

12-month sentencing powers for magistrates reversed – but why?

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Early numbers indicate that the controversial policy had a minimal or even beneficial impact on the Crown Court backlog, contrary to some fears. So why has it been abolished so soon?

1. On 2 May last year, the maximum custodial sentence available for a single either way offence was doubled from 6 to 12 months, for offences committed after that date.
2. However, anybody paying close attention on Thursday 9 March to the doings of Mike Freer, Parliamentary Under Secretary of State at the Ministry of Justice, will have seen that the experiment lasted, well, less than 12 months.
3. The Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2023, authorised by Mr Freer, amends section 224(1A)(b) of the Sentencing Act 2020, reducing the maximum sentence for an either way offence from 12 to 6 months. The change will come into force on 30 March 2023. Presumably, it will apply to offences committed both before and after 30 March, given the wording of s.224 (as prospectively amended):

General limit on magistrates' court's power to impose imprisonment or detention in a young offender institution.

*(1) A magistrates' court **does not have power to impose—***

(a) imprisonment, or

(b) detention in a young offender institution,

for a term exceeding the applicable limit in respect of any one offence.

(1A) The applicable limit is—

(a) 6 months in the case of a summary offence, or

*(b) **6 months in the case of an offence triable either way.***

4. This represents quite an about-turn, and indeed the change was executed with more discretion than fanfare. In comments to the press, the MoJ has framed it as a 'pause' rather than reversal of the policy entirely. So, did it work, and what are the chances of a return to 12-month powers in future?
5. In the MoJ's announcement of the policy in May, it was hailed as *'the latest step to tackle the impact of the pandemic on the criminal justice system and is expected to free up around 1,700 extra days of Crown Court time each year.'* Ostensibly, this reduction would be achieved by reducing the number of cases sent for trial or committed for sentence, since the magistrates could now deal with a greater number of more serious cases. However, potential pitfalls were highlighted at the time. If defendants faced 12-month custodial sentences, why not elect Crown Court trial? And if they received longer custodial sentences from the magistrates, all the more incentive to appeal them (or the underlying conviction) to the Crown Court.
6. It may not be possible to assess who was right on this. The increased powers only applied to offences committed after 2 May 2022, which will only have made up part of the overall caseload of the magistrates' courts between then and now. Furthermore, we do not yet have any data beyond September 2022, the latest set of figures released by the MoJ.
7. However, with that said, the numbers so far do not look bad for the government.
 - Committals for sentence fell 10% between the first and third quarters of 2022 (that is, January-March versus July-September).
 - Appeals to the Crown Court actually fell 5% in the same period, contrary to expectations. Not only did they fall across the period, but the decline was consistent. The number of appeals was lower in April-June (when the policy came into force) than it was in January-March, and lower still in July-September.
 - The number of either way offences sent for Crown Court trial fell by 2%, comparing April-June with July-September. (Not that this particularly helped the backlog: the number of such cases disposed of fell by 23% across the year, thanks presumably to the barristers' strike.) While this is hardly a revolution, it does suggest at least that there was no eruption in elective trials.
8. Are these all just statistical anomalies? Quite possibly. It will be interesting to see the next two rounds of statistics, covering October-December 2022 and January-March 2023.

9. Even if the Crown Court's caseload has fallen, it is questionable whether the magistrates have the capacity to take up the slack. The number of trials for either way offences in the magistrates' courts actually *fell* by 3% across the period of January-September 2022 (although this trend was partially reversed as the changes were introduced in May, with the number of trials rising 0.7% from April-June to July-September).
10. Still, if the policy was possibly reducing the number of cases going to the Crown Court, why has it been abolished? Since May 2022, when the higher powers were introduced, the prison population has risen by 4,000 (or 5%). Since the end of last year, spare capacity in the prison estate has fallen by more than half. In a system with around 85,000 spaces, just over 1,000 are available for new occupants (in the week to 10 March). That is particularly problematic when the number of people on home detention curfew alone is nearly double that, posing real issues if they need to be recalled to custody after reoffending.
11. It is hard to say whether this is a consequence of the magistrates' new sentencing powers. The latest figures we have are for the year to September 2022, and the MoJ does not produce separate statistics for the Crown and magistrates' courts on sentence length for indictable offences. The statistics we do have, for the year ending September 2022, are inconclusive. There was a 9% reduction in the use of the former maximum 6-month sentence, and a 3% rise in the number of terms set at the new maximum of 12 months. Strangely though, there was a 3% fall in custodial terms lasting between 6-9 months. It might simply be that either the months since September 2022 have seen a sharp rise, as more offences committed since May 2022 became subject to the new powers; or the government is simply conscious of the likelihood that this would happen soon.
12. Overall, it may be that the government has won a Pyrrhic victory. So far as the backlog is concerned, the impact of any reduction in committals (or either way offences sent for trial) was wiped out by the barristers' strike. Further, while the policy may well have increased the length of custodial sentences in the magistrates' court, the consequence has been to increase prison overcrowding to an unsustainable level. So much so, in fact, that the Court of Appeal recently urged that *'the impact of the current prison population levels'* should be taken into account by sentencing judges, both when setting the length of terms and in deciding whether to suspend them (*Ali* [2023] EWCA Crim 232, paragraphs 21-22: judgment delivered on 3 March 2023). The Court further commented that this consideration *'will principally apply to shorter sentences because a significant proportion of such sentences is likely to be served during the time when the prison population is very*

high; in other words, exactly the 6-12-month range that the new powers allowed. That means fewer and shorter sentences, from now on.

13. It is open to the government to increase funding for prisons, creating enough spaces to accommodate longer sentences. In that scenario, the temptation could arise to renew the experiment with 12-month powers. That would then raise the small matter of whether we *want* more custodial sentences of between 6 and 12 months. The problem often identified with short sentences is that they do little to tackle the underlying factors of criminal behaviour. But that is another question entirely.

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