossing the custody threshold. This clause intends to emphasise that short periods in custody should not be seen as an inevitable response to a person with a history of relatively minor offending.
* Intend to help shape the approach of judges and magistrates considering a custodial sentence in a substantial proportion of cases which currently result in a short prison sentence. However, it is important to emphasise that nothing in the proposed provisions prevents a court from imposing a custodial sentence of any length.
* Can be further built on in the future, rather than being the final word.

1. **Wording of the amendment**

**After Clause 124**

LORD PONSONBY OF SHULBREDE

Insert the following new Clause—

**“Short custodial sentences**

(1) The Sentencing Code is amended as follows.

(2) In section 230 (threshold for imposing discretionary custodial sentence), after subsection (2) insert—

“(2A) If the court finds that the offence is so serious that neither a fine alone or a community sentence can be justified for the offence, it must state its reasons for being satisfied that the offence is so serious (having regard to the considerations in subsection (2B)), and, in particular, why a community order with appropriate requirements could not be justified.

(2B) In this determination, the court must take account of the following principles—

(i) passing the custody threshold does not mean that a custodial sentence should be deemed inevitable;

(ii) custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime;

(iii) sentences should not necessarily escalate from one community order range to the next at each sentencing occasion;

(iv) the decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s);

(v) section 65 (a relevant previous conviction to be treated as an aggravating factor) should not be interpreted so as to meet the custody threshold in respect of the sentence for one or more offences that would not themselves justify custody; and

(vi) where the offender being sentenced is a primary carer for a child, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.”

(3) After section 230, insert—

**“230A Impact of custodial sentence on child or unborn child**

(1) This section applies where a court is considering imposing a custodial sentence on—

(a) a primary carer for a child, or

(b) a pregnant woman.

(2) The sentencing court must—

(a) consider the impact of a custodial sentence on the child or unborn child, and

(b) presume (subject to victim impact and any other sentencing considerations) that a non-custodial sentence is in the best interests of the child or unborn child.

(3) In this section—

(a) “child” means a person under the age of 18, and

(b) “primary carer” means a person who has primary or substantial care responsibilities for a child.””

1. **What about a presumption against short sentences?**

* Another potential formulation of an amendment on this issue is introducing a presumption against short sentences, building on Labour’s 2019 manifesto commitment of a presumption against prison sentences of up to six months excluding violent and sexual offences.
* A presumption has advantages. It is bold sounding, gives clarity to others over the target and builds on the considerable consensus that short prison sentences are not desirable.
* However, given the long-term trend of increased prison sentences, and that this is likely to be exacerbated in the coming period in the wake of this Bill, a presumption at this point runs a significant risk that some lawbreakers will receive a longer prison sentence as a result of any restriction on short prison sentences.
* In addition, introducing a presumption against custody, based only on specifying the prison sentence length to which the presumption applies with exemptions for certain serious lawbreaking such as violent and sexual offences, is likely quickly to run into difficulties in practice. It could create circumstances whereby some of those committing low level (but persistent) lawbreaking, such as theft, would be subject to longer prison sentences of six months plus than the potentially shorter sentence received for violence against the person or sexual offences, for which the whole sentencing tariff still applies. If additional work aligning sentences of imprisonment with a clear and restrictive purpose is not done, such inconsistencies could result in a ratcheting up of sentencing generally, significantly backfiring if the reform’s intended target is reducing the use of imprisonment in less serious cases. This has the potential to bring the whole sentencing system into disrepute.
* Reducing short prison sentences has been a long term and vexed target for reform. A strength of this formation is it builds on already established sentencing guidance. This should be helpful to getting and keeping sentencers on board, who will ultimately be charged with implementing it. A second strength is that the amendment avoids introducing well-intentioned reforms intended to tackle high short prison sentences that in practice have had unintended consequences:
* It isn’t introducing another ‘tough’ new community based sentence to act as alternative to custody. England and Wales already has more alternatives to custody than most European countries but a higher prison population.
* It does not prohibit / ban / bar short prison sentences. This has been shown to lead to sentence creep, for example in Western Australia a ban on prison sentences of up to six months resulted in an increase in prison sentences over six month for law breaking that would previously had received a shorter prison sentence.

1. **Longer term considerations**

* Over the longer-term the reform of the custody threshold could be one element in a shift to ground imprisonment on a more coherent footing with public safety more broadly. In the medium term, this could include Labour supporting calls for a coherent, comprehensive review of sentencing, considering matters such as the huge escalation of prison sentencing across the board. These would offer far more solid grounds on which to make inroads into high prison populations and their problematic consequences.

**Centre for Crime and Justice Studies**

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1. The Centre is an independent educational charity established in 1931. Through diverse, inclusive and durable collaborations, we work to advance knowledge of crime and criminal justice, to champion evidenced and just policy and practice, and to support good legislation. [↑](#footnote-ref-1)
2. First set out in *Criminal Justice Act 2003*, s. 152(2), superseded by *Sentencing Act 2020* s. 230 (2) [↑](#footnote-ref-2)
3. Foreword to HM Inspectorate of Probation (2019) *Post-release supervision for short-term prisoners: The work undertaken by Community Rehabilitation Companies. A thematic inspection by HM Inspectorate of Probation,* Her Majesty’s Inspectorate of Probation: Manchester [↑](#footnote-ref-3)
4. Mews, A., Hillier, J., McHugh, M. and Coxon, C. (2015), *The impact of short custodial sentences, community orders and suspended sentence orders on re-offending*, Ministry of Justice: London. [↑](#footnote-ref-4)
5. Black, C. (2020) Review of drugs policy. Executive summary. [↑](#footnote-ref-5)
6. Ministry of Justice (2020) *A Smarter Approach to Sentencing,* Ministry of Justice: London [↑](#footnote-ref-6)
7. Please note the wording of this clause has been updated since the Commons Bill Committee tabled amendment. This update reflects the Joint Committee on Human Rights [proposed amendments](https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/155167/judges-must-consider-interests-of-child-when-sentencing-mother-urges-committee/) on this issue. These were separately tabled in the Commons Bill Committee and may be reintroduced in the Lords. [↑](#footnote-ref-7)