

**SENTENCING
ACADEMY**

Response to Independent Sentencing Review Call for Evidence

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Authors: Julian V Roberts, Jonathan Bild, Ellie Cumbo, Estella Baker, Gavin Dingwall, Jose Pina-Sánchez and Mike Hough

Executive Summary

- Previous Sentencing Academy research has demonstrated that there has been a significant shift to the greater use of custody specifically for indictable and triable either way offences over the past two decades.
- For the purposes of informing the Sentencing Review, we have completed some additional analysis of sentencing patterns over the period 2004-2024. For most summary offences, there has been no increase in sentence severity during this period. For some indictable or triable either way crimes, the observed increases in the use of imprisonment is fully explained by a shift to more serious cases appearing at sentencing, while for others, like sexual offences, the increase in sentence severity appears to reflect a genuine change in punitiveness.
- These findings suggest that if the Sentencing Review is to address the sentence inflation that has led to a level of demand for prison places that outstrips the available supply, it will need to focus its efforts at the more serious end of the offending scale.
- A previous recommendation by the House of Commons Justice Committee for the establishment of an independent advisory group on sentencing to advise the Ministry of Justice of the likely impact of proposed policy and legislative changes may aid policy-making process in this area and contribute to a more coherent sentencing framework.
- A better-resourced Sentencing Council, promoting cost-effective sentencing practices and focusing on improving public confidence and understanding would enable the Council to fulfil its full statutory remit and may deliver savings overall.
- Technological advances, particularly around the further use of data and Artificial Intelligence might allow faster, more sophisticated analysis of reoffending rates in wider government policy decisions, rather than simply in individual sentencing.
- Greater use of electronic monitoring may provide an opportunity to punish people more effectively in the community without the deleterious consequences of admitting someone into custody. This might be turned into a new type of sentence of ‘Community Imprisonment’.
- The current array of alternative forms of custodial sentences and differing release arrangements even for the same type of custodial sentence has created a system that is impossible for the public to comprehend and is difficult to defend on principle. More broadly, a greater effort needs to be made to ensure that the practical implications of a sentence are comprehensible to offenders, victims and the public.
- The greater use of deferred sentencing should be encouraged to avoid the unnecessary use of immediate custodial sentences.
- The Victim Personal Statement system is in need of a systematic review to ensure that it better meets the needs of both victims and sentencers.

Summary of Recommendations

- Implement the House of Commons Justice Committee’s recommendation for the Ministry of Justice to establish an independent advisory group on sentencing. Alternatively, a Sentencing Advisory Group (SAG) could be created reporting to, or independent of, the Justice Committee itself. The SAG would assist Parliamentarians and other stakeholders to understand the potential consequences of legislative initiatives relating to sentencing.
- Parliament should undertake or commission a review of all current mandatory minimum sentences of imprisonment with a view to repealing or amending any mandatory sentences which are failing to achieve their stated goals of greater certainty and deterrence.
- Consider the funding arrangements for the Sentencing Council to explore whether a better-resourced Council could deliver a significant net saving in costs to the criminal justice system.
- Review the role of the Attorney General in the Unduly Lenient Sentence scheme with a view to rationalising the scope of the scheme and transferring the power to refer potentially unduly lenient sentence to the Court of Appeal to the Director of Public Prosecutions.
- Clarify that any plans to expand the use of personal data to predict prison capacity, including by third parties, will be consistent with the principles of the Data (Use and Access) Bill, and will not infringe human rights.
- Ensure that any expansion in the use of electronic monitoring (EM) is informed by careful evaluation of both the technological capacity available and the impact on human rights and equalities, and support the development of a more robust evidence base on the impact of EM on public protection and reduced reoffending.
- Explore the potential for EM or separate interactive technology to be used not only in monitoring compliance, but to support offenders in desisting from future crime, for example through encouraging positive changes in behaviour and thought patterns.
- Consider developing a new sentencing option, either as a requirement of a conditional or suspended sentence order or a standalone disposal, to limit offenders’ access to technology.
- Initiate a ‘penal audit’ to determine what percentage of the prison population could have been adequately punished in the community.
- Reform custodial sentences by legislating to introduce a presumption against the imposition of short immediate custodial sentences, returning conformity to release arrangements for standard determinate sentences and reviewing and rationalising the range of sentences available for offenders convicted of certain offences.

- Introduce the possibility of earlier release for longer-sentenced prisoners who demonstrate exceptional progress in custody.
- Encourage the greater use of community orders and fines.
- Legislate to introduce a statutory purpose of imprisonment.
- Explore the feasibility of introducing new forms of custody in the form of Intermittent Imprisonment and Community Imprisonment.
- Improve sentencing terminology so that sentence labels bear a closer resemblance to the practical implications of the sentence to aid public understanding and confidence.
- Promote the increased use of deferred sentencing to reduce unnecessary admissions into custody.
- Ensure the proper resourcing and utilisation of open prisons. As the number of prisoners serving long sentences has grown in recent decades, consideration may need to be given to whether long-term prisoners should be able to access the open estate at an earlier point in their sentence to facilitate rehabilitation and ameliorate the effects of very long periods spent in closed conditions.
- Evaluate the proper role of public opinion in the use of both Release on Temporary Licence and Home Detention Curfew to ensure that both can be used effectively to aid rehabilitation but without unduly compromising public confidence in the criminal justice system.
- Ensure any policy proposals designed to promote the interests of victims are supported by robust evidence rather than assumptions, including any move to extend the maximum sentencing reduction available for a guilty plea. The extent to which court-ordered compensation achieves the purpose of reparation to victims, especially where offenders pay in instalments, should also be explored.
- Consider the development of a more precise definition that would capture the circumstances in which it is appropriate to recall a prisoner.
- Conduct a comprehensive review of the Victim Personal Statement scheme, and consider rebranding and relaunching a ‘Victim Impact Statement’.
- Develop a separate VPS protocol and form for relatives of victims of fatal offences.

Theme 1: History and Trends in Sentencing

Q: What have been the key drivers in changes in sentencing, and how have these changes met the statutory purposes of sentencing?

The Sentencing Academy welcomes both the principle of the Independent Sentencing Review ('the Review'), and this starting point. It is right to consider not only the current state of sentencing policy, but the longer-term factors that have led to it. The Sentencing Academy has undertaken its own research on this, including an analysis of sentencing trends from 2002-2022, in which we examined broadly the same question that this part of the Review aims to answer: what the key changes in sentencing severity have been in that time, and how they have contributed to the growth in the prison population.¹ We have also carried out fresh analysis for the purposes of this Review.

As we outline in more detail below, our research demonstrates that both the use of custodial sentences and their length have increased relative to other disposals in that time, but not across all offence categories. In fact, if no distinction is made between summary, triable either-way and indictable offences, the general picture is one of relative stability; there was actually a slight decrease in the use of immediate custodial sentences overall. When the three offence categories are separated out, however, it becomes clear that there has indeed been a significant shift to the greater use of custody specifically for indictable and triable either way offences, rather than for summary offences.

All other disposals for indictable and triable either way offences declined, especially the use of community orders, which fell from approximately one third to one fifth, a trend that has been extensively researched (and which we summarise in our 2021 review of the evidence).²

The length of custodial sentences has also significantly increased for these offence categories. In our analysis, there was an 86% increase in the Average Custodial Sentence Length (ACSL) for indictable and triable either way offences, from 15.5 months in 2002 to 24.6 months in 2022. By contrast, the ACSL for summary offences declined, from 3.2 months in 2002 to 2.6 months in 2022. The Review itself references an increase in the average time spent in custody from 12.7 months in 2003 to 20.9 months in 2023, but our research specifically highlights the importance of distinguishing between the different categories of offence in order to understand the drivers of this trend. Our research combines both the frequency and the length of custodial sentences into a single scale or index of severity, and concludes that:

'Sentences for indictable and triable either way offences [were] 38% more severe in 2022 than 2002. Sentence severity for summary offences remained stable, increasing by just 2% over the period.'³

¹ Pina-Sánchez, J., Crellin, L., Bild, J., Roberts, J.V. and Hough, M. (2023) *Sentencing Trends in England and Wales (2002-2022)*. London: Sentencing Academy. Available here: <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/10/Sentencing-Trends-in-England-and-Wales-2002-2022.pdf>.

² Guilfoyle, E. (2021) *Community Orders: A review of the sanction, its use and operation and research evidence*. London: Sentencing Academy. Available here: <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Community-Orders-3.pdf>.

³ Pina-Sánchez, J., Crellin, L., Bild, J., Roberts, J.V. and Hough, M. (2023) *Sentencing Trends in England and Wales (2002-2022)*, p. 5.

There are several possible reasons for this increase in severity, and further research is still needed to determine the exact causes. The Sentencing Academy intends to publish more analysis in due course, but we summarise existing findings on some of the potential explanations below.

Sentence Inflation

Greater use and the length of imprisonment is an obvious contributor to a higher prison population. That said, it is important to distinguish between changes in the size of the prison population and sentence inflation. Sentencing patterns are just one of many variables that affect the prison population. Other influences include the rate of recalls to prison and the numbers of prisoners on remand awaiting trial or awaiting sentencing following conviction. The remand problem is almost wholly a result of the backlogs in the criminal courts.

The publication of a report by several former Lord Chief Justices and Sir Brian Leveson⁴ has attracted additional attention to the problem of sentence inflation. Potential contributors include: changes in statutory sentencing provisions affecting sentence lengths (e.g. Schedule 21 and various maximum penalties); legislative changes in the proportion of a prison sentence which must be served in prison (e.g. the increase from 50% to two-thirds for certain offences); an increase in the seriousness of offending and/or offenders' criminal histories; and public pressure on the courts to sentence more harshly. To date, the research upon these influences has been sparse and unsystematic.

Defining Sentence Inflation

Sentence inflation simply defined occurs when sentence severity for an offence increases over a relatively short period of time. If sentence lengths for, say, sexual offences are 50% higher now than in 2015, this represents sentence inflation. However, some degree of any such sentence inflation may be explained by changes in offence seriousness or offender profiles. A relevant authority – whether the Sentencing Council or the Ministry of Justice – should monitor changes in both variables over time, to determine their respective contributions to inflation.

Having noted sentence inflation, it is necessary to determine its causes. One set of key drivers of sentence inflation are to be found in changes to the sentencing framework, such as increases in maximum sentences, introduction of mandatory sentences, and increases to the proportion of time served. This form of sentence inflation might be called politically-led sentence inflation. The challenge here is to determine whether these changes are justified with respect to the purposes and principles of sentencing.

A different form of sentence inflation arises if sentencers respond to the 'climate of opinion' about crime and punishment by increasing sentence severity. This might be called judicially-led sentence inflation, even if the climate of opinion is at least in part politically shaped.

Where the average seriousness of any category of crime coming before the courts has grown, the resultant increases in severity for that category cannot be regarded as sentence inflation. These changes represent what we regard as natural inflation. If sentence severity increases to match more serious offending or a higher proportion of repeat offenders, this is surely

⁴ Howard League for Penal Reform (2024) *Sentence Inflation: a judicial critique*. London: Howard league.

appropriate. The reasons for the increase in gravity for that category may be found in changes in detection rates or charging practice, or in real changes in offending. We urge the Ministry of Justice to undertake a detailed analysis⁵ to determine how much of the increase in sentence severity (which has triggered the prisons crisis) can be explained by changes in offender profiles or the seriousness of offences sentenced by the courts.

Measuring The Use of Imprisonment

The use of imprisonment reflects two variables: Prison Admissions (PA, the immediate custody rate) and Prison Durations (PD, the average custodial sentence length (ACSL)). PA inflation occurs when the custody rate for an offence increases without changes in any legally-relevant characteristics; PD inflation arises when average sentence lengths increase without such changes. Both dimensions of punitiveness need to be considered when measuring sentence inflation.

Analysis of sentencing trends by the Sentencing Academy provides a steer regarding the most effective strategy to constrain sentence inflation. PD increased at a much higher rate than PA over the period 2002-2022. PD (the average custodial sentence length) increased by 61% compared to only 33% for PA (the custody rate). These figures relate only to indictable and triable either way offences. For summary offences, PA and PD both declined over this period. We draw two key conclusions from our analyses: (i) longer sentences likely contributed more to sentence inflation than higher custody rates; and (ii) there has been modest sentence *deflation* in the magistrates' courts. The critical question is then what has triggered the longer prison sentences, and if appropriate, how can this trend be slowed or stopped.

For the purposes of informing the Review, the Sentencing Academy has recently completed its own analysis of sentencing patterns over the period 2004-2024.⁶ This research has revealed that the increase in the size of the prison population cannot be attributed to any single cause, and that some of the causes of the rising prison population have been overlooked. The following key findings are worth noting:

- Schedule 21 to the Criminal Justice Act 2003 clearly increased the average minimum term imposed on offenders sentenced to life imprisonment for murder. This was the intention of Parliament; Schedule 21 introduced new, higher starting points based upon the mode and motive of killing and victim characteristics. However, there is no evidence to support the hypothesis that the Schedule triggered a generalised uplift across all offences. Given the relationship between manslaughter to murder, on proportionality grounds it would be reasonable to expect Schedule 21 to have uplifted sentences for the lesser homicide offence, and this is in fact what transpired. This has also been the case for offences of attempted murder, but many other unrelated offences appear unaffected.
- These latest statistics as with previous Sentencing Academy analyses draw upon a sentencing imprisonment index composed by combining the custody rate and the average custodial sentence length to provide a better measure of the use of custody than either

⁵ A similar analysis was conducted in 2003 – see Hough, M., Jacobson, J. and Millie, A. (2003) *The Decision to Imprison: Sentencing and the Prison Population*. London: Prison Reform Trust.

⁶ A research report describing the research in more detail will be published later in 2025.

variable alone. These analyses revealed that there was no change, in fact a slight decline in the use of imprisonment for summary offences (Figure 1 below). However, there was a 113% increase (i.e. more than a double increase) in the imprisonment index for indictable and triable either way cases over the period 2002-2022. Examination of sentence severity over time using 2002 as the base year shows stability from the introduction of Schedule 21 (in 2003) until 2012. The increase in the use of imprisonment does not occur until about 10 years after Schedule 21 became law.

Figure 1 Changes in the Use of Imprisonment, 2002-2022, by offence group

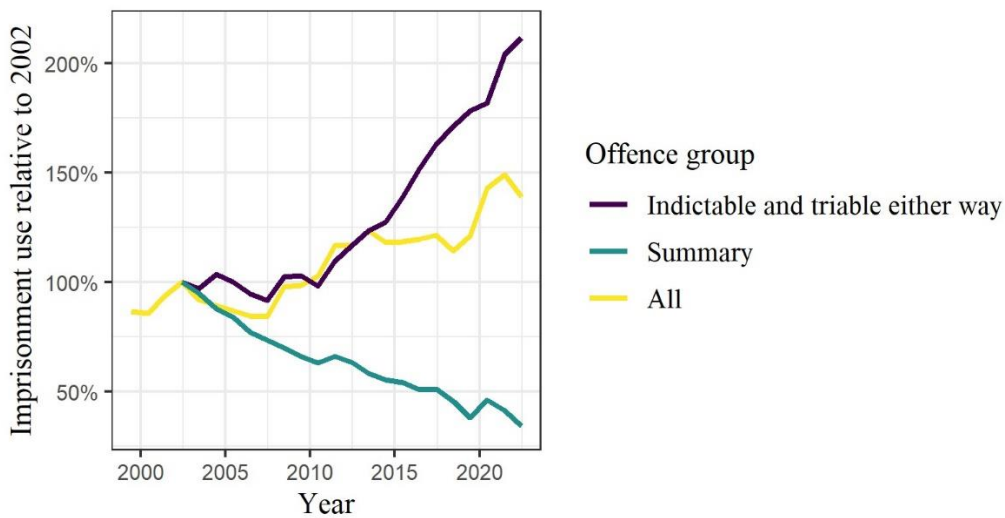
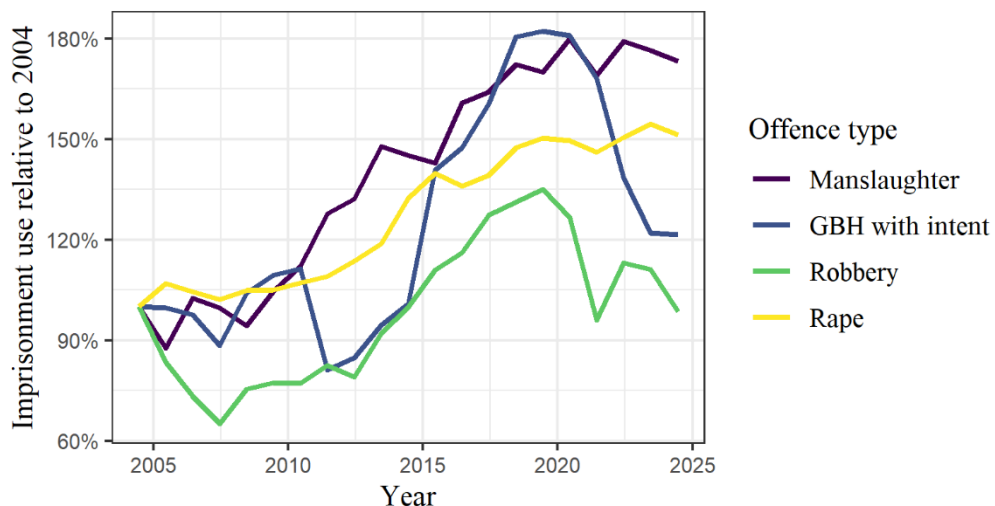


Figure 2 illustrates changes in the Imprisonment Index over the period 2004-2024 for selected offences. As can be seen, manslaughter sentences began to increase in severity around 2008, rape and GBH with intent (assault occasioning grievous bodily harm with intent) about five years later. Robbery sentences remained relatively stable and appear unaffected by sentence inflation. This figure – using just a few offences – highlights the variable patterns of sentence inflation.

Figure 2 Changes in the Use of Imprisonment, 2004-2024, selected offence types

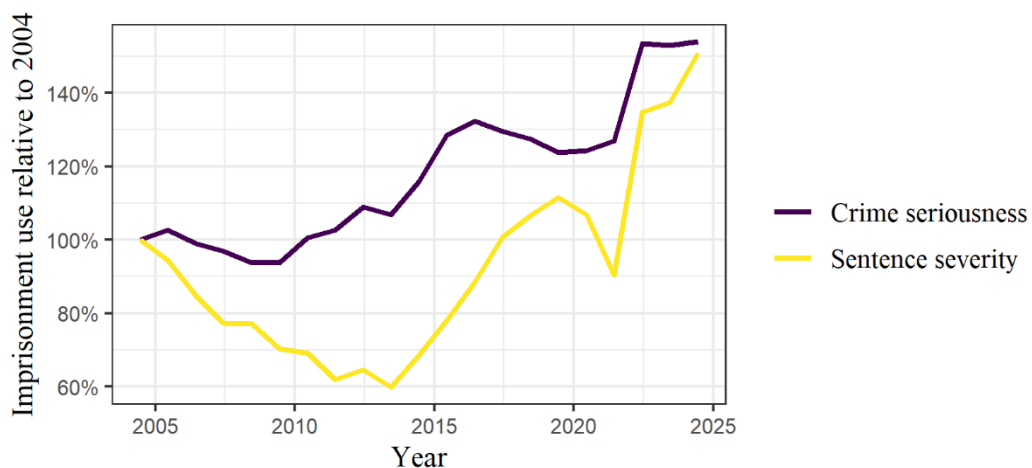


Effect of Changes in Offence Seriousness

Our analyses⁷ test one key potential explanation of what we term legitimate sentence inflation: an increase in seriousness of cases appearing for sentencing. For example, taking all sexual offences, if the proportion of rape cases had increased over time, this would explain an increase in the severity of sentencing outcomes for the category of offending as a whole. Taking 2004 as the baseline year, we used weights derived from the ONS crime severity score to examine changes in the mix of crimes appearing for sentencing. This is an independent measure of the seriousness of cases being sentenced.⁸ We focused on a sample of offence groups where sentence inflation has been detected. These analyses compare trends in crime seriousness with trends in sentence severity, and seeks to establish whether they are correlated, or whether sentence severity has increased to a greater extent than crime seriousness.

Drug offences: Sentence severity increased by 51% over the period 2004-2024. However, as shown in Figure 3, when we compare the seriousness of cases sentenced in 2004 with those sentenced in 2024, we see that drug offences processed through courts today are 54% more serious than in 2004. In other words, all the increase in severity can be explained by the fact that more serious cases are being sentenced, possibly reflecting a higher emphasis placed on arrests and prosecutions of more serious drug cases at the expense of less serious drug cases that are dropped before they reach the sentencing stage.

Figure 3 Trends in Crime Seriousness and Sentence Severity, Drug Offences

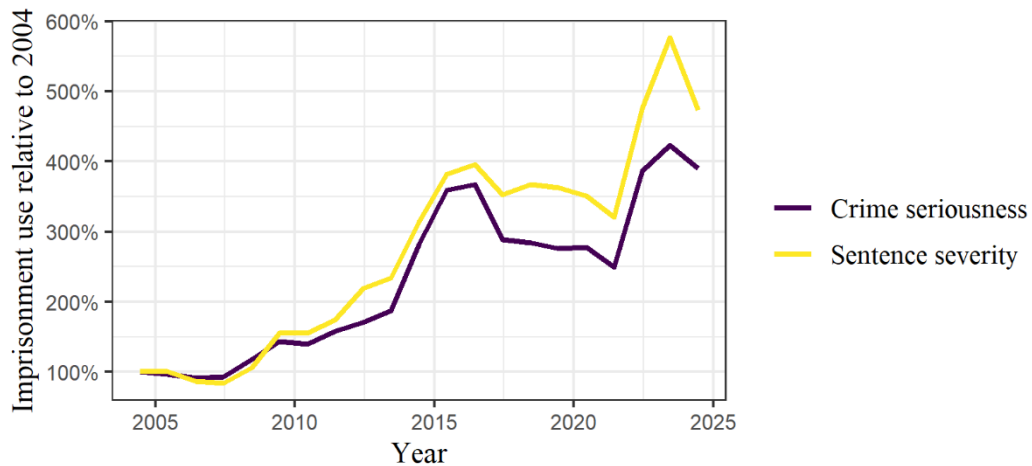


⁷ All the analyses reported in this document were conducted by Professor Jose Pina-Sánchez, University of Leeds. Further details on the methodology are available by contacting the Sentencing Academy.

⁸ The ONS crime severity score does not capture offender or offence characteristics beyond the specific offence type. Thus, we cannot determine what effect any change in other relevant legal factors (e.g. criminal histories or guilty plea rates) over time may have had on sentencing outcomes. However, as will be seen, the data patterns are sufficiently robust to be explained by relative changes in other offence or offender characteristics. In addition, it seems that neither criminal histories nor guilty plea rates have changed dramatically over the last couple of decades.

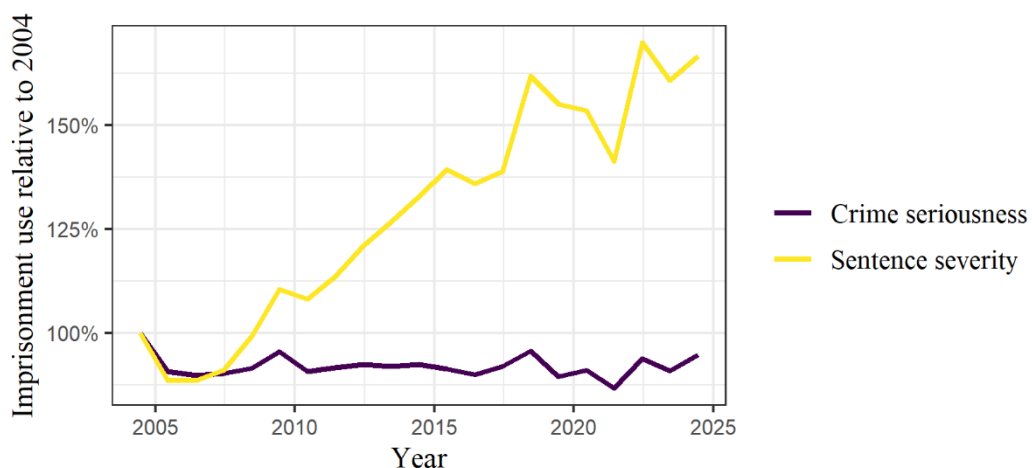
Criminal Damage: Applying the ‘seriousness of cases’ correction we found that most (82%) of the increase in sentence severity amongst criminal damage offences was explained by changes in the seriousness of cases referred to trial. Figure 4 reveals the effect. As can be seen, sentence severity closely tracks offence seriousness. If courts were sentencing more harshly in the *absence* of any increase in the seriousness of cases, the severity line would escalate and the seriousness line would remain flat. This is clearly not the case.

Figure 4 Trends in Crime Seriousness and Sentence Severity, Criminal Damage



Sexual offences: In clear contrast to the previous offences, sentence inflation for sexual crimes cannot be explained by changes in offence seriousness. The seriousness of sexual offences appearing for sentence was generally unchanged over the period 2004-2024. In fact, the mix of offences is slightly (5%) less serious over the period. On the other hand, sentence severity increased by 67%. Clearly, a different dynamic is at work for this form of offending, a view strengthened by the fact that the increase in severity began much earlier than other offences, around 2007. We note that this is the period after the enactment of the Sexual Offences Act 2003. The patterns of seriousness and severity are presented in Figure 5.

Figure 5 Crime Seriousness and Sentence Severity, Sexual Offences, 2004-2024

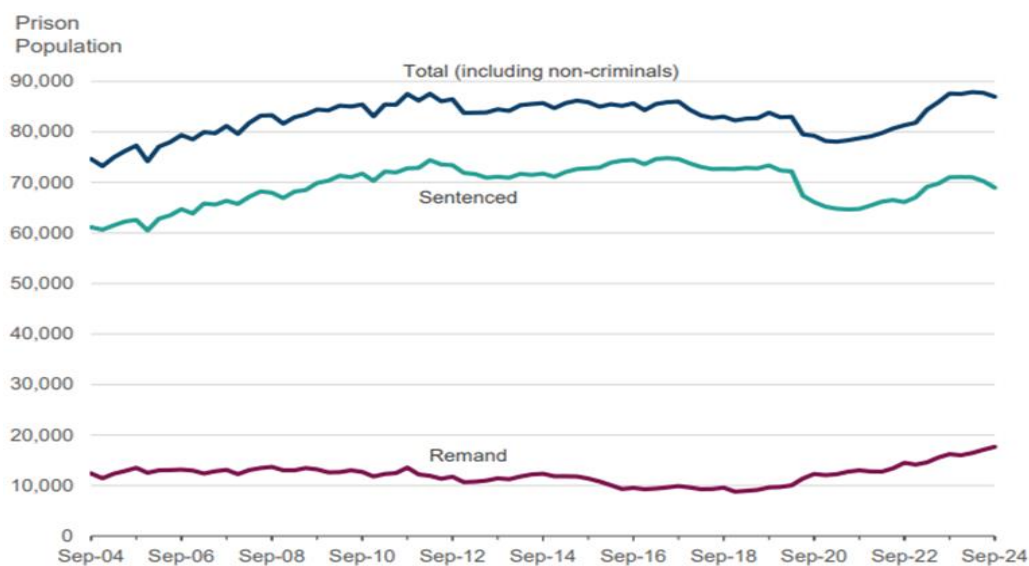


Given the tight timelines of the Review, we have yet to conduct this analysis for other offence categories. The important lesson from these limited analyses is clear, however. Sentence inflation, and the mechanisms behind such processes, vary greatly across offences. For most summary offences, there has been no increase in sentence severity. For some indictable or triable either way crimes, the observed increases in the use of imprisonment is fully explained by a shift to more serious cases appearing at sentencing, while for others, like sexual offences, the increase in sentence severity appears to reflect a genuine change in punitiveness that requires further investigation.

To summarise, more – and better – research is necessary to understand the causes of sentence inflation and the rise in the prison population. It is worth noting that most of the increase in the latter has come about very recently. The most recent prison population statistic (in June 2024) was actually only 2% higher than in 2017 (87,276 vs 85,863). The current crisis is largely explained by a 12% increase in the prison population in the last three years. Prison receptions dropped as a result of the pandemic and quickly accelerated thereafter to the current level. The trend is apparent in Figure 6 extracted from a recent Ministry of Justice publication.⁹

Earlier research by Hough, Jacobson and Millie (2003) on sentencing trends from 1991-2001 is also relevant to the present discussion. These researchers drew two important conclusions. First, that sentencers’ perceptions of changes in patterns of offending contributed to a greater use of imprisonment over the preceding 20 years. Second, that ‘statistics do not support sentencers’ belief that offenders are becoming more persistent and committing more serious crimes’ (p. ix). A similar research project is necessary today as part of an integrated approach to ensuring increases in the use of imprisonment reflect only changes in offending and offenders, rather than perceptions.

Figure 6 Prison Population Trends, 2004-2024



Source: Ministry of Justice

⁹ Ministry of Justice. (2024) *Justice in Numbers Pocketbook. December 2024*. London: Ministry of Justice.

What is clear, however, is that if the Review is to address the sentence inflation that has led to a level of demand for prison places that outstrips the available supply, it will need to focus its efforts at the more serious end of the offending scale. This is perhaps not surprising given the degree of change arising purely from the frequent and piecemeal legislative interventions in the relevant period. Such interventions have been made almost invariably with a view to increased severity, and have generally targeted the more serious offence types.

A notable recent example is that the previous Government made two separate efforts to increase both the use of whole life orders in murder cases, and the proportion of their custodial term that people convicted of serious sexual offences must spend in custody. Not only did both these proposals involve additional demand on prison places, but the gap between the passing of the Police, Crime, Sentencing and Courts Act 2022, and the publication in 2023 of the Sentencing Bill (which did not in the end progress) was less than two years, meaning that the impact of the first legislation had not yet been comprehensively understood before the second was on the drafting table.

Another instance worth noting is the recent history of sentencing for assault where the occupation of the victim is treated as significant. Prior to 2018, the only such specific offence was the summary-only offence of assault on a constable under section 89 of the Police Act 1996; there was also a general, non-statutory aggravating factor in sentencing guidelines for offences committed against public sector workers.

In 2018, the Assaults on Emergency Workers (Offences) Act 2018 came into force, providing a new, either way offence of common assault or battery committed against an emergency worker acting in the exercise of functions as such a worker, with a maximum sentence of 12 months' custody. This therefore represented a doubling of the six-month maximum for the general offence of common assault that would previously have been applicable in most such cases. One year later, the Conservative Party manifesto proposed consulting on doubling it once again to two years,¹⁰ and duly made this change in section 2 of the Police, Crime, Sentencing and Courts Act 2022.

The Labour government is itself expected to introduce a new standalone offence of assault on a shop worker in its forthcoming Crime and Policing Bill; although it has not made specific commitments on sentence length while in government, the Home Secretary explicitly committed to 'tougher sentences' in a speech at the party's 2023 annual conference.¹¹

While there is not yet sufficient data available to assess the impact of the updated guidance for assault on an emergency worker, it is undeniable that this represents an inflationary trend.

The evidence does not suggest that individual interventions such as new legislation are by themselves responsible for the long-term increase in sentencing severity. It is worth highlighting that the ACSL for indictable and triable either way offences has risen steadily throughout the 20-year period analysed, rather than experiencing peaks and troughs; in any given year, it has almost always been the same or higher than the previous year. Moreover, where the seriousness of indictable and triable either way offences have increased in that time,

¹⁰ The Conservative and Unionist Party Manifesto 2019 (2019) *Get Brexit Done: Unleash Britain's Potential*, pp. 18-19.

¹¹ Available at: <https://labour.org.uk/updates/press-releases/yvette-coopers-speech-at-labour-conference/>.

then the Government would have every justification for choosing to reflect this in sentencing policy.

The most that can be laid at the door of political decision-makers, then, is that they have been slow to note the inevitable resource challenge this trend would ultimately present, and slow to explore alternatives to prison. While those commissioning the Review are better placed to discuss the reasons for this than those responding to it, it is reasonable to assume that concerns regarding public opinion have played a role.

The Sentencing Academy's most recent survey of public attitudes provides support for the proposition that the public generally sees sentencing as too lenient; 49% also thought that life in prison was 'too easy'.¹² At the same time, there were evident misconceptions about the composition of the prison population, such as the tendency to over-estimate the proportion sentenced for a violent offence, and to under-estimate the proportion with at least one mental health or substance abuse problem. Despite the relatively high-profile public debate about short sentences of less than 12 months over the last few years, people significantly over-estimated the proportion of those serving a short sentence. Where evidence has shown that short sentences are associated with substantially higher rates of reoffending than longer sentences, respondents thought the opposite.

Perhaps most strikingly, nearly two-thirds of respondents (63%) said that they knew 'not very much' about prisons. This is broadly consistent with the findings of a MORI poll from 2003, suggesting that public awareness has remained low throughout the period in question. As we note later, a greater effort is needed to ensure that the public has accurate information to underpin any future reform in this area. This in turn may lessen the tendency of political decision-makers to feel constrained to commit to ever greater sentencing inflation, and to custody as the only credible sentencing option. There may also be another factor at play which would reward further exploration, and that is the level of knowledge that politicians themselves have not only about the nature, effectiveness and costs of different sentencing options, but even of the very purposes for which sentencing exists as a matter of law.

This chapter of the Review makes specific reference to the five statutory purposes of sentencing, which have been established in statute for more than 20 years. Legislated for by a Labour government, and left in place under successive Conservative-led ones, these reflect a political consensus on what sentencing is intended to achieve.

However, it is unclear to what extent they are known outside the world of legal practice and academia; very rarely are they referenced in Parliamentary debates or media commentary, and this is especially true of the executive branch. This was demonstrated most recently in the Second Reading debate on the previous Government's Sentencing Bill, held in early December 2023.¹³ The five statutory purposes were referred to only by Sir Bob Neill, the longstanding

¹² Roberts, J.V., Crellin, L., Bild, J. and Mouton, J. (2024) *Who's in Prison and What's the Purpose of Imprisonment? A Survey of Public Knowledge and Attitudes*. London: Sentencing Academy. Available at: <https://www.sentencingacademy.org.uk/whos-in-prison-and-whats-the-purpose-of-imprisonment-a-survey-of-public-knowledge-and-attitudes/>.

¹³ HC Deb (6 December 2023). Vol. 742. Cols. 384-432. Available at: <https://hansard.parliament.uk/commons/2023-12-06/debates/77B5411B-A141-4048-8F1C-A19A28D9EFD8/SentencingBill>.

former chair of the Justice Select Committee, and another backbench MP; there was no mention of them either from the Justice Secretary or from the Labour spokesperson.

There was also virtually no mention of the fifth purpose: the making of reparation to those affected by crime. This is the natural consequences of a criminal justice discourse that focuses strongly on prison, which plays no role in achieving reparation, either to victims of crime or to communities. It is arguable that a more in-depth consideration of all five purposes whenever changes are made to sentencing policy might have gone some way to lessening the sentence inflation we have seen, in addition to delivering greater levels of satisfaction from victims and the public.

The work of the Sentencing Academy focuses strongly on making evidence available to sentencers, on the basis that greater use of evidence in sentencing decisions would help to achieve just and sustainable outcomes. Nevertheless, it is also worth asking what more might be done to assist political decision-makers, commentators and the public to play their part in ensuring that the future of justice policy is not simply an eternal race to build more prisons.

For example, it is impossible not to note a contrast between the general caution that politicians on all sides have shown in making public spending commitments in recent years, and the ease with which plans to increase sentencing severity have been accepted, often with very limited scrutiny of the costs, the impact on prison places and the eventual likelihood of increased reoffending. An independent, authoritative body along the lines of the Office of Budget Responsibility might be an innovation worth considering.

For now, we commend the scope and ambition of this Call for Evidence and hope our responses will be of assistance, but we also hope it is not the end of the conversation.

Theme 2: Structures

Q: How might we reform structures and processes to better meet the purposes of sentencing while ensuring a sustainable system?

In answering this question we address the structures which have or could influence sentencing patterns.

1. The Role of Parliament

Many commentators have pointed to Parliament as a major cause of sentence inflation and the current prison crisis. In a nutshell, the critique is that Parliament has introduced a series of legislative provisions many of which have had an inflationary impact that the legislature either did not intend or intended but failed to accompany with the resources necessary to ensure the prison estate remained manageable.

The Sentencing Academy has previously proposed a new body to promote more principled and cost-effective sentencing reform. In its report into *Public opinion and understanding of sentencing*, the House of Commons Justice Committee recommended that the Ministry of Justice should establish an independent advisory group on sentencing.¹⁴ We support this recommendation.

However, if there is no appetite within the Ministry of Justice to create such a group, we have advocated the creation of an advisory group which would provide independent advice to parliamentarians and indeed all stakeholders in the field of sentencing. This body could take the form of an external advisory body along the lines of the *Sentencing Advisory Panel* (SAP) which existed until 2010 when it was one of two statutory bodies replaced by the Sentencing Council. However, in the present economic climate we believe it is unlikely that the necessary resources will be made available to establish a statutory panel of this kind.

Instead, we propose an advisory group of independent experts. This body could be appointed by, and responsible to, the House of Commons Justice Committee itself, or it could be completely independent. Such a body would not be an entirely new innovation as an Advisory Council on the Penal System was created in 1966 to advise the Home Secretary.¹⁵ The Advisory Council produced a number of reports and some of its recommendations still influence penal policy today – for example, the recommendation of dispersing high security prisoners rather than concentrating them. We believe that the Justice Committee could and should play a greater

¹⁴ The Justice Committee recommended that: ‘The MoJ should establish an independent advisory panel on sentencing to consider proposed changes to sentencing policy and to provide advice to ministers. The independent panel should bring together academic experts, the voluntary sector, and, importantly, representatives of victims of crime and their families. It is vital for the legitimacy of the independent panel that it should contain a diversity of opinion and a range of perspectives on sentencing. The panel should also conduct structured public engagement as part of its work. Its findings and advice should be publicly available. The MoJ should also instruct the independent advisory panel to conduct regular reviews of the statutory minimum and maximum tariffs for sentences to determine whether sentences are proportionate and consistent across different types of offence’. House of Commons Justice Committee (2023) *Public opinion and understanding of sentencing*, para. 95.

¹⁵ The terms of reference of the Advisory Council were: ‘To make recommendations about such matters relating to the prevention of crime and the treatment of offenders as the Home Secretary may from time to time refer to it, or as the Council itself, after consultation with the Home Secretary, may decide to consider’.

role in advising Parliament and the Government as well as encouraging a more reasoned public debate about sentencing reform.

The Committee's work would be greatly facilitated by an advisory group which we term a Sentencing Advisory Group (SAG) to distinguish it from the SAP which was abolished in 2010. The SAG would provide advice in a way that is analogised to the work of the *Office for Budget Responsibility* (OBR). It would be a low-cost source of advice, with an unremunerated membership.¹⁶ The SAG would include a range of key stakeholders, including representatives with expertise in relevant social science as well as criminal justice practitioners, and would meet regularly or in response to requests by the Select Committee. A key function of the proposed group would be to alert Parliamentarians about any likely adverse unintended consequences of legislative proposals. The SAG would assist in promoting a more evidence-based approach to sentencing legislation and contribute towards 'ensuring sustainable sentencing in the future'.

For example, one of the contributors to sentence inflation occurred when the Government moved automatic halfway release for many serious offenders to the two-thirds point in the sentence. This reform had the same effect as increasing sentence lengths: the Government itself predicted that thousands of prisoners 'will spend longer in custody'.¹⁷ The reform increased the prison population in a way that would not be apparent by examining average sentence lengths. It is what we term hidden or occult sentence inflation. The SAG would also assist the Committee in its role as a statutory consultee of the Sentencing Council which would provide Parliament with an avenue for considered input into the creation of sentencing guidelines.

Mandatory Minimum Penalties

Parliament should undertake or commission a review of all current mandatory minimum sentences of imprisonment. These sentences were introduced to achieve greater deterrence for particular offences. Although no systematic evaluation has been conducted, there is evidence that several such offences are ineffective. They are either frequently circumvented as courts exercise their legitimate discretion to sentence below the mandatory minimum, or they have not achieved the reductions in offending rates of the offences for which they are prescribed. We also note that some of the mandatory minimum sentences are sentences of six months' imprisonment; retaining these runs contrary to recent moves to reduce the number of short custodial sentences.

Much has changed in sentencing since these mandatory minimum sentences were introduced – more than a quarter of a century ago in some cases – and they create some anomalies, such as no reduction for a guilty plea for the least culpable offenders in firearms possession cases whereas offenders convicted of more serious firearms possessions offences may benefit from a guilty plea reduction.¹⁸ Following a review of these sentences, Parliament should repeal or amend any mandatory sentences which are failing to achieve their stated goals of greater certainty and deterrence.

¹⁶ We note that a number of bodies such as the Scottish Sentencing Council are composed of unremunerated members, and this seems appropriate in the current fiscal climate.

¹⁷ This was noted in the Ministry of Justice publication *A Smarter Approach to Sentencing* (2020) p. 9.

¹⁸ This anomaly arises from the wording of section 51A of the Firearms Act 1968 which stipulates that absent exceptional circumstances (in effect, those that disapply the minimum sentence altogether) a sentence cannot fall below the specified minimum sentence.

2. *The Role of the Sentencing Council (SC)*

The judicial majority of the SC prevents it from having a policy function. In its evidence to the Justice Committee, Council has to date explicitly rejected ‘an explicit role in damping down’ any emerging sentence inflation. Accordingly, we do not believe the Council itself could or should directly contribute to reducing the size of the prison population. However, the Council could do more than it currently is doing to promote the more cost-effective sanctions within its guidelines. The terms of reference of the sentencing review note that ‘The Sentencing Council provides guidelines on the application of the law to promote transparency and consistency’ but the Council should also attempt, insofar as possible, to contribute to more cost-effective sentencing. We note that Lord Carter’s Review of Prisons in 2007, which ultimately gave rise to the creation of the Sentencing Council, proposed that the Council have an ‘ongoing role to collect information on each of the factors that affect the prison population, including the impact of [its] indicative [sentencing] ranges.’¹⁹

Several analyses of the impact of the council’s guidelines have concluded that they have not contributed to sentence inflation.²⁰ The Council predicts the effect of each guideline on the need for prison places but could do more to enhance our understanding of the influences on the size of the prison population more generally. Overall, the Sentencing Council has a wide statutory remit, but its modest budget has always inhibited its ability to completely fulfil its statutory functions; for example, its work on publishing information on sentencing practice at a local level has always been very limited. If the Council’s budget was increased to enable it to perform all of its remit, then they may be a net saving for the criminal justice system with a better-resourced Sentencing Council at the heart of the sentencing framework, promoting cost-effective sentencing practices and improving public confidence and understanding. Some additional suggestions in this direction include the following:

- In order to promote tough community-based sentences (rather than short prison sentences) the Council could insert a clearer message about the custody threshold into all its offence-specific guidelines. The Sentencing Act 2020 directs courts that a custodial sentence must not be imposed unless the offence or a combination of the offence and associated offences are so serious that neither lesser sentences (fine or community order) can be justified. The Imposition guideline (see next point) reiterates this direction (although without noting its statutory basis). Yet there is no mention of the statutory provision or the imposition guideline in the offence specific guidelines. It would be relatively straightforward to insert a reminder within the body of each offence guideline.²¹
- Amend its ‘Imposition’ guideline which addresses the use of custody and community orders. Although this guidance has recently been revised, the Council could provide greater encouragement for courts to use non-custodial options. For example, it could provide a

¹⁹ House of Lords (2007) *Securing the Future. Proposals for the efficient and sustainable use of custody in England and Wales*. (Lord Carter’s Review of Prisons) (p. 34).

²⁰ E.g., Pina-Sánchez, J. et al. (2019). “Have the England and Wales Guidelines Affected Sentencing Severity? An Empirical Analysis Using a Scale of Severity and Time Series Analysis.” *British Journal of Criminology* 59: 979–1001. For a review of the research, see Roberts, J.V. (2025) *Sentencing Councils and Guidelines in the United Kingdom*. Oxford: Centre for Criminology, University of Oxford.

²¹ This suggestion was first made by Sir Anthony Bottoms: Bottoms, A. (2017). *The Sentencing Council in 2017*. Cambridge: Institute of Criminology, University of Cambridge.

more focused steer to courts contemplating an immediate prison sentence of less than six or 12 months to consider non-custodial options.

- Review its guidelines for offences where the volume of short prison sentences is relatively high. Theft and motoring offences are good examples. Over 2,000 prisoners were serving prison sentences under 12 months for these offences in 2019.²² Council could then revise its sentence recommendations to increase the uptake of tough community penalties instead of short prison sentences or suspended sentence orders.
- Issue separate guidance for the sentencing of young adults (i.e. aged 18-25). There is a growing consensus that young adults require a modified approach at sentencing. This age group accounts for a relatively high percentage of short prison sentences, and these sentences are particularly damaging to this cohort of offenders.

3. *The Role of the Attorney General*

It is a constitutional anomaly that the power to refer a potentially unduly lenient sentence to the Court of Appeal lies with a member of the Government. The introduction of an avenue of appeal against a sentence for the prosecution may have been a controversial innovation when it was introduced by the Criminal Justice Act 1988 – potentially allowing the judicial process to increase a sentence that had already been imposed on an offender – and at that time leaving a power that was to be used only very sparingly in the hands of the Attorney General may have been considered an important safeguard against its over-use.

However, much has changed in the intervening 35 years, including a greater appreciation of the role of the victim in the sentencing process and the requirement of a just sentence to be imposed not just for the offender but for the victim too. Now that prosecutorial appeals against unduly lenient sentences are an established part of the sentencing framework, and the number of offences for which an appeal is available has been expanded, consideration should be given to whether the Attorney General remains the appropriate person to hold this power. We would propose a full review of the Attorney General’s Reference scheme that explores both its scope and the process by which a referral to the Court of Appeal is made – with that power potentially being transferred from the Attorney General to the Director of Public Prosecutions.

Summary of Recommendations:

- Implement the House of Commons Justice Committee’s recommendation for the Ministry of Justice to establish an independent advisory group on sentencing. Alternatively, a Sentencing Advisory Group (SAG) could be created reporting to, or independent of, the Justice Committee itself. The SAG would assist Parliamentarians and other stakeholders to understand the potential consequences of legislative initiatives relating to sentencing.
- Parliament should undertake or commission a review of all current mandatory minimum sentences of imprisonment with a view to repealing or amending any

²² Analyses available from the Sentencing Academy.

mandatory sentences which are failing to achieve their stated goals of greater certainty and deterrence.

- Consider the funding arrangements for the Sentencing Council to explore whether a better-resourced Council could deliver a significant net saving in costs to the criminal justice system.
- Review the role of the Attorney General in the Unduly Lenient Sentence scheme with a view to rationalising the scope of the scheme and transferring the power to refer potentially unduly lenient sentence to the Court of Appeal to the Director of Public Prosecutions.

Theme 3: Technology

How can we use technology to be innovative in our sentencing options, including considering how we administer sentences and manage offenders in the community?

Sentencers already make use of technology, including Artificial Intelligence (AI), to facilitate faster, more efficient and more evidence-based decisions. Although judges' direct use of AI is limited and administrative in nature, for example in writing emails and presentations,²³ they also draw on the OASys (Offender Assessment System), which combines algorithmic and human assessment, to predict an individual offender's risk of reoffending.

The opportunities for going further, such as directly using AI in judicial decision-making, are considered in a blog published by the Sentencing Academy in May 2024.²⁴ This notes that the promise of entirely neutral, objective decisions can only be realised where datasets are themselves free of bias, and that the challenges associated with a lack of transparency and the dehumanisation of the courtroom may outweigh the benefits of greater efficiency. Caution is clearly to be advised.

A related, equally controversial area where further use of data and AI might be considered is in allowing faster, more sophisticated analysis of reoffending rates in wider government policy decisions, rather than simply in individual sentencing. For example, the Ministry of Justice's future approach to planning and monitoring prison capacity would no doubt benefit from being guided by the most accurate data; this prospect is perhaps particularly appealing at a time when the system is facing such acute pressures that even relatively minor increases in demand are matters of serious ministerial concern.

A move in this direction would be consistent with the focus that the new Government has placed on technology in other areas of public service reform, such as the commitment it made in opposition to fund NHS trusts to purchase new scanners with inbuilt AI diagnostic tools in order to detect and treat disease earlier.²⁵

Concerns have been expressed over this potential use of AI and personal data in state decision-making, especially in relation to privacy and non-discrimination.²⁶ This is a serious risk that any Government would be advised to take seriously, given a history of complex legal challenges in relation to the treatment of prisoners, such as the long-running dispute with the European Court of Human Rights over prisoners' voting rights.

It is noteworthy that the Ministry of Justice is not listed as one of the departments involved in the current Data (Use and Access) Bill; provisions relating to the use of data for law enforcement purposes appear to be limited to Home Office functions. It is assumed that any related plans the Ministry of Justice has, for example to allow third parties to use personal data

²³ Courts and Tribunals Judiciary (2023) *Artificial Intelligence (AI): Guidance for Judicial Office Holders*. Available at: <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/>.

²⁴ Grindle, H. (2024) *The Techno-Judiciary: Sentencing in the Age of Artificial Intelligence*. Available at: <https://www.sentencingacademy.org.uk/sentencing-in-the-age-of-artificial-intelligence/>.

²⁵ Labour Party (2023) *Labour's 'Fit For The Future Fund' to arm NHS with new scanners and AI*. Available at: <https://labour.org.uk/updates/press-releases/labours-fit-for-the-future-fund-to-arm-nhs-with-new-scanners-and-ai/>.

²⁶ Quinn, B. 'Tech firm Palantir spoke with MoJ about calculating prisoners' 'reoffending risks', *The Guardian* (16 November 2024). Available at: <https://www.theguardian.com/technology/2024/nov/16/tech-firm-palantir-spoke-with-moj-about-calculating-prisoners-reoffending-risks>.

to predict prison capacity, will be consistent with the new statutory regime for regulating the use of data by third parties, but confirmation on this point will no doubt be welcomed by stakeholders keen to be reassured that the greater use of technology is not intended as a means of circumventing human rights.

Turning to sentencing options, a well-established use of technology in the context of sentencing is electronic monitoring (EM). Initially introduced in 1999 to promote compliance with curfews, recent technological advance has enabled its expansion. First, GPS technology now makes it possible to establish an individual's movements 24 hours a day. As a consequence, added to its original purpose, EM can be used to monitor a person's whereabouts, compliance with exclusion zones and/or attendance at required activities and appointments, or combinations of these requirements, when imposed in the context of community sentences (community orders, suspended sentence orders) or post-custodial licence conditions. Second, it has become possible to monitor an individual's alcohol consumption via an EM device and this innovation has been used to support the introduction of the Alcohol Abstinence and Monitoring Requirement as a new community sentencing option. In a further development, HMPPS has been piloting the targeted use of GPS monitoring as a licence condition for certain offender groups; notably, those convicted of a specified acquisitive crime. Consistent with these developments, the use of EM has been increasing. For example, between 30 June 2023 and 30 June 2024, the number of individuals fitted with a GPS device and with an alcohol monitoring device increased by 34% and 38% respectively.²⁷

The attractions of EM are easy to identify. In principle, it provides a cost-effective alternative to custody by protecting the public through reducing reoffending, on the one hand, and facilitating improved targeting of custodial resources, on the other. There may therefore be scope for expansion, both in terms of increased use of selective targeting and in the light of further advances in technology (for example, the prospective ability to monitor illicit drug consumption). However, any expansion should be informed by careful evaluation. EM is not immune from problems, such as the potential for interruptions in, or failure of, the technology that supports it. It may also raise issues relating to human rights and equalities due to the need to be resident at a specified address and/or demographic, cultural or situational factors.²⁸ Added to these concerns, the evidence base regarding its impact on public protection and reducing reoffending, and consequently, its value for money, has been criticised.²⁹ Therefore, further work is needed to establish the contribution of EM in managing offenders in the community and refining its use.

More positively, in terms of achieving the purposes of sentencing, EM may be supportive in modifying their behaviour in ways that encourage or reinforce the processes of desistance from future crime. For example, this might result from fortifying their ability to avoid certain activities, habits or environments that have been associated with previous offending or, for those with a chaotic lifestyle, by providing a framework of external accountability that

²⁷ Ministry of Justice (2024) *Electronic Monitoring Statistics Publication, England and Wales: June 2024*. Available at: <https://www.gov.uk/government/statistics/electronic-monitoring-statistics-publication-june-2024/electronic-monitoring-statistics-publication-england-and-wales-june-2024>.

²⁸ Hucklesby, A. and Holdsworth, E. (2016) *Electronic Monitoring in England and Wales*, Centre for Criminal Justice Studies, University of Leeds, May 2016.

²⁹ National Audit Office (2022) *Electronic monitoring: A progress update*. London: National Audit Office. Available at: <https://www.nao.org.uk/reports/electronic-monitoring-a-progress-update/>.

enhances the likelihood that they will cooperate with probation and other necessary support services. Arguably, what would be more effective still would be to introduce a dedicated form of technological support that is specifically tailored to this end. To be clear, this would not necessarily be a further evolution in the EM that we currently have, but an innovation that might sit in conjunction with, or independent of, it.

It is already known that discussions have taken place regarding the possible introduction of “nudge watches” for offenders on probation, geared to the needs of offenders with “chaotic” lives. From the information in the public domain, the concept seems to be relatively restricted in that such a device might nudge the offender towards compliance with appointments by sending pertinent reminders, and similar functions.³⁰ However, it is possible to envision that such a tool might be developed into something much more innovative and far reaching. Apps that involve a high degree of personalisation and interaction, such as those that enable health monitoring and promotion, are already commonplace. With that model in mind, an interactive monitoring device could be created that is informed by the increasingly sophisticated literature on desistance, and explicitly designed to encourage behaviours, thought patterns, etc. that are consistent with processes of desistance (and flag up, and potentially report, factors liable to contradict them). Rapid advances in AI imply that the opportunity to develop a tool along these lines is growing.

A final question to consider under this theme is the potential for limits on access to technology to be part of the range of sentencing options available in future. It is often noted that the internet in particular has had a significant effect in driving new offending behaviour, including the rise of cybercrime and online abuse and exploitation. However, its greater centrality in the normal day-to-day lives of many people may also prevent new opportunities for punishment and deterrence.

Sexual Harm Prevention Orders (SHPO) already allow the courts to limit an offender’s use of certain technology, either for a fixed period of at least five years or until a further order is made. Prohibitions can include not being allowed to use any device which can access the internet, or any capable of storing digital images, unless this is made available on request for inspection by a police officer. Offenders can be explicitly required not to delete their internet history, or use private or incognito browsing, or any software that would prevent their history from being visible, and the police can install monitoring software. Exceptions can be made for computers used at work or at a public place such as the job centre or library. Since 2022, SHPOs have also been capable of imposing positive obligations, such as wearing an electronic monitoring tag, participating in a behaviour change programme or taking a polygraph test.³¹

The orders are only available in relation to a sexual offence,³² and only where the offender presents a risk of sexual harm to the public (or particular members of the public) and an order is judged necessary to protect against this risk. In other words, SHPOs are currently conceived of solely as a public protection measure, rather than a punitive measure; they are ancillary to the sentence rather than being part of it.

³⁰ Syal, R. ‘Judges could impose house arrest on criminals as part of major overhaul of sentencing’, *The Guardian* (21 October 2024). Available at: <https://www.theguardian.com/law/2024/oct/21/england-and-wales-sentencing-overhaul-could-bring-in-home-detention>

³¹ Section 175 of the Police, Crime, Sentencing and Courts Act 2022.

³² As listed in either Schedule 3 or Schedule 5 to the Sexual Offences Act 2003.

A notable recent policy development is the announcement that the Home Office intends to introduce new interim Serious Crime Prevention Orders as a part of the Government's response to serious and organised crime, including immigration offences.³³ These would allow the police, National Crime Agency and others to seek immediate prohibitions on a suspect's device and social media usage without the need for a conviction, while a full order is considered.

A further, pre-existing comparator is the Terrorism Prevention and Investigation Measures (TPIM) Notice, which can be imposed by the Home Secretary where terrorism-related activity is suspected. Introduced by the Terrorism Prevention and Investigation Measures Act 2011, these also allow a person's use of electronic communications to be restricted and monitored.

That the Government has reason to consider these existing, analogous measures to be enforceable may indicate that there is a parallel opportunity to be considered in sentencing. A new option could be developed based on similar prohibitions, either as a requirement imposed as part of a community or suspended sentence order, or as an entirely standalone disposal. Eligibility for such an order would not need to be limited to sexual offences, or even to offenders whose future risk can be established, but as a substantive sentencing option in any case where such an order is considered to be a just outcome.

A primary advantage of this would be the provision of a further, low-cost alternative to prison, although it should be noted that there would be a cost involved in terms of monitoring by the Probation Service, including through EM. In addition, however, it may be that such an order would have a greater deterrent effect on certain groups of offenders than some of the other requirements or disposals currently available, for example where the offender does not habitually socialise in a way that would make a curfew or exclusion requirement a significant interference in their lives. The third purpose of sentencing, the reform and rehabilitation of offenders, could still be met by including positive requirements such as attending skills and training courses or seeking treatment, where relevant.

Any such proposal should of course be informed by research on the likely effectiveness of such orders, including comprehensive analysis of how successful SHPOs have been in preventing future offending by the cohort for whom they are currently available, and examination of their likely deterrent effect.

Summary of Recommendations:

- Clarify that any plans to expand the use of personal data to predict prison capacity, including by third parties, will be consistent with the principles of the Data (Use and Access) Bill, and will not infringe human rights.
- Ensure that any expansion in the use of EM is informed by careful evaluation of both the technological capacity available and the impact on human rights and equalities, and support the development of a more robust evidence base on the impact of EM on public protection and reduced reoffending.

³³ Home Office and The Rt Hon Yvette Cooper MP (2025) *Serious crime laws to be overhauled to combat people-smuggling gangs*. Available at: <https://www.gov.uk/government/news/serious-crime-laws-to-be-overhauled-to-combat-people-smuggling-gangs>.

- Explore the potential for EM or separate interactive technology to be used not only in monitoring compliance, but to support offenders in desisting from future crime, for example through encouraging positive changes in behaviour and thought patterns. This could resemble the apps already in general use for health monitoring and promotion.
- Consider developing a new sentencing option, either as a requirement of a conditional or suspended sentence order or a standalone disposal, to limit offenders' access to technology. This could be based on the prohibitions available as part of a Sexual Harm Prevention Order but available to a wider range of offenders for the purposes of punishment and deterrence. Research should first be commissioned on the likely deterrent effect, and on the current impact of SHPOs on reduced reoffending and public protection.

Themes 4 and 5: Community and Custodial Sentences

Qs. How should we reform the use of community sentences and other alternatives to custody to deliver justice and improve outcomes for offenders, victims and communities? How should custodial sentences be reformed to deliver justice and improve outcomes for offenders, victims and communities?

We address Themes 4 and 5 together as the use of community and custodial sentences are intrinsically linked. However, our primary focus here is on the use of custodial sentences as this has contributed to the current acute crisis in prisons. Other respondents to this Call for Evidence may be better placed to provide detailed proposals for the development of new, or expansion of existing, non-custodial disposals. This section makes suggestions for the reform primarily of custodial sentences.

Need for a 'Penal Audit'

Independent of any changes to the use of imprisonment over time, it is important to determine what percentage of the prison population could have been adequately punished in the community. The Sentencing Academy has for several years advocated a *penal audit* of the prison estate. As an analogy, it has recently been estimated that between one-third and 40% of receptions to Accident and Emergency departments could have been appropriately treated in community clinics or through online and telephone consultations. We need a comparable audit of the prison estate to determine what percentage of admissions to prison could have been safely and proportionately punished with a non-custodial sanction. Various estimates have been proposed³⁴. A systematic analysis of this kind would help devise and shape attempts to reduce the use of short prison sentences.

A penal audit would be a relatively straightforward analytic exercise. It would involve reviewing a sample of short to medium prison sentence cases. The review would be conducted by a panel including judicial, prosecution and defence representatives. The goal would be to determine whether the prisoner could have been punished adequately with an alternative to imprisonment. Beyond providing an estimate of the percentage of cases which could have been punished in the community, the audit would also reveal the specific offences where sentence inflation has occurred. This information could then be used by the Sentencing Council in constructing or amending its guidelines.

Reform of Custodial Sentences

Custodial sentences demonstrably need reforming. Several problems exist, including the extreme pressure on prison capacity from the current use of immediate imprisonment and low levels of public confidence. Both problems have been well-documented in recent years. The high use of imprisonment as a sanction can be addressed in a number of ways, including the use of a presumption against short prison sentences and/or a requirement for courts to justify the imposition of a short prison sentence. The abolition of short sentences has been advocated

³⁴ In 2007, Louis Blom-Cooper estimated that 60% of the prison population should have been punished in the community, but this estimate was not based upon any review of cases or systematic analysis. See Blom-Cooper, L. (2008) *The Penalty of Imprisonment. Why 60% of the Prison Population Shouldn't be there*. London: Continuum Books.

for at least 75 years³⁵ and we support a statutory presumption against such sentences. The experience in Scotland, while unsuccessful in significantly reducing the volume of short prison sentences, provides a basis for a revised approach in England and Wales. One possible model would be to introduce a strong presumption against such sentences for a limited range of offences or offence categories.

It is important to note, however, that reducing the number of short prison sentences will have only modestly reduce the size of the prison estate. There are three reasons for this:

- Short prison sentences have been declining in recent years. The percentage of short sentence prisoners declined from 9% of the prison population in 2010 to 3% in 2023.
- Sentencing in the magistrates' courts (where short sentences are most likely to be imposed) has shown modest sentence deflation (see earlier discussion).
- As noted earlier, sentence inflation is primarily a result of increases to the ACSL (PD) and not changes to the custody rate (PA).

In the absence of a presumption against short prison sentences, we recommend introduction of a provision to reconfigure the statutory test for custodial sentences, as proposed by two academics. Ashworth and Kelly recommended introduction of a new provision which would state that: 'If a court imposes a custodial sentence of less than six months, it must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and in particular, why a community order with a curfew requirement could not be justified.'³⁶ This reform would likely reduce the number of short prison sentences without unduly restricting the discretion of a sentencing court.

Simplification and Rationalisation of Custodial Sentences

Legislative reforms in recent years – both through the creation of new types of custodial sentences and amendments to the release arrangements for standard determinate sentences – have created a system that is difficult to comprehend with a myriad of release arrangements. Clearly a special form of custodial sentence is required for those who represent a serious risk of causing harm upon release but the framework is arguably over-crowded with different types of sentence: life sentences, extended sentences, serious terrorism sentences and special custodial sentences for certain offenders of particular concern.

In particular, it is unclear that the latter two forms of sentence meet any penological need. We would suggest the abolition of these two types of sentence and a return to a simplified system of life sentences for those either convicted of the most serious offences or who pose the most significant risk to the public and extended sentences for those considered dangerous but who do not meet the higher threshold for a life sentence. Those convicted of offences that would currently receive a serious terrorism sentence or a special custodial sentence for certain offenders of particular concern could be amply punished – and the public protected – by either a life or extended sentence if the court finds them dangerous.

³⁵ In 1949, a US Supreme Court Justice advocated 'Abolition of most short term imprisonment for a year or less.. such sentences have no reformatory value.. and are useless.' Cited in Bergan, F. (1949) 'The Sentencing Power in Criminal Cases', *Albany Law Review* 13, no. 1 (1949): 1-9, p. 8.

³⁶ Ashworth, A. and Kelly, R. (2021) Reducing the use of short custodial sentences. *Archbold Review*, 7, 6-9.

The second part of the necessary simplification of custodial sentences is a return to uniform release arrangements for prisoners serving a standard determinate sentence. At present, someone who receives a standard determinate sentence may be released automatically after serving two-fifths, one-half or two-thirds of their sentence depending on their offence. Such disparity is difficult to justify when a five year custodial sentence might mean 24 months in custody or 40 months. The gravity of the offence and the offender's risk of re-offending is already reflected in the sentence imposed by the court. Differential release points therefore complicate the sentencing process, change the meaning of a sentence of imprisonment, and confuse the public who will not have a clear idea of what proportion of a prison sentence will be served 'inside'. Where certain offences merit a longer period in custody that should be reflected in the sentence length and not the release arrangements. Moving all prisoners to the two-thirds point would increase 'truth in sentencing': a prison sentence as served would more closely reflect the duration imposed. This would also promote public confidence in sentencing. Without compensatory reductions in sentence length, however, moving all prisoners to the later release point would be prohibitively inflationary; we recognise that it is therefore an option to be considered in the longer term.

The Possibility of Earlier Release Through Positive Sentence Engagement

The most notable change in the composition of the prison population over the past two decades is a shift towards prisoners serving long sentences with a corresponding reduction in shorter sentence prisoners. This raises the question of whether some prisoners serving long sentences may be suitable for release at an earlier stage than was applicable at the time of sentencing. We believe that how an offender responds to their sentence is a penologically relevant consideration and therefore would support the availability of *modest* sentence reductions for those who make significant progress in custody.

At present, those convicted of murder under the age of 18 who are sentenced to Detention at His Majesty's Pleasure can apply to the High Court for a 'minimum term review' from the halfway point of their minimum term.³⁷ A reduction of one or two years can be made to their minimum term where they have demonstrated *exceptional* progress in custody. This measure requires more than a mere absence of poor compliance and requires the demonstration of positive engagement with their sentence. Such an approach provides a possible model for other prisoners serving long sentences where it would be beneficial for the criminal justice system to encourage a genuinely positive approach to the serving of such sentences.

Replicating the 'minimum term review' model would be impractical as the feasibility of a High Court review lies with the relatively small pool of eligible prisoners. However, detailed guidance could be produced to define what characterises exceptional progress and it may be possible to place the decision with prison governors (with some form of potential judicial oversight). This would be analogous to their powers to release a prisoner under Home Detention Curfew, which may soon enable them to release a prisoner 12 months before the expiry of the custodial portion of their sentence.

³⁷ Sections 27A and 27B of the Crime (Sentences) Act 1997.

Increase the Use of Deferred Sentencing

The use of deferred sentencing has declined greatly over the past 20 years.³⁸ Recent years have witnessed a growth in interest in deferral. Deferral of sentence is more frequent in Scotland and indeed in most other jurisdictions. Defendants who complete the period of deferral without violating the court's requirements benefit from a less severe sentence when ultimately sentenced. This means a non-immediate custodial sanction where the offender would have been committed to custody had they been sentenced immediately following conviction. Deferral offers offenders an opportunity to address the cause of their offending – which is often the goal of the sentence itself.

There is a clear place for deferral in the array of judicial responses to offending. Deferral will not account for a high volume of cases, but it can (and should) be employed more often than at present. A diverse profile of offenders may be appropriate for deferral, including young adults completing a training, educational or professional placement among others. A number of pregnant women are committed to custody every year and give birth in prison. There is no public support for this practice and no justification either when courts are able to defer sentence or impose a suspended sentence order. Deferred sentencing may also be particularly applicable in cases involving a sole carer of a dependant. Clearer guidance from the Council could help promote greater use of this option. The current guidance is 10 years old now, and Council is currently reviewing this guidance. We suggest:

- Increase the maximum length of deferral from six to 12 months. The current six-month limit is much lower than deferred sentencing regimes in other jurisdictions, including several Australian states.
- Provide additional guidance to clarify the purpose of sentence deferral.
- Increase the range and onerousness of requirements imposed during the period of deferral. The Scottish 'Structured Deferred Sentence' regime offers one possible model to follow.
- Provide additional guidance on the profiles of offenders and offences for which deferral may be appropriate. This would include highlighting the relevance of deferral for young adults in the age range 18-25 years of age.

Increase the Use of Fines and Community Orders

The use of community orders has declined in recent years, from 13% in 2002 to 7% in 2022. It is unclear how much of this decline is attributable to an increase in the seriousness of offending, but this factor is unlikely to explain the whole decline. The initial decline was accompanied by an increase in the use of suspended sentence orders after restrictions on their use were removed by the Criminal Justice Act 2003, suggesting a possible process of up-tariffing where a more severe sentence is imposed in the place of the less severe option. However, a subsequent decline in the use of suspended sentence orders without a corresponding increase in the use of

³⁸ See two reports by the Sentencing Academy: Roberts, J.V., Freer, E. and Bild, J. (2022) *The Use of Deferred Sentencing in England and Wales: A Review of Law, Guidance and Research* and Freer, E. (2022) *Deferred Sentencing: A review of practice*. Available at: <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/The-Use-of-Deferred-Sentencing-in-England-and-Wales.pdf> and <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Deferred-Sentencing-August-2022.pdf>.

community orders suggests that a simple replacement of one option by the other has not taken place. Greater investment in probation services is necessary to assist in increasing the volume of community orders more generally.

Overall, the use of fines increased slightly over the period 2002 to 2022. However, the volume of fines declined significantly for indictable offences, from 23% to 16%. Appropriately determined to ensure the defendant's income and economic resources are fairly considered, fines represent the most cost-effective ways of holding offenders accountable. A clear message should be sent to courts – by Parliament or the Sentencing Council – to increase the proportion of cases resolved through the imposition of fines. However, ensuring the payment of fines imposed is clearly a significant issue: in the fourth quarter of 2023, the total value of financial impositions outstanding in England and Wales was £1.59 billion. Failure to ensure payment of fines is both an affront to victims and a missed opportunity to turn punishment from being a drain on the public purse to providing resources to help fund the criminal justice system.

Legislating a Statement of the Purpose(s) of Imprisonment

Although the Sentencing Act 2020 stipulates the multiple purposes of sentencing, there is no statutory guidance on the purpose of imprisonment *per se*. A group of stakeholders led by the Bishop of Gloucester has advocated that Parliament legislate a statement of the purpose of imprisonment. We agree with this recommendation. If courts had a clearer direction from Parliament regarding the purposes of a prison sentence this would carry benefits in terms of a more focused use of imprisonment and greater public understanding of sentences of imprisonment.

Reconceptualising and Relabelling Sentences

With respect to immediate prison terms, the public routinely discount sentences and regard prison sentences with a high degree of cynicism. This tendency will have been exacerbated by the (necessary) mass early release of prisoners this autumn. (Earlier in this response we addressed ways of obviating the need for such measures.) The public also have little idea what is meant by several sanctions. For example, a 'suspended sentence order' (SSO) causes confusion among members of the public who likely assume it is a sentence which has a minimal impact on the offender. It is not seen as a form of, or adequate substitute for, a sentence of institutional imprisonment and is routinely characterised in media reporting as an offender 'walking free' from court.

Two current sentences of imprisonment (standard determinate sentences and the SSO) are poorly labelled and misunderstood by the public. Most western common law jurisdictions operate multiple forms of custody, and we propose a new scheme to expand and improve the range and effectiveness of custodial sanctions. An important element of our proposals involves re-labelling several sentences to make them more comprehensible to the public. This proposal reflects an ongoing Sentencing Academy research project supported by the Justice Committee and previous reports which have discussed ways in which sentences might better be expressed to improve public understanding.³⁹ Although we do not discuss it further here, the sentence of life imprisonment could be better labelled and the Sentencing Academy will advance proposals

³⁹ See Queensland Sentencing Advisory Council (2023) *Understanding of Sentencing: Community Knowledge of sentencing terms* and Ministry of Justice (2013) *Communicating Sentencing: exploring new ways to explain adult sentences*.

in the Spring for better terminology to describe this sentence after reviewing findings from our ongoing research.

Four New or Amended Forms of Imprisonment

We advocate the creation of a revised suite of prison sentences. This reform would serve two purposes: it would help reduce the number of admissions to prison and promote greater public confidence in prison sentences through more accurate and comprehensible labels. We propose four clear custodial options. Limitations on space prevent a comprehensive discussion of all four forms of sentence but summary points include the following:

- *Immediate Imprisonment*: These sentences will still require the offender to go immediately into a custodial setting.
- *Suspended Imprisonment*: The current SSO would be re-labelled and re-launched. All suspended prison sentences would carry a core constellation of requirements and would be more onerous and more rigorously enforced than at present.
- *Intermittent Imprisonment*: Courts in most western common law nations may impose a prison sentence to be served on weekends. There is usually a maximum term (90 days is common) and offenders spend their weekends at Category D or other low security facilities. This option was briefly trialled over 20 years ago, but we believe the conditions preventing successful implementation have now changed, as has the imperative to reduce the number of admissions to the prison estate. Category D facilities are currently underused and could be deployed to support this sanction. At the very least, the Government should conduct a further trial scheme, drawing on the successful regimes in other jurisdictions.
- *Community Imprisonment*: Almost all jurisdictions operate a home confinement sanction.⁴⁰ Offenders are required to remain at home, observe a strict curfew, and have their compliance with this and other requirements electronically monitored. These offenders are permitted to leave home for specific court-authorized purposes such as attending medical or professional appointments and to go to work. Breach of any requirements would carry a heavy presumption of committal to custody for the time remaining on the order at the point in the sentence at which the breach occurred. As with Intermittent or Weekend Imprisonment there would be a cap on the maximum length of the sentence. The cap would prevent excessively long sentences and would also ensure that these community imprisonment options would not be imposed in the most serious cases. They would, therefore, replace in suitable cases a disruptive short term of immediate imprisonment.

⁴⁰ The Community Custody Order in Australia, the Conditional Sentence of Imprisonment in Canada, and the Community Detention sentence in New Zealand. Our proposed order is similar but distinct from other proposals recently advanced e.g., the *Intensive Control and Rehabilitation Order* (ICRO) advanced by the Centre for Social Justice (see *Sentencing in the Dock. An Alternative to the use of the prison estate in suitable cases.* (More generally see Roberts, J.V. and Cole, D.P. (2020) *Conditional Sentences of Imprisonment: Past, Present and Future.* In: *Sentencing in Canada. Essays in Law, Policy and Practice.* Toronto: Irwin Law).

For all non-institutional forms of imprisonment there would be a limited schedule of serious offences for which these sanctions are presumptively excluded. For these crimes, courts would only be able to impose one of these sentences after first finding exceptional circumstances.

We make one additional recommendation which relates to three of the proposed forms of custody. For suspended, intermittent and community imprisonment, courts should place greater emphasis on incorporating rehabilitation-related incentives. This could assume several forms. For example, offenders serving a suspended prison sentence could be incentivised to participate in rehabilitative programming. Successful completion of various rehabilitative programmes or requirements would trigger amendment to either the punitive requirements of the order (all such orders should have punitive requirements) or the overall duration of the order. Similarly, for offenders serving intermittent sentences on weekends, the number of weekends could be reduced in recognition of successful progress towards rehabilitation or desistance. As a general approach to sentencing, offenders should be expected to make greater efforts towards desistance and rehabilitation. In return, the criminal justice system should provide them with greater assistance in their efforts and incentives in the form of sentence reductions.

Sentencing Methodology

The introduction of the four forms of custody would need to be incorporated into the current sentencing methodology. As now, a court would first determine whether the custody threshold had been crossed, following the guidance from the Sentencing Council and the Court of Appeal. If the court concluded it had been passed it would then proceed through the four sanctions in the following order:

Suspended Imprisonment - Community Imprisonment- Intermittent Imprisonment- Immediate Imprisonment

The court would have to sequentially reject each form of custody before it could impose immediate imprisonment. In this way, a sentence of immediate imprisonment would only be imposed after the court had rejected all non-custodial sentencing options and all other imprisonment sentences. This structured form of judicial decision-making has successfully reduced the use of custody in other jurisdictions.

Response to Breach of a Community Order

Re-sentencing to imprisonment following breach of a community order's requirements should be rare. It will need to remain the 'ultimate sanction' for breach, but it should be circumscribed. One option would be to suspend any custodial sentence imposed for breach. Courts should also be encouraged to sanction and encourage future compliance through other means, principally fines (where the offender has the means to pay a fine) and increase in the duration of the order or the onerousness of its requirements. It may help to re-frame breach hearings as a 'breach and review' hearing. This would encourage courts to re-define the response to breach in more constructive terms. More could be done to anticipate and therefore prevent a breach from occurring. One suggestion would be to conduct interim reviews, particularly for the longer orders. These could be conducted outside of the court process by probation professionals with the power to invoke a court hearing if necessary.

Public Opinion

Repeated reference has been made in the popular and academic literature to the potential contribution of public opinion to sentence inflation. It has been argued that both Parliament

and the courts have been affected by public views, or what they interpret to be the views of the public. Parliament has introduced legislation which has increased severity for a number of offences and also increased the time served in prison for specified prisoners. Whether these changes were motivated by a desire to respond to public opinion, or whether they can be justified on penological grounds is unclear and outside the scope of our analysis.

With respect to courts, it is argued that they have become tougher in their sentencing patterns in response to what they perceive to be a public desire for harsher sentencing. There is no hard evidence to sustain or refute this hypothesis. However, two facts are clear. First, most people hold the view that sentencing is too lenient; and second, most people under-estimate the severity of current sentencing practice.⁴¹ Accordingly, we advocate a renewed effort to educate the public about current sentencing trends. For example, whatever their view of the appropriate sentence for murder, people need to know that offenders convicted of murder in England and Wales serve significantly longer periods in prison before being considered for release than other common law countries. The average minimum term for murder today is over 20 years. This is significantly longer than the comparable statistic in Canada, New Zealand, or Australia. A public education initiative could involve the House of Commons Justice Select Committee, the Ministry of Justice and the Sentencing Council. Together it should be possible to provide more information about sentencing practice.⁴² With respect to the immediate future, any substantive reforms to sentencing practice or release provisions will need to be explained and justified to the public. Otherwise, the already high levels of public criticism of sentencing will worsen.

Summary of Recommendations:

- Initiate a ‘penal audit’ to determine what percentage of the prison population could have been adequately punished in the community.
- Reform custodial sentences by legislating to introduce a presumption against the imposition of short immediate custodial sentences, returning conformity to release arrangements for standard determinate sentences and reviewing and rationalising the range of sentences available for offenders convicted of certain offences.
- Introduce the possibility of earlier release for longer sentence prisoners who demonstrate exceptional progress in custody.
- Encourage the greater use of community orders and fines.
- Legislate to introduce a statutory purpose of imprisonment.

⁴¹ See Roberts, J.V., Bild, J., Pina-Sánchez, J. and Hough, M. (2022) *Public Knowledge of Sentencing Practice and Trends*. London: Sentencing Academy. Available at: <https://sentencingacademy.org.uk/wp-content/uploads/2023/08/Public-Knowledge-of-Sentencing-Practice-and-Trends.pdf>.

⁴² The availability of recorded sentencing remarks on YouTube is an important step forward with respect to increasing transparency and making sentencing decisions more accessible to the public beyond courtrooms. More could be done. For example, over the past decade the BBC has broadcast several documentaries on the work and deliberations of the Parole Board of England and Wales. These have provided viewers with insight into the decision-making of the Board. There have been no similar programmes focusing on sentencing courts or the Sentencing Council.

- Explore the feasibility of introducing new forms of custody in the form of Intermittent Imprisonment and Community Imprisonment.
- Improve sentencing terminology so that sentence labels bear a closer resemblance to the practical implications of the sentence to aid public understanding and confidence.
- Promote the increased use of deferred sentencing to reduce unnecessary admissions into custody.

Theme Six: Progression of Custodial Sentences

Q: How should we reform the way offenders progress through their custodial sentences to ensure we are delivering justice and improving outcomes for offenders, victims and communities?

Issues of sentence progression do not necessarily lend themselves to consideration in isolation. For example, prisoners serving their sentence or part of their sentence in the open estate may also spend time outside the prison on temporary licence to attend educational courses, re-establish contact with the community into which they will be released or to work in the community. The benefits of one means of progression from custody to the community may be hampered by another. This section highlights how delays in handling applications for release on temporary licence in one open prison meant that prisoners were denied work opportunities in the community. Nonetheless, considering progression as discrete stages provides structure. We therefore consider in turn: (1) progression through prison categories from the closed to the open estate; (2) release on temporary licence (ROTL); (3) home detention curfew; (4) recall to custody. The conclusion will make brief comment on the ‘truth in sentencing’ movement which sought to reduce the opportunity for early release in some jurisdictions in the belief that public confidence in justice was undermined when prisoners were released having served only a portion of their sentence in custody. Given the remit of the Independent Review, no consideration will be given to the progression of prisoners serving Imprisonment for Public Protection (IPP) or life imprisonment.

Prison Categories: From the Closed to the Open Estate

Prisons for adult men are classified into four categories depending on function: the High Security Estate (Category A); local prisons (Category B); closed training prisons (Category C); and open prisons (Category D). Prisons for women are classified depending upon whether they provide open or closed conditions. It is common for prisoners to move between category of prison as they serve their sentence, often as their risk to the public reduces and / or they come towards the end of a sentence.⁴³

Prisoners are categorised based on security classifications (which do not necessarily equate to the offence(s) for which they were imprisoned). Although the impact of classification can be significant, decisions concerning the security classifications of prisoners do not concern civil rights for the purposes of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁴ Instead, they should be regarded as a matter of ‘administrative classification’.⁴⁵ Similarly Article 5(4) is not engaged when a prisoner is transferred from the open to the closed estate.⁴⁶

The latest annual report by the Chief Inspector of Prisons found that: ‘open prisons generally had the best outcomes of all prison categories, with an increased focus on rehabilitation and supporting prisoners towards release’.⁴⁷ However, there is variance in the conditions and

⁴³ Prisoners may also move between prisons in the same category for administrative reasons.

⁴⁴ Application 8575/79 *Brady v United Kingdom* (1981) 3 EHRR 297.

⁴⁵ It is also worth noting that there is no statutory requirement to categorise male or female prisoners by security status.

⁴⁶ *R (on the application of Davies) v Secretary of State for Justice* [2008] EWHC 397 (Admin).

⁴⁷ HM Chief Inspector of Prisons for England and Wales (2024) *Annual Report 2023-24*. London: HMIP, p.40.

outcomes in the open estate and it would be a mistake to conclude that all open prisons meet with similar success. A priority would be to ensure that all open prisons are adequately resourced to ensure they can meet the resettlement function satisfactorily. A further consideration is whether prisoners serving long sentences should be able to access the open estate at an earlier stage in their sentence than is currently the case.

Research on how prisoners regard open conditions is limited.⁴⁸ One must guard against assumptions that prisoners find transition to the open estate straightforward or conditions preferable.⁴⁹ Opinions of those with experience of serving terms in open and closed conditions would be valuable to informing this review.

Release on Temporary Licence (ROTL)

The rules governing release on temporary licence are found in Rule 9(3) of the Prison Rules 1999. A prisoner may only be released by the Secretary of State⁵⁰ and there are two grounds for refusal. A prisoner may not be temporarily released unless the Secretary of State is satisfied that there would not be an unacceptable risk of him committing offences whilst released or otherwise failing to comply with any condition upon which he is released.⁵¹ The second ground concerns public confidence in the administration of justice. The Secretary of State must not release a prisoner under these provisions if, having regard to the period or proportion of his sentence which the prisoner has served and the frequency with which the prisoner has been granted temporary release, the Secretary of State is of the opinion that the release of the prisoner would be likely to undermine public confidence in the administration of justice.⁵²

Case law has identified factors that could be in play under Article 8(2) of the European Convention on Human Rights, including the risk of absconding, the risk of reoffending, the fact that a mother and child are separated by imprisonment, and the risk of offending public opinion.⁵³ Whilst offending public opinion is a relevant factor in considering whether to grant temporary release, a refusal solely on this basis would not be consistent with Article 8(2).⁵⁴ However, the fact that consideration should be given to public opinion when deciding whether to grant temporary release illustrates the tension that can exist between measures designed to facilitate reintegration from custody to the community and perceptions that justice is not served unless offenders serve at least a significant proportion of their sentence in custody.

Home Detention Curfew (HDC)

The statutory framework for HDC is largely to be found in section 246 of the Criminal Justice Act 2003. Extensive guidance has recently been issued by the Ministry of Justice and HM

⁴⁸ See Marder, I., Lapouge, M., Garrity, J. and Brandon, A. (2021) 'Empirical Research on the Impact and Experience of Open Prisons: State of the Field and Future Directions' *Prison Service Journal* 2516, 3-9.

⁴⁹ Waite, S. (2024) 'A Whole New World...': Exploring Transcarcerated Habitus and Women's Transition from a Closed to an Open Prison' *The Howard Journal of Criminal Justice* 63(1) 82-97.

⁵⁰ Prison Rules 1999, SI 1999/728, rule 9(1). The rules state that the decision to grant an application for temporary release is a decision for the Secretary of State alone though in practice the decision will normally be taken by the prison governor: *Lexi Holdings plc v Luqman* [2008] EWHC 151 (Ch.).

⁵¹ Prison Rules 1999, SI 1999/728, rule 9(4).

⁵² Prison Rules 1999, SI 1999/728, rule 9(5).

⁵³ *Dickson v United Kingdom* (2007) 46 EHRR 927.

⁵⁴ *R (on the application of MP) v Secretary of State for Justice, R (on the application of P) v Governor of HMP Downview* [2012] EWHC 214 (Admin).

Prison & Probation Service and it is unnecessary to detail the key provisions as a result.⁵⁵ Twelve categories of offender are excluded by statute from HDC.⁵⁶ Of more interest is a category entitled ‘Presumed Unsuitable Offenders’, justified on the grounds of the need to maintain public confidence in the scheme, which captures a wide range of individuals.⁵⁷

The recent proposal to double the maximum duration from six to 12 months is not an uncontroversial one. An offender sentenced to five years’ imprisonment, subject to automatic release at 40% who spends the final 12 months of the custodial element of their sentence under HDC would serve only 12 months in prison. The extent to which such a sentence can really be categorised as a ‘five-year prison sentence’ is highly questionable.

Allied to this is a more fundamental consideration. What is the underlying purpose of releasing prisoners under HDC: is it primarily a lever that is pulled to relieve pressure on prison places or is there penological merit in enabling some prisoners to spend part of the custodial element of their sentence under HDC? If it is the latter then this should guide the approach taken in determining who to release under HDC, and when. If it is the former, and there is a cohort of relatively low risk prisoners who can be released to free up prison capacity, then it does raise the question as to whether they needed to serve a sentence in a custodial institution in the first place. Such offenders might instead be sentenced to a form of Community Imprisonment, as we propose in Theme 5, which would also be a more transparent sentencing outcome than a prison sentence that could entail serving as little as 20% of the pronounced sentence length in prison.

Recall

The Secretary of State may revoke the licence of any determinate sentenced prisoner who has been released on licence and recall the prisoner to custody.⁵⁸ Where an offender’s licence is revoked, they are liable to be detained in pursuance of their sentence and a failure to return to prison would mean that the offender would be unlawfully at large.⁵⁹ The recalled prisoner may make representations in writing with respect to their recall⁶⁰ and, on their return to prison, they must be informed of the reasons for their recall and of their right to make representations.⁶¹

If a prisoner is recalled in pursuance of section 254 of the Criminal Justice Act 2003, they are entitled to have the lawfulness of the recall decision determined speedily by a court to comply with Article 5(4) of the European Convention on Human Rights.⁶²

⁵⁵ Ministry of Justice / HM Prison & Probation Service (2024) *Home Detention Curfew (HDC) Policy Framework*.

⁵⁶ Ministry of Justice / HM Prison & Probation Service (2024) *Home Detention Curfew (HDC) Policy Framework*, para 4.3.1.

⁵⁷ Ministry of Justice / HM Prison & Probation Service (2024) *Home Detention Curfew (HDC) Policy Framework*, para 4.3.6.

⁵⁸ Section 254(1) of the Criminal Justice Act 2003. A prisoner recalled under sections 254 or 255 commits an offence if he has been notified of the recall orally or in writing and while unlawfully at large fails, without reasonable excuse, to take all reasonable steps to return to prison as soon as possible.

⁵⁹ Section 254(6) of the Criminal Justice Act 2003.

⁶⁰ Section 254(2)(a) of the Criminal Justice Act 2003.

⁶¹ Section 254(2)(b) of the Criminal Justice Act 2003.

⁶² *R (on the application of Smith) v Parole Board, R (on the application of West) v Parole Board* [2005] UKHL 1.

There are many potential grounds for recall. As they are separate grounds, being of ‘good behaviour’ goes further than requiring the offender to desist from offending. Limited guidance on interpretation is provided in *R (on the application of McDonagh) v Secretary of State for Justice*.⁶³ The offender had to act lawfully, and in a way that did not adversely affect, annoy, hinder, inconvenience or distress another or others in relation to their lawful activities or performance of their lawful duties, whether by action, omission or by a course of conduct. This is a broad definition; the review panel may wish to consider whether a more precise definition would capture the circumstances in which it is appropriate to recall a prisoner. Since non-compliance with conditions was the most common reason for recall,⁶⁴ a more detailed analysis of the nature of the breach may suggest ways in which compliance can be achieved without returning the individual to prison. The policy response here should take account of the social science literature on mechanisms of compliance.

Conclusion

The legal complexity of sentence progression means that the public are likely to find the current arrangements for release unsatisfactory. It is evident that prisoners are frequently released having served only a proportion of their sentence in custody, as the following Table demonstrates.

All determinate sentences	58%
Less than or equal to 6 months	94%
Greater than six months to less than 12 months	67%
12 months to less than 2 years	56%
2 years to less than 4 years	49%
4 years to less than 5 years	56%
5 years to less than 7 years	54%
7 years to less than 10 years	61%
10 years to less than 14 years	57%
14 years or more (excluding indeterminate sentences)	53%
Extended determinate sentences (EDS)	86%

Mean time served (including remand) as a percentage of mean sentence length of prisoners released from determinate sentences April to June 2024 by custody type⁶⁵

Calls for ‘truth in sentencing’ led to restrictions in the use of early release in several jurisdictions in the 1980s and 1990s. The political context is obvious; public confidence is eroded if the time people serve in custody bears little resemblance to the sentence stated in

⁶³ [2010] EWHC 369 (Admin).

⁶⁴ Ministry of Justice (2024) *Offender Management Statistics Quarterly: April to June 2024*, Table 5_Q-10.

⁶⁵ From Ministry of Justice (2024) *Offender Management Statistics Quarterly: April to June 2024*, Table 3_Q-5.

court. Certainly, in England and Wales the current position is too complex and impossible to explain as a matter of principle.

Summary of Recommendations:

- Ensure the proper resourcing and utilisation of open prisons. As the number of prisoners serving long sentences has grown in recent decades, consideration may need to be given to whether long-term prisoners should be able to access the open estate at an earlier point in their sentence to facilitate rehabilitation and ameliorate the effects of very long periods spent in closed conditions.
- Evaluate the proper role of public opinion in the use of both ROTL and HDC to ensure that both can be used effectively to aid rehabilitation but without unduly compromising public confidence in the criminal justice system. Where a prisoner may be suitable to spend a large part of the custodial element of their sentence under HDC, it may be more appropriate to sentence them to a form of Community Imprisonment in the first place as proposed in Theme 5.
- Consider the development of a more precise definition that would capture the circumstances in which it is appropriate to recall a prisoner.

Theme 7: Individual Needs of Victims and Offenders

Q: What, if any, changes are needed in sentencing to meet the individual needs of different victims and offenders and to drive better outcomes?

Whilst the Sentencing Academy is supportive of a more individualised approach to sentencing that recognises the particular needs of certain cohorts of offenders, we believe that other respondents will be better placed to advise on these needs. Accordingly, we confine our response to this section of the Review to victims, and principally focus on the main vehicle for victim involvement in the sentencing process: the Victim Personal Statement.

It is essential that the Review should engage with the needs of victims of crime, who are not only the people most directly affected by the original crime, but also often key participants in proceedings, including at the point of sentencing.

At the outset, however, the Sentencing Academy would encourage decision-makers to ensure that discussions of victims' interests are always rooted in evidence, rather than assumptions. An instance of assumptions seeming to take precedence is in the frequent citing of victims' interests in support of the sentencing reductions offered to defendants who enter a guilty plea before trial, particularly whenever it is proposed that these should be greater. A recent example is in the statement made by the previous Justice Secretary in October 2023 on the steps that the Government was taking to manage the prison capacity challenge. As part of this, he noted that the Government would consider extending the reductions available for those who plead guilty at the earliest possible opportunity, on the basis that 'when more offenders plead guilty, that saves time in the courts, cuts the number of people in our prisons on remand, but most importantly saves victims the ordeal of giving evidence in court'.⁶⁶

The Sentencing Academy has previously reviewed the current law and use of the most recent Sentencing Council guideline on sentencing reductions for early guilty pleas and concluded that the courts are broadly following the suggested approach.⁶⁷ Decision-makers may therefore consider an extension to the currently available maximum sentencing reduction justified if it were indeed to lead to more guilty pleas. However, we are not aware of empirical evidence that demonstrates the extent to which victims would prefer this to having the opportunity to give their evidence, or whether this depends on the nature and seriousness of the alleged offence and would support the development of a robust evidence to support such a proposition if any further extension were to be pursued.

There are other current sentencing practices more directly relevant to victims, such as court-ordered compensation, where it is similarly unclear to what extent the true impact on victims is understood. For example, where offenders pay in small instalments, it would be beneficial to explore to what extent victims experience these orders as achieving the relevant purpose of sentencing, which is the making of reparation by offenders to those affected by their offences. Since the effect of paying in instalments is also that contact between victim and offender is

⁶⁶ HC Deb (16 October 2023). Vol. 738. Col. 61.

⁶⁷ Gormley, J., Roberts, J.V., Bild, J. and Harris, L. (2020) *Sentence Reductions for Guilty Pleas: A review of policy, practice and research*. London: Sentencing Academy. Available at: <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Sentence-Reductions-for-Guilty-Pleas.pdf>.

prolonged, it would be worth examining the effects this has on the former in both financial and psychological terms.

The principal vehicle for direct victim participation in sentencing is the Victim Personal Statement (VPS) scheme. The VPS was introduced in England and Wales in 2001 following a commitment in the Victims' Charter of 1996. The right to submit a VPS is contained in the Victims' Code; however, the VPS regime suffers from a number of problems.

Research with sentencers found that only around one sentencer in 10 believed that the VPS regime was working well. Around 60% rated the scheme as poor or very poor.⁶⁸ Another key weakness of the regime is that only a small minority of victims participate, and system failure is one explanation. Earlier analyses of Crime Survey for England and Wales (CSEW) data found that across the most recent administrations of the CSEW only 13% recalled receiving an offer. Of the victims who recalled being offered the opportunity to submit a statement, about half (53%) stated they had submitted one. Those who reported having submitted a VPS were asked whether in their opinion the VPS 'was taken into account by the CJS'. Approximately one-third responded 'yes, completely', 30% chose 'yes, to some extent' and 34% responded 'no'. Unfortunately, the VPS questions are no longer included in the CSEW. As a result, there is no source of data on the current use of VPSs. England and Wales is likely the only jurisdiction in which usage data are unavailable. Other data sources confirm the CSEW trends. According to a recent annual survey by the Office of the Victims' Commissioner, fewer than one quarter of respondents said they were offered an opportunity to make a VPS.⁶⁹

Summary of Recommendations:

- Ensure any policy proposals designed to promote the interests of victims are supported by robust evidence rather than assumptions, including any move to extend the maximum sentencing reduction available for a guilty plea. The extent to which court-ordered compensation achieves the purpose of reparation to victims, especially where offenders pay in instalments, should also be explored.
- Although the Victims Commissioner, the Sentencing Academy and others have conducted limited reviews, there has been no comprehensive government review of the scheme since its creation. The Sentencing Review should encourage the Government to conduct such a review, which need not be time-consuming or particularly expensive. This review should examine experiences in other common law jurisdictions such as Canada and New Zealand where victim impact schemes appear to function better, in terms of victim participation and victim entitlements at sentencing and parole. The

⁶⁸ Research conducted by the Victims' Commissioner and summarised in Rock, F. (2024) *Victim Personal Statements: A Review of Recent Research and Developments*. London: Sentencing Academy, Table 1. Available at: <https://www.sentencingacademy.org.uk/wp-content/uploads/2024/02/Victim-Personal-Statements-A-Review-of-Recent-Research-and-Developments.pdf>

⁶⁹ Murray, S., Welland, S. and Storry, M. (2024) *Annual Victims' Survey 2023*. London: Office of the Victims' Commissioner, p. 32. Available at: <https://cloud-platform-e218f50a4812967ba1215eacede923f.s3.amazonaws.com/uploads/sites/6/2024/08/Victim-Survey-2023-final-full-with-alt-text-27-Aug.pdf>

review should explore the reasons why so many victims appear not to have received a VPS and why such a high percentage decline to participate by submitting a statement.

- Several academics and agencies have proposed that VPS should be re-named ‘Victim Impact Statements’.⁷⁰ The rationale is that the name ‘Victim Impact Statement’ would more accurately convey to victims that the role of the statement is to inform the court about the impact of the crime rather than to convey their personal opinions about the offence, the offender or the sentence. The Government should consider rebranding and relaunching the victim impact statement.
- Development of a separate protocol and form for relatives of victims of fatal offences. The VPS plays, or should play, a particularly important role at sentencing in cases involving fatalities. Recent research in other jurisdictions confirms that victim statements are most likely to be used in homicide offences, and particularly murder.⁷¹ The State owes a heightened duty of care to relatives in homicide offences. In addition, these victims are more likely to attend the sentencing hearing to deliver their statements orally. The standard VPS form is inadequate to address the needs of these victims. Consideration should be given to developing a bespoke form and protocol for engaging with secondary homicide victims. In devising such a protocol, it would be important to consult individuals recently bereaved who have participated in the sentencing process.

⁷⁰ See discussion in Rock, F. (2024) *Victim Personal Statements: A Review of Recent Research and Developments*. London: Sentencing Academy.

⁷¹ Dufour, G., Ternes, M., and Stinson, V. (2023) The Relationship between Victim Impact Statements and Judicial Decision-Making: An Archival Analysis of Sentencing Outcomes. *Law and Human Behavior*, 1-15

Appendix: Data Summary

Our recent analyses for the Sentencing Review suggest the following conclusions:

- The size of the prison population is affected by many variables, and not simply changes in the severity of sentencing. For example, admissions for unconvicted and as-yet unsentenced prisoners are also a major contributor to the prison population. In addition, changes to the release provisions will swell the prison population in a way that is undetectable by examining sentence lengths.
- Sentence inflation may reflect natural causes. Any increase in the overall seriousness cases would naturally result in more and longer custodial sentences.
- Sentencing practices in the magistrates' courts revealed modest sentence *deflation*. Sentence severity declined modestly in this level of court over the past decade.
- For indictable offences and offences triable either way, significant sentence inflation occurred. The *Custody Rate* increased as well the *Average Custodial Sentence Length*. Sentence inflation was confirmed by the SA Imprisonment index which combines the incarceration rate with the average sentence length to produce a single measure of the use of imprisonment.
- The use of imprisonment reflects two variables: Prison Admissions (PA, the immediate custody rate) and Prison Durations (PD, the average custodial sentence length (ACSL)).
- PD increased more rapidly than PA over the period 2002-2022. PD (the ACSL) increased by 61% compared to only 33% for PA (the custody rate). The key conclusion from our analyses is that longer sentences contributed more to sentence inflation than higher custody rates: PD was more responsible for the current situation than PA.
- We conducted analyses to test one plausible explanation of what we term legitimate sentence inflation: an increase in more serious cases. Taking 2010 as a comparator year, we used the ONS seriousness classifications to examine changes in the seriousness of crimes appearing for sentencing. For some of the offence categories we have selected, changes in the seriousness of offences played a major role in explaining 'sentence inflation'. Sentencing for drug offences increased by 54% over the period 2010-2024. However, when we compare the seriousness of cases sentenced in 2010 with those sentenced in 2024, we see a 51% increase in the seriousness of cases. In other words, almost all of the increase in severity for these offences can be explained by the fact that more serious cases are being sentenced. If courts were sentencing more harshly in the absence of any increase in the seriousness of cases, the severity line would escalate and the seriousness line would remain flat. This is clearly not the case.
- In clear contrast, sentencing for sexual offences appears to reflect spurious inflation. The seriousness of sexual offences appearing for sentence was generally unchanged over the period 2005-2024. Sentence severity however increased by 67%. Clearly, a different dynamic is at work for this form of offending, a view strengthened by the fact that the increase in severity began much earlier than other offences, around 2007.