

‘STOPPING SHORT?’ SENTENCING REFORM AND SHORT PRISON SENTENCES

by **Helen Mills**

[...] there is a very strong case to abolish [prison] sentences of six months or less altogether, with some closely defined exceptions, and put in their place, a robust community order regime.

Former Justice Secretary David Gauke 18 February 2019

I believe [moving away from short prison sentences] is a balanced, considered and, crucially, evidence-based approach to sentencing policy [...] And I would hope that the next Prime Minister would continue with this reform agenda.

Former Justice Secretary David Gauke 18 July 2019

‘Abolish’ is not standard terminology for justice secretaries talking about their intentions for sentencing reform. The notion put forward in February this year, of taking a firmly established element of sentencing practice, questioning its value, and saying we should do something else instead, seems a bold one. Not since Kenneth Clarke’s tenure in 2010, has there been a justice secretary who presented a reform agenda in sentencing intended to reduce the numbers imprisoned.

Six months on, the future of sentencing reform as a government agenda is, at best, uncertain. Will this policy agenda survive the significant personnel changes of a new Prime Minister and a new ministerial team at the Ministry of Justice? Will it rise above or fly under the radar of our distracted political times?

Whatever the answer to these questions and whatever the future of this policy agenda, the issues that have been highlighted over recent months, in relation to sentencing reform and restricting the use of prison, remain highly significant to those concerned with criminal justice reform. It is these matters this briefing focuses on. Three main elements are covered here.

1. The case for reducing short prison sentences, as it has been presented by various government figures in the period January to July 2019.
2. The options for sentencing reform with the intention to reduce short prison sentences and the issues that arise from their implementation. In particular, considering the evidence from Scotland about the impact of their presumption against short prison sentences.
3. Assessing the potential impact various sentencing reform scenarios would have, should they be implemented, on their intended target of prison receptions and the prison population.

1. THE CASE

The case for the reform of short prison sentences presented by Ministry of Justice ministers and officials in various media interventions and, parliamentary and public speeches in the first half of 2019 can be boiled down to three justifications.

Short prison sentences:

1. Do not work
2. Are fuelled by a use of prison for less serious/ less harmful lawbreaking for which there are better responses in the community
3. Create chaos and churn in the prison estate

Not working

On the first of these justifications, that short sentences do not work, as Justice Secretary, David Gauke had been clear that his key criteria for making this decision was what works to reduce reconvictions. This approach, which he dubbed ‘smart justice’, proposed reforming the justice system based on evidence about reducing reconvictions, not reforms to make criminal justice ‘harder’ or ‘softer’ or more pro-victim or pro-offender.

Ministers in the Ministry of Justice have cited the findings of a reconvictions study which showed for matched offences, those subject to community sentences are less likely to be reconvicted than those who received a short prison sentence (Mews et al., 2015). Both the justice and prisons ministers have explained this difference by prison sentence length, arguing a short prison sentence is long enough to be disruptive, but not long enough to rehabilitate.

However, no wider strategy for implementing this vision of reducing reconvictions has been announced. Chair of the Justice Committee, Robert Neill, welcomed the progressive intention but criticised the government’s

‘lack of coherent means of driving reform’ (Justice Committee, 2019). Particularly in the context of the department’s limited current resources and no clear commitments yet in place regarding the availability of future resources. Neill’s calls for greater clarity and commitment about what this agenda might mean in practice have yet to be answered by government.

Serious lawbreaking

The second justification that has been given is that short prison sentences are typically being used for less serious/harmful lawbreaking for which there are better responses in the community. Shoplifting and non-payment of a television licence have both been given as examples in this respect. Gauke advocated that in these instances, sentencing aims of both punishment and rehabilitation can be more effectively carried out in the community than in a prison cell.

Electronic monitoring is the likely key component of the punishment objective. Global Positioning Systems (GPS) monitoring the location requirements of those subject to curfews, was put in place in April this year. This followed changes to increase the eligibility of Home Detention Curfews (HDC) for those subject to prison sentences of up to four years.

Regarding the second sentencing objective, rehabilitation; what may at first glance seem a progressive break with the past, on closer inspection maintained an important continuation of it: limited resources. In discussions about their plans, additional resources in the community were a matter of ministerial hope rather than one of imminent address and guarantee:

I believe in the end there is a strong case for switching resource away from ineffective prison sentences into probation.

David Gauke, 18 February 2019, *my emphasis added*

In terms of ‘seriousness’, politicians promising that prison will be reserved for ‘serious offences’ is a common reassurance when sentencing reform is proposed. What counts as ‘serious’ is a matter of detail those same politicians usually do not task themselves with resolving. This seems to be the case thus far regarding restricting the use of short prison sentences.

Specific offence categories have been named as exempt from any potential restrictions introduced to the use of short-term custody. Violence against the person and sexual violence would be excluded from any potential plans. It has also been reported that knife-related lawbreaking may be excluded from any sentencing reform restrictions under pressure from the Prime Minister’s Office (Harper and Wheeler, 2019). Beyond this, it would

likely be a matter for the Sentencing Council to define ‘seriousness’ in their guidelines and for sentencers’ own discretion.

Managing chaos and churn

The final reason that has been given for reforming short prison sentences is the most clarifying about the scale of the government’s intentions: that the high volume of short prison sentences creates problems in the prison estate.

The degradation of conditions in the prison estate has been the subject of sustained criticism over a number of years. The Chief Inspector of Prisons, in his annual report, described:

...some of the most disturbing prison conditions we have ever seen - conditions which have no place in an advance nation in the twenty first century.

Her Majesty’s Inspectorate of Prisons, 2018

Ministers have described the high volume of short prison sentences as creating managerial issues for prisons. The rapid turnover in this population has been blamed for creating churn and adding to the chaotic situation within prisons. Processing admissions and responding to new arrivals has been described as taking up a significant proportion of prison staff time and resources. The aligned issue of a high prison population, it has been acknowledged, would be relatively unchanged. ‘Reducing reoffending’, was ‘the big prize’ according to Gauke, ‘rather than what are likely to be relatively marginal changes to the prison population’ (Gauke, 4 June 2019).

The case put forward for the reform of short prison sentences references ongoing concerns about the state of prisons, whilst also limiting the scope of the problem. Rather than attempting to tackle the structural issue of high prison numbers, the principal intended saving of this reform agenda is the relatively managerial matter of prison staff time.

2. THE OPTIONS

Ministers publicly stating their concerns about short terms of imprisonment, and putting on record their desire to address the numbers being subject to ‘unnecessary’ and ‘wasteful’ short prison sentences, were the intended build up to them putting forward proposals about how to tackle this issue. These proposals were to be the subject of a planned Green Paper in the summer of 2019. However, days before the Green Paper was due to be released on 16 July 2019, its publication was put on

hold. With a new incumbent at 10 Downing Street around a week away, whether and when such a consultation would take place became a matter for Theresa May's successor to decide (see 'What's next?', p. 10).

Whilst firm plans about the proposed mechanism for achieving reductions in short prison sentences remain off the table, David Gauke, in what was to be his last public speech as Justice Secretary on 18 July 2019, gave several indications about the options for reform that were being considered. 'Moving away from prison sentences up to six months', would, he said 'deliver real and positive change'.

As well defining the length of short-term custody the intended reforms would be aimed at, Gauke also outlined that the government was considering two main sentencing reform options:

1. A bar whereby the imposition of custodial sentences up to a certain length would be prohibited.
2. A 'presumption against' whereby prison sentences of a certain length would only be able to be imposed in exceptional/particular circumstances.

'You could', Gauke said, 'consider combining these options, applying a presumption to sentences of up to 12 months with a bar for up to six months. I think there's a strong case to explore this, given the evidence' (Gauke, 18 July 2019).

Presumption assumption

Adopting some form of presumption against short prison sentences was perhaps the most obvious policy option when ministers first signalled their interest in reducing short prison sentences. A presumption would mean England and Wales following the example of neighbouring Scotland. Scotland introduced a presumption against prison sentences of less than three months in 2011. In June this year, this was extended to a presumption against prison sentences of less than 12 months.

However, David Gauke suggested it was unlikely England and Wales would simply follow the Scottish-style presumption to address short-term prison numbers. The presumption against short sentences in Scotland has had a very limited impact on addressing prison numbers up to now (see Box 1 for more information). A point acknowledged by the Scottish Government itself (Scottish Government, 2019a). In addition, custody is, in statutory terms at

least, already only used as a last resort in England and Wales, so it is not clear what the purpose of a presumption against custody would be, other than for its symbolic significance.

The government has documented its desire to explore whether England and Wales ‘can go further’ than the presumption as it has been adopted in Scotland. One possibility for ‘doing more’ would be seeking a presumption which defines exceptionalism in stronger terms than that adopted in Scotland.

Tackling the other backstop: prison as a last resort

For a presumption to have an impact on short prison sentences in practice, the definition of the exceptional circumstances in which short prison sentences are still to be used, and how much sentencer discretion is maintained in reaching this definition, are both key.

For example, under the first Scottish presumption against short sentences, sentencers could still impose prison sentences of less than three months if they considered ‘that no other method of dealing with the person is appropriate’. In practice this amounted to little more than asking sentencers who were minded to give a short sentence if they had really thought about this. As described in Box 1, most likely they had. In Germany, a presumption against prison sentences of less than six months is more tightly defined:

The court shall not impose a term of imprisonment of less than six months unless special circumstances exist in the offence or (the offenders) that render the imposition of a prison sentence indispensable to influence the offender or defend legal order.

German presumption quoted in Harrendorf, 2017,
my emphasis added

Both the Scottish and German models are presumptions against custody. However, in the Scottish model, a short prison sentence could still be given if the sentencer believed for example, the person being sentenced would not comply with a community order because of their previous non-compliance. In the German model, in the same circumstance, the sentencer would only impose a short prison sentence if there was a case for why prison would better fulfil the sentencing objective, not because community sanctions are seen as exhausted.

One reason cited for the consistency in the use of short-term custody in Scotland, despite a presumption, is because the presumption left unaddressed the main reason why sentencers impose short terms of imprisonment:

persistent lawbreaking or serial non-compliance (see Armstrong's comments in Scottish Justice Committee, 2019).

Prison is the backstop 'stick' for all other measures in the current criminal justice system. Sentence escalation, with prison at the top, is the only strategy sentencers currently have to respond to persistent lawbreaking, including low level. A point illustrated well in the following verbal evidence given to the Scottish Justice Committee prior to the Scottish government extending the Scottish presumption to 12 months:

The extension to 12 months is unlikely to have much effect on sentencing practice: at best it is a reminder to sentencers of the existing injunction that imprisonment should be 'a last resort'. Yet ironically, entrenching prison as 'the last resort' is the problem.

Cyrus Tata, quoted in Scottish Justice Committee, 2019

Gauke's last speech as Justice Secretary suggested the government were likely to fluff this central issue:

For those repeat offenders who have been given community orders and who wilfully and persistently fail to comply with them, they need to know that they cannot get away with it with impunity.

Given persistence is a key-cited reason for sentencers giving short terms of imprisonment, such comments may simply be political posturing, but they suggest relatively modest intentions were informing the government's plans.

In attempting to 'go further than Scotland', rather than opening up critical issues for sentencing reform to have a practical impact, the government appeared to be leaning towards a much blunter reform option: a bar on imposing prison sentences up to a certain length.

A bar may not be straightforward

In comparison to a presumption, a bar leaves no room for ambiguity. However, the implications of a bar are by no means a straightforward emptying of prison cells of all those who would previously have been sentenced to a short prison sentence.

A bar introduces a gap in what would otherwise be a continuum of sentencing options. This inevitably means some of those sentenced will 'step up' to a longer prison sentence as well as 'step down' to a non-custodial option. For example, should a bar on prison sentences of up to six months be adopted, it is reasonable to assume that a custodial sentence for shoplifting would

then start at six months, whereas prior to a bar a sentencer may have been minded to give a shorter prison sentence than this. Whilst it may be presumed that a bar on short-term imprisonment results in most of those convicted of shoplifting not receiving a prison sentence at all, the experience of bars on short terms of imprisonment in other jurisdictions suggests there is movement in both directions. Some move down the sentencing tariff, some move up it.

This could be as a result of prison still being considered the only option for a proportion of those convicted. It could also be due to up-tariffing in sentencing. For example, in Western Australia, in anticipation of a bar on prison sentences of less than six months for minor crimes, sentencers were reported to have up-tariffed to longer custodial sentences in a proportion of cases (Eley et al., 2005). As a result of movement in both directions, the net outcome of the bar on the prison population was considered to be negligible. A bar was something the Scottish government excluded from consideration in their sentencing reforms because of the restriction it would place on judicial discretion (Scottish Justice Secretary in Scottish Justice Committee, 2019).

Additionally, excluding some offence categories from the bar, as has been suggested for categories such as violence against the person, sexual violence and potentially knife-related offences, may also have wider consequences for this reform option. This could in theory result in some individuals receiving longer prison sentences for lawbreaking, such as shoplifting, for which there would be a bar on short terms of imprisonment, in comparison to the potentially shorter sentence received for violence against the person convictions for which the full tariff of prison length still applies. One possibility is that the potential for such inconsistencies results in a ratcheting up of sentencing generally, including for those categories excluded from the bar.

The pragmatics of introducing a bar may also dampen its intended impact on diversion from custody. For example, should a bar of prison sentences of up to, but not including, six months be introduced, under the current arrangements, it would leave magistrates only able to impose custody if it is for a period of exactly six months. One possible consequence of this could be that magistrates' custodial powers are aligned with the change in custodial sentencing and that their sentencing powers are removed or significantly restricted to only sentences of exactly six months. Another foreseeable consequence is that magistrates' custodial sentencing powers are increased alongside the change, say to their being able to impose custodial sentences between six and 12 months alongside a bar on sentences of up to six months.

Box 1: What impact did the presumption against short sentences (PSS) have in Scotland?

Figure 1: The number of people starting 0-3 months prison sentence has steadily reduced. This trend predates the PSS but has continued after it. Scottish prison receptions by sentence length, 2008-2009 to 2017-18

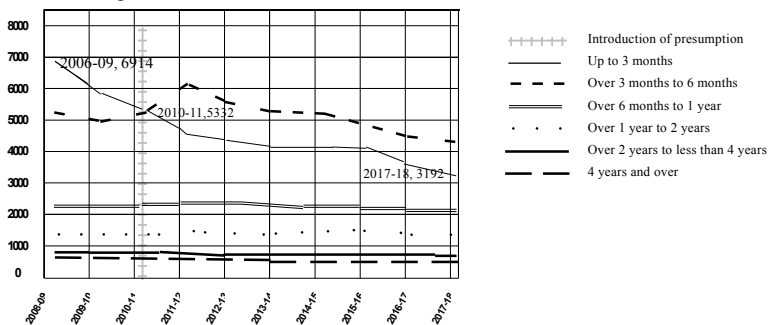


Table 1: Much of the decline in 0-3 months prison sentences is explained by the reduction in those coming before the court rather than a change in sentencing practice. The PSS did not notably increase sentencers' use of community-based sentences in the place of short prison sentences. People convicted by main penalty in Scotland, 2008-2009 to 2017-2018 (%)

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
Custody (all lengths)	13	13	13	15	15	13	13	14	14	14
Of which a custodial sentence of										
Up to 3 m	5	5	5	4	4	4	4	4	4	4
Over 3 m to 6 m	4	4	5	6	5	5	5	5	5	5
Over 6 m to 1 y	2	2	2	2	2	2	2	2	2	2
Over 6 m to 1 y	1	1	1	1	1	1	1	1	2	2
Over 2 y to less than 4 y	1	1	1	1	1	1	1	1	1	1
4y and over					1				1	1
Community sentence	14	14	14	16	17	17	17	19	20	20
Financial penalty	59	60	58	55	53	55	53	50	49	47
Other sentence	14	14	15	15	15	15	16	17	17	18
Total No.	125,893	121,041	115,581	108,424	101,019	105,664	106,584	99,962	92,347	82,716

Note: Shaded column is the year the presumption was introduced. ^ Indicates a value of less than one per cent. 'Other sentence' mainly consists of a verbal warning.

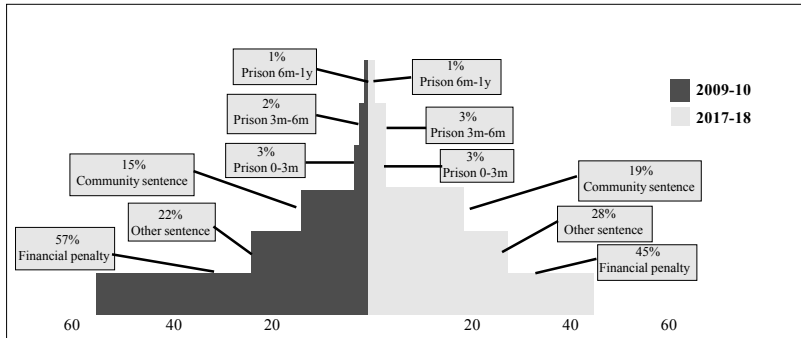
Source: Scottish government, 2019b

Table 2: People continue to receive 0-3 months sentences for non-violent, low level law breaking despite the PSS. Main offence for which people received a prison sentence of under three months in Scotland, 2009-2010 and 2017-2018 (%)

Law breaking category	2009-10	2017-18
Crimes against public justice	23	28
Shoplifting	20	21
Breach of the peace	17	21

Source: Scottish government, 2019b

Figure 2: Sentencers' use of 0-3m sentences for women has not changed since the introduction of the PSS. Sentencing outcomes for women in Scotland, 2009-10 and 2017-18 (%)



Note: Prison sentences over one year are imposed for < 1% of all women sentenced and are not shown. 'Other sentence' mainly consists of a verbal warning. Total penalties: 2009-10: 19,424 and 2017-18: 14,533

Source: Scottish government, 2019c

The figures opposite and above show the PSS was not an emergency stop on the use of 0 to 3 months prison sentences. The consistent year-on-year declines in the number receiving 0 to 3 months sentences suggests a clear - albeit slow - direction of travel away from short-term imprisonment. However, it doesn't appear to be the presumption or a change in sentencing behaviour more generally, which is driving these trends. The reduction in those coming before the courts is a more significant factor.¹

Crucially, sentencing patterns suggest no discernible shift in sentencers imposing community sentences in the place of short-term custody. The data does not suggest the presumption had a notable impact on the use of short-term custody generally, let alone encouraged the use of community-based sentences in the place of short-term prison places in particular. Indeed, the most significant trend is the decline in the use of the fine. This is a well-established long-term trend, in England and Wales as well as Scotland, not guided by an explicit policy aim. The fall in use of the fine is a much more likely source of the increase in community sentences than those who would have previously received a short-term prison sentence.

For women, the introduction of the PSS caused no discernable difference in the sentence they received. This is surprising when the non-violent, low-level lawbreaking associated with women's short-term imprisonment was

advocated as a prime candidate for a community-based sentence in the place of prison. The use of short terms of imprisonment as a response to persistent lawbreaking may be a reason for this.

The Scottish government's own evaluation of the PSS's introduction suggested it was 'largely inconsequential' to sentencing decisions (Anderson et al., 2015). Many of the sentencers surveyed considered they continued to use short-term custody in much the same way as they had before the presumption. Others reported imposing a 3 to 6 months sentence where they would previously have imposed a 0 to 3 months sentence (even though it was still possible to impose a 0 to 3 months sentence). Others said they were more likely to downtariff to a community-based sentence as a result of the presumption. So, of the three ways sentencer's decision-making could be affected (uptariff, downtariff or unchanged), the indication is that all three happened, with the majority indicating they carried on much as before.

3. THE IMPACT

Tables 3 and 4 set out the possible impact of six sentencing reform scenarios. The key question being asked here is: If these reforms were introduced in June 2020, what impact might they have on the size of prison and probation populations after a few years?

The first five of these scenarios are all reforms intended to reduce the use of short-term imprisonment by diverting the numbers being sentenced to prison. The final scenario takes a different approach. Rather than seek to reduce the number sentenced to custody, it produces a change in the prison population by reducing the length of time for which someone is held in prison. There is no indication this is a strategy likely to be in contention for the government. Indeed, it is an option that tends to be dismissed as not politically palatable. It is included here for comparative purposes.

The sentencing reform calculations in tables 3 and 4 are based on a set of assumptions, they are not predictions.² As has been described, the impact of a change in sentencing policy will depend on how it affects sentencing behaviour and practice. This is not something that can be predetermined with any certainty. Tables 3 and 4 should at best be treated as a basis for offering something in the way of a comparative picture of the relative potential of each scenario to impact on key aspects of the population subject to the criminal justice system, rather than be considered an early set of literal results of the policy possibilities.

Modelling impact reflects the assumptions that the model is built on. This modelling is based on more generous assumptions about the impact sentencing reform would have on sentencing behaviour than has been shown to be the case in practice. Here it is assumed each sentencing reform would produce some diversion in practice. As previously described, in practice, this relationship cannot be taken for granted.³

With these caveats in mind, the calculations serve to show the scale of the challenges to this type of reform achieving progressive change in the use of prison. They clearly demonstrate that the significance of short prison sentence reform is on prison receptions because short terms of imprisonment account for a high number of prison receptions. Successfully reducing these receptions would have a significant impact on prison admissions' churn and decrease pressures on prison staff time.

Tables 3 and 4 show the change for the total prison population. If these figures were broken down by sex it would show reducing prison receptions would also have a magnified impact for the female prison population. Imposing a 12 months' bar, on these assumptions, would reduce the female prison population by 370 prison places or around ten per cent by 2023.

However, short terms of imprisonment account for a small proportion of prison places. Hence, no matter how successful, changes in the use of short terms of imprisonment are unable to 'scale up' to have a significant impact on the number of prison places or the size of the overall prison population.

Indeed, the scenarios shown here would not even enable the government to manage the prison population within the constraints of their current resources. The Ministry of Justice's Chief Finance Officer estimated it would have to reduce prison numbers by 20,000 places to meet the current prison budget (Driver, 2018). The sentencing reforms depicted here would barely make a dent in this 20,000 number.

By comparison, reducing all sentencing lengths by 20 per cent has a more significant impact on the overall prison population than any reform to short sentences. Cascading change downwards from longer prison sentences has a magnified net effect on prison places.

The scenarios shown here also raise an interesting question about resources. They indicate cost savings will not necessarily follow a movement of people. In the case of a bar on prison sentences of 12 months or less, 36,900 people would be diverted from a short-term prison sentence. This is estimated to

‘save’ 2,470 prison places and ‘create’ 39,000 more people subject to a community-based sentence. Whilst there may be a saving to prison officer time, crucially there would not be cost savings from prisons that could be transferred to community sentences.

Table 3: Impact of sentencing reform scenarios: Change in criminal justice populations by 2023

Sentencing reform adopted June 2020	Change in:				
	Number entering prison for up to 12m	Prison population up to 12m	Overall prison population	Number subject to community sentence	Number subject to post release licence
Ban < 12m	-36,900	-2,470	-2,470	39,000	-31,700
Ban < 6m and presumption <12m	-34,000	-2,030	-2,030	33,600	-31,800
Ban < 6m	-30,700	-1,300	-1,300	25,100	-26,750
Presumption < 12m	-18,400	-1,280	-1,280	19,500	-16,000
Presumption < 6m	-14,900	-700	-700	14,600	-13,800
All sentence lengths reduced by 20%	0	0	-7,400	-1,100	4,800

Table 4: Impact of sentencing reform scenarios: Size of criminal justice populations by 2023

Sentencing reform adopted June 2020	Number entering prison for up to 12m	Prison population up to 12m	Overall prison population	Number subject to community sentence	Number subject to post release licence
Baseline (do Nothing)	68,500	5,600	81,500	117,600	95,100
Ban < 12m	31,600	3,130	79,030	156,600	63,400
Ban < 6m and presumption < 12m	34,500	3,750	79,470	151,200	63,300
Ban < 6m	37,800	4,300	80,200	142,700	68,350
Presumption < 12m	50,100	4,320	80,220	137,100	79,100
Presumption < 6m	53,600	4,900	80,800	132,200	81,300
All sentence lengths reduced by 20%	68,500	5,600	74,100	116,500	99,900

What’s next?

Summer 2019 was expected to be a pivotal moment in the development of the agenda described here of sentencing reform to restrict the use of short-term custody. And so it has been proved. Though not for the reasons that had been anticipated.

To date, the Ministry of Justice was charting a course about making the case for sentencing reform to reduce the use of short-term custody. The pivot expected by the midpoint of this year was for the department to set out its plans and proposals about how these reductions could best be achieved in practice. This was not to be the case.

The selection of Boris Johnson as Conservative party leader and Prime Minister was swiftly followed by David Gauke, a key advocate of the sentencing reforms thus far, resigning. In Robert Buckland the Ministry of Justice now has its ninth Justice Secretary.

Setting out the priorities for his new government, Boris Johnson revealed he has asked officials to:

[...] draw up proposals to ensure that in future those found guilty of the most serious sexual and violent offences are required to serve a custodial sentence that truly reflects the severity of their offence and policy measures that will see a reduction in the number of prolific offenders.

Prime Minister Boris Johnson, 25 July 2019

Plans to restrict access to short prison sentences received no mention. It is reported the Prime Minister favours halting this reform agenda altogether (Morris, 2019; Swinford, 2019).

The extraordinary uncertainty in our political climate prohibits accurately forecasting much into the future regarding a domestic policy agenda at this point. However, indications are that even the modestly liberal approach to criminal justice that restrictions to short term sentences symbolised, is unlikely to find favour with the current political administration. Even if this reform agenda does survive, it seems likely it would be at best a weak counterweight to a system simultaneously being reformed to lock people up for longer.

On one level this briefing suggests, so what? Tackling short-term imprisonment, whatever its other merits, always lacked coherence as a progressive reform in the context of high prison numbers overall. As this briefing showed, reducing short-term custody has an inevitable cost of increasing the length of some prison sentences. A coherent, comprehensive review of prison sentencing, considering matters such as escalation of prison sentence length across the board, would be a far more impactful basis on which to make inroads into high prison numbers.

If restricting access to short-term prison sentences is not progressed by the current political administration, this would be more significant for what it symbolises about the current policy environment for law and order. It is the punitive rhetoric that this reform appears to have been the victim of, rather than a loss in terms of the practical difference this constrained policy agenda is likely to have been able to achieve, which is concerning.

In terms of impact, the hoped-for target of this reform agenda is relatively managerial rather than transformational. The intended saving is principally to an overstretched prison staff. Whilst few would argue an overstretched prison staff is a good thing, the government's rationale for reforming short prison sentences conveniently defines high short-term prison numbers as the problem, rather than as one of a number of symptoms of an overused prison system.

This briefing also shows that for restrictions on the use of short-term prison sentences to be impactful, even in their own managerial terms, would require government willingness to open up of a number of complex issues contained in sentencing practice. A presumption, unless the exceptionalism is clearly worded and the nettle of non-custodial responses to persistence grasped, risks simply continuing the status quo use of prison rather than disrupting it. A bar may have the surface appeal of bold certainty. But a bar would replace a continuum of sentencing options with a model with a gap and a significant risk of unintended consequences in terms of up-tariffing.

Thus far the unchallenged position of prison as a backstop for the perceived failure of other criminal justice measures, combined with the notable silence on resources, and an unspecified approach about how any sentencing reform would be embedded in a wider strategy to address the complex needs caught up in short-term prison sentences, all indicate an approach unlikely to offer much beyond a superficial change in practice.

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1. The reduction in criminal prosecutions is a subject worthy of study in its own right. Whilst there is likely no single driver of this trend, the use of informal or non-court mechanisms in place of court processes are not thought to be a significant factor, as the fall in court proceeding has not been accompanied by an increased use of these measures.
2. The figures were produced via computer simulation and provided by Justice Episteme. This model replicates the current criminal justice system population. Criminal justice reforms are then introduced to the simulation and their impacts on the flow of people in the criminal justice system are modelled. Further details of the model can be found at www.justice-episteme.com
3. These calculations assume the following sentencing behaviour amongst the cases that could be diverted: For a presumption: 20 per cent receive a longer prison sentence. 35 per cent diverted to a community sentence. 45 per cent remain unchanged. For a bar: 25 per cent receive a longer prison sentence. 75 per cent diverted to a community sentence. In all scenarios the following offence categories have been excluded from potential diversion: violence, sexual offences, possession of weapons, and robbery. All scenarios, including the baseline, include the 2016/2017 change in Home Detention Curfew (HDC) which allows for early release for those serving prison sentences of less than four years, with exclusions for specific offences. It is assumed all other factors, including reconvictions rates, stay the same.

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