EXPLANATORY MEMORANDUM TO

THE SENTENCING ACT 2020 (AMENDMENT OF SCHEDULE 21) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument introduces two additional statutory aggravating factors, and one additional statutory mitigating factor, in the determination of the minimum term in relation to the mandatory life sentence for murder. The new aggravating factors are: (a) the fact that the offender had repeatedly or continuously engaged in behaviour towards the victim that was controlling or coercive and (b) the use of sustained and excessive violence towards the victim. The new mitigating factor is the fact that the victim had repeatedly or continuously engaged in behaviour towards the offender that was controlling or coercive.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The Lord Chancellor and Secretary of State for Justice, the Right Honourable Alex Chalk MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Sentencing Act 2020 (Amendment of Schedule 21) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Schedule 21 to the Sentencing Act 2020 ('Schedule 21') sets out the principles which the court must have regard to in the determination of the minimum term in relation to the mandatory life sentence for murder.

6.2 This instrument amends paragraphs 9 and 10 of Schedule 21, following recommendations made in the independent Domestic Homicide Sentencing Review undertaken by Clare Wade KC.

6.3 This instrument is being made under paragraph 19 of Schedule 23 to the Sentencing Act 2020, which provides a regulation making power to amend Schedule 21 to that Act.

The Sentencing Framework for Murder

A Mandatory Life Sentence

6.4 Anyone who is found guilty of murder will receive a mandatory life sentence. Alongside this life sentence, the sentencing judge will also set a minimum custodial term. A minimum term is the amount of time the offender will spend in prison before the Parole Board considers, for the first time, whether the offender can safely be released to serve the rest of their life sentence on licence in the community.

Schedule 21 to the Sentencing Act 2020

6.5 Schedule 21 contains a range of starting points for determination of the minimum term. The particular circumstances of a murder will determine which of these starting points apply to a particular case.

6.6 A baseline starting point of 15 years applies to all murder cases committed by offenders aged 18 or over.

6.7 There is a 25-year starting point for murders involving the use of a knife or other weapon which has been taken to the scene with intent, which was put in place to recognise the seriousness of the illegal possession and use of knives in public.

6.8 The highest starting points are 30 years in a case of particularly high seriousness, such as the murder of two or more persons and murder involving the use of a firearm or explosive, and whole life orders in a case of exceptionally high seriousness, such as the abduction and murder of a child.

6.9 Offenders who are under 18 when they commit murder face a sliding scale of starting points ranging from 8 to 27 years, depending on the age of the offender when the offence was committed and the seriousness of the offence.

6.10 After identifying the starting point, the court will consider relevant aggravating and mitigating factors. The minimum term imposed can vary significantly upwards or downwards from the initial starting point, depending on the aggravating and mitigating factors in each case.

6.11 Paragraph 9 of Schedule 21 contains a non-exhaustive list of statutory aggravating factors that may be relevant to the offence of murder and paragraph 10 of Schedule 21 contains a non-exhaustive list of statutory mitigating factors that may be relevant to the offence of murder.

6.12 There is no upper or lower limit on the final minimum term to be imposed. Having taken into account all the circumstances of the case and the relevant aggravating and mitigating factors, the judge is able to impose a minimum term of any length, whatever the starting point.

7. Policy background

Domestic Murder

7.1 Schedule 21 was first introduced in the Criminal Justice Act 2003. Over the last twenty years societal and legal understanding of domestic abuse has evolved.

7.2 The Domestic Abuse Act 2021 introduced a wide-ranging legal definition of domestic abuse which incorporates a range of abuses beyond physical violence, including emotional and economic abuse, and coercive or controlling behaviour. Furthermore, the Sentencing Council for England and Wales produced the 'Overarching principles: domestic abuse' guideline[1] in 2018 which recognises that the domestic context of offending behaviour represents a violation of trust and security and therefore makes the offending, including the offence of murder, more serious.

7.3 Historically, Schedule 21 has not reflected this increased seriousness with which society now recognises in domestic cases, nor has it adequately accounted for the extent of culpability arising from whether a perpetrator of murder was also a perpetrator or victim of abuse before the killing.

What is being done and why?

7.4 This instrument implements recommendations made in the independent Domestic Homicide Sentencing Review (the 'Review') undertaken by Clare Wade KC.

7.5 The Review was published on 17 March 2023, accompanied by an interim response from the Government. The Government published its final response on 20 July 2023.[2]

7.6 The Review was based on a detailed case review of sentencing remarks from 120 domestic homicide cases between 2018 and 2022 (the 'case review'), supplemented by academic literature, consultation in focus groups with targeted stakeholders and evidence gathered through further interviews with stakeholders, lawyers, and criminologists.

7.7 Based on the analysis, the Review made 17 recommendations for reform. Underpinning many of these recommendations is Recommendation 4, an overarching recommendation that domestic murders should be given specialist consideration within the present sentencing framework under Schedule 21.

7.8 This instrument implements recommendations 5 and 8. Recommendation 5 is: "where there is a history of coercive control that this should be an aggravating or mitigating factor and that paragraphs 9 and 10 of schedule 21 should be amended accordingly". Recommendation 8 is: "overkill should be defined in law as a specific legal harm and that it should be an aggravating factor in murder. Paragraph 9 of schedule 21 should be amended accordingly."

7.9 While the starting points and statutory aggravating factors in Schedule 21 reflect the particular need to recognise the vulnerability of certain victims, for example due to their race, sexual orientation, religion, age or disability, until now they have not reflected the vulnerability of victims in abusive relationships. There has also been no mitigating factor in Schedule 21 which has recognised that, where an offender murders their partner following a history of being subjected to abuse, the effect of that preceding abuse on the culpability of the offender ought to receive specific consideration.

[1] The guideline is available here: www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse (accessed 28 July 2023).
[2] The review, the interim response, and the final response are available here: https://www.gov.uk/guidance/domestic-homicide-sentencing-review (accessed 28 July 2023).

7.10 These additions to the statutory aggravating and mitigating factors in Schedule 21 will ensure that domestic murders and the particular and wider harms that arise in these cases will be given specialist consideration in the framework.

Controlling or Coercive Behaviour

7.11 Controlling or coercive behaviour in an intimate or family relationship became a criminal offence on 29 December 2015 as a result of section 76 of the Serious Crime Act 2015. In April 2023, the Home Office published an updated statutory guidance framework for the offence.[3]

7.12 According to the guidance, controlling or coercive behaviour can comprise economic, emotional or psychological abuse, technology-facilitated domestic abuse, as well as threats, whether they are accompanied or not by physical and sexual violence or abuse. This behaviour does not relate to a single incident. It is a purposeful pattern of behaviour which takes place over time which isolates the victim from support, exploits them, deprives them of independence and regulates their everyday behaviour.

7.13 Cases of domestic murder are rarely isolated incidents. They are often the culmination of years of abuse; abuse which is often underpinned by coercion and control.

7.14 In the majority of cases, this abuse has been committed by the perpetrator of the murder against the victim. A minority of cases, however, involve a victim of abuse who has killed their abuser. In most of these cases, the perpetrator of the killing and the victim of the abuse is a woman.

7.15 The Sentencing Council's Overarching principles: domestic abuse guideline specifically recognises that the domestic context of offending behaviour represents a violation of trust and security, and therefore makes the offending more serious.

7.16 However, until now there have been no statutory aggravating or mitigating factors within Schedule 21 which recognise the seriousness of the preceding abuse that is so common in domestic cases. Clare Wade KC therefore recommended the addition of a statutory aggravating factor to Schedule 21 for cases where there isa history of controlling or coercive behaviour by the perpetrator against the victim, and a statutory mitigating factor to Schedule 21 for cases where there is a history of controlling or coercive behaviour by the victim against the perpetrator.

Overkill

7.17 Clare Wade KC uses the term 'overkill' in the Review to refer to the use of excessive or gratuitous violence, beyond that which is necessary to kill. Overkill causes intense distress to the families of victims, knowing that the body of their loved one was violated in such a way.

7.18 Overkill is prevalent in domestic murders and was identified in over half of the murder cases analysed in the case review. In all but one of these cases, the perpetrator was male, and in over two-thirds of the cases, the perpetrator had also exhibited behaviour which was coercive or controlling towards the victim.

7.19 Overkill has historically not been recognised in statute as an aggravating factor. Clare Wade KC therefore recommended adding a statutory aggravating factor to Schedule

[3] The Guidance is available here: https://www.gov.uk/government/publications/controlling-or-coercive-behaviour-statutory-guidance-framework (accessed 28 July 2023).

21 to recognise this harm, which has been defined in the instrument as 'the use of sustained and excessive violence towards the victim'.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate another instrument.

10. Consultation outcome

10.1 Paragraph 19(2) of Schedule 23 to the Sentencing Act 2020 stipulates that, before amending Schedule 21 by regulations subject to the affirmative resolution procedure, the Lord Chancellor must consult the Sentencing Council for England and Wales.

10.2 The Lord Chancellor has consulted the Sentencing Council for England and Wales in accordance with paragraph 19(2) and the Sentencing Council's views have been taken into account in preparing this instrument.

11. Guidance

11.1 A full Government response was published to announce the proposed change in the law. The instrument is not complex and will not apply retrospectively and therefore no specific guidance is necessary for this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is detailed in the full Impact Assessment submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 All sentencing is kept under review, and we will draw on any data, including sentencing statistics and the Home Office Homicide Index to monitor the impact of this proposal in so far as that is possible.

15. Contact

15.1 Lorna Dovey at the Ministry of Justice, telephone: 07889 405900 or email: Lorna.Dovey2@justice.gov.uk can be contacted with any queries regarding the instrument. Alternatively, Sarah Clutterbuck at the Ministry of Justice, telephone: 07840 001054 or email: Sarah.Clutterbuck@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Christina Pride, Deputy Director for Sentencing and Parole Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Lord Chancellor and Secretary of State for Justice, the Right Honourable Alex Chalk MP, can confirm that this Explanatory Memorandum meets the required standard.