***Police, Crime, Sentencing and Courts Bill* amendment 82A to encourage use of community based sentences over short prison sentences, from the Centre for Crime and Justice Studies**

1. Background

This document has been produced by the Centre for Crime and Justice Studies[1] to support amendment 82A to the *Police, Crime, Sentencing and Courts Bill* at the report stage.

Earlier versions of this amendment were tabled by Alex Cunningham MP in the Commons Bill Committee (see col 699-704) and by Lord Ponsonby of Shulbrede in the Lords Committee stage (from col 72). Both were withdrawn prior to a vote.

2. Summary

The purpose of this amendment is to encourage sentencers to use community based sentences rather than short prison sentences.

It would reform the *Sentencing Act 2020*, the legislation governing how judges and magistrates decide on imprisonment in the first place.

It offers a practical, principled way forward that can be further built on in the future. It aligns with cross-party ambition to reduce the use of wasteful short prison sentences.

This amendment reforms on the basis of length of sentence and on clarifying the principles for imposing imprisonment. We believe this is a more powerful, impactful and coherent formulation than a presumption alone.

3. 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] 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] Pre-pandemic around half (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

[1] The Centre for Crime and Justice Studies 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.

[2] First set out in *Criminal Justice Act 2003*, s. 152(2), superseded by *Sentencing Act 2020* s. 230 (2)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

at reducing reconvictions[4], morality, addressing underlying needs such as problematic drug use[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.

- In addition to the long standing case for reform, a practical reform to sentencing makes sense at a time when changes are being made to the available sentencing options. This bill will see extended curfew requirements available to community sentences. This increases the punitiveness of the available options in community. The line at which custody is imposed should be adjusted upwards to reflect this change. Without this change we will see more punitive options in the community, alongside a continued reliance on short prison sentences. This is undesirable for reasons set out in government's sentencing White Paper. That 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] This reform is a practical way to realign the custody threshold with the more punitive range of options available in the community as a result of this bill. As well as to help to mitigate against more punitive community sentences simply further fuelling wasteful prison demands via compliance issues, rather than because the original offence demanded it.

The amendment proposed does two things.

Firstly it emphasises short periods in custody should not be an inevitable response to someone with a history of relatively minor offending. 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, it clarifies they should not be used as a free-standing justification for crossing the custody threshold.

Secondly it requires sentencers to state the reasons for giving a prison sentence up to and including six months. When a prison sentence of six months or less is being considered these are the cases closest to the cusp of custody. Asking sentencers to state reasons for giving a sentence of up to six months is a practical way to reinforce to the courts the desired emphasis on community based options over imprisonment, whilst maintaining sentencer discretion.

Taken in combination, this amendment intends to help shape the approach of courts considering a custodial sentence in a substantial proportion of the cases which currently result in a short prison sentence.

[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.
[5] Black, C. (2020) *Review of drugs policy. Executive summary.*
[6] Ministry of Justice (2020) *A Smarter Approach to Sentencing,* Ministry of Justice: London

However, it is important to emphasise that nothing in the proposed provisions prevents a court from imposing a custodial sentence of any length.

That repeat short sentences is a long standing issue should not be a cause for fatalism. This reform is a meaningful step in the right direction. It can be further built on in the future, rather than being the final word.

4. Wording of proposed amendment

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 imposes a custodial sentence of six months or less, it must state its reasons for being satisfied that the offence is so serious that neither a fine alone nor a community sentence can be justified for the offence (having regard to the considerations in subsection (2B)), and, in particular, why a community order 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) previous convictions are only relevant to the extent they affect the seriousness of the offence at issue.

5. Responses to issues raised in Committee Stages

<u>Is a presumption against six month prison sentences a simpler and bolder reform option than that proposed here?</u>

A presumption against prison sentences up to and including six months sounds temptingly straightforward and is the more familiar option. But on closer inspection 'a presumption is not the ready-made solution it may at first appear'[7]:

- It has proven to be an ineffective test in practice for reducing a reliance on short term imprisonment. In Scotland for example, a presumption failed to significantly affect sentencing decision making or outcomes.[8]
- It risks uptariffing to longer prison sentences for some as a result of placing any restriction on short prison sentences – significantly backfiring on the intended target for reform.
- It may not be straightforwardly workable within our current sentencing system. How would a presumption work with / alongside our current custody threshold in sentence decision making? Would introducing a separate sentencing regime for short prison sentences be desirable or coherent in our system of continuous and overlapping sentencing options?

The formulation offered here reforms on the basis of length of sentence and on clarifying the principles for imposing imprisonment. This is more powerful, impactful and coherent than a presumption alone.

Does this amendment repeat sentencing guidelines? Will it do more than the current arrangements?

This amendment builds on principles currently spread across several separate sentencing guidelines. It does not simply repeat them. It brings them together for the first time and magnifies their relevance at the point of decision making about the custody threshold.

It is fair to say the current arrangements appear robust in theory. Imprisonment is already reserved for 'serious' offences and custody is already described as a 'last resort'. As principles, these sound restrictive but have not proven to be so in practice.

The current arrangements regarding the custody threshold are an unsatisfactory test because they can be interpreted so as to allow a custodial sentences when someone has experienced all other possible forms of sentence, even though the offence is not serious.

This reform clarifies that those committing repeat low level offences should be dealt with in the community as a default. It looks to build consensus about a use of custody that more closely aligns with evidence about better outcomes. Evidence the government's own White Paper has acknowledged:

> "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

[7] Kelly, R; Ashworth, A; (2021) *Reducing the use of short custodial sentences.* Archbold Review. Issue 7

[8] Anderson, S. et al (2015), Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences, Scottish Government

> 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." [9]

This reform would be an important step in the right direction, rather than a comprehensive solution to the issue of problematic short sentences.

It is also obviously not as directive as a ban on short prison sentences. We believe a ban is both undesirable and unworkable as well as being unlikely to resolve the issues underlying the current use of short term prison sentences. Rather we hope this reform offers a practical way forward that helps focus minds, builds consensus, and acts as a further impetus to improve the available support to address underlying issues in the community. There are no simple solutions.

Acknowledgements and contact details

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[9] Ministry of Justice (2020) *A Smarter Approach to Sentencing,* Ministry of Justice: London