



Faint Hope: What to do about long sentences

the Howard League for Penal Reform

Key points

- There are more people sentenced to an indeterminate term in England and Wales than in the other 46 countries in the Council of Europe combined.
- There are currently 11,675 people serving life and Indeterminate sentences for Public Protection (IPP) sentences, which compares to 4,530 in 2001 and 2,708 in 1991.
- As the number of people serving open-ended sentences has increased, so too has the length of time they spend in prison. Average tariffs have increased by 32 per cent and 75 per cent for mandatory and non-mandatory sentences respectively in less than a decade. Most people spend many years in prison beyond the minimum tariff length set by the court.
- Making thousands of already long sentences longer is extremely expensive and there is no evidence that it achieves improved penal aims.
- There are lessons to be learned from the way other jurisdictions approach long-term imprisonment. This briefing examines Canada, Portugal and the Netherlands.
- Sentence inflation should be reversed and a review of recommended tariff lengths for life sentences should be undertaken.
- A 'faint hope' law should be introduced. This would enable people sentenced to an indeterminate term, who had made an exceptional effort, to apply for earlier parole eligibility. This would both incentivise and reward progress and save the taxpayer millions of pounds.
- Recall policy and practice requires a major overhaul. Technical breaches of licence conditions should be responded to in the community save in exceptional circumstances.
- Once a person is eligible for release there should be a presumption in favour of release. The onus should be upon the state to demonstrate continued imprisonment is necessary.

The huge number of people serving increasingly long indeterminate sentences is one of the most pressing, but least discussed, issues facing prisons in England and Wales today. This briefing assesses the domestic situation and examines what lessons can be learned from other jurisdictions' approach to long term imprisonment.

England and Wales

There are more prisoners sentenced to an indeterminate term in England and Wales than in the other 46 countries in the Council of Europe combined (Council of Europe 2015). There are currently 11,675 people serving life and IPP sentences (Ministry of Justice 2016a), this compares to 4,530 in 2001 and 2,708 in 1991 (Home Office 2001). Due to the abolition of the IPP sentence in December 2012 the population with a non-life indeterminate sentence is very slowly beginning to fall. However, despite the gradual reduction of IPP prisoners, a substantial proportion of the prison population serving very lengthy sentences will be a long-term reality unless policy change is made soon.

As the number of people serving indeterminate sentences has increased, so too has the length of time they spend in prison. In 2005 the average minimum tariff for a mandatory life sentence was just under 16 years, by 2014 the average minimum tariff was almost 21 years – a 32 per cent increase in less than a decade (Ministry of Justice 2015a). The average tariff for non-mandatory life sentences increased by an astonishing 75 per cent over the same time period, from just over six years to almost 11 years (ibid). There does not appear to be any explanation for these significant increases in tariff length other than sentence inflation. There is no evidence that murders have become more sadistic or brutal, or that reoffending rates for those who have committed serious offences have increased. On the contrary, reoffending rates of those released from the custodial part of a life sentence have continued to be very low – latest figures show that 3.2 per cent of released mandatory lifers reoffend, compared to a prison population average of 45.8 per cent (Ministry of Justice 2016b). Rather, tariff lengths have gradually, and largely unintentionally, risen in a punitive penal climate.

The situation is exacerbated by an overwhelmed and overly risk-averse Parole Board, which is tasked with determining when and if a person sentenced to an indeterminate term is released.

The Parole Board is struggling with a huge backlog of cases, which is to grow even larger in 2016 with the National Offender Management Service (NOMS) predicting that increases in delays will require an additional 650-700 prison places (NOMS 2015). This is compounded by overly risk averse decision-making, with the Parole Board accused of an unsustainable focus on risk elimination rather than their task of risk management. Former Parole Board head Sir David Latham criticised the decision-making approach in the following terms:

“Our release rates have reduced in the last few years in a way which is arguably an overreaction to public concern about the reoffending by released prisoners...actually, the serious further offending rate of released prisoners is just 1-2%, a level that has remained stable for many years.”

“It is grotesquely unfair because in relation to a prisoner for whom there's a one in 10 risk of him committing a future offence but a nine in 10 chance of him not, if you're risk averse, you keep those nine in prison for significantly longer than you should do.” (The Guardian 2010)

Both this approach to decision-making and inadequate resources contribute to many people remaining in custody for years after their already-long minimum tariff lengths.

Reforming long sentences for serious offences can be politically difficult, but making thousands of already long sentences longer is extremely expensive and achieves no penal aim. Whilst much of the focus has been on short sentences in recent years, the real driver of prison population increase is sentence lengths growing and opportunities to earn release shrinking (Ministry of Justice 2015b). Action is needed. There are many lessons that can be learned from Canada, Portugal and the Netherlands regarding how to reduce the number and length of future long sentences and facilitate release for those serving long sentences where this is desirable.

Restraint in long sentences

With the important exception of the United States, few other jurisdictions face the same challenges around overuse of long sentences as England and Wales. The vast majority of countries encourage restraint in sentencing, particularly with regard to the most severe sentences.

Portugal was the first country in the world to abolish life sentences, doing so over 130 years ago. Recently the maximum sentence available

to the courts has increased from 20 to 25 years (although there is some argument about a small number of concurrent sentences handed down to individuals – see Dores, Pontes and Loureiro 2013). However, few sentences above 20 years have been handed down. The idea of a life sentence is anathema to the Portuguese system, which forbids purely punitive sentences and places a legal duty upon the state to provide opportunities for prisoners to rehabilitate and resettle in the community. Perhaps unsurprisingly under these legal traditions, there is little to no appetite amongst politicians, practitioners or the public in Portugal for the introduction of an indeterminate or a life sentence.

Canada, a jurisdiction characterised by its high number of life and other indeterminate sentences, still has a lower rate of such sentences compared to England and Wales. Latest figures show that there were 5,347 people serving an indeterminate sentence in 2013 - almost a quarter of the federal prisoner population (Public Safety Canada 2013). This equates to approximately 0.15 indeterminate sentences per 100,000 population in Canada, compared to 0.20 per 100,000 in England and Wales. It is also important to note that the number of prisoners sentenced to an indeterminate term in Canadian prisons is at an all-time high – having increased by 9 per cent in the last five years (ibid). This sharp increase is a direct consequence of the ‘tough on crime’ policies of the Stephen Harper administration, with prominent academics noting the sharp distinction in approach: ‘[I]n the past, Canadian governments and policies reflected the view that those who committed offences needed to be held accountable (or punished) for their deeds, and then reintegrated into Canadian society. In the Harper Decade, our collective voice of reason and moderation in criminal justice, which has served us reasonably well in the past, has faded’ (*Ottawa Citizen* 2015). The newly elected Canadian government led by Justin Trudeau has outlined a markedly different approach to justice policy and it is likely that the number of prisoners, including prisoners sentenced to an indeterminate term, will fall in the coming years.

The only form of life sentence available in the Netherlands is the most severe form – the whole life sentence. However, they are used very sparingly; latest figures show 30 people are currently serving this sentence (Council of Europe 2015). Since 2005, between one and five life

sentences have been handed down each year – this is considered a historically and worryingly high number in the Netherlands, where no life sentences were handed down between 1969 and 1982, only three were handed down in the 1980s and seven in the 1990s (Van Hattum and Meijer, forthcoming). As a result of the spike in life sentences, and following adverse judgments regarding whole life tariffs from the European Court of Human Rights, the life sentence system is being reviewed. Despite the outlier status alongside the UK as a user of whole life tariffs, the Netherlands has resisted a race to the top and the most severe sentence available remains a rare occurrence. The vast majority of very serious offences, therefore, are dealt with by determinate sentences. The average sentence for homicide is nine years (Ganpat and Liem 2012) with release possible after two-thirds of the sentence has been served.

England and Wales must tackle its high use of life sentences and long tariff lengths. An independent commission ought to be established with the aim to reverse sentence inflation, review the number of offences that can be punished by a life sentence and review tariff lengths, taking into account European norms.

Opportunities for release

The key feature that links the Canadian, Dutch and Portuguese systems is the potential for release at several different stages of a sentence. Multiple opportunities for release are linked to a much greater recognition that steps should be taken to prevent somebody being in prison longer than necessary.

Portugal has a dedicated court for overseeing and reviewing sentences – the Tribunal de Execução de Penas, which roughly translates as the Court of Implementation of Sentences. Specialist judges and prosecutors approve sentence plans, review the legality and legitimacy of treatment and conditions and, most importantly, consider release at regular intervals. All persons sentenced to more than two years in custody will be first considered for release after serving one-sixth of their sentence. If they are not released at that early stage, release will be considered again at the halfway and two-thirds point (or each year, depending on which is the shortest time period). If a person is still detained after having served five-sixths of their sentence, release is practically automatic. This is due to the important principle

of a right to probation under Portuguese law, so that a proportion of the sentence must be reserved for reintegration and support. In practice, the five-sixths rule acts as a vital safeguard but the vast majority of people are released before this stage of the sentence. Those serving sentences for non-violent offences are often released at the earliest possible stage (Antunes and Pinto 2013).

In the Netherlands restraint is the overarching theme of the sentencing system (with the exception of the extreme, but limited, approach to life imprisonment). The vast majority of sentences are determinate and relatively short. Prisoners are eligible for release at the two-thirds stage of their sentence and the overwhelming majority are released at this point. For those serving longer determinate sentences less restrictive conditions are considered at a relatively early stage.

Canadian life sentences follow a similar structure to those in England and Wales – a minimum tariff set by the sentencing judge must be served before a person can apply for release to the Parole Board of Canada. The guidelines for tariff lengths are fairly rigid - 10-25 years for second degree homicide and at least 25 years for first degree. However, innovative policies facilitate earlier release in certain circumstances, the most notable being the 'faint hope clause'.

Section 745.6 of the Canadian Criminal Code, colloquially known as the faint hope clause, allows those sentenced to life with a minimum of 15 years, to apply to have a jury examine the progress they have made in prison and review parole eligibility. The thinking behind the clause, which came into force in 1976, was that it is contrary to the public interest to continue to detain a person who has already served a significant period of time in custody, has made exceptional efforts to rehabilitative themselves and poses a low risk of harm. Further, there was recognition that by international standards those serving life sentences in Canada spend a very long time in prison and there ought to be mechanisms to identify persons who no longer needed to be incarcerated (John Howard Societies of Canada and Ontario 2010). Most importantly, the policy enhances democratic input in the penal process, enabling ordinary citizens to have a say on the sentence lengths of those convicted of the most serious crimes. Theoretically, any person serving life with a minimum tariff of 15 years can apply for a jury to consider their case. However, in practice

the majority of lifers who have not made efforts to rehabilitate themselves or have a poor record of behaviour in prison do not apply. All applications go through judicial pre-screening and only those judged as having a reasonable prospect of success proceed to a full jury hearing. The decision of the jury to reduce the number of years before parole eligibility must be unanimous.

The faint hope clause has been successful. Between 1987 (when the first hearing took place) and 2010, 173 applicants received a full jury hearing, 143 (82.7 per cent) had their parole eligibility dates reduced and 130 were subsequently released by the Parole Board of Canada. Only four of the 130 released have been returned to custody - three for a drugs offence and one for robbery (John Howard Societies of Canada and Ontario 2010). Despite widespread opposition, former Canadian Prime Minister, Stephen Harper, abolished the faint hope clause in 2011. This change was not applied retrospectively so it will remain a part of Canadian policy until at least 2025. It is unclear whether the new administration will reverse the abolition.

A version of the faint hope clause should be introduced in England and Wales. Even if such a policy had a very limited impact and only one per cent of those serving an indeterminate sentence were released five years earlier than they otherwise would have been without a faint hope policy, this would amount to 584 fewer years of imprisonment, saving approximately £21.5 million.

In addition to multiple opportunities for release, a presumption in favour of release unites the European jurisdictions examined. In both the Dutch and Portuguese systems prisoners were released at the earliest stage unless evidence was presented to the contrary. This is in stark contrast to the approach in England and Wales. In Portugal and the Netherlands the burden of proof was placed on state representatives to convince those making decisions around release that a person was dangerous and required further imprisonment, rather than on an individual to prove they do not pose a risk. Introducing a presumption in favour of release in England and Wales would have a significant impact and restore parole as a process of safe and gradual release and increase the number of timely releases.

Trusting the prison system to have an impact

When questioned about the shorter sentences and greater flexibility around release compared

to England and Wales, policy makers, parole board employees, judges, prison governors and prison officers invariably raised the importance of recognising in the design of a criminal justice system that people change and prison can have a rehabilitative impact. When asked about the frequency of review in Portugal, a judge on Lisbon's Court of Implementation of Sentences responded that a year in prison is a long time and much can be achieved. It was important that sentences were reviewed regularly because an unnecessarily long prison sentence provides no benefit and wastes precious resources. Policy makers in the Netherlands were surprised at the extent of use of indeterminate and long determinate sentences in England and Wales. They argued that this suggested prisons could and would not rehabilitate and undermined the professionalism of prison staff. A prison governor in Canada bemoaned the eventual abolition of the faint hope clause regarding it as one of the only policies explicitly recognising that prisons are able to facilitate change.

The limits of what prison can achieve were also borne in mind. For example, during a discussion about the recent increase in the maximum sentence from 20 to 25 years the chief of prison guards in a prison near Lisbon asked 'what do they expect us to do for that long?' There was consensus among both officers and officials in Portugal that prison could have an impact, but that it was limited and could be undermined by very long sentences. Psychologists delivering offender behaviour programmes felt frustrated by the inflexibility of the release process even in comparatively flexible Portugal, arguing that important progress achieved in their courses could be undone by having to survive for many more years in prison. Similarly, custodial parole officers in Canada (equivalent to probation officers in England and Wales) were frustrated that some prisoners had made enormous progress and had completed every rehabilitative programme available but would still not be released for many years.

Enabling efficient sentence progression

Canada has a long history of assisting life-sentenced prisoners to navigate and progress through the prison system towards release, avoiding unnecessary years in prison over tariff. This is a significant problem in England and Wales, where a lack of sentencing planning and prioritisation of lifers for various prison-based programmes can result in people getting 'stuck'

in the wrong type of prison and spending years longer in custody. The Lifeline programme in Ontario, predominantly staffed by former prisoners, assists those serving life sentences in adapting and integrating into prison life, preparing for release and reintegration into the community. Lifeline workers stated in interviews that their most crucial role was informing prisoners about when they would be eligible for the next stage of their sentence and how they could make progress, particularly around access to offender behaviour programmes, applying for minimum security conditions and being approved for escorted and unescorted temporary releases. Official evaluations concluded that the Lifeline project reduces non-compliance amongst those involved and results in improvement in participation in institutional programs, pre-release planning and rates of conditional release (Correctional Service Canada 2009). The Ministry of Justice should introduce a Lifeline-style service in England and Wales to reduce the time prisoners with an indeterminate term spend in custody post-tariff and to provide crucial support post release.

Recall

A key component in England and Wales' high life imprisonment rate is the ease with which people are pulled back into prisons following release. Longer sentence lengths and increased recall account for up to 85 per cent of the increase in the prison population since 1993 (Ministry of Justice 2013).

Recall, whilst technically possible in the Netherlands and Portugal, was virtually unknown in practice. Any further offences committed whilst under supervision in the community were always prosecuted and sentenced separately. Recalls for technical breaches of conditions were almost never used. Senior officials in both the Dutch and Portuguese Departments of Justice confirmed that they expected non-criminal violations of parole to be dealt with by probation services in the community. Conversely, for the last ten years Canada has had a high rate of recall, termed parole revocation. Between 2006-9 revocation numbers grew to be only around a thousand fewer than admissions for new sentences. Following a concerted attempt to reduce this trend, the number of revocations has fallen by around 10 per cent since 2009 (Public Safety Canada 2013). A review of recall policy and practice is required in England and Wales, all technical breaches of licences should be responded

to by the probation service in the community unless there are exceptional circumstances.

Recommendations for policy makers in England and Wales

Examination of other jurisdictions shows that a very high use of indeterminate sentences with increasingly lengthy minimum tariffs is neither necessary nor desirable. Canada, Portugal and the Netherlands all have substantially different approaches to responding to those who commit the most serious offences, but important lessons for England and Wales can be found in each system. Fairly modest policy changes, such as introducing a 'faint hope' policy for those with long tariffs and taking steps to improve the efficiency with which life-sentenced prisoners and others progress, would do much to relieve some of the pressure placed on the prison system. However, if these smaller policy changes were combined with bold revisions of sentence lengths and use of recall it would be a major step towards a cheaper, less overcrowded, more effective and proportionate system.

1. Sentence inflation should be reversed.

Unnecessary sentence inflation is a major contributor to overcrowding and excessively long sentences can undermine any rehabilitative potential of imprisonment. Life sentences should be reserved for the most serious offences only. A review of recommended tariff lengths for life sentences should be undertaken, including an examination of tariff lengths in other European jurisdictions.

2. A 'faint hope'-type provision should be introduced in England and Wales. Such a policy would not only prevent those who had made substantial progress whilst in prison spending additional decades in custody, it would also save millions of pounds, enhance democratic input in the sentencing process, bolster public confidence in sentencing and provide an incentive for good behaviour in the difficult early years of a long sentence. If, under a 'faint hope' policy, only one per cent of those serving

an indeterminate sentence were released five years earlier than they otherwise would have been, this would amount to 584 fewer years in prison saving approximately £21.5 million in imprisonment costs.

3. Measures should be introduced to improve the efficiency with which prisoners with an indeterminate term move through the prison system. The Ministry of Justice should explore whether a 'Lifeline'-style mentoring and support service is the best model to pursue.
4. Once a prisoner is eligible for release, there should be a presumption in favour of release. The onus should be on the representatives of the Secretary of State to demonstrate that continued detention is necessary, rather on the prisoner to prove they pose no risk.
5. Recall policy and practice requires a major overhaul. The number of people recalled each year should be dramatically reduced. All technical breaches of licence conditions should be responded to in the community save in exceptional circumstances.

Full references at www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Faint_hope_-_references.pdf

About the Howard League for Penal Reform

The Howard league is a national charity working for less crime, safer communities and fewer people in prison.

It campaigns, researches and takes legal action on a wide range of issues. It works with parliament, the media, criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change.

Ellie Butt, Policy Advisor at the Howard League, visited Canada, Portugal and the Netherlands in 2015. This research formed part of a Winston Churchill Memorial Trust Fellowship and was generously funded and supported by the Trust and the Howard League for Penal Reform.

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