

# SENTENCING ACADEMY

## **Homicide law: Call for Evidence**

**October 31<sup>st</sup> 2025**

We confine our response to this call for evidence to the sentencing framework for murder, recognising the continuing existence of the mandatory life sentence and that the sentencing framework will continue to be set out in primary legislation. We do not, therefore, offer a view on these key aspects of sentencing for murder. We also recognise that your ultimate recommendations for the sentencing framework for murder will be influenced by recommendations in respect of amendments to the substantive criminal law. As we cannot anticipate what these may be, our focus here will be on amending the existing framework contained in Schedule 21 to the Sentencing Act 2020, assuming no substantive change to the criminal law. We are strongly supportive of the Law Commission's attempts to rationalise the sentencing framework, and we will not rehearse the many criticisms that have been made of Schedule 21 since its enactment in 2003. We hope that this response is the start of a dialogue in relation to the sentencing framework and that future opportunities to contribute to the Law Commission's important work will arise once attention turns to this aspect of the review of the law of homicide.

Richard Martin  
Jonathan Bild  
Julian Roberts

## **Part I: Reforming Schedule 21**

We begin by noting that in the event that the Government declines any reform to the definition of murder, much remains to be done in terms of reforming Schedule 21. The academic literature documents the many significant shortcomings of the Schedule and suggests ways in which it should be amended. In what follows we provide some examples of the problems and possible solutions. This submission is not entirely comprehensive but rather indicative: we would be happy to prepare a more detailed and comprehensive paper if the Commission considers this would be helpful.

### *Proportionality and Schedule 21*

Anomalies which violate proportionality arise in several ways. Murders of very different seriousness are treated in a comparable way; the differences in harm and culpability are 'levelled' by the Schedule. Similarly, murders of approximately comparable seriousness may attract starting point sentences of very different severity. Some murders will attract a starting point sentence in excess of that which is associated with a more serious comparator, while minor discrepancies in seriousness will attract starting point sentences of much greater magnitude. Of course, these are statutory starting points, not the final sentence imposed; courts retain the discretion to move up or down from the Schedule's starting points,<sup>1</sup> but the task of achieving a proportional response to sentencing for murder will be significantly undermined; if the point of departure is in error, the point of arrival is also likely to be amiss. For these reasons, reform of Schedule 21 is necessary with a specific focus on the starting points and sentencing factors which determine the length of minimum term imposed.

### **Issues Arising from Current Starting Point Sentences**

If the offender was 21 or over at the time of the crime, and the court considers the offence (or the combination of the offence and associated offences) to be 'exceptionally high', a whole life order is the appropriate starting point sentence. Since this is the most severe sentence possible in English law, a court can only drop down to a specific minimum term in the event that the case at bar meets the criteria specified in paragraph 4 but is in some respect less serious. Paragraph 4(2) of Schedule 21 enumerates a non-exhaustive list of aggravating circumstances which would, in the words of the statute, 'normally' result in the adoption of a whole life order Starting Point. These include (but are not restricted to):

- (a) the murder of two or more persons, where each murder involves any of the following—*
  - (i) a substantial degree of premeditation or planning,*
  - (ii) the abduction of the victim, or*
  - (iii) sexual or sadistic conduct,*
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
- (c) the murder of a police officer or prison officer in the course of his or her duty,*
- (d) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
- (e) a murder by an offender previously convicted of murder.*

---

<sup>1</sup> See, for example, *R v Jones* [2005] EWCA Crim 3115, Hughes LJ at [8].

These five characteristics based on the offence or the offender should capture the most serious circumstances in which murder may be committed. Although the list is not exclusive ('includes', so is not restricted to these examples), cases with these aggravating features should be demonstrably more serious than those 'normally' attracting the starting point in paragraph 3 (30 years). This is manifestly not the case. First, however, some commentary is necessary upon the distance between the four starting point sentences.

Ordinal proportionality requires levels of severity to reflect corresponding differences in offence seriousness. Schedule 21 prescribes starting point sentences which are very far apart. They range (for adult offenders) from 15 years to 25, to 30 years and then to a whole life order. The consequence of this degree of spacing is that in order to justify a very significant uplift, the triggering circumstances should be important enough to sustain a great jump in severity. The very significant gap between the two most common starting points of 15 and 30 years has attracted criticism from the outset. It was described by David Thomas in 2008 as 'a major flaw'<sup>2</sup> in the regime, and subsequent scholars have endorsed this criticism.<sup>3</sup> Indeed, emphasizing the movement between starting points, the Court of Appeal has stated the starting points 'provide a very broad framework for the sentencing exercise. They are so far apart that it will often be impossible to divorce the choice of starting point from the application of aggravating and mitigating factors'<sup>4</sup>

Simply put, the greater the degree of separation between levels, the more 'work' the aggravating factors have to do to achieve ordinal proportionality. Imagine two levels of starting point sentences: twelve and 15 years. In order to attract the higher SP, a case may need to contain one or more aggravating circumstances, including, for example, 'planning and premeditation' and 'sexual or sadistic conduct'. Caselaw, and possibly research as well, would confirm that both factors have been considered as significantly aggravating by the Court of Appeal, and also by the wider community (if the latter are considered a legitimate source of guidance on the relevance and weight of sentencing factors). The problem of spacing the levels of seriousness arises from the vast range of sentence that must be covered by a guideline or guideline-like structure such as that laid down by Schedule 21. As articulated by the appellate courts, the offence of murder ranges from 'multiple sadistic murders at one end and mercy killings at the other'.<sup>5</sup>

With no minimum term of imprisonment, and a maximum term of the whole life order, the span of the custodial sentence is too wide to be adequately divided by only four levels. One solution to this problem would be to create more levels of seriousness, each with a distinct starting point.

Paragraph 5(2) enumerates the aggravating features which should 'normally' result in a starting point of 30 years:

- .....
- (b) *a murder involving the use of a firearm or explosive,*

---

<sup>2</sup> David Thomas, 'Case Comment, Sentencing: Murder – Minimum Term', (2008) Criminal Law Review 904

<sup>3</sup> Jonathan Bild, 'The Mandatory Life Sentence: Lessons from Two Neighbours', unpublished PhD, University of Cambridge (2014) at 70, and elsewhere in the thesis; Andrew Ashworth notes the 'great distance between the starting points'; *Sentencing and Criminal Justice*. Sixth edn (CUP 2016) 126.

<sup>4</sup> *R v Jones* [2005] EWCA Crim 3115, Hughes LJ (at [7]); see also (Sullivan [2004], at [16]; Griffiths at [15]).

<sup>5</sup> *R. (Anderson and Taylor) v. Secretary of State for the Home Department* [2001] EWCA Civ 1698, Simon Brown LJ.

- (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
- (d) a murder intended to obstruct or interfere with the course of justice,
- (e) a murder involving sexual or sadistic conduct,
- (f) the murder of two or more persons,
- (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity, or
- (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

The already complex determination of a minimum term for murder becomes even more challenging when there are multiple victims. A court sentencing a lesser offence with multiple victims, even fatal offences such as manslaughter, will follow the Sentencing Council's totality guideline when determining sentence.<sup>6</sup> In contrast, Schedule 21 adopts a different approach; the number of victims is integrated directly into the starting point sentence structure. Before identifying the weaknesses of this approach, it is necessary to describe the way that the existence of multiple victims affects the starting point sentence. For many lesser crimes, a single charge may be more serious than two charges of the same crime. A high value fraud involving a single victim would normally be more serious than two counts of fraud where the victims suffered minimal loss. Yet a double murder is almost always more serious than a single murder can ever be, even one with multiple aggravating features.<sup>7</sup>

Schedule 21 incorporates multiple victims in two ways. First, a case of murder involving two or more victims normally attracts a starting point sentence of 30 years. Assuming no other aggravating factors are present, the effect is to double the normal starting point. Second, if the multiple murders involve additional, specified aggravation, the normal starting point becomes a whole life order, as per para. 2(a):

- (f) the murder of two or more persons, where each murder involves any of the following—
  - (i) a substantial degree of premeditation or planning,
  - (ii) the abduction of the victim, or
  - (iii) sexual or sadistic conduct,

The whole life order provision relating to multiple convictions is narrow-tailored: one or more of three aggravating circumstances (substantial premeditation; abduction of the victim; sexual or sadistic conduct) must be present for *each* of the victims. A triple murder where the defendant had extensively planned to kill a single person but who ultimately killed two people, would therefore not qualify for a starting point sentence of a whole life order. To summarise, the gravity of multiple murder cases is insufficiently recognised by Schedule 21.

---

<sup>6</sup> <https://www.sentencingcouncil.org.uk/publications/item/offences-taken-into-consideration-and-totality-definitive-guideline/>.

<sup>7</sup> As with all issues, it would be unwise to prohibit any exception to this rule. There may be some exceptions. For example, D1 is a contract killer who is convicted of murdering a single victim. D2 has taken the life of two greatly suffering relatives, and claims mitigation for what she perceives as two acts of mercy. Here the combination of harm and culpability may justify a longer minimum term for D1 than for D2.

The structure of Schedule 21 is crude and downplays the significance of multiple victims as a source of aggravation at sentencing for murder. This factor stands out above the rest in terms of harm: the existence of multiple victims. Culpability is also likely to be much higher in multiple count murders. If the second victim involves killing a person who unexpectedly arrives at, or is present when the primary victim is targeted, culpability may not have doubled; the 'single transaction' element of the principle of totality will be relevant.<sup>8</sup>

This kind of case is very different from one in which the offender kills two victims on separate occasions. He or she may not benefit from any 'single transaction' mitigated culpability. Nevertheless, even the first case (involving an unplanned, second murder) is associated with a much higher level of culpability than a single count case of murder: the offender took a conscious decision to kill or seriously harm a victim at the same time as he takes the life of a different person. This factor (multiple victims but without further aggravating factors) may be compared upwards as it were, to multiple counts with additional aggravation which result in a whole life order starting point, and downwards to a single victim murder committed by an offender who took a knife (or other weapon) to the scene, resulting in a 25-year starting point.

Consider the following two scenarios:

*D1 is an animal rights extremist protesting against the company's use of animals in drug trials. He is convicted of murdering a pharmaceutical executive. This profile of murder would normally trigger a starting point of a whole life order.*

*D2 is convicted of burning down a house and killing an ex-spouse and two children. The crime was an act of revenge following the couple's separation.*

The harm involved in D2 is three-fold that of D1 and the offender's motive is arguably more reprehensible, yet Schedule 21 prescribes a starting point sentence of 30 years rather than a whole life order.

The comparison between these cases reveals a glaring weakness of the Schedule 21 regime. Two critiques may be made. First, the death of a second person should result in a starting point increase far in excess of five years; the current, narrow gap is therefore not tenable on retributive grounds. Ordinal proportionality demands a greater distinction in starting point sentences when the harm and culpability are so manifestly different. Second, this comparison illustrates the collision of retributive and preventive philosophies. A desire to deter offenders from bringing weapons to the scene, particularly knives, has resulted in a disproportionate starting point sentence; prevention has trumped proportionality.

Other anomalies in Schedule 21 which violate ordinal proportionality may readily be identified:

*D1 plans a commercial burglary of a warehouse. D1 identifies shift patterns, and plans the break-in for a night when no staff are present. During the burglary, D1 is unexpectedly confronted by a security guard. In the struggle, D1 panics, strikes the guard with a heavy implement, intending to cause serious harm, but the victim dies. This case normally attracts the starting point of 30 years (a murder done for gain).*

---

<sup>8</sup> See Sentencing Council guideline: <https://www.sentencingcouncil.org.uk/publications/item/offences-taken-into-consideration-and-totality-definitive-guideline/>.

*In contrast, D2 has a grudge against a former business partner over a failed venture that D2 believes destroyed D2's livelihood. D2 is consumed by a desire for vengeance; he doesn't stand to gain financially from his former business partner's death. D2 meticulously plans the murder of his former partner. D2 executes the plan, killing the victim in a carefully orchestrated ambush. The case normally attracts the 15-year starting point as it does not fall within the provisions containing the higher starting points of 25 years, 30 years, or a whole life order.*

Determining the relative seriousness of these two cases is ultimately a matter for judicial discretion to resolve; the starting point sentences constitute a guide, rather than a mandatory sentence. It is therefore open to a court to impose a minimum term in excess of 15 years on D2, or a lower minimum term in the case of D1. The point, however, is that the statutory guidance - Schedule 21's statutory starting points - are inconsistent with ordinal proportionality; assuming the harm is equivalent in the two murders, few would argue that D1's culpability was sufficient to justify a starting point *double* that associated with D2. In all likelihood most people would regard D2 as manifestly more blameworthy: he had undertaken 'significant' planning to accomplish his murderous intent. D2 in contrast, may have actively taken steps to avoid encountering security personnel – for example by committing the burglary when the warehouse was likely to have been deserted.

The factor identified in paragraph 5(2)(c) conflates two diverse circumstances which reflect very different levels of culpability. For example, this scenario might arise as a result of the chance arrival of the victim on the scene. The offender may have gone to great lengths to avoid any such encounter. In contrast, a murder committed for gain is more serious and normally associated with a much higher level of culpability. First, by definition it suggests planning and premeditation; contract killings do not occur on the spur of the moment. Second, the decision to kill for financial gain reflects a very high degree of disdain for human life. Finally, from a preventive perspective, the contract killing suggests a character willing to kill when the opportunity and reward arises. This is very different from a murder committed by a burglar in the heat of the moment as he attempts to escape the attentions of a security guard. The two circumstances fused into this factor therefore represent very different levels of seriousness, yet Schedule 21 equates them for the purposes of establishing a starting point sentence. Once again, the Schedule's arrangement violates ordinal proportionality considerations.

Taking a weapon to the scene carries the potential to increase the starting point sentence from 15 to 25 years. Can this circumstance justify such a jump in severity? In order to be consistent with the guiding spirit of the Schedule, this circumstance should be relevant to harm or culpability. More than that, it should constitute an important difference in one or both of these concepts since it triggers such a significant increase in the length of the starting point sentence. Some indication of the severity of the uplift can be gleaned from the fact that a 10 year minimum term would represent a 20 year standard determinate sentence – far in excess of the average sentence imposed in most cases of manslaughter or attempted murder. In any event, the retributive justification seems unconvincing, even to justify a minimal increase in the starting point sentence.

A major issue arising from para 5A – aside from the paragraph's failure to provide an adjective to describe the level of seriousness of the offence – is the term 'took the knife or other weapon to the scene'. Consider the following two scenarios. D1 picks up a knife in his own kitchen, goes next door and murders his neighbour. D2 goes next door, seizes a knife in his neighbour's kitchen and murders the man. Wherein lies the difference in terms of harm or culpability

between these two cases? Wherefore the striking difference in starting point sentences? The harm inflicted is the same. Regarding culpability, one might argue that D1 creates the additional harm of a potential threat to third parties he may encounter on the way, which may be minimal if he is going next door, but possibly serious if he crosses the city to murder his victim. Since he has acquired the weapon with the specific intent to murder a particular individual, the general threat is absent. If the weapon is a knife, Parliament may have been hoping to deter potential offenders from arming themselves in this way. Yet this is a preventive rather than retributive objective, and one which founders in the face of empirical research on the effectiveness of deterrent-based sentences. Is there a really culpability difference between D1 and D2? It may be argued that taking a weapon to the scene is evidence of planning on the part of D1, and this reflects enhanced culpability. This being the case, a higher starting point may be appropriate. Yet if this is the case, taking a weapon to the scene is evidence of, or a proxy for, enhanced culpability through planning and premeditation – a factor already well-represented in Schedule 21.

By inserting a 25 year starting point for cases in which a weapon was taken to the scene, Parliament significantly undermined the proportional structure of the murder sentencing regime laid down by Schedule 21. It introduces a deterrence-based premium at odds with the proportionality-based concepts of harm and culpability.<sup>9</sup> Finally, limitations on space prevent further discussion of the issue, but the wording of this provision is likely to generate inconsistent outcomes as courts may interpret the taking to the scene differently. This starting point sentence should be repealed, and the factor ‘taking a weapon to the scene’ should be incorporated into the aggravation associated with premeditation and planning. Prior to the introduction of the 25 year starting point, the use of a weapon was rightly already being treated by the courts as an aggravating factor and a return to the treatment of it as an aggravating factor would remove the anomalies around whether or not a weapon was taken to the scene.

## Sentencing Factors

Schedule 21’s lists of sentencing factors should capture the most important circumstances relating to sentencing for murder. They should be derived from a thorough analysis of appellate case law, and possibly other sources of information such as empirical research on murder or similar lists of factors issued by the Sentencing Council in its guidelines for other offences. While some circumstances may be particularly relevant to sentencing for murder, most factors of general application also apply. The lists contained in Schedule 21 are inadequate<sup>10</sup> to the task of providing guidance for courts. In this sense, they constitute another significant weakness of the schedule. For example, there are several problematic mitigating factors.

### *An Intention to Cause Serious Bodily Harm Rather than to Kill*

The most important culpability-derived factor in sentencing for murder is the offender’s intention to commit serious harm rather than to kill. Further still, the jury is entitled to convict a defendant for murder where they find death or really serious harm was a virtually certain

---

<sup>9</sup> It is noteworthy that in his chapter on sentencing for murder Wasik describes ‘the nature of the weapon which was used to kill’ as an example of a neutral factor which ‘should *not* be regarded as having a significant impact on the sentence imposed’. Martin Wasik, ‘Sentencing in Homicide’. In Andrew Ashworth and Barry Mitchell (eds.) *Rethinking English Homicide Law* (OUP 2000), p. 183 (emphasis in original).

<sup>10</sup> Notes on the Schedule provided by the Standing Committee state that the list of mitigating factors contained in paragraph 11 ‘covers most of the mitigating factors that are likely to arise in cases of murder’. This seems very wide of the mark.

consequence of the defendant's conduct and the defendant knew this to be so.<sup>11</sup> The offender's intention is central to his level of culpability. One obvious manifestation of its importance is the fact that, as noted, in most common law jurisdictions, an intent to kill is a requisite element of mens rea for murder. In fact, England and Wales is the exception to a general rule across most common and civil law jurisdictions,<sup>12</sup> that an intent to kill is necessary for a conviction for murder.

Although in practice the two categories may overlap in terms of culpability, as a general rule, offenders who intend only to cause really serious bodily harm are normally considered less culpable than those who intend fatal harm. The distinction between these two categories may be enhanced if the offences involve planning and premeditation. The offender who carefully plans to kill his victim is considerably more culpable than the defendant who kills spontaneously. This second individual is more culpable than one who kills inadvertently, having intended only to cause serious bodily harm. The offender may even have expressly intended *not* to kill, as was the case in punishments inflicted as a deterrent to other potential informants in the context of organised crime or so-called 'punishment beatings' in the 'Troubles' in Northern Ireland.

The offender's intention at the time of the crime should be incorporated directly into the starting point structure of the Schedule. One possible option would be to place all 'intent to cause serious bodily harm' cases at a 'normal' (lowest) starting point of 15 years. Courts would still be able to increase the minimum term in cases where the offender's culpability closely approached the intent to kill cases.

### *Lack of Premeditation*

Another anomaly contained in paragraph 11 relates to 11(b), which makes the absence of premeditation a source of mitigation. Premeditation thus aggravates while the absence of planning mitigates. This makes little sense. As a general proposition, *the absence of an aggravating factor should not constitute a source of mitigation*.<sup>13</sup> Imagine applying the Schedule's logic to some other aggravating factors, either derived from Schedule 21 or more generally. Paragraph 10(c) makes the infliction of mental or physical suffering on the victim before death an aggravating factor. The offender who kills the victim without inflicting such suffering cannot claim mitigation as a result.<sup>14</sup> The 'base' condition of an action is surely a spontaneous decision. Culpability then increases to reflect the duration and degree of planning. The greater the planning and the longer the offender contemplates the murder, the higher the level of blameworthiness. Presumably, the architects of Schedule 21 meant to recognise the mental state of an offender who commits murder suddenly and without any reflection, deeming the offender less culpable than the one who plans to kill.<sup>15</sup>

---

<sup>11</sup> *R v Woollin* [1999] AC 82.

<sup>12</sup> In France for example, see the Code Penal, Article 221-1.

<sup>13</sup> Previous convictions would appear to be the exception to this rule: an absence of priors mitigates while increasing numbers of previous convictions aggravates. The exception is explained by the fact that the mitigation arising from the first offender status is conceptually different from the aggravation triggered by accumulating additional convictions; the two categories (first offender; repeat offender) does not in fact derive from a single dimension, hence the exception.

<sup>14</sup> Just try to imagine the wording of such a mitigating factor.

<sup>15</sup> There are surely three very distinct categories of murder: Premeditated murder; murder which was not planned but where there was a clear intent to kill; and murder where the death of the victim arose from the offender's intent to cause serious bodily harm. Although some cases may straddle the borders of these categories, as a matter of general principle they represent three very different levels of culpability.

The spontaneous killer is normally less culpable than the one who premeditates the offence, but this should not move the former into a zone of mitigation. It simply means he is not subject to additional punishment in recognition of the aggravating effect of planning. Offenders may thus be arrayed on a dimension of premeditation, with spontaneous cases at one pole and those killing after meticulous and protracted planning at the other end of the dimension. Premeditation is therefore actually a dimension and increases in severity should correlate with movement along the scale towards the end of maximal preparation. But the scale is anchored by an *absence of aggravation*, and does not include mitigation at one end, and aggravation at the other, although this is the scheme reflected in Schedule 21. Paragraph 11(b) should be removed from the list of mitigating factors.<sup>16</sup>

### *Defendant's Belief that the Crime was an Act of Mercy*

Paragraph 11 recognises the diminished culpability of a murder arising from 'a belief by the offender that the murder was an act of mercy'. This mitigating factor warrants greater discussion. If an offender kills upon a reasonable belief, evidenced by the victim's words or actions, that his actions are in the best interests of the victim, this greatly reduces the offender's level of culpability. Schedule 21 should recognise this to a greater degree than at present. In the area of mitigation this is another example of penal levelling: two very different factors are listed as if they carried the same weight. An honest and reasonable belief that the killing was an act of mercy is a more powerful source of mitigation than, say, the absence of premeditation. As it stands, placement of this factor in the list of mitigating factors alone means that a 'belief in mercy' killing could attract any of the various starting point sentences. The circumstance should be treated more robustly in the same spirit that the less culpable intent to commit only serious bodily harm should exercise more influence over the starting point sentence and hence minimum term imposed.

In order for this factor to be restricted to the appropriate cases, it needs to be narrow-tailored. Additional qualifiers need to be added; the Schedule should clarify the circumstances which would justify mitigation. For example, the belief needs to be reasonable. Paragraph 4(2) enumerates three alternative elements which must be present in each of the separate killings before a case is assigned to the highest starting point of a whole life order.

One solution would involve creation of an analogous provision in mitigation to ensure that the 'mercy mitigation' is justified. These criteria might include the following:

- (i) the victim was a close relative of the offender;
- (ii) the victim had expressed a desire to terminate their life;
- (iii) the offender did not stand to benefit materially from the death of the victim.

---

<sup>16</sup> There may be a broader rule at work here, namely that if X aggravates or mitigates, the absence of X cannot serve to change the sentence. From the perspective of mitigation, remorse mitigates, but the absence of remorse does not aggravate sentence. Similarly, the use or threat of violence is an aggravating factor for an offence such as burglary, but the absence of this factor cannot serve as a mitigator. See <https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-definitive-guideline-Web.pdf>, 8.

The CPS guidance for prosecutors regarding whether the public interest for prosecution has been met in cases of encouraging or assisting suicide may be of some use in determining these characteristics.<sup>17</sup>

So-called ‘merciful intent’ murders create an additional problem which may further justify a separate seriousness level and starting point sentence. For most murders, the determination of the minimum term will reflect a judicial balancing of all relevant mitigating and aggravating factors. For example, a case of murder may be aggravated by virtue of the fact that the offender planned the killing and inflicted excessive suffering on the victim. The resulting uplift however will be offset to some degree if the offender was a young adult, say 18, and played a relatively minor role in a group murder. When the killing is motivated by a merciful intention, however, does it make sense to consider the offender's planning in aggravation? In *Inglis*,<sup>18</sup> a distraught mother had taken the life of her irreparably brain-damaged son. The defendant had carefully planned the crime and was on bail for a previous attempt to kill when the murder was finally committed. In addition, there was an obvious breach of trust -- he was her son -- and the defendant had been entrusted to enter the hospital where he was being treated. Finally, the victim’s medical condition made him highly vulnerable. If the merciful intention mitigation is accepted, these circumstances explain the defendant’s actions rather than aggravate the gravity of the crime. The conventional balancing of aggravating and mitigating factors therefore makes little sense, and such cases require a different approach at sentencing. However, as noted they do need to be carefully circumscribed. As much was acknowledged by the Lord Chief Justice in *Inglis*:

‘we are satisfied that the factors [...] which would normally aggravate the offence of murder, should not be taken to aggravate a murder committed by an individual who genuinely believes that her actions in bringing about the death constitute an act of mercy. If it were otherwise this express feature of mitigation would be deprived of any or any significant practical effect.’<sup>19</sup>

Specific criteria should be listed in the schedule to be met before a belief that the killing was an act of mercy can be invoked. This accomplished, mercy belief cases should then attract a separate, much lower starting point, perhaps of eight to 10 years. A reform of this would prevent a mercy killing case from attracting a higher starting point on the basis that there was ‘substantial planning and premeditation’.

### **Omitted Mitigating Factors**

Notwithstanding the perception that mitigating factors are rare in cases of murder, it is possible to identify sources of mitigation which should be considered by courts, and in order to ensure some consistency of application these should be provided in any offence-specific guideline, or the statute itself. For example, *offender played a lesser role in the crime*. The significant number of accomplice liability (or ‘joint enterprise’) murders in recent years suggests that this is a not uncommon factor for courts. In the event that a group of offenders are convicted of the same murder, there may well be very different levels of involvement. There will be those that played a more peripheral role, who are clearly less blameworthy. It should be recalled that simple association or presence at the scene of fatal violence, where they embolden or fortify, the principal offender, are ‘likely to be very relevant evidence on the question whether

---

<sup>17</sup> See <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>.

<sup>18</sup> *Inglis* [2011] WLR 1110.

<sup>19</sup> *Ibid*, at [53].

assistance or encouragement was provided.’<sup>20</sup> Further still, once encouragement or assistance is proved to have been given by the accomplice, there is no need for the prosecution to prove that it had a positive effect on the principal’s conduct or on the outcome.<sup>21</sup> This should be recognised in mitigation. A significant difference in roles and contributions, possibly accompanied by an age difference may have an important effect on the appropriate starting point sentence.

## Summary

To summarise, the lists of sentencing factors contained in Schedule 21 lack theoretical consistency, overlook some important factors, and provide insufficient guidance with respect to the key concepts of aggravation and mitigation. This is hardly surprising; most of the enumerated factors were imported from earlier statutes and Parliament has not conducted a systematic review of the factors since passage of the statute in 2003. This is one deficiency of statutory provisions; review and subsequent amendment is sporadic and unsystematic. The static nature of the Schedule constitutes another compelling reason for adoption of a sentencing guideline for murder. If the Sentencing Council were to create a guideline for sentencing murder, the contents could be reviewed periodically, and if necessary amended. The Sentencing Council conducts such reviews of its guidelines, and in this way ensures that they constitute a dynamic rather than static guide for sentencers. We strongly urge the Commission to recommend that the Council issue a guideline to assist courts in determining the minimum term for murder. This would usefully supplement the guidance contained in Schedule 21, whatever form that ultimately assumed.

---

<sup>20</sup> R v *Jogee* [2016] UKSC 8, at [11].

<sup>21</sup> *Ibid* at [12].

## **Part II: Sentencing Under 18s for Murder**

### **1. Clarification of the Availability of Whole Life Orders (WLOs)**

**Schedule 21 should be amended to include an express provision prohibiting WLOs for offenders aged under 18 at the date of sentencing.**

#### **A. The Law Post-2022: An Overview**

Young offenders convicted of murder receive detention at His Majesty's pleasure (DHMP) pursuant to section 259 of the Sentencing Act 2020. The sentencing court fixes a minimum term by reference to Schedule 21 starting points. For offenders aged under 18 at sentence, the applicable starting points are found in paragraphs 3, 4, and 5, with age-specific bands (14 or under, 15-16, 17). These range from 8 years (paragraph 5, age 14 or under) to 27 years (paragraph 3, age 17). Importantly, those aged 18+ at sentence are treated as adults and may fall within any of the paragraphs in Schedule 21—including paragraph 2 (WLO), though for the 18-21 age band, a WLO is only available in "exceptional circumstances." The Police, Crime, Sentencing and Courts Act 2022 Act introduced a statutory right to review the minimum term: section 27A of the Crime (Sentences) Act 1997 (as inserted by section 128 of the 2022 Act) allows those sentenced under 18 to apply for a review after serving half the minimum term, with potential for further applications every two years (provided the offender remains under 18). The criteria for reduction are set out in section 27B(4): exceptional rehabilitation, or serious risk to welfare/continued rehabilitation if detention continues.

#### **B. Legislative Ambiguity**

The sentencing judge in *Rudakubana* appears to have treated WLOs as unavailable for under-18s, imposing a minimum term of 52 years instead.<sup>22</sup> But there is no clear legal authority for this. If the question were to reach the Court of Appeal, it would have to reason from the silence in Schedule 21 and infer Parliament's intent from the structure of the 2022 Act. Schedule 21, paragraph 2 specifies that a WLO is the starting point for the most serious murders and is available "Over 21 (or >18 but <21 if 'exceptional circumstances')". For offenders aged under 18 at sentence, paragraph 2 contains no mention. This creates an unnecessary degree of ambiguity surrounding such a serious sentence. Is the omission of under-18s from paragraph 2 an implicit prohibition, or merely silence? If Parliament intended that WLOs be available for under-18s, it would have said so (just as it did for the 18-21 category). The omission is deliberate exclusion. On another possible reading, Paragraph 2 does not apply to under-18s because they fall outside the stated age band – but this does not necessarily mean a WLO is prohibited. A sentencing judge, finding an under-18 offender's case falls within paragraph 2's *circumstances* (e.g., murder of two or more persons involving sexual sadism), might submit they can aggravate upwards from the paragraph 3/4/5 starting points to a WLO, something that is possible within Schedule 21.

There is good reason to understand that it is a necessary implication that Parliament's did not intend to allow WLOs for under 18s. The 2022 Act itself provides a significant interpretive signal. By creating a statutory right to review the minimum term for those sentenced under 18 (sections 27A-27B), Parliament has made clear that: the minimum term is reviewable and

---

<sup>22</sup> *R v Axel Rudakubana* [2025] Sentencing Note. Available at: <https://www.judiciary.uk/wp-content/uploads/2025/01/R-v-Rudabukana.pdf>.

reducible for young offenders; the review is subject to defined criteria (exceptional rehabilitation; or serious risk to welfare/continued rehabilitation); the review process contemplates a judicial determination of whether reduction is appropriate. Critically, Parliament did not create any comparable right for offenders sentenced to a WLO. There is no provision for reviewing a whole life sentence.

The statutory creation of a review right for those sentenced under 18 therefore signals that Parliament did not intend for under-18s to receive WLOs. If a WLO could be imposed, the review right would be meaningless—the offender could never benefit from it. The two provisions work in tandem: the review right presupposes that the offender has a minimum term (not a whole life sentence) that *can* be reviewed. This is reinforced by the structure of Schedule 21 itself. The 2022 Act (section 127) modified the starting points in Schedule 21 for murder committed by children. It introduced differentiation by age and seriousness. But it contains no provision extending paragraph 2 (WLOs) to under-18s. The legislative silence, read in context of the new review right, is most naturally understood as an implicit prohibition.

The stated policy is that children retain a capacity for development and maturation, and that ‘all offenders who have reached adulthood are treated equally.’<sup>23</sup> The restriction of the review right to under-18s, and presumably the unavailability of WLOs for the same cohort, reflects this principle. Further still, Article 37(a) of the UN Convention on the Rights of the Child prohibits life without parole for juveniles. English law should implement this principle clearly, not leave it to be inferred from the structure of legislative provisions.

### **C. Recommended Reform: Clarifying the Whole Life Order Position**

The prohibition should be inserted as a new principle at the head of Schedule 21, or as a clarifying note following paragraph 2. The wording might be:

‘Detention at His Majesty’s Pleasure: Offenders Under 18

An offender convicted of murder while aged under 18 shall not be sentenced to a whole life order. The court must fix a minimum term by reference to the paragraphs below.’

Or, more explicitly as a proviso to paragraph 2:

‘Paragraph 2 does not apply to an offender aged under 18 at the date of sentencing. Such offenders shall be sentenced in accordance with paragraphs 3, 4 or 5 below, regardless of seriousness.’

## **2. The Secretary of State's Role in the Statutory Review of DHMP: An Anachronism**

**We recommend that the Secretary of State's filtering role should be removed, and applications for tariff review should be made directly to the High Court.**

### **A. The Context: Removal of the Secretary of State from Sentencing**

To understand why the Secretary of State's current role in tariff review is anomalous, it is necessary to consider the arc of legal development. Prior to 30 November 2000, the Secretary

---

<sup>23</sup> Ministry of Justice, *A Smarter Approach to Sentencing* (White Paper, CP 292, September 2020), available at: <https://assets.publishing.service.gov.uk/media/5f61d395d3bf7f723c19cb42/a-smarter-approach-to-sentencing.pdf> paras 329-331

of State played a central role in sentencing young offenders convicted of murder. As confirmed in *Ex p. Venables and Thompson*,<sup>24</sup> and *R (Smith)*,<sup>25</sup> the Secretary of State fixed the minimum term and was under a duty to keep it under continuing review, taking into account the offender's development and welfare as they matured (and not giving weight to public protests about the level of the tariff to be fixed to the detriment of the prisoners).

This generated an issue of compatibility with the Article 6 of the ECHR. In *V v United Kingdom*,<sup>26</sup> the Court held that the fixing of a minimum term was part of sentencing and involved Article 6 considerations (fair trial by an impartial tribunal independent of the executive). The Secretary of State, being part of the executive, was not sufficiently independent. The response was section 82A of the Powers of Criminal Court (Sentencing) Act 2000, whereby the court (not the Secretary of State) fixed the minimum term. This is now reflected in sections 321-323 of the Sentencing Act 2020. The principle was clear: sentencing decisions—substantive determinations about the length of detention—should be made by the court, not by the executive. The Secretary of State was removed from the sentencing function. Alongside removing the Secretary of State from minimum term determination, the framework placed the Parole Board (an independent body, distinct from the executive) in charge of assessing risk for release once the minimum term has been served. The Parole Board's role is to determine whether the offender can be safely managed in the community. This is a risk assessment, not a sentencing function.

### **B. The Issue: The Secretary of State's Filtering Role**

The 2022 Act created a statutory route through which to review the minimum term for those sentenced under 18. Section 27A(2) states: 'A relevant young offender may make an application for a minimum term review to the Secretary of State after serving half of the minimum term.' The Secretary of State thus has a gatekeeping function. Section 27A(5) continues: 'Where the Secretary of State receives an application under this section, the Secretary of State must—(a) consider the application, and (b) unless the Secretary of State forms the view that the application is frivolous or vexatious, refer it to the High Court.' This reintroduces the Secretary of State into the sentencing sphere in a way that is inconsistent with the principle established by the 2000 reforms. An offender sentenced under 18 does not have a right to have their case considered by a court. They have a right to *apply*, but the Secretary of State decides whether the application merits judicial consideration. The Secretary of State is the gatekeeper. The Secretary of State was removed from fixing minimum terms because the European Court held that executive involvement in sentencing violated Article 6. Yet the Secretary of State retains the power to determine which sentencing-related applications reach the court.

### **C. Recommended Reform**

The Law Commission should recommend that the Secretary of State's filtering role should be removed, and applications for tariff review should be made directly to the High Court. This would (a) give the statutory right substance: Offenders would have a genuine right to judicial consideration of their application, not a discretionary right dependent on executive filtering (b) eliminate subjective executive discretion: The question of whether an application merits judicial consideration would no longer depend on the Secretary of State's subjective assessment

---

<sup>24</sup> *R v Secretary of State for the Home Department, Ex p. Venables and Thompson* [1998] AC 407.

<sup>25</sup> *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51.

<sup>26</sup> *V v United Kingdom* (1999) 30 EHRR 121

of frivolousness. Instead, the High Court would apply the statutory criteria in section 27B(4) and (c) align with principle: Sentencing (including review of sentencing) would be entirely a court function, as the 2000 reforms intended (d) legal predictability: prisoners and their representatives would know that if they meet the statutory criteria (exceptional rehabilitation; or serious risk to welfare/continued rehabilitation), their application will be heard by a judge.

### **Part III: A ‘Faint Hope’ Clause: Procedural Recognition of Rehabilitation and Penological Shifts**

**We recommend that after serving two-thirds of the minimum term (or after a period of not less than 20 years, whichever is the greater), an offender may apply for a review of the justification for their continued detention on penological grounds.**

Prisoners serving lengthy sentences have minimal formal avenues through which to make the case that their continued detention is no longer justified on legitimate penological grounds. The Parole Board's role is restricted to risk assessment; it is not constitutionally positioned to undertake the holistic penological review that *Vinter* describes. The National Parole Board in Canada, in contrast, explicitly stated that it had no role in the actual judicial review process itself; the Board's involvement occurred only after a successful judicial review, when it conducted a thorough risk assessment to determine whether parole should be granted. Compassionate release remains rare, discretionary, and rarely invoked. In practice, many prisoners serving lengthy sentences progress through decades of their sentence with no formal opportunity to challenge the penological foundations of their continued detention. This is particularly acute given the trajectory of sentencing: offenders sentenced under Schedule 21 may now serve sentences of 25, 30, or more years with no structured mechanism for reviewing whether the penological grounds that justified those sentences at the point of imposition remain apposite decades later.

#### **A. ‘Faint Hope’ Clause: Recognition of Rehabilitation, Penological Shifts and the Length of Minimum Terms**

The trend in the length of minimum terms in England and Wales is one of increasing severity. The average minimum term for murder has risen from 13 years in 2000 to 21 years in 2021—an increase of over 60%. This has its origins in the introduction of Schedule 21 to the Criminal Justice Act 2003, which represented, in the words of Lord Woolf CJ, Parliament's clear intention that ‘crimes which result in death should be treated more seriously and dealt with more severely than before.’ The shift was not modest. In 2002 the Sentencing Advisory Panel (2002) – the predecessor to the Sentencing Council – gave guidance to the Court of Appeal on the length of minimum terms. It suggested that there should be a higher (15/16), middle (12) and lower (8/9) starting points; in contrast, Schedule 21 establishes starting point of 15 years for a ‘normal’ murder. It is unsurprising, therefore, that the Sentencing Council identified Schedule 21 as one of the most significant legislative changes affecting the increase in the prison population, observing that because of Schedule 21, ‘sentences for the vast majority of murder cases increased substantially’ (Sentencing Council, 2018, p3). A significant cohort of prisoners now serves exceptionally long custodial terms with no formal prospect of review. The system has become one of enhanced severity without structural counterweight—harsher sentences without mechanism for recognising that penological grounds may shift over decades of imprisonment.

The Canadian example is instructive and provides empirical vindication of an alternative approach.

## **B. Comparative Evidence from Canada: the Pre-2011 ‘Faint Hope’ Clause**

Prior to its abolition in 2011, Canadian law provided a ‘faint hope’ mechanism permitting offenders serving life sentences for murder to seek judicial review of their parole ineligibility after serving a minimum of 15 years. The provision was established in 1976 (Section 745.6 of the Criminal Code) following the abolition of capital punishment, as a safeguard acknowledging that penological grounds might justify reassessment even of sentences imposed for the most serious offences.

### *(i) The Canadian Process*

The mechanism operated as follows. An offender serving a life sentence with parole ineligibility of more than 15 years could apply to a judge for an initial screening. If the judge determined the application had reasonable prospect of success, a full judicial review would then proceed before a judge and jury in the province where the conviction occurred (Stein and Antonowicz, 2001; Zhang and Ha, 2010). The jury was required to consider the character of the offender, their conduct during incarceration, the nature of the offence, and such other matters as the presiding judge deemed relevant. From 1998 onwards, the jury's decision to reduce the ineligibility period had to be unanimous. Critically, if the jury unanimously agreed to reduce the period, the offender could then apply to the Parole Board for parole, which retained discretion to release on a graduated basis, starting with escorted community visits and progressing through halfway house placements, with continued supervision until death (ibid). The judicial review process and the parole assessment were distinct stages: the former addressed whether penological grounds for the original ineligibility period remained valid; the latter addressed risk and reintegration.

The Canadian system was notable not merely for the availability of review, but for the institutional support around it. Twelve months before an offender's judicial review eligibility date, an institutional parole officer (or primary worker in the case of women offenders) would meet with the offender to determine whether they intended to submit an application. Staff would advise the offender of their responsibility to engage legal counsel, facilitate a transfer to the jurisdiction where the hearing would be held if requested, or alternatively arrange participation through escorted temporary absences (Zhang and Ha, 2010). Staff would advise the offender to request access to their file through freedom of information to share with legal counsel and would ensure that a psychiatric and/or psychological assessment was completed in the 12 months leading up to the application, as well as a comprehensive judicial review report.

The judicial review report followed the form used for determining parole eligibility and covered six areas: the offender's social, family, and criminal background; sentence administration dates; summary of transfers and any disciplinary actions; summary of the offender's performance and conduct; any assessments done by psychiatrists, psychologists, or elders; and the offender's personal development (Don Head, Commissioner, Correctional Service of Canada, House of Commons Standing Committee on Justice and Human Rights, Evidence, Meeting 35, November 16, 2010). This demonstrates that the Canadian system did not treat penological review as an afterthought or a theoretical possibility. Rather, it embedded the review mechanism within the correctional apparatus itself, with dedicated staff

responsibility for ensuring that offenders had the information, support, and assessment necessary to present a credible case. The 12-month preparation period allowed for psychological and social assessment that could inform genuine evaluation of changed circumstances.

(ii) *'Anti-Despair' Function: Rehabilitation as Incentive and Penological Purpose*

The faint hope clause was adopted to give a convicted person 'a glimmer of hope' and to 'leave some incentive when such a severe punishment is imposed for the most serious crimes.'<sup>27</sup> The clause provided an inmate with incentive to mend their ways and adopt conduct making their application more likely to succeed and enabled the inmate to 'better cope with the despair caused by sentencing someone to life imprisonment, because of the realistic possibility available to them of reintegrating into society before their life is over.'<sup>28</sup> This grounds the availability in the concrete penological objective of maintaining rehabilitation as a meaningful penological purpose. It provides incentive for constructive institutional engagement, prevents the psychological death-in-life that very long sentences can produce, and ensures that the penological balance can shift from punishment and deterrence toward rehabilitation as time passes and circumstances change.

(iii) *The empirical record of the Faint Hope Clause*

The record from three decades of Canadian practice provides concrete evidence of the faint clauses operation. Analysis of Correctional Service of Canada data by Zhang and Ha up to January 2010 demonstrates the mechanism's selectivity and effectiveness.<sup>29</sup> Of 777 offenders eligible for judicial review of their sentence, 741 reached the 15-year threshold; of these, 276 (37 per cent) applied, and 141 (51 per cent) of applicants achieved a reduction in parole ineligibility.<sup>30</sup> This low application rate reflects a highly selective process: only offenders presenting credible evidence of release succeeded in review. The system distinguished by seriousness: first-degree murderers applied more frequently (41.5 per cent) with higher success rates (53.8 per cent) than second-degree murderers (25.3 per cent application, 39.2 per cent success), receiving larger average reductions (6.7 years versus 4.6 years).<sup>31</sup>

The analysis by Zhang and Ha distinguishes between two types of failure: breaches of parole conditions (technical violations) and new offences (reconvictions). At six years post-release, those released early under faint hope had the lowest breach rate (21 per cent) among all groups—compared to 42 per cent for unsuccessful applicants, 23 per cent for eligible non-applicants, and 25 per cent for those not eligible.<sup>32</sup> Notably, the faint hope group's breach rate plateaued after year 5, indicating that initial reintegration difficulties did not escalate into persistent violations. More significantly, when examining actual reconvictions, at five years post-release those released early under faint hope had a recidivism rate of only 4 per cent for new offences—half the rate of those either not eligible or who did not apply (both 7 per cent).<sup>33</sup> Of 131 offenders released early under faint hope, only 5 reoffended with a new offence. Zhang

---

<sup>27</sup> Giles Trudeau, Director of the Office of Criminal Affairs and Matters, House of Commons Standing Committee on Justice and Human Rights testimony, November 16, 2010.

<sup>28</sup> *Ibid.*

<sup>29</sup> T. Zhang and L. Ha, 'An Analysis of the use of the Faint Hope Clause', Department of Justice Canada, 2010 CanLIIDocs 624, 1-13.

<sup>30</sup> *Ibid.*, p. 4.

<sup>31</sup> *Ibid.*, p. 7, Table 4.

<sup>32</sup> *Ibid.*, p. 9, Table 5.

<sup>33</sup> *Ibid.*, p. 10, Table 6.

and Ha conclude that ‘Lower recidivism rates from faint hope offenders suggest that decisions to release early are based on fairly accurate assessments of an offenders’ risk to reoffend, and therefore we can safely release select offenders earlier without increasing the risk to the public.’<sup>34</sup>

(iv) *The Abolition and Its Significance*

In 2011, Bill S-6 abolished the ‘Faint Hope Clause’. The abolition has been described by as contrary to the principles of sentencing laid out in Section 718 of the Canadian Criminal Code, as it ‘reduces the opportunity for further rehabilitation once the benefit of incapacitation and general deterrence have been exhausted.’<sup>35</sup> It is important to note that the clause was not abolished because of demonstrated failures in risk management or because public safety outcomes proved unsatisfactory. The empirical record showed the opposite. Rather, the abolition represented a political choice. The Barreau du Québec, representing consensus among Quebec professors, Crown prosecutors, and defence counsel, stated that ‘the process set out in section 745.6 was working perfectly and did not need any legislative amendment,’ and that the statistics ‘proved very clearly that the system is working for people who are incarcerated for a serious crime.’<sup>36</sup>

**C. Linking with the European Context: *Vinter* and *Hutchinson***

The European Court of Human Rights has affirmed that Article 3 of the European Convention requires that imprisonment be justifiable by reference to legitimate penological grounds. Crucially, the Court recognised in *Vinter and Ors v UK* (para. 111) that:

‘It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention... these grounds will include punishment, deterrence, public protection and rehabilitation... the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence... It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.’<sup>37</sup>

The Canadian experience provides empirical evidence that this principle, far from being theoretical, operates in practice. The Canadian framework demonstrates what genuine penological review looks like: structured inquiry into character, institutional conduct, and whether the original offence retains its original moral weight in light of demonstrated rehabilitation.

**D. Imagining a “Faint Hope” Clause: A Proposed Framework**

The framework should be explicit that the availability of review does not undermine the seriousness of the original sentence; rather, it reflects the dynamic character of penological reasoning that *Vinter* identified. The fact that a life sentence may, after decades, be subject to penological review does not diminish the fact that it was a life sentence. The review is not

---

<sup>34</sup> Ibid, p. 11.

<sup>35</sup> The Canadian Criminal Justice Association, ‘Position Paper: Life Sentences subject to The “Faint Hope Clause”’. Available at: <https://www.ccja-acjp.ca/pub/en/positions/faint-hope-clause/>

<sup>36</sup> G. Trudeau, Director, Office of Criminal Affairs and Matters, Barreau du Québec, 2010, House of Commons Standing Committee on Justice and Human Rights, Evidence, Meeting 35, November 16, 2010

<sup>37</sup> *Vinter and Ors v UK* [GC] [2013] Applications nos. 66069/09, 130/10 and 3896/10.

revisiting the original sentencing decision; it is asking whether that decision's justifications remain valid. A 'faint hope' clause adapted to the English context would operate as follows:

*(i) Trigger and Threshold*

After serving two-thirds of the minimum term (or after a period of not less than 20 years, whichever is the greater), an offender may apply for a review of the justification for their continued detention on penological grounds. This threshold is calibrated to be more demanding than the Canadian 15-year threshold, reflecting both the increased severity of English sentences and the principle that review should occur only when sufficient time has passed for genuine rehabilitation to be credibly assessed and demonstrated.

*(ii) The Review Body and Its Mandate*

The review would be conducted by a judicial officer (or panel) distinct from the Parole Board and charged specifically with determining whether the original penological justifications for the sentence remain valid. The court would not operate under a presumption in favour of release; rather, it would undertake structured inquiry into whether penological grounds have shifted. The court would consider:

- a) Whether the offender has engaged in genuine and sustained rehabilitation, evidenced by conduct during incarceration, engagement with programmes, changes in character and understanding;
- b) Whether the original penological purposes—punishment, deterrence, public protection—remain meaningfully advanced by continued detention, or whether continued detention serves no penological purpose beyond the abstract;
- c) Whether rehabilitation has become, or should become, the primary penological ground, and if so, whether the prospect of eventual release on licence would better serve that objective than continued indefinite detention;
- d) Changes in the offender's personal circumstances, health, family ties, or social circumstances since the original sentence, and whether these changes bear on the penological assessment;
- e) The nature and gravity of the original offence, and whether the passage of time and evidence of change has altered the moral weight properly attachable to it in the penological calculus.

Following the Canadian model, the review should specifically engage with evidence of character and conduct during incarceration, rather than conducting abstract penological analysis divorced from the particular offender's circumstances.

*(iii) Institutional Support for Genuine Review*

Drawing on the Canadian experience, the framework should embed institutional support for penological review within the correctional system. Specifically:

- (a) Twelve months before an offender's review eligibility date, a dedicated institutional officer should meet with the offender to determine whether they intend to apply and advise them of their responsibility to engage legal counsel;

- (b) The Correctional Service should facilitate transfer to the jurisdiction where the review would be held, or alternatively arrange participation through escorted temporary absences;
- (c) The Correctional Service should advise the offender to request access to their complete file to share with legal counsel, and should ensure that psychiatric and/or psychological assessment is completed in the 12 months leading up to the application;
- (d) A comprehensive penological review report should be prepared, covering: the offender's social, family, and criminal background; sentence administration dates; summary of transfers and disciplinary actions; summary of performance and conduct; any professional assessments (psychiatric, psychological); and evidence of personal development and changed circumstances.

*(iv) Standard of Proof and Burden*

The burden would remain on the offender to make a compelling case for review. Reviews would be available only where the offender demonstrates genuine and sustained progress toward rehabilitation. This is not a mechanism for routine release, but for the recognition that penological justifications may shift over decades of imprisonment. The threshold for success should be demanding; the point is not to facilitate easy release, but to create a formal structure within which the question of penological shift can be properly engaged.

*(v) Consequences of a Successful Review and the Separation of Functions*

A successful review would not mandate release. Rather, it would establish that the penological grounds originally justifying the sentence no longer hold with sufficient force to justify indefinite detention. The offender would then be eligible to apply to the Parole Board under the normal parole framework, which would retain discretion to assess risk and determine conditions of release. Following the Canadian model, the Parole Board would conduct a thorough risk assessment of all relevant available information, just as it would in any other parole case. If the Board grants parole, the offender would remain subject to the original sentence imposed by the court, as well as to standard and special parole conditions, and would remain under Correctional Service supervision for life, with the possibility that parole could be revoked if conditions were violated.