Submission to Independent Sentencing Review, from the Institute for Crime & Justice Policy Research, Birkbeck, University of London

The Institute for Crime & Justice Policy Research (ICPR) conducts academically grounded, policy-oriented research on justice, which includes research on sentencing policy in England and Wales and public attitudes to sentencing. ICPR's prisons research team monitors trends in world prison populations and conducts comparative thematic research to understand the causes and consequences of rising levels of imprisonment. A core component of ICPR's World Prison Research Programme involves compiling and hosting the World Prison Brief, a unique database that provides free access to information about prison systems throughout the world. For 25 years the Brief has been collecting and publishing the best available data on prison populations and reporting on trends in imprisonment worldwide. Today, it provides data for virtually every country in the world, at www.prisonstudies.org/. Country information is updated on the website at least monthly, using data largely derived from governmental or other official sources.

In this submission, our chief focus is on prison population numbers and the use of imprisonment as a tool of penal policy: we focus on questions in Themes 1 and 2 of the Terms of Reference, and comment briefly on use of technology in limiting use of imprisonment (under Theme 3). All prison population data in this submission are taken from the World Prison Brief site and reflect the latest available figures as at 9 January 2025.

Theme 1: History and trends in sentencing

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

In sub-sections 1.1 and 1.2 below, we draw on World Prison Brief data and our recent international comparative research on changing patterns of imprisonment and the factors driving those changes.[1] In sub-section 1.3, we discuss England and Wales specifically, drawing on research on public attitudes to crime and punishment and how successive governments have responded to that research. In section 2, we discuss difficulties presented by the current statutory sentencing purposes and the scope for reform to curb sentencing inflation and, with it, prison population growth.

1.1 UK prison population rates in international context

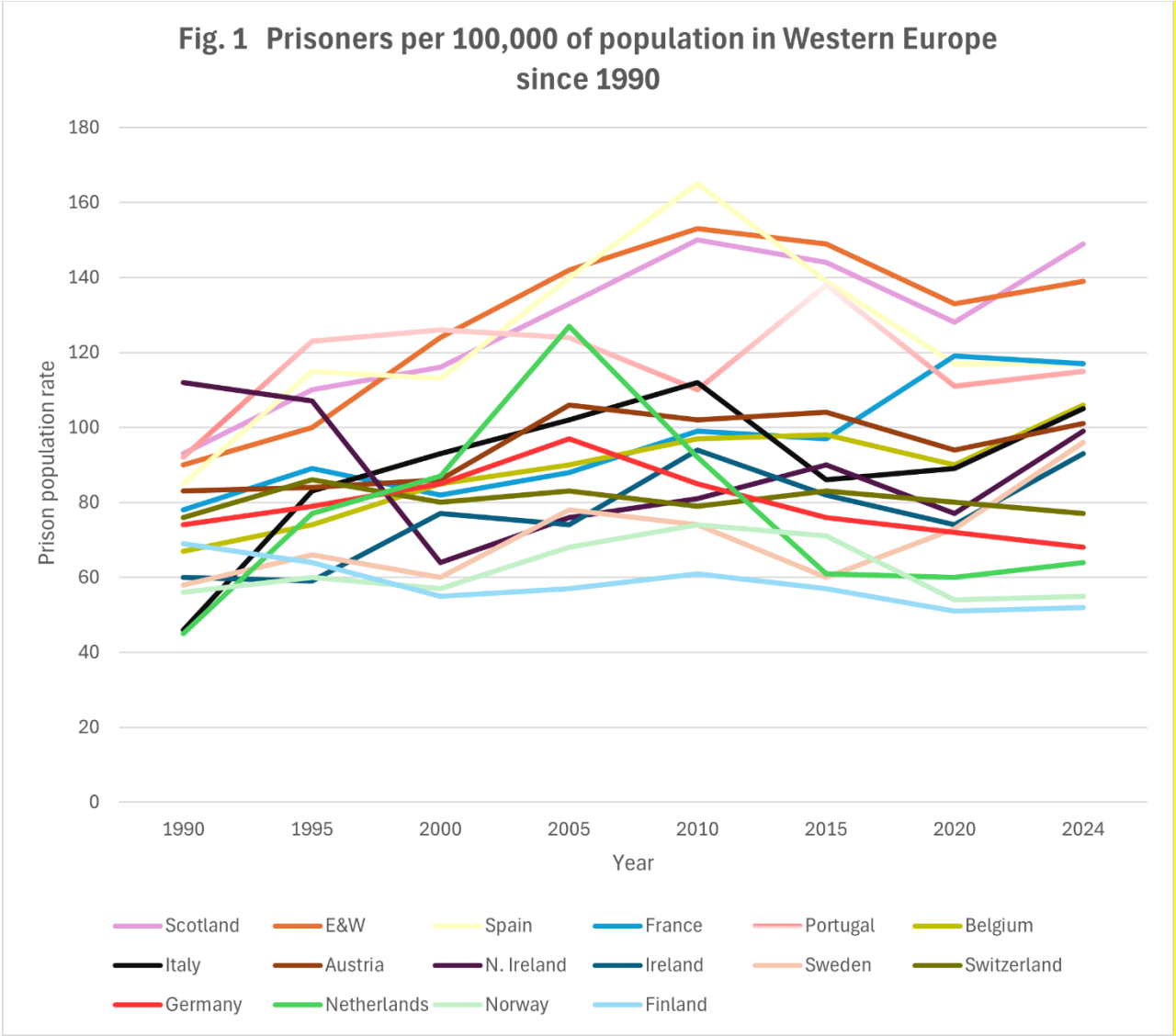
It is instructive to compare trends in UK countries' prison population rates (measured by the number of prisoners per 100,000 of the national population) with those in a selection of other

[1] 'Ten-country prisons project': all publications and other material can be found at https://www.prisonstudies.org/ten-country-prisons-project

countries. We summarise the resulting picture as follows, drawing on data from the World Prison Brief as at January 2025 and at five year intervals since 1990.

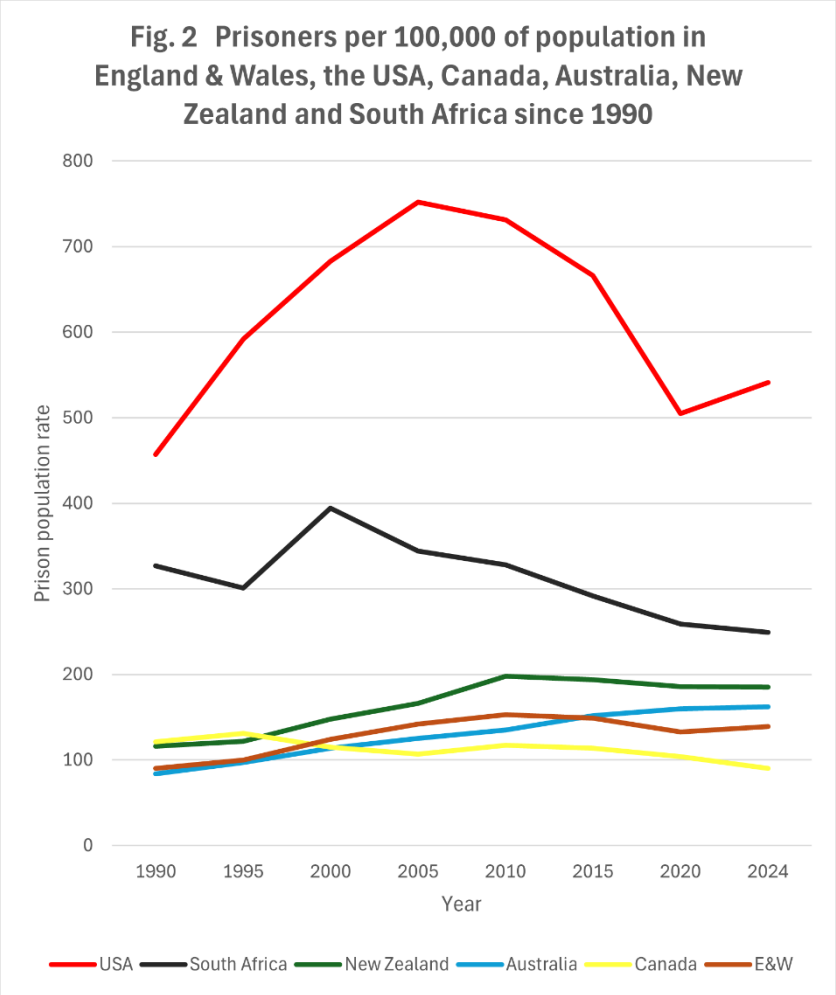
Prison population rates in England, Wales and Scotland are higher today than in any other Western European country, as shown in Figure 1. Together, the UK countries imprison 139 people per 100,000, which is significantly higher than any other Western European nation. Scotland imprisons 149 people per 100,000: England and Wales, 139, and Northern Ireland, 99. By contrast, Germany imprisons 68 per 100,000, the Netherlands, 64, Norway, 55 and Finland, 52.

Fig. 1 Prisoners per 100,000 of population in Western Europe since 1990



Source: World Prison Brief, ICPR, Birkbeck

Nonetheless, UK and other European prison rates are lower than those in many other parts of the world. Figure 2 below shows prison population rates for England and Wales alongside those of a group of other common law countries that have experienced rapid growth in their prison populations in recent decades.



Source: World Prison Brief, ICPR, Birkbeck

The combined figures for all countries above are shown in the Table below, with countries listed in order of their current prison population rate (highest first).

Table: prison population per 100,000 of population: Western Europe and five common law countries*								
Country	**1990**	**1995**	**2000**	**2005**	**2010**	**2015**	**2020**	**Current**
USA	457	592	683	752	731	666	505	541
South Africa	327	301	394	344	328	292	259	249
New Zealand	116	122	148	166	198	194	186	185
Australia	84	97	114	125	135	152	160	162
Scotland	93	110	116	133	150	144	128	149
Eng & Wales	90	100	124	142	153	149	133	139
Spain	85	115	113	140	165	139	117	117
Portugal	92	123	126	124	110	138	111	115
France	78	89	82	88	99	97	119	117
Italy	46	83	93	102	112	86	89	105
Belgium	67	74	85	90	97	98	90	106

Austria	83	84	86	106	102	104	94	101
Canada	121	131	115	107	117	114	104	90
N. Ireland	112	107	64	76	81	90	77	99
Rep. of Ireland	60	59	77	74	94	82	74	93
Sweden	58	66	60	78	74	60	73	96
Switzerland	76	86	80	83	79	83	80	77
Germany	74	79	85	97	85	76	72	68
Netherlands	45	77	87	127	92	61	60	64
Norway	56	60	57	68	74	71	54	55
Finland	69	64	55	57	61	57	51	52

Source: World Prison Brief, ICPR, Birkbeck

*Notes to Figures 1 and 2 and Table: France's 2010 figure is for 2011; Germany's pre-2000 figures are for 1993 and 1996; USA's 2005 figure is for 2006 and its 2015 figure is for 2016; Sweden's 2005 figure is for 2006

1.2 Factors driving prison population change: lessons from other jurisdictions

Accounting for the reasons prisoner numbers increase is a complex exercise, with many separate factors operating at different stages of (as well as outside) the criminal justice process, but sentencing inflation plays a key role.

Sentencing inflation in England and Wales

We offer a definition of sentencing inflation that follows that developed by the Sentencing Academy.

> Sentencing inflation occurs when sentence severity for an offence increases over a relatively short period of time. One set of key drivers of sentencing 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 sentencing might be called politically-led sentencing inflation. The challenge here is to determine whether these changes are justified with respect to the purposes and principles of sentencing. Another form of sentencing inflation arises if sentencers respond to the 'climate of opinion' about crime and punishment by increasing their severity. This might be called judicially-led sentencing inflation, even if the climate of opinion is at least in part politically shaped.

In England and Wales, it is well established that sentencing has become more severe over the last 30 years. The statistical evidence is well summarised in a paper by the Sentencing Academy and by the Academy's evidence to the current inquiry. Some of the causal mechanisms are discussed in a note by five of the country's most senior judges.

Both politically- and judicially-led sentencing inflation have been significant in England and Wales. Legislative changes underlying the former include the 2000 'three strikes' legislation requiring mandatory 3-year prison sentences for the third conviction for domestic burglary, the increases in tariffs for life sentences for various categories of murder by Schedule 21 of the 2003 Criminal Justice Act, and the introduction in 2005 of the sentence of Imprisonment for

Public Protection. Such developments do not only increase severity of sentencing of specific offences. Reflecting the priority attached to proportionality, there are also likely to be more diffuse and indirect effects on other offences that are adjacent in gravity to those whose sentences have been uplifted.

More severe sentencing may also reflect real increases in the average level of gravity for *some* categories of crime, and real increases in the culpability of some groups of offenders, but we would not regard these as manifestations of sentencing inflation.

International comparisons

Research we have conducted on a diverse group of countries reveals that sentencing inflation, largely politically-led, has contributed to rapid prison population growth in several countries.

Common features in countries experiencing high levels of growth in prisoner numbers include the introduction of mandatory minimum sentences for serious and/or repeat offences: this is a shared feature of legal systems in the USA, South Africa and Australia, as well as England and Wales. All these countries have experienced large increases in the number of prisoners serving extremely long custodial sentences including life sentences. The increased use of such sentences has also placed pressure on parole systems, and on probation services where these have a role in supervising released prisoners under long-term or lifetime licence conditions.

In the USA, rapid increases in prisoner numbers followed the introduction of tougher sentencing policy, pushing the country's total prison population to a high of just over 2.3 million in 2008. At this point, there were 755 people in US prisons and jails for every 100,000 of the national population: today the rate is 541 (having increased from 505 in 2020). In South Africa, the total prison population peaked in 2004, at 190,000: a rate of 403.

Rising levels of crime, particularly violent crime, were a key driver of the tougher sentencing approaches taken in both the US and South Africa. This undoubtedly led policymakers towards commitment to the increased use of imprisonment to deter, punish and incapacitate, with a toughening of penal policy, through legislation for, and court implementation of, more frequent and ever longer custodial terms.

Following the peaks reached in the noughties, prison population growth in the USA and South Africa went into reverse. The US saw a degree of bipartisan consensus on the need to address mass incarceration, driven by fiscal constraints making it economically unsustainable, and informed by a strong and well-funded civil society reform agenda highlighting the associated structural and racial injustices. Sentencing reforms resulting from this change of policy direction have included a loosening of mandatory provisions both at federal level and in several states; and an expansion of the use of community measures. In South Africa, too, civil society has successfully held the state to account for poor prison conditions resulting from prison overcrowding. There the reform strategy has focused more on pretrial justice than on sentencing; and crime rates have also fallen. South Africa's prison population rate is lower today than it has been for decades, at 249 – although prison overcrowding persists (with occupancy levels reported at 148% of capacity).

The Netherlands is another country in our comparative study to have experienced a dramatic increase in its prison population and then taken decisive action to drive it down, although the absolute and proportionate numbers are far smaller than in the US or South Africa. The Netherlands achieved steady reductions in its use of imprisonment over two separate periods

of its recent history. The first was between the mid-1940s and the mid-1970s: average prison population rates fell from 71 to 24 over this period. These lower levels were sustained even in the face of rising crime during the 1960s and 1970s. However, from the late 1980s the prison population rate surged: this trend was only reversed from 2006, since when it has seen a relatively sustained decline. From a peak of 125 (in 2006) it now stands at 64.

During the first Dutch decarceration phase, a strategy of legislative reform supported by research led to significantly reduced use of imprisonment and more humane conditions. The Principles of Prison Administration Act 1953[2] substituted re-socialisation for retribution as the key principle governing prison regimes (see further under 2 below). There was increasing use of psychiatric and mental health treatment. Research was conducted on the effects of imprisonment on individuals. Association and activity replaced harsh, isolating regimes. Prisoner numbers were kept down by pragmatic measures such as home leave, parole, and waiting lists for people sentenced to custody if no prison place was available. By the early 1970s, Dutch imprisonment rates were among the lowest in Europe.

Researchers found that these policies of steady reduction in imprisonment and greater focus on resocialisation were introduced in a socio-political context of high employment and strong welfare support, free of the 'law and order politics' emerging in the USA at the time.[3] As regards crime, the dominant narrative was one of 'minimal resort to coercion and punishment, combined with a maximum investment in welfare and rehabilitation'.[4]

However, in the second half of the 1970s and early 1980s, the Netherlands experienced an increase in the incidence of high-volume, low-level crime. In response, in 1985 the justice ministry issued a white paper proposing tougher crime prevention and justice policies. The recommendations included prosecuting more cases, making greater use of non-custodial penalties for minor offences, and using harsher penalties for the most serious ones. The use of imprisonment began to rise, and this trend continued even after the crime rate started to level off (from 1985). In prison regimes, there was now more focus on risk management, and less on treatment and re-socialisation. Growth in the prison population accelerated, peaking at 134 in 2005 (double the rate in 1990).

The steep rise in Dutch prisoner numbers from the late 1980s was not caused primarily by the enactment of harsher sentencing laws, as in America and South Africa. Instead, it reflected a policy focus on tougher enforcement to restore credibility to the criminal justice system and respond to public concerns about rising crime. Prosecutors and judges played a key role in implementing this policy, seeking and imposing longer prison terms for more serious offences, and making greater use of short prison terms to punish reoffenders.

Since 2006, the Netherlands has seen a second period of decarceration. The reasons advanced for the decline in prisoner numbers over this period include lower levels of serious violent crime, fewer cases of serious crime coming before the courts, and new legislation and prosecution guidelines promoting the use of community measures in place of short prison sentences.[5]

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[2] Replaced by the Penitentiary Principles Act 1998, see S.2 below.

[3] Downes, D. and van Swaaningen, R. (2007) 'The Road to Dystopia? Changes in the Penal Climate of the Netherlands' in Tonry, M. and Bijleveld, C. (eds) Crime and Justice in the Netherlands, 35, Chicago: University of Chicago Press

[4] Downes, D. (2007) 'Visions of Penal Control in the Netherlands' Crime and Justice, 36 (1), 93-125

[5] Allen, R. (2014) 'Reducing the use of imprisonment What can we learn from Europe?', at https://criminaljusticealliance.org/wp-content/uploads/CJA_ReducingImprisonment_Europe.pdf

Australia provides further lessons about the factors driving rapid increases in prisoner numbers. In 1950, Australia's prison population rate was 53. Since then, the country has seen sustained and accelerating growth in prisoner numbers, except for some short-lived declines in the early 1970s and in 2010 to 2012. Today's prison population rate is 162, over three times the 1950 figure. There is variation across territories and states, but all have seen some increase in prisoner numbers over the past thirty years. Crime rates do not provide a convincing explanation for the trend, as these have remained steady or decreased over much of this period of penal expansion. Increasingly punitive criminal justice policies and practices were introduced across some states and territories including the introduction of mandatory sentencing and tighter sentencing guidelines, which led to longer custodial terms and reductions in the use of parole. As the Law Council of Australia has noted, 'the introduction of minimum mandatory regimes in most states and territories and the Commonwealth are a political response to the concern that courts are too lenient on offenders'.

Lessons from other jurisdictions – overview

To summarise, all the countries discussed in this brief overview have experienced rising prison population rates as a result of the lengthening of prison terms, notably for more serious offences and often also for some types of reoffending. (As discussed above, the United States and South Africa have more recently seen marked declines in prisoner numbers.) In almost all cases, legislative changes to sentencing frameworks brought about these longer prison sentences. In the United States, South Africa and Australia, as also in England and Wales, mandatory sentencing provisions were introduced, variously employing mandatory minimum terms and 'three strikes' systems. Greater use has been made of life sentences with highly restricted (or no) access to parole.

By way of contrast to those approaches, it is instructive to look at the Dutch sentencing framework. The judiciary retains wide discretionary powers in sentencing. Legislation establishes maximum sentences for particular crimes; there are no statutory mandatory minimum sentences. Indeterminate sentences are never used other than the life sentence, which is handed down extremely rarely: 39 prisoners are serving a life sentence in the Netherlands,[6] whereas more than 7,400 are under a life sentence in England & Wales. (Turkey is the only Council of Europe country with more lifers than England & Wales.) Generally, a custodial sanction is treated as a last resort in practice as well as policy; significant use is made of community service orders, fines and electronic tagging. Only when other methods have failed is prison used, and the custodial term is limited to the period deemed necessary for rehabilitation.[7]

Lengthy and indeterminate sentences usually form one thread of wider penal policy aiming to show toughness in the face of serious and persistent forms of offending. The influence of pressure from the public and, particularly, mainstream and social media, is often highly significant, leading political parties to compete with each other to prove they can keep the public safe from crime. While these policies significantly impact prisoner numbers, it is less

[6] Council of Europe Annual Penal Statistics for 2023, at https://wp.unil.ch/space/files/2024/11/SPACE_I_2023_Report.pdf

[7] Subramanian, R. and Shames, A. (2013) Sentencing and prison practices in Germany and the Netherlands: Implications for the United States, New York: Vera Institute of Justice, at https://vera-institute.files.svdcdn.com/production/downloads/publications/european-american-prison-report-v3.pdf

clear how effectively they meet the objectives of sentencing, beyond punishment and incapacitation. (This is a question we return to in section 2 below.) They are characterised by an approach to sentencing that removes much of the discretion traditionally reserved to sentencing courts to assess seriousness, harm, risk, aggravating and mitigating circumstances, and other variables relevant to sentencing. This removes an important check on unnecessarily long, or indefinite, custodial terms and also carries an implicit disregard for the individual prisoner's potential for rehabilitation.

1.3 England and Wales: politicisation of sentencing, public attitudes to crime and sentencing[8]

The rapid increase in the prison population rate in England and Wales since the early 1990s reflected the courts' imposition of proportionately more, and longer, custodial sentences; an additional factor has been a progressively higher rate of recall to custody of offenders who break their licence conditions. The policy changes giving rise to longer sentences, largely in the form of legislative provisions on sentencing, were introduced in a context of media pressure, as well as competition between the Conservative and Labour parties over which of them could best meet the general public's (presumed) demands for tougher responses to crime.

There is solid research on crime trends in western industrialized countries since WW2. Crime rates increased, often rapidly, until the 1980s or 1990s. Most forms of violence and property crime have since fallen, the exception being the explosion in cybercrime. This increase has not yet offset the fall in traditional forms of crime. According to the CSEW, falls in crime rates in England and Wales began in the mid-1990s.

Public views on crime trends in England and Wales have changed little since the early 1990s Then, most people thought— correctly—that crime was rising. Since then, successive sweeps of the CSEW have shown that most people still think that national crime rates have risen. By 2021, a Sentencing Academy survey showed that 60 per cent of the public in England and Wales wrongly believed that crime rates across the nation were higher than twenty-five years ago. However, people have a more realistic sense of crime in their own neighbourhood.

These misperceptions are unsurprising. At the national level, the main sources of information about crime trends are television, radio, print media, and (now, increasingly) social media newsfeeds. Inevitably, news values privilege the dramatic and the unsettling. Besides, half the population have grown up with the reality that crime was indeed rising throughout their early life, and this may have led those with long memories to believe that crime always rises. A further factor is the nature of party politics: opposition parties will always criticize the government for their failure to address crime effectively, and against widespread beliefs that crime is rising, it is a high-risk strategy for the government of the day to suggest that 'things are not that bad'.

[8] The material in this subsection 1.3 draws extensively on Hough, M. and Roberts, J. V. (2023) 'Public Knowledge and Opinion, Crime, and Criminal Justice', in (eds, Liebling, A., Maruna, S. and McAra, L.) The Oxford Handbook of Criminology. Seventh Edition. Oxford: Oxford University Press.

There are similar systematic misperceptions about the severity of punishments meted out by the courts. The 1996 BCS demonstrated that most people underestimated the imprisonment rate for various crimes, including rape and burglary, and subsequent sweeps of the CSEW have replicated this, as has the Sentencing Academy's recent survey. People in England and Wales are equally misinformed about historical trends in sentencing severity. Over the past decade, prison sentences have increased significantly, despite falling or stable crime rates. For example, the Average Custodial Sentence Length (ACSL) has increased steadily for over a decade now, from 13.8 months in 2009 to 18.9 months in 2019, an increase of 37 per cent. The ACSL for manslaughter almost doubled between 2007 and 2017. The 2021 Sentencing Academy survey asked people if prison sentences had become longer, shorter, or stayed the same over the last twenty-five years. Excluding 'don't knows', three-quarters thought that sentences had become shorter.

The factors that shape limited public knowledge about punishment are likely to mirror those that underlie misunderstandings about crime trends. The only sources of readily available information about court sentences are the various forms of mass and social media, whose news values privilege the shocking, the unfair and the outrageous. If most people believe that crime is rising nationally and that prison sentences are reducing nationally, they are likely to conclude that sentencing is too soft.

Public views on court leniency and the adequacy of sentencing

Research going back fifty years has assessed the degree of 'fit' between public sentencing preferences and court practice. The overall picture to emerge, especially in common law countries, is as follows. If general questions are asked, such as 'Are the courts too lenient, too harsh, or about right?', the weight of opinion will always be that they are too lenient. The BCS/CSEW routinely found that three-quarters of the population consistently say that the courts are too lenient: the percentage saying this in 1996 was 79 per cent; in 2008–2009 it stood at 76 per cent; and in 2010–2011 it fell slightly to 74 per cent. The survey commissioned by the Sentencing Academy in 2021 found that excluding the 15 per cent who responded 'don't know' (to ensure comparability with the CSEW), the figure stood at 76 per cent. This consistency over time is striking, especially given that sentencing became much *tougher* over this period in England and Wales – but unnoticed by most of the public.

Negative attitudes also emerge when samples are asked about their confidence in the judiciary. In the Sentencing Academy's 2021 survey, 59 per cent of the public believed judges were out of touch with what the public thinks—or 78 per cent excluding 'don't knows'. In the 1996 BCS, the equivalent figure was 82 per cent. Part of the reasons for this can be found in the lack of public knowledge about sentencing practice: if people underestimate how much the courts imprison offenders, it is hardly surprising that they think the courts are too soft and out of touch.

Public preferences in specific cases

In the development of sentencing policy, the most helpful indicators of public sentencing preferences were measures that tapped into people's informed and considered views. The best way of designing such indicators is to present survey respondents with vignettes of offenders

and their offences and ask them to 'pass sentence'. This approach largely side-steps the problems of misinformation and ignorance that arise when surveys ask general questions about whether courts are tough enough. The 'sentences' emerging from this method can then be compared with sentences typically or actually imposed in these cases. Assessed in this way, public sentencing preferences and judicial practice are usually closer together: the 'punitiveness gap' diminishes.

The BCS/CSEW, in various sweeps since 1996, has asked subsamples to 'sentence' a burglar whose details were summarized on a showcard. (He was described as a man aged 23 with previous convictions who broke into an elderly man's home and stole electrical goods.) The case on which the vignette was modelled had attracted a sentence of three years, reduced on appeal to two. Had the burglar been sentenced *after* the enactment of the Crime (Sentences) Act 1997, he would have probably faced a mandatory three-year sentence, as this was his third conviction. However, when the public was asked to 'sentence' this case in 1996, only 54 per cent of the sample favoured imprisonment at all. Public polling has also consistently found support for community sentences and for the use of restorative justice as an alternative to conventional forms of punishment, particularly where repeat offending is an entrenched response to poverty or addiction.[9] Clearly, public attitudes and court practice are not inevitably out of step, and a significant proportion of the public can be less tough-minded than current practice. This general finding has been replicated on numerous occasions in Britain and elsewhere.

To summarize, a large body of research now qualifies the conventional view that the public is deeply punitive towards those convicted of crime. Simple questions yield simple—and largely negative—answers. However, when people are asked to deliberate about particular cases, a more nuanced picture emerges, where many people are less tough-minded than sentencers. What is especially clear is that the public is so poorly informed about sentencing practice that even quite large increases in sentence severity will go unnoticed.

Theme 2: Structures

2. **How might we reform structures and processes to better meet the purposes of sentencing whilst ensuring a sustainable system?**

The main difficulty presented by the five statutory purposes of sentencing set out in the Criminal Justice Act 2003 is the absence of guidance as to how much weight should be given to each. Sentencers must consider how to give effect to these distinct and sometimes conflicting aims, both when deciding whether to impose a custodial or community sentence, and when setting the length of a custodial sentence in a case where the law or guidelines rule out a non-custodial penalty. To what extent should punishment take precedence over rehabilitation – or vice versa –

[9] See for example, Revolving Doors, 2018, 'Reducing the use of short prison sentences in favour of a smarter approach' at https://howardleague.org/wp-content/uploads/2018/06/Revolving-Doors-Agency-written-evidence.pdf; and Restorative Justice Council, 2014, 'Overwhelming support for restorative justice among the public' at https://restorativejustice.org.uk/sites/default/files/resources/files/Ipsos%20MORI%202014%20summary.pdf

in this process? This question is all the more important given prison's poor record in preventing crime and reoffending (either by deterrence or rehabilitation towards desistence).

Our comparative research on sentencing in ten countries revealed that several other jurisdictions' sentencing laws provide also provide a 'menu' of sentencing purposes. In South Africa, the seriousness of the offence, the personal circumstances of the accused, and the public interest are factors courts must give equal weight to, in order to ensure that the sentence is 'just and equitable'. In New South Wales, there are seven statutory purposes of sentencing that closely resemble those in our Criminal Justice Act 2003. As in England and Wales, it is left to the court's discretion to decide what weight to give these different purposes.

It is rarer to find jurisdictions with a statutory or common law definition of the purposes of *imprisonment,* or established principles on what these should be. (The Netherlands and Finland are exceptions, as explained below.) Despite the large and enduring social and economic costs of incarceration, there is no international consensus on its proper purposes. Theorists have put forward the following as objectives and justifications: (*i*) punishment or retribution; (*ii*) denunciation of wrongdoing; (*iii*) deterrence; (*iv*) incapacitation (to manage risk and protect against further harm); and (*v*) rehabilitation or re-socialisation. [10]

Non-custodial sanctions and measures are capable of meeting these five objectives in significant numbers of cases. Only the objective of incapacitation might, in certain cases, *necessitate* use of incarceration on the basis of the risks presented by the individual being sentenced. The questions then arise as to how the prison sentence – not only its length but also the way it is delivered or experienced – should be calibrated to match the risk it seeks to manage, and whether or to what extent the goal of public protection should override the principle of proportionality. These difficult questions often become highly politicized: we have provided examples of countries where, as in England and Wales, harsher, more arbitrary sentencing regimes featuring increased use of life and other indeterminate sentences, and mandatory minimum sentencing, have been the policy response to the most serious forms of offending.

Yet there are countries that do not use life or other indeterminate sentences at all, or do so exceptionally rarely (for example, the Netherlands). Our sentencing research shows significant disparity in terms of the likely sentencing outcomes in three offence vignettes, including murder. In England and Wales, a 23 year-old first time offender convicted of intentional homicide (using a knife) would likely receive a life sentence with a 25-year tariff; likely sentences would be as harsh or harsher in South Africa and New South Wales (possibly also in New York state, depending on the plea deal offered). By contrast, if sentenced in the Netherlands, a custodial term of less than12 years would be the most likely outcome, perhaps with a stay in a

[10] There are regional and international detention standards relevant to the purposes of imprisonment, to which England and Wales are expected to adhere. The UN Standard Minimum Rules for the Treatment of Prisoners (UNSMRs), last revised in 2015 and known since then as the Nelson Mandela Rules (NMRs); and the European Prison Rules (EPRs), last revised in 2020. The EPRs acknowledge that prison sentences may be imposed with more than one aim in mind (e.g. deterrence, punishment and rehabilitation), but prescribe that prisons must be managed to 'facilitate the reintegration into free society of persons who have been deprived of their liberty'. The NMRs explicitly prioritise a specific aim, stating that the primary purpose of imprisonment should be 'to protect society against crime and to reduce recidivism'. The NMRs and EPRs require states to minimise the adverse impacts of imprisonment over and above those inherent in being deprived of liberty. Both sets of rules contain a principle of 'normalisation': conditions in prison should, as closely as possible, resemble those outside.

psychiatric treatment centre to follow if there is evidence of a mental health condition. In Brazil and Hungary the likely sentence would also have been a shorter custodial term than England and Wales.

As to the objective of rehabilitation, prison has a poor record, with better results evidenced by non-custodial measures. It is inherently contradictory to expect custodial settings to reform and resocialise, when they involve separation from family and community, hours of confinement and inactivity, forced cohabitation with other convicts and, in many countries including our own, exposure to violence and disorder on a routine basis. Undeniably there are a few countries, such as the Netherlands and Finland, where prisons are exceptionally well resourced, with large numbers of highly qualified staff striving to create humane, supportive living conditions. In these countries, too, when custodial sentences are used, they tend to be short.

In both countries, statutory purposes are laid down for the use of imprisonment. Finland's Imprisonment Act defines the purposes of imprisonment as: 'to increase the readiness of a prisoner to lead a life without crime by promoting the prisoner's ability to manage his or her life and by promoting his or her reintegration into society, and to prevent the commission of offences during the term of sentence'. The Netherlands' Penitentiary Principles Act also prioritises the re-socialisation of prisoners, stating that a prison sentence 'shall be aimed at preparing the person involved as much as possible for reintegration in the community'. Both countries' laws require prison conditions to resemble as closely as possible life in the community, limiting the restrictions imposed on prisoners beyond the loss of liberty itself. It is worth noting in this context that Finland, like the Netherlands, has experienced higher prison rates in recent history, and adopted a strategy to reduce reliance on incarceration and make way for alternatives. Finland also makes far greater use of open prisons than England and Wales.

In England and Wales, absent such a clear statutory mandate to prioritise resocialisation over punishment, the sentencing framework would benefit from principled guidance on the relative weight and value to be ascribed to each of the five sentencing objectives, as well as a process to enable informed consideration of prison's capacity to meet them in individual cases.

If one accepts that the sentencing decision should reflect the likely effects of imprisonment, the sentencer should have access to information on the prevailing conditions and regime at relevant establishments. Such information could be made available routinely on the website of the Sentencing Council (supplied by HMPPS and informed by relevant HMIP inspection reports). This would cover levels of overcrowding, understaffing, drug use, violence and self-harm; and the availability of work, training, education and rehabilitation programmes. Data on such matters would shed light on the likely impacts of the prison term on the individual's resocialisation and future reoffending risk. This information could impact the court's assessment of whether incarceration or a suitable non-custodial penalty would more effectively serve the statutory purposes of sentencing.

Short sentences

Although the use of short prison sentences has declined in recent years there remains a case for adopting more stringent guidance, or a statutory provision, ruling out custodial sentences of less than six months. This would focus the court's decision on whether statutory sentencing objectives could be met by a community penalty, backed up if necessary with a further restriction or requirement, such as a curfew or treatment order.

In relation to frequent or prolific reoffenders, in particular, it is clear that a different approach is required given the vastly disproportionate burden this kind of offending places on the resources of local prisons, courts and legal services, and given the economic and social costs of repeat offending by this cohort.

The harsher punishment of repeat offenders is common around the world, as our comparative study of sentencing frameworks has shown. It is predicated on the aim of reducing re-offending, but the overwhelming evidence is that brief and repeated spells in prison achieve nothing in this regard beyond a temporary incapacitative effect – and indeed that post-release reoffending risk is exacerbated by time in custody, given prison's lack of scope to help people address the problems underlying their entrenched reoffending.

Longer and indeterminate sentences

In England and Wales, the increase in the number of prisoners serving lengthy and indeterminate sentences has played a far greater role than the over-use of short sentences in driving up the prison population rate. The acute resource pressures caused by the growth of this part of the prison population have been documented by HM Prisons Inspectorate and the Independent Monitoring Boards for years. It has produced a prison estate in which most prisons cannot even keep prisoners and staff safe, far from being able to meet the rehabilitation objectives of sentencing. This exacerbates reoffending by people released from custody. That, in turn, places further pressure on courts, probation and, ultimately, the prison service again, including through increased recalls to custody.

It follows that reforms to the statutory and policy structures underlying both short and longer or indeterminate custodial sentences are necessary if the sentencing framework is to meet its objectives.

The role of the Sentencing Council in addressing sentencing inflation

Under the Coroners and Justice Act 2009 the Sentencing Council must, when producing sentencing guidelines, have regard to the 'cost of different sentences and their relative effectiveness in preventing re-offending'. All new definitive guidelines must contain an assessment of their resource implications including as regards prison places. Once implemented, each guideline's effect must be monitored by the Council. In consultations and inquiries considering sentencing inflation and the future of the prison system, concerns have been voiced about how the Council performs these aspects of its role. Here we briefly consider whether changing the Council's remit could be beneficial in preventing further sentencing inflation or reducing the use of imprisonment.

In 2020 the Sentencing Council consulted on its future operation, and many bodies proposed that it should be given a clearer role in addressing sentencing inflation. The Council's response was clear:

> "In terms of reversing any observed trends in the prison population, we do not feel that this is the Council's role.... [A]bsent an explicit statutory remit, the Council is of the strong view that were it to seek, artificially and unilaterally, to raise or lower sentence levels without good cause ... it would rapidly lose the confidence of sentencers, a broad range of public opinion, and no doubt a significant body of opinion within Parliament."

A solution might be to extend the statutory remit of the Council, to address sentencing inflation in a way which preserves Parliament's primacy in setting the framework for sentencing. The legislative arrangements for the Office for Budget Responsibility could provide a model.

Consideration should also be given to whether the establishment of detailed guidelines which sentencers *must* follow – unless this is contrary to justice – has the unintended effect of accelerating sentencing inflation. Although it is difficult to assess whether this has been the case in England and Wales, guidelines have certainly not curtailed, and may have exacerbated, inflation. This may be because guidelines could inhibit sentencers from passing sentences, in unusual circumstances, below the established range, whilst having little impact on sentences above the range, as these were already strongly discouraged by the appellate system. If it is indeed the case that guidelines contribute to sentencing inflation for the reason suggested above, it will be important to develop methods of restoring sentencer discretion where circumstances merit 'lenient' approaches. This brings into sharp focus the continuing challenge of achieving a balance between individualised sentencing and pursuit of the goal of consistency.

The Sentencing Council's responsibilities to chart sentencing inflation and its causes

In order to perform an OBR-type function, the Council will need to be better resourced to carry out or commission research to identify more fully the nature and causes of sentencing inflation. There is a good case for developing the in-house research team whilst exploiting the growing capacity for sentencing research in academia. This extended research role might include monitoring and assessing more fully whether and how any Council guidelines have unintentionally fuelled sentencing inflation. Greater investment in research would prove highly cost-effective even if it succeeded simply in slowing sentencing inflation.

The role of the Sentencing Council in improving public trust in justice

Public cynicism about sentencers has energised many political initiatives to introduce tougher sentencing. The Council recognises that lack of resources has limited its work to address public distrust in justice. However, it is well established that low public confidence in justice is a direct function of misinformation about crime and sentencing, and there is scope to address public ignorance and cynicism grounded in misinformation. For the Council to develop this area of its responsibilities, additional resources are again clearly needed.

The membership of the Sentencing Council

The Council is – properly – a judicially-led organisation. However, there is scope to extend the number of lay members, or to shift the balance between judicial and lay members. This would provide an opportunity for ensuring that the Council's work drew on a greater diversity of views. There is obviously a clear case for the Council to appoint *ex officio* a senior member of HM Prison Service.

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?

In many cases, the objectives of incapacitation and risk management can be achieved at less cost and with less harm through the use of electronic monitoring, curfews, supervision and other forms of restriction or control. These forms of non-custodial monitoring are likely to be

more supportive to object of rehabilitation and curbing reoffending risk, for example by aiding compliance with abstinence orders and similar restrictions, and enabling the known protective factors such as family relationships, employment, and participation in education and training to continue (or resume).

Use of technology as a means of curbing rates of incarceration and enforcing post-release compliance with licence requirements has grown significantly worldwide. For example, in Brazil when prison overcrowding reached unprecedented levels in 2016, the federal government authorised wider use of conditional release into 'residential custody' with GPS or electronic monitoring when required. Today almost 24% of the sentenced custodial population is now in this category: over 220,000 people compared with around 6,000 a decade earlier.

Now that these forms of monitoring are increasingly widely used in this country, the government should collect and publish data on their relative effectiveness. This could help make the case for their expansion to support a decarceration strategy.

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