UNIVERSITY OF Southampton
School of Law

Response to Sentencing Review Consultation

Professor Harry Annison
Southampton Law School, University of Southampton

Harry Annison is Professor of Criminal Justice at Southampton Law School, University of Southampton. He is a member of the Southampton Centre for Justice Studies. This submission draws primarily on Professor Annison's research and expertise[1] on penal politics and policymaking,[2] the history and lessons of the Imprisonment for Public Protection (IPP) sentence,[3] and parole.[4]

In response to this call for evidence on Independent Sentencing Review, **I provide evidence and policy recommendations in relation to Themes 1, 2, 5, 6 and 7.** I am grateful to my colleague Dr Ben Jarman for the discussions that have informed my response. I have read, and endorse fully, Dr Jarman's own submission.

Executive Summary

I argue in this submission that the current crisis requires 'penal de-escalation', implementing reductionist reforms to achieve a sustainable decline in the prison population.

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[1] The majority of publications are available open access at https://orcid.org/0000-0001-6042-038X and https://scholar.google.com/citations?user=gNFBGo8AAAAJ&hl=en&oi=ao

[2] ANNISON, H. 2022. The role of storylines in penal policy change. *Punishment & Society,* 24**,** 387-409; ANNISON, H. 2015. *Dangerous Politics,* Oxford, Oxford University Press.; ANNISON, H. & GUINEY, T. 2023. Locked In? Achieving penal change in the context of crisis and scandal. London: Prison Reform Trust.

[3] ANNISON, H. 2015. *Dangerous Politics,* Oxford, Oxford University Press; ANNISON, H. 2018. Tracing the Gordian Knot: Indeterminate-Sentenced Prisoners and the Pathologies of English Penal Politics. *The Political Quarterly*; ANNISON, H. & STRAUB, C. 2019. A Helping Hand: Supporting families in the resettlement of people serving IPPs. London: Prison Reform Trust.

[4] Professor Annison was member of the Working Party for JUSTICE's 'A Parole System Fit for Purpose', and Chair of the Sub-Group 'The Experiences of Prisoners and Other Parole Users Through the Parole Process'. See also ANNISON, H. 2020. Re-examining risk and blame in penal controversies: Parole in England and Wales, 2013-2018. *In:* PRATT, J. & ANDERSON, J. (eds.) *Criminal Justice, Risk and the Revolt against Uncertainty.* London: Palgrave Macmillan.; ANNISON, H., GUINEY, T. & CARR, N. Forthcoming. *Parole Futures: Rationalities, institutions and practices,* London, Hart.

I argue that there are three fundamental requirements for achieving sustainable reform:

- Tackle sentence inflation at all levels (not just short sentences)
- Develop a "story of sentencing" to inform and reshape public discourse
- Treat imprisonment as a finite resource requiring careful and prioritised allocation

My submission draws in particular on:

- Lessons from the creation and implementation Imprisonment for Public Protection (IPP) sentence,[5] and the ongoing challenges
- My research on parole and in particular my collaboration with JUSTICE on the report 'A Parole System Fit for Purpose'[6]
- Wider research on penal policy change

Key Recommendations

1. Structural reforms
    a. Create or empower an existing independent body to align sentencing policy with available resources
    b. Establish better mechanisms to incorporate diverse expertise, including lived experience, into policy development
    c. Utilise the review as an opportunity to make further improvements to the parole system and Parole Board, ensuring in particular that its powers are sufficient

2. Specific operational changes

[5] It is recognised that proposals for action on the IPP sentence are specifically excluded from this review; the IPP sentence here is discussed for the lessons it provides more generally for the Sentencing Review.

[6] JUSTICE, 'A Parole System Fit for Purpose'. London: JUSTICE

a. Reform recall procedures to ensure that recall is only used where absolutely necessary. Consider specifically JUSTICE's proposals for a two stage, fact/risk and necessity, model

b. Improve transparency of sentencing (for victims, prisoners and the public generally), especially regarding release arrangements

3. System-wide changes

   a. Move away from a narrow risk-based approach

   b. Recognise the limited, 'thin', ways in which imprisonment results in public protection

   c. Develop and foster a supporting narrative, which is able to begin to re-shape public debate on crime and criminal justice. It is likely that such a narrative would:

      - Embrace the legitimate force of emotional responses to crime, but encourage more imaginative ways of facilitating their processing (within appropriate ethical boundaries)
      - Recognise the inevitable limits of criminal justice interventions in improving overall public safety (and its inter-relation with other social and community interventions)
      - Nonetheless, potentially demand more from criminal justice agencies in relation to specific forms of offending

The Need for Penal De-escalation

Across the political spectrum, it is widely recognised that the penal systems of England and Wales are in an unprecedented crisis. Prisoner numbers are already the highest in Western Europe and are projected to grow much further by 2027, well beyond current capacity. Economic pressures and moral obligations on the state mean that this crisis can only credibly be addressed through 'penal de-escalation': reductionist reforms to sentencing, which would achieve a sustainable decline in the prison population.[7]

[7] This concept has been developed in collaboration with Dr Tom O'Grady, UCL.

Recent experiences around the world suggest that change is possible. In several American states and countries such as the Netherlands and Spain, reforms to reduce imprisonment have been implemented with prison populations falling dramatically in the last fifteen years.[8] There is, to date, an absence of rigorous scholarly research that has developed a robust theoretical account of how the mechanisms by which these developments have taken place could be utilised within an Anglo-Welsh context.

Nonetheless, some key lessons can plausibly be identified from analysis of the developments in England and Wales over recent decades, as well as more recent developments abroad. These include:

- Tackle sentence inflation at all levels (not just short sentences)
- Develop a new "story of sentencing" to reshape public discourse
- Treat imprisonment as a finite resource requiring careful and prioritised allocation

Theme 2: Structures

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

<u>It is essential to tackle sentence inflation at all 'levels'</u>

[8] See Corda, A. (2024) 'Reshaping Goals and Values in Times of Penal Transition: The Dynamics of Penal Change in the Collateral Consequences Reform Space', *Law & Social Inquiry*, 49(3), pp. 1479–1509. doi:10.1017/lsi.2023.46. ; Brandariz, J. A. (2022). Beyond the austerity-driven hypothesis: Political economic theses on penality and the recent prison population decline. *European Journal of Criminology*, *19*(3), 349-367. ; Katherine Beckett, Anna Rheosti and Emily Knaphus (2016). "The End of an Era? Understanding the Contradictions of Criminal Justice Reform." *Annals of the American Academy of Political and Social Science 664: 238-259.* ; Miranda Boone, Francis Pakes and Sigrid van Wingerden (2022). "Explaining the Collapse of the Prison Population in the Netherlands: Testing the Theories." *European Journal of Criminology* 19: 488-505. ; Michael Campbell, Heather Schoenfeld and Paige Vaughn (2020). "Same Old Song and Dance? An Analysis of Legislative Activity in a Period of Penal Reform." *Punishment and Society* 22: 389-412. ; Frieder Dünkel (2017). "European Penology: The Rise and Fall of Prison Population Rates in Europe in Times of Migrant Crises and Terrorism." *European Journal of Criminology* 14: 629-653. ; Susanne Karstedt, Tiffany Bergin and Michael Koch (2019). "Critical Junctures and Conditions of Change: Exploring the Fall of Prison Populations in US States." *Social & Legal Studies* 28: 58-80.

The consultation rightly seeks to consider the use and impact of short custodial sentences, and their possible reduction.

To be successful in providing long term solutions for the justice system, it is also essential that the dramatic growth of longer sentences is also addressed. This growth can be expressed in terms of two important dynamics: First, more than three times as many people were sentenced to imprisonment of 10 years or more in 2022, compared to 2008. Second, the average prison sentence is now over 62 months, compared to 34 months in 2008.[9]

At the same time, measures have been introduced that have increased the amount of time in prison actually served by many prisoners, especially those receiving longer sentences.

While short prison sentences contribute considerably to 'churn' within the prison population – and disrupt the lives of sentenced individuals and their families, often in a manner that is hard to square with goals regarding long-term desistance – it is long sentences that make an outsize contribution to the growth of the prison population, and the increasingly intractable nature of the problem.

Providing A Story of Sentencing – What's the Narrative?

Stories are the lifeblood of politics and of public communication. **Any effort to reform sentencing must be accompanied by a persuasive narrative about what sentencing, and specific measures such as imprisonment or community supervision are intended to achieve. It needs to be responsive to legitimate individual and community concerns, while speaking to the kind of society we seek to be and the appropriate role of criminal justice institutions within this**.

[9] See Prison Reform Trust (2024) 'Bromley Briefings Prison Factfile: February 2024' London: PRT

The past two decades has seen a bipartisan consensus emerge that gives primacy to a 'tough on crime' narrative,[10] coupled with a prioritisation of a certain (what we can call a 'thin') notion of public protection.[11] This narrative communicates to the public that imprisonment is the sole means by which it is possible to convey a society's condemnation of a serious public wrong (one which has been criminalised). It also communicates to the public that imprisonment is the primary means by which public protection is achieved, supported by the Probation Service.

Research has consistently demonstrated that the public are uninformed about crime, sentencing and prisons. Large parts of the public think that crime generally is increasing; that sentence lengths are far lower than they deem acceptable; and that prisons are unacceptably 'soft'.[12]

In this context, the current political framing communicates to the public:

i. Our condemnation of a crime is, and can only ever, be captured by the length of prison sentence imposed.
ii. Prison sentence lengths must be ever higher: whatever the current sentence length is, is not enough
iii. Prison affords absolute safety, and other criminal justice agencies such as the Probation Service can achieve the same. Any further offending is a failure which must result in a further ratcheting-up of sentence lengths (and the extent to which they are enacted in a risk-averse manner)

[10] N. Lacey, The Prisoners' Dilemma, Cambridge, Cambridge University Press, 2008.
[11] It is 'thin' because it is an approach to public protection that encourages a risk-elimination mindset where any further offending by a justice-involved individual is a failure; it uncritically sees individuals as bearers of risks (a focus on the individual, rather than the context); it sees ever-lengthening imprisonment as providing safety (rather than carrying with it risks, unintended consequences, institutionalisation and rising un-safety within the penal institution itself); it crowds out supportive processes for desistance, and the 'false starts' and 'backward steps' that are often inherent in such positive processes; and it demands and rewards an institutional risk-aversion that prioritises processes that minimize the risk of backlash on an organisation, or practitioner, when a further offence is committed by someone who is or was under their supervision.
[12] ROBERTS, J. V., CRELLIN, L., BILD, J. & MOUTON, J. 2024. Who's in Prison and What's the Purpose of Imprisonment?: A survey of public knowledge and attitudes. London: Sentencing Academy.; ROBERTS, J. V. & HOUGH, J. M. 2002. *Changing Attitudes to Punishment: Public opinion, crime and justice,* Cullompton, Willan Publishing.

To be achieved and to sustain, major sentencing reforms will require the development and ongoing fostering of a supportive narrative, which is able to begin to re-shape public debate on crime and criminal justice. We can provisionally suggest that such a narrative would:

i. **Embrace the legitimate force of emotional responses to crime, but encourage more imaginative ways of facilitating their processing (within appropriate ethical boundaries)**
ii. **Recognise the inevitable limits of criminal justice interventions in improving overall public safety (and its inter-relation with other social and community interventions)**
iii. **Nonetheless, potentially demand more from criminal justice agencies in relation to specific forms of offending**

<u>The Need for Resource Alignment – imprisonment as a finite resource</u>

In order feasibly to play a role in achieving sentencing goals – including rehabilitation – prisons must be suitably resourced, structured and located. The system must have sufficient capacity to enable meaningful activity to take place.[13]

This requires a system that enables active consideration of the relationship between sentencing, practice, and capacity in a manner that has simply not occurred. Prisons, rather, for too long have been expected to find ways to manage; with emergency measures then being required such as SDS40 to avoid catastrophe.

The creation and implementation of the IPP sentence was a particularly egregious example of the ongoing absence of systems that ensure sufficient consideration of the relationship between sentencing measures and implementation requirements, and oversight to ensure that this is actually achieved. In the case of the IPP sentence, it was self-evident that a sentence requiring active demonstrable

[13] HM CHIEF INSPECTOR OF PRISONS 2024. Annual Report 2023-24. London: HMIP.

rehabilitation on behalf of any person sentenced to IPP, in order to achieve release, would require considerable investment in appropriate forms of support: whether structured programmes, or more general opportunities for training and education. In addition there was the need for training of staff, and availability of suitable expert practitioners. Further, there needed to be sufficient capacity within the overall prison estate to enable prisoners to progress to the right prison at the right time. No additional resources were provided—not to the Parole Board for additional hearings, nor to prisons for additional interventions, nor elsewhere—as a result of the creation of the IPP sentence.[14] This has, at best, only ever been partially addressed even two decades on from the sentence's creation.

The dynamics of the IPP sentence are however not particularly exceptional. In the absence of any system for consideration of the relationship between sentencing policy and the capacity for the system to enact that policy, and the absence of the assignment of any organisation to conduct such a task on an ongoing basis, this situation is inevitable.[15]

There are also recurring examples across the past two decades of high profile, single case, campaigns driving policy change. The underlying social dynamics influencing this have been recognised for at least two decades, and especially in the socio-cultural context that criminal justice operates it is implausible that salient cases would not have a considerable effect on the course of debate regarding penal policy. A feature, however, of the past decades, is the lack of any structured approach by which specific concerns, including those raised by high profile cases, can be explored in a way that facilitates full consideration of the potential knock-on effects for the wider system of any proposed changes.

A particular, related feature of sentencing policy over recent decades is an imbalanced dynamic in relation to the forms of expertise that are drawn upon, and

[14] See Annison, H. (2015) *Dangerous Politics*, Oxford: OUP, Chapter 3
[15] Impact Assessments for specific bills are at best a partial answer to such a concern, and insufficient for the purpose set out here.

the voices that are welcomed into policy discussions. Specifically, the extent to which those with lived experience, including prisoners and their families, have been able to inform policy development has been highly variable and often extremely limited.[16] This can contribute towards a disjuncture between the intended outcome of specific policy measures and that actual effect.[17]

It is essential that structures and processes are established that better draw upon collective memory: thinking, experiences, and understandings of criminal justice as shared by a range of stakeholders, including those with lived experience of prison and other relevant institutions. This represents a crucial repository of knowledge and insight, well placed to guide policy thinking, to advise on how it might be experienced by different groups, and to ensure that hard-learned lessons from previous periods of policy change, challenge, or even crisis, do not fall away over time.[18]

Establishing an organisation and process to ensure resource alignment

Bodies already exist that could be utilised for such a purpose, most obviously the Sentencing Council.

There is potential for a more ambitious approach to be pursued, which could draw on debates regarding the creation of a form of 'National Institute for Criminal Justice Excellence' (NICJE). Different forms of such a body have been proposed; most attractive is a form of a NICJE that would operate as an opportunity for consideration of the relationship between sentencing policy and current/future capacity, but in so doing also operate as a mechanism for introducing a higher level of ongoing public and stakeholder engagement within penal policy development.[19]

[16] See ANNISON, H. & GUINEY, T. 2023. Locked In? Achieving penal change in the context of crisis and scandal. London: Prison Reform Trust.
[17] Dr Ben Jarman's submission provides valuable examples to this end.
[18] See ANNISON, H. & GUINEY, T. 2023. Locked In? Achieving penal change in the context of crisis and scandal. London: Prison Reform Trust.
[19] See Loader I, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) 63(1) *Current Legal Problems* 72

Equally, there is scope for consideration of a more localised approach that devolves responsibility for criminal justice resources in a manner that recognises imprisonment as part of a wider set of possible interventions in relation to crime. In so doing, it would enables local areas to examine the appropriate prioritisation of interventions (and the organisations and resources therein) in their area. In addition to supporting a more integrated approach to issues of crime, recognising their relationship with other policy areas such as health.[20]

I also draw the Sentencing Review panel's attention to Dr Ben Jarman's submission, and his detailed examination of these matters and his persuasive argument for the implementation of the Independent Commission into the Experience of Victims and Long-Term Prisoners' report 'Making sense of sentencing: Doing justice to both victim and prisoner'.

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?

<u>A Penal Arms Race: Lessons from the IPP Sentence</u>

I will respond to this Theme by reference specifically to the Imprisonment for Public Protection (IPP) sentence, which provides important insights and illustrates some of the key drivers as regards sentencing change over the past two decades.[21]

In 2003, an indeterminate sentence targeted at dangerous offenders—the IPP—was introduced by the Criminal Justice Act of that year. It emerged in a context of

[20] See Commission on English Prisons Today (2009) 'Do Better Do Less' https://howardleague.org/wp-content/uploads/2016/04/Do-Better-Do-Less-low-res.pdf
[21] This section draws heavily on ANNISON, H. 2015. *Dangerous Politics,* Oxford, Oxford University Press.; ANNISON, H. 2018. Tracing the Gordian Knot: Indeterminate-Sentenced Prisoners and the Pathologies of English Penal Politics. *The Political Quarterly*

rising media and professional attention being trained on issues of risk and public protection. It reflected the 'rise of the idea of risk' in penal policy: an idea which was becoming increasingly central albeit often with a failure to engage sufficiently with recognised experts in relevant fields. More proximately, it was propelled by ministerial concern with some high-profile cases of determinate-sentenced prisoners who went on to commit serious crimes upon release: offences that were considered, in hindsight, potentially to have been preventable if systems of indeterminate or indefinite detention had been available.

This specific development occurred in a period during which sentencing has increasingly been conducted as a 'penal arms race', with politicians seeking ever-tougher measures. As Nicola Lacey has observed, UK politicians have considered themselves to be trapped within a 'prisoners' dilemma' where they feel compelled, for electoral considerations, to argue for ever-tougher measures on crime and criminal justice.[22] Over the past decade the picture became a little more mixed, with some periods of apparent effort to re-orient the public debate, and at other moments evidence of efforts to 'talk tough' while carefully managing the substantive impact on the prison population.[23] Nonetheless, **there has been little sign of a significant re-orientation of public debates on criminal justice, which would truly dislodge the 'bipartisan consensus' that gives primacy to a 'tough on crime' narrative,[24] and a public protection discourse that frames imprisonment as the primary means by which to achieve public safety.**

The IPP story was a tale of continued and substantial influence on penal policymaking of a very small number of tabloid newspaper editors. While such secretive interventions are by definition obscured, the sustained campaign by the *News of the World* on the issue of sexual predators (that in part propelled the development of the IPP sentence) was publicly visible. **While the media**

[22] N. Lacey, The Prisoners' Dilemma, Cambridge, Cambridge University Press, 2008.
[23] See ANNISON, H. 2018. The Policymakers' Dilemma: Change, Continuity and Enduring Rationalities of English Penal Policy. *The British Journal of Criminology*, 1066-1086.
[24] NEWBURN, T. 2003. *Crime and Criminal Justice Policy,* Harlow, PearsonLongman.

landscape has changed considerably in some regards since the early 2000s, the outsize role of particular elements of the press has persisted.

Further we can note the issue of policymaking dynamics. Prosaically, students of policymaking have long observed that, for policy change to occur, there needs to be a 'window' of opportunity, and (ideally) a 'hook' onto which reforms can be attached. In 2010, the change of government focus towards expenditure reduction, and the potential for penal reform offered by coalition government, provided such a window. This opportunity was squandered.

The issues relating to the IPP prisoners left behind may be particularly acute, but they are not unique. In fact, they throw into sharp relief the more general failings of penal policymaking of recent years, made only more severe by the resourcing constraints (and for many years considerable real-terms reductions) experienced across the criminal justice system, especially from 2010.

A second crucial dynamic is the grip of a public protection paradigm on penal policy, and indeed, the narrow boundaries of this perspective. Implicit in the IPP policy, and indeterminate sentencing more generally, is a belief in the need for risk aversion in the name of public protection. This was exemplified by the initial IPP provisions, which on their face excluded sentencing goals other than public protection from consideration.

Giving primacy to 'public safety' in the present age is generally taken to mean embracing a risk paradigm that sees the identification of 'the dangerous' as taking a robust, scientific and objective form. The notion that risk tools—whether actuarial or based on professional judgement—can bear this weight was taken by the political creators of the IPP as a given. However, this view of the 'state of the art' of risk assessment has also faced significant challenge.

Alongside a number of compelling academic critiques of risk-based sentencing in the UK, Australia, Canada and elsewhere,[25] the Ministry of Justice itself asserted in its consultation paper preceding the abolition of the IPP sentence that: 'The limitations in our ability to predict future serious offending also calls into question the whole basis on which many offenders are sentenced to IPPs and, among those who are already serving these sentences, which of them are suitable for release.'[26]

Further, **policies that equate continued imprisonment with public safety fail to recognise the centrality of family relationships, employment and (put simply) hope to the likelihood that prisoners will successfully construct a crime-free life for themselves. Related to this is the conflation, within such systems, of indicators of vulnerability (mental illness, drug dependence, educational problems) as signs of dangerousness (of being 'high risk').**

It is important to note, returning to the notion of a 'penal arms race', that this has been a battle to be 'tough on crime' that has resulted in notably little benefit – electoral or otherwise – to any political party. As Dr Ben Jarman describes in persuasive detail in his own submission, research has consistently demonstrated that the public are uninformed about crime, sentencing and prisons. Large parts of the public think that crime generally is increasing; that sentence lengths are far lower than they deem acceptable (and have decreased in severity over recent decades, when the opposite is the case); and that prisons are unacceptably 'soft'.[27] In short, therefore, **political efforts to seek to public concern regarding crime by imposing 'tougher' sentences of imprisonment, have tended to serve merely further to encourage a public notion that these measures, in turn, are**

[25] See for example ASHWORTH, A. & ZEDNER, L. 2014. *Preventive Justice,* Oxford, Oxford University Press.; and MCSHERRY, B. & KEYZER, P. (eds.) 2011. *Dangerous People: Policy, Prediction and Practice,* Hove, East Sussex: Routledge.
[26] Cited in Annison, H (2015) *Dangerous Politics*, Oxford: OUP, Chapter 7
[27] ROBERTS, J. V., CRELLIN, L., BILD, J. & MOUTON, J. 2024. Who's in Prison and What's the Purpose of Imprisonment?: A survey of public knowledge and attitudes. London: Sentencing Academy.; ROBERTS, J. V. & HOUGH, J. M. 2002. *Changing Attitudes to Punishment: Public opinion, crime and justice,* Cullompton, Willan Publishing.

never enough. It is an exercise in seeking to feed an appetite that can never be sated.[28]

Theme 5: Custodial Sentences

How should custodial sentences be reformed to deliver justice and improve outcomes for offenders, victims and communities?

Whether a fundamentally new type of custodial sentence is needed, for example, which builds in staged incentives for rehabilitation, and who should administer it.

The experience of the IPP (and the history of conditional prison release more generally)[29] would suggest that any such proposal should be treated with considerable caution, would require considerable planning and resourcing to ensure viability. The proposal raises a number of consequential questions. These include:

- How would 'rehabilitation' be defined?
- Whose evidence would support this, and whose form(s) of expertise would predominate?
- How would due process requirements be safeguarded?
- More broadly, how would procedural fairness be embedded into such a system?
- In particular, how would dangers of disproportionality in the practice of such a sentence be avoided?

[28] LOADER, I. 2009. Ice Cream and Incarceration: On appetites for security and punishment. *Punishment & Society*, 11, 241-257.
[29] See GUINEY, T. 2018. *Getting Out,* Oxford, Oxford University Press.

I would further draw the panel's attention to the points made by Dr Ben Jarman in his submission, regarding Theme 5, which expand on some of the above issues. I fully support his observations and arguments therein.

Theme 6: Progression

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

Prisoner progression and a parole system fit for purpose

These recommendations draw primarily on the JUSTICE report 'A Parole System Fit for Purpose', for which I was a Working Group member and Chair of the Sub-Group 'The Experiences of Prisoners and Other Parole Users Through the Parole Process'.

For context, it should be recognised that sentencing is a social process.[30] It is not a discrete 'event' occurring at the time of sentencing by a court, but includes 'back door' processes as much as 'front door'.[31] It is essential for the Review to place this at the front and centre of its thinking, in a context where the policies and practices relating to prison sentences has become generally more risk averse, increasing the effective proportion (and thus length) of sentences actually served in a penal institution.

This is seen most clearly with prisoners subject to parole, where a system initially created as one of 'early conditional release' has become one of 'delayed conditional

[30] See Tata and Padfield, 2023
[31] N. Padfield, Front Door and Backdoor Sentencing. In G. Bruinsma, & D. Weisburd,eds., *Encyclopedia of Criminology and Criminal Justice* (New York, NY: Springer New York, 2014), pp. 1846–1855. https://doi.org/10.1007/978-1-4614-5690-2_492.

release', where most prisoners are released 'late', many years after the minimum term prescribed by the court on the grounds (usually) of retribution.[32]

It is welcome therefore that this Sentencing Review considers questions of progression towards release. **I urge the panel also to utilise this review as an opportunity to propose improvements to the parole system in England and Wales, benefiting from considerable developmental work by a range of stakeholders over recent years which has not been utilised as it might have been to date.**

As we noted in the report, '**The prison system as it stands often does a disservice to victims, prisoners, and the general public when individuals are released back into the community unprepared and poorly supported with little done to address the underlying causes of their offending. Poor prison conditions result in high reoffending rates; new victims, frustrated human potential, and the waste of public resources. It is in everybody's interest that individuals in prison are equipped with the tools and support necessary to reintegrate back into the community successfully.'**[33]

Overall, there are persuasive arguments for rehabilitation to form the bedrock of the parole system. The benefits are threefold. First, the prisoner is better equipped to live their life constructively in the community. Secondly, the victim may achieve a sense of closure that the criminal justice system has taken its course, with lessons learnt and future victims prevented. Thirdly, a reduced level of reoffending and smaller prison population are obvious boons to the public finances, given the exorbitant sums that are spent with no obvious return.[34]

[32] Padfield (2020).
[33] JUSTICE, 'A Parole System Fit for Purpose'. London: JUSTICE, p130
[34] JUSTICE, A Parole System Fit for Purpose. London: JUSTICE, para 6.9

This should be enabled, in part, by the provision of changes that would better enable the Parole Board to consider how sentence progression is managed, as well as the impact that continued detention has on rehabilitation.

There are contrasting views on whether the Parole Board is best retained in its current form (as a 'court like body'), or constituted as a Tribunal.[35] I do not take a firm view on this, but **there are compelling arguments for the Parole Board to be provided with increased procedural rules and case management powers, in line with other courts and tribunals.** In particular, while the Parole Board can make any direction necessary in the interests of justice to effectively manage a case (including directions for evidence, reports, and attendance of witnesses) it has no capacity to enforce these directions in its own right.[36]

Recall to prison is a considerable driver of imprisonment. It is also a driver of perceptions of unfairness, and recall causes considerable disruption to individuals who might better continue to be managed in the community with more robust support mechanisms. There are different ways in which the extent to which recall is (over-)utilised could be addressed.

The JUSTICE report 'A Parole System Fit for Purpose' recommended that a new recall model be created. Under this approach, in order to initiate a recall, an Offender Manager must first make an application to the Magistrates' Court, which should be seized to consider the allegation and make a finding of fact. Where the court finds a breach of the licence conditions, the case should then proceed to the Parole Tribunal to consider the issue of risk, and whether re-incarceration is appropriate.[37]

This proposal is underpinned by a recognition of the value of distinguishing the question of fact (has a breach occurred, and/or a criminal offence, and/or evidence

[35] JUSTICE, A Parole System Fit for Purpose. London: JUSTICE
[36] See Ministry of Justice, 'Tailored Review', (The Parole Board for England and Wales, October 2020), p.30. See also *R. v Vowles & Ors* [2015] EWCA Crim 45, para 42.
[37] JUSTICE, A Parole System Fit for Purpose. London: JUSTICE, paragraph 2.64

of imminent criminal behaviour or elevated risk) from the question of risk and whether imprisonment (as opposed to some other measure to manage risk) is necessary under the circumstances.[38] A 'walk through' of the proposed approach is provided as an appendix to this submission.

Theme 7: Victims and Offenders

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

Transparency in Sentencing

It is widely accepted that sentencing has developed into a complex tapestry, regarding both sentences but also their administration – most obviously, the rules regarding release.[39]

The Consultation rightly notes that the timing of a prisoner's release, and the conditions relating to it, can have a significant impact on victims. There is scope for the provision of much greater clarity to victims, and other interested parties, in specific cases regarding not only the overall sentence but its component 'parts': is there an automatic early release point? Will the prisoner be subject to parole review? If released, will they remain under licence?

Developments regarding the Parole Board over recent years have been a welcome example of a successful effort to promote much clearer public understanding of the nature of one aspect of the sentencing regime: providing clarity about the role of the organisation, its function; what terms like being 'released on licence' mean; and summaries of the outcome (and reasons therein) in specific cases. There is much scope for this better to be emulated through the criminal justice system.

[38] JUSTICE, A Parole System Fit for Purpose. London: JUSTICE, paragraph 2.62
[39] See for example ASHWORTH, A. & KELLY, R. 2021. *Sentencing and Criminal Justice,* Oxford, Hart.

Appendix

The JUSTICE report provides a 'walk through' of the proposed approach to recall (see Theme 6 above) as follows:[40]

- **Allegation of a breach of licence condition, not an allegation of a criminal offence:**
    a. The Offender Manager applies to the Magistrates' Court in order to establish whether the individual concerned did indeed breach their licence condition.
        i. If the Court is not of the opinion that the individual breached their licence condition, then nothing further happens, and the individual is not recalled.
        ii. If the Court is of the opinion that the individual breached their licence condition, then the case is referred to the Parole Tribunal in order to assess the manageability of any risk in the community.
    b. Once it is determined that the breach of licence condition did occur, the Parole Tribunal would be tasked with assessing if the individual's risk can be managed in the community in light of the breach of the licence condition. We propose that this assessment is made within 72 hours of the Magistrates' Court's finding that there was a breach.[41]
        i. If the Parole Tribunal determines that the risk cannot be managed in the community, then they may authorise the recall. Only once the Parole Tribunal has been seized of the matter may recall be directed.

[40] JUSTICE, A Parole System Fit for Purpose. London: JUSTICE, paragraph 2.62

[41] In light of the fact that the individual will already have been released and therefore the probation service ought to have all the relevant information on the individual, the Working Party considers this to be a sufficient timeframe.

ii. If the Parole Tribunal determines that risk can be managed in the community, then they will not authorise the recall and the individual is not recalled.

- **Allegation of breach of licence condition involving an alleged criminal offence:**
    a. The new offence is referred to the police to be investigated if they are not already aware.
        i. If the individual is accused of having committed an offence and they are remanded, the criminal justice system must be allowed to progress. If the case proceeds to a trial before a Magistrates' Court, and the individual is found guilty, the sentencing court will determine the new sentence and any effect of the fact that the individual was on licence.
            1. If the sentencing court gives a custodial sentence, the individual will return to prison and the Parole Tribunal will not be involved at this stage.
            2. If the sentencing court gives a non-custodial sentence, the case will then progress to the Parole Tribunal to determine if there is now a risk that cannot be managed in the community and therefore whether the individual ought to be recalled.
            3. If the individual is not found guilty of the offence, then there is no role for the Parole Tribunal and the individual is not recalled.
        ii. If the individual is accused of having committed an offence and the individual is issued bail, then they would await until the trial which establishes as a matter of fact whether the offending behaviour occurred, and the individual is not recalled. After the trial occurs, the above process follows.
- **Allegation or concern that offending behaviour is imminent or that there is an elevated risk:**
    a. The Offender Manager refers the matter to the Magistrates' Court.

b. The Magistrates' Court is seized of the matter immediately to determine if there is sufficient factual basis to determine that there is a risk of imminent serious criminal conduct.
c. If the Magistrates' Court is satisfied that there is a significantly elevated level of risk, they can authorise an emergency recall. The case is then referred to the Parole Tribunal.
d. Within 72 hours of an emergency recall, the Parole Tribunal must make a determination as to whether the risk of the individual can be managed in the community in light of the factual finding of the Magistrates' Court.

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