
The Criminal Justice (Sentencing etc.) Bill

The Bar of Northern Ireland

The Bar of Northern Ireland welcomes the opportunity to respond to the Committee of Justice's consultation on the Criminal Justice (Sentencing etc.) Bill. This submission has been made with the views of the Criminal Bar Association.

The Bar is a profession of self-employed barristers in independent practice with a unique specialism and expertise in legal advocacy. Members of the Bar champion the rule of law, serving the administration of justice and public interest. In exercising their duties to both their clients and courts, they play a vital role in safeguarding the legal rights afforded to all citizens across NI. Over 700 self-employed barristers operate independently from the Bar Library under the "cab rank" rule, which requires barristers to accept instructions in any field in which they are competent, regardless of their views of the client or circumstances of the case.

The Criminal Justice (Sentencing etc.) Bill has 51 clauses, divided into eight parts and seven schedules. The provisions stem from a variety of reviews and consultations, including the Sentencing Policy Review in 2016, and the Sentencing Policy Review in 2019, as well as consultations and reviews on Hate Crime legislation. The Bar provided comprehensive responses to these policy reviews and consultations.

Part 1: Exercise of the Court's discretion when sentencing

We are aware that Part 1 of the Bill sets out the purposes and principles of sentencing to which the Court must have regard to in certain circumstances when sentencing adult offenders. It also creates a duty for the court to follow any relevant sentencing guidance.

When developing 'guidance' that the Courts must follow, the question of judicial discretion is one which requires consideration. Judicial discretion is the power or right of the judiciary to make official decisions using reason and judgement. It is instrumental within the trial process as it is crucial for developing interventions that resonate with the concerns of victims and communities.¹ It is also unavoidable, as the legislature cannot foresee every eventuality which may come in judicial proceedings.²

The Bar does not support the practice of detailing the principles and purposes of sentencing in legislation, and feel that policy guidance would be preferable. Statutory guidance does not provide additional clarity or awareness of sentencing, and we are concerned that the wording in the legislation may be potentially restrictive. In particular, the legislation notes that the judiciary "must follow" statutory guidance, rather than "have regard" to relevant guidelines. The Department themselves, in

¹ Ralph Henham, "Sentencing Policy, Social Values and Discretionary Justice" (2022) *Oxford Journal of Legal Studies* 42(4)

² Rashmi Goyal, "Judicial Discretion" (2014) *Uttarakhand Judicial and Legal Academy*

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their 2019 consultation paper, recognised that the former is more restrictive, and that a duty to ‘have regard’ offers more flexibility or discretion to a judge.³

We are aware that the legislation closely replicates the legislation in England and Wales, which also notes the court must have regard to the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences. In this jurisdiction, the Department have noted the principles are being laid out in statute to achieve improved awareness, understanding and clarity in how sentencing decisions are reached.

However, there is little evidence to demonstrate that having statutory guidance for sentencing can achieve these aims. Research in England and Wales, where guidance for the judiciary is depicted in statute, found that there were still low levels of understanding of sentencing amongst the public, and a “significant gap” in the public information on sentencing.⁴ Indeed, only 56% of respondents were aware that the average minimum term for murder had increased since 1996. With many reports in recent years acknowledging that there was a need to improve public knowledge and understanding of sentencing.⁵

We welcome that the legislation attempts to give some discretion to the courts, allowing them to depart from statutory guidance if it is “in the interest of justice”. However, the judiciary should have the power to depart from guidelines in circumstances where there are justifiable reasons for doing so. This is the current practice, where the judiciary will only depart from a guideline judgement if the circumstances merit such a departure, and this will already apply an “in the interests of justice” assessment.

Part 2: Suspended Sentences

Part 2 of the Act creates a new suspended sentence order to adult offenders. This dictates that where the offence is not a serious offence, the court may make a suspended order if the term of the sentence is not more than 2 years. Where the offence is a serious offence, the court may make a suspended order if the term of the sentence is not more than 7 years. A suspended sentence order may specific one or more community requirements.

The Bar is supportive of greater usage of community sentences as an alternative to short prison sentences. Practitioners are well aware of the difficulties encountered in getting offenders to attend any type of rehabilitative or educational treatment programmes whilst in custody serving a short

³ Department of Justice, “Sentencing Review Northern Ireland: A Public Consultation” (October 2019) pg. 22 para 3.34.

⁴ Justice Committee, “Public opinion and understanding of sentencing” (25 October 2023) Tenth Report of Session 2022-23, UK Parliament

⁵ Sentencing Academy, “Public Knowledge of Sentencing Practice and Trends” (January 2022)

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sentence. Consequently, there is a concern that once released the offender has not been provided with any guidance or assistance in reducing their risk of re-offending.

Indeed, there is a wealth of evidence to demonstrate the effectiveness of community sentences on reducing reoffending rates. Data in England and Wales shows that the proven reoffending rate for adult offenders with a community or suspended sentence was 30.6%, whilst the rate for adult offenders released from a custodial sentence of less than 12 months was 55.1%.⁶ Community and suspended sentences allow for “the maintenance of family ties, jobs, and childcare responsibilities – all factors which reduce the risk of reoffending.”⁷

Part 3: Life Sentences

Part 3 places a duty on the court, when passing a life sentence, to state in open court its reasons for deciding such a sentence and to explain to the offender the effect of it. However, this requirement has already been established in European Court of Human Rights precedent, binding the court to it. In *Hadjianastassiou v Greece [1992]* it was ruled that Court judgements must contain adequate and clear reasoning under Article 6 so that a party can understand the decision, and exercise appeal rights.

The Bill also sets out the starting points when determining the tariff part of a life sentence. The Bar of NI takes the view that the current statutory points are adequately clear and provided for a lengthy sentences. We do not consider that they needed to be recorded in statute, as they are already well established amongst practitioners and the judiciary. Therefore, we are uncertain as to how these would be enhanced if moved into legislation.

The Department are also provided with the power to set or amend starting points for tariffs within the Bill. This raises potential concerns regarding the separation of powers. Article 6 of the European Convention on Human Rights requires that sentencing be determined by an independent and impartial tribunal. If the Department’s powers are exercised in a manner that is overly prescriptive, or which in practice dictates sentencing outcomes, there is a risk that judicial independence could be undermined.

This concern is reflected in *R (Anderson) v Secretary of State for the Home Department*, where the House of Lords held that the Secretary of State’s procedure for fixing the tariff for mandatory life sentence prisoners – namely that he dealt with the question as a matter of reality and not of form – effectively made him perform a judicial function. The Court emphasised that tariff setting is, in legal terms, indistinguishable from sentencing and must therefore comply with the requirements of Article 6.

⁶ Justice and Home Affairs Committee, “Cutting crime: better community sentences” (28 December 2023) 1st Report of Session 2023-24, HL Paper 27.

⁷ Prison Reform Trust, “Written evidence to ‘Cutting crime: better community sentences’” (2023)

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Accordingly, if such a power is to be conferred on the Department, it is essential that it does not constrain the judiciary's role. Courts must retain meaningful discretion, including the ability to depart from any prescribed starting points if there are justifiable reasons to do so.

Part 4: Unduly Lenient Sentences

Currently, the DPP has the power to refer unduly lenient sentences to the Court of Appeal, but Part 4 simplifies and extends those arrangements so that all sentences imposed in the Crown Court will be capable of being referred to the Court of Appeal for reconsideration.

We are concerned that this will lead to an increase in the number of cases being referred to the Court of Appeal. This provision could also offend the principle of finality in a judgement, and may be seen as removing the discretion currently afforded to the judiciary in the Crown Court. Sentences for some very serious offences should be open to challenge, but this should not be widened.

Part 6: Particular Persons or Groups

We understand that Part 6 creates a number of statutory aggravators in respect of aggravation by hostility, aggravation by way of vulnerability, and aggravation where an offence is committed against a public worker. Part 6 also creates a new offence of assault on a public worker or person assisting a public worker who is acting in exercise of their functions.

The Bar has been consistently supportive of the use of a statutory aggravation model instead of the enhanced sentencing model that is being used at present. The Bar stated that this approach, which would involve an existing offence, such as assault, being motivated by demonstrating hostility in respect of one or more characteristics, was the desired outcome.

This model will provide a clearer and more comprehensive scheme for hate crime in Northern Ireland, as it will require the police and wider criminal justice system to be aware of the need to take potential identity hostility into account when investigating a crime, and would allow for more accurate records to be maintained. It may also allow for a greater monitoring of statistics and trends on hate crime.

The Bar would however, like to highlight the potential, under this scheme, of an increased deployment of Newton Hearings if an aggravated sentence was recorded on a Criminal Record Viewer. If that was the case, then hostility would have to be proven to the criminal standard and if denied by the offender, this would require a Newton hearing. This may be unsatisfactory to victim, if they have been informed that an offender has pleaded guilty, but have now been informed that they must attend a hearing and be cross-examined. Furthermore, they may give testimony, but the hostility may not be proven the criminal process. This may leave victims despondent and reduce confidence in the system.

The Bar has been supportive of the Law Society's call for;

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- Statutory recognition of an officer of the court as providing services to the public;
- Attacks on officers of the court should be aggravating factors in sentencing;
- A statutory presumption against suspended sentences in cases where the victim is an officer of the court.

These calls come amongst the concerning growth in threats against legal professionals in the course of conducting their professional duties. A recent internal survey of the Bar's membership found that around 50% had often, or occasionally felt unsafe whilst performing their duties over the last 12 months, with just under 30% experiencing threats whilst performing their professional duties. These threats included threats of violence, threats of reputational damage, and online threats. Furthermore, over 60% of respondents agreed that incidents of harassment, threats, or improper interference had increase in the last 3-5 years.

This experience is not contained to this jurisdiction, with the Council of Bars and Law Society of Europe finding that out of 14,559 lawyers surveyed across Europe, 57.6% had been the victims of threatening behaviour or aggression in the previous two or three years. One out of three responding lawyers considered leaving the profession at least once because of encounters with threatening behaviour, harassment or aggression. Nearly half of respondents also reported that threatening behaviours, harassment, and aggression over the past five years have strongly increased, with 12.6% reporting incidents had 'strongly increased', and 32.9% reporting they had increased.

Part 6 represents a positive step towards a clearer and more coherent statutory framework. The Bar particularly welcomes the move towards a statutory aggravation model. However, we reiterate our support for the proposals in respect of officers of the court, particularly in light of the evidence of increasing threats, harassment, and intimidation experienced by legal professionals.

Conclusion

Various studies have demonstrated that the public's understanding of legal frameworks and processes are generally poor. In particular, public understanding of sentencing in the UK is poor, as evidenced by JUSTICE's 'Understanding Courts' report which identified sentencing as a gap in the knowledge of lay users'.⁸ This has led to some sentiment amongst sections of the public and media that sentences are 'unfair' or being implemented 'incorrectly'.⁹ Therefore, the Bar emphasises that rather than seeking

⁸ Sir Nicholas Blake, "Understanding Courts: A report by JUSTICE" (2019)

⁹ See Jonathan McCambridge, "Winston Irvine court case impacted confidence in entire criminal justice system, says senior officer" (Newsletter, June 2025) <<https://www.newsletter.co.uk/news/crime/winston-irvine-court-case-impacted-confidence-in-entire-criminal-justice-system-says-senior-officer-5163950>>

See also: Scottish Sentencing Council "Public attitudes to sentencing following a guilty plea: findings from a mixed methods research project" (March 2025)

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to implement changes to sentencing provisions, efforts should be made to improve public education of existing sentencing provisions and the process of applying sentences.