
Sentence inflation: a judicial critique

Foreword

Over the half-century that we have been involved in the law, custodial sentence lengths have approximately doubled and the same is true of prison numbers. The connection between the two is obvious. Over time, the growing prison population has outstripped safe and decent accommodation. As a consequence, prison overcrowding prevents the rehabilitation that should take place to reduce reoffending.

There is nothing that justifies this doubling of sentence lengths. Government legislation relating to sentencing has consistently provided that imprisonment should only be imposed if there is no suitable alternative punishment, and that imprisonment should be for the minimum period commensurate with the crime. The law dictates this. The problem is that there is no objective measure for deciding what term of imprisonment is commensurate with a particular offence. Nor have governments always been content to leave it to the judges to decide the appropriate sentence. Instead they have intervened piecemeal, by securing legislation to impose minimum sentences where crimes, typically murder, are committed in specified circumstances that are seen as aggravating the offence. The result of such interventions has been to raise the level of sentences imposed across the board, as judges, with guidance from the Sentencing Council, seek to maintain a consistent scale of punishment.

The only purposes of sentencing which are served by longer sentences are punishment and, in some instances, the protection of the public. But punishment does not stop reoffending and is expensive. It currently costs about £50,000 to imprison an adult for a year.

We are grateful for the assistance of the Howard League for Penal Reform in preparing this paper. It shows that imprisoning more people for longer is something that we simply cannot afford. The country's limited resources should be spent in areas that produce a positive benefit. In the case of crime, they should be spent on keeping people out of prison rather than locking them up for ever longer for no gain. Reversing the current trend of sentence inflation will not be easy. The public will need to be persuaded of the benefits of doing this, but the benefits are very much in the public's interest.

The new government has indicated that it will review sentencing, with Lord Timpson having previously described a societal addiction to punishment leading to sentences that are much too long. We strongly support this sentiment. What follows sets out the need for a serious review of sentences, with a particular focus on combatting sentence inflation.

Lord Woolf
Lord Phillips of Worth Matravers (Chair)
Lord Thomas of Cwmgiedd
Lord Burnett of Maldon
Sir Brian Leveson

6 September 2024

Sentence inflation: a judicial critique

“Overcrowding has had a mesmerizing effect on the prison system and has absorbed energy which could have been used in improving prisons. In addition, prisons are expensive and have damaging effects on prisoners. It is therefore important... to reduce the prison population to an unavoidable minimum.”¹

The Woolf Report, 1991

This paper, signed by the four surviving former Lords Chief Justice of England and Wales, and the only surviving President of the Queen’s Bench Division who was also Head of Criminal Justice, raises serious concerns about the state of sentencing law and practice in this country. It urges not merely the new government, but politicians of all parties, to reflect on Lord Woolf’s words above.

In 1991 the prison population of England and Wales was just nudging 40,000. Today it stands at over 88,000 – of whom more than 80% are sentenced – and it has been rising steeply. We already have the highest rate of imprisonment per capita in Western Europe,² and the Ministry of Justice’s own projections suggest that by March 2028 we face a ‘low’ scenario of 94,600, a ‘high’ scenario of 114,800, and a central estimate of 105,800.³ This forecast should be treated as unacceptable.

There have been two main causes of the steady rise in prison numbers that has taken place since the Second World War. The first is a continuous escalation in the length of sentences imposed for more serious offences. The second is a lack of confidence in the efficacy of non-custodial sentences for less serious offences. These factors might have been offset if imprisonment had proved an occasion for effective rehabilitation, but it has not. Other causes include the increase in the requirement for many prisoners to serve two-thirds of the sentence before release, and that licence conditions now apply for the entirety of the sentence. The number of prisoners recalled to prison during this period of supervision has soared.

The construction of prison accommodation is unable to keep pace with the demand for prison spaces. The result is severely overcrowded prisons. As the new Prime Minister has made clear, we are close to breaking point. By the Ministry of Justice’s own measure, there are nearly 8,000 more people in prison than can be held in safety and decency.⁴

¹ Lord Justice Woolf, *The Woolf Report—a summary of the main findings and recommendations of the inquiry into prison disturbances* (1991) <https://prisonreformtrust.org.uk/publication/the-woolf-report-a-summary-of-the-main-findings-and-recommendations-of-the-inquiry-into-prison-disturbances/> accessed 2 September 2024

² Joint with Scotland at 145 per 100,000 people. Prison Studies, *World Prison Brief data: Europe* (2024) <https://www.prisonstudies.org/map/europe> accessed 2 September 2024

³ Ministry of Justice (MoJ), *Prison Population Projections 2023 to 2028, England and Wales* (2024) https://assets.publishing.service.gov.uk/media/65df5123b8da630f42c86271/Prison_Population_Projections_2023_to_2028.pdf accessed 2 September 2024

⁴ The Baseline Certified Normal Accommodation (CNA) is the number of places in the prison, according to the prison service’s own measure of accommodation; as the MoJ puts it, “CNA represents the good, decent standard of accommodation that the service aspires to provide all prisoners”. This differs from the Operational Capacity, a figure which is decided by prison group directors and is “the total number of prisoners that an establishment can hold taking into account control, security and the proper operation of the planned regime”. As of 30 August, there were 88,350 people in prison, 8,494 over the CNA. Prison population statistics can be found here: <https://www.gov.uk/government/collections/prison-population-statistics>. Further information about the reporting of prison capacity can be found here: <https://howardleague.org/why-are-prisons-overcrowded/>. It should be noted that 10 September 2024 will see about 1,500 people released under the emergency early release scheme (SDS40), with up to 5,000 more over the subsequent months. SDS40 will reduce the prison population in the short term, though it is expected that the population will return to current levels within a year.

Reports of His Majesty's Inspectorate of Prisons (HMIP), including a recent spate of Urgent Notifications of unacceptable prisons, evidence the scope and severity of the challenge. HMIP reports, along with those of the statutory Independent Monitoring Boards report poor physical conditions in many jails, the absence of meaningful activity for prisoners and diminishing safety across the estate.⁵ Population and staffing pressures mean that access to a useful daily regime, one which gives any opportunity for rehabilitation, is severely curtailed for most people in prison. Last year, HMIP found that 42% of those surveyed spent more than 22 hours a day in their cell, and that access to purposeful activity in the library, gym, employment and education was limited.⁶ Lack of purposeful activity has been repeatedly highlighted as HMIP's biggest area of concern.

To address the current crisis, the last government pursued a series of emergency measures that included reversing an increase in the sentencing powers of magistrates, releasing prisoners days early and delaying court processes likely to result in imprisonment. The new government has reduced the proportion of a sentence that many prisoners must serve before release on licence. Recent Court of Appeal rulings and statements from the Sentencing Council indicate that judges may have regard to the effect of prison overcrowding when passing sentence.⁷

From the outset we should be clear in our understanding that prisons hold many people who have committed very serious offences and who present a real danger to the public. In these cases, a substantial custodial sentence will be necessary and inevitable. However, in England and Wales, sentences for such offending have grown significantly over our time as judges. And this growth has resulted in the inflation of sentences across the board.

⁵ See for example: Independent Monitoring Boards (IMB), *National Annual Report 2023: Adult prisons, young offender institutions and immigration detention* (2024) <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/13/2024/05/IMB-2023-National-Annual-Report-.pdf> accessed 2 September 2024; His Majesty's Inspectorate of Prisons (HMIP), *Report on an unannounced inspection of HMP Nottingham by HM Chief Inspector of Prisons (13–24 May 2024)* (2024) https://hmiiprison.justiceinspectorates.gov.uk/hmiiprison_reports/hmp-nottingham-3/ accessed 2 September 2024; HMIP, *Report on an unannounced inspection of HMP Wandsworth by HM Chief Inspector of Prisons (22 April–2 May 2024)* (2024) https://hmiiprison.justiceinspectorates.gov.uk/hmiiprison_reports/hmp-wandsworth-3/ accessed 2 September 2024

⁶ HMIP, *HM Chief Inspector of Prisons for England and Wales Annual Report 2022–23* (2023) <https://webarchive.nationalarchives.gov.uk/ukgwa/20240417095837/https://www.justiceinspectorates.gov.uk/hmiiprison/inspections/annual-report-2022-23/> accessed 2 September 2024

⁷ See *R v Ali* [2023] EWCA Crim 232 and *R v Foster* [2023] EWCA Crim 1196. See also Sentencing Council, *The application of sentencing principles during a period when the prison population is very high – statement from the Chairman of the Sentencing Council* (2023) <https://www.sentencingcouncil.org.uk/news/item/the-application-of-sentencing-principles-during-a-period-when-the-prison-population-is-very-high-statement-from-the-chairman-of-the-sentencing-council/> accessed 2 September 2024; and Haroon Siddique and Vikram Dodd 'England and Wales judges told not to jail criminals as prisons full – report', *The Guardian* (12 October 2023) <https://www.theguardian.com/law/2023/oct/12/england-and-wales-judges-told-not-to-jail-criminals-because-prisons-full-report> accessed 2 September 2024

The problem

Contrary to public perception, the Office of National Statistics (ONS) crime survey data for England and Wales indicates a long-term decline in common types of crime since the 1990s.⁸ The number of police-recorded homicides has decreased since the early 2000s and the volume of violent crime has declined significantly since a peak in 1995.⁹ This phenomenon is observed across high-income countries and researchers have explored potential causes, pointing to a wide range of socio-economic and political factors such as improved security and surveillance, economic growth, and an ageing population. There is little evidence that increased use of longer prison sentences has contributed to falling crime rates.¹⁰

But despite these downward trends, both the number of custodial sentences, and crucially their length, have increased dramatically. The proportion of immediate custodial sentences handed down for indictable or triable-either-way offences between 2002 and 2022 increased from 25% to 34%, whilst the use of other disposal types declined.¹¹ Over the last 10 years, the average custodial sentence length for indictable offences increased from 18 months in 2013 to almost 23 months in 2024.¹² Use of the most severe sentences has also increased. Almost 11,000 people are currently serving an indeterminate sentence, comprising 16% of the sentenced prison population and up from 9% in 1993.¹³ The number of life sentence prisoners serving a minimum term of over 20 years more than doubled between 2013 and 2023.¹⁴ As of June 2024, there were 67 people serving whole life orders (compared to 43 a decade earlier). This is not only a recent trend; the length of sentences has steadily increased, and approximately doubled, over the last 50 years.¹⁵

8 Office for National Statistics (ONS), *Crime in England and Wales: year ending March 2024*, Figure 1 (2024)

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2024> accessed 2 September 2024. 'Common' types of crime include theft, robbery, criminal damage, and violence with or without injury, fraud and computer misuse. These trends are replicated across much of the globe, particularly Western countries. Research suggests that this is due to a combination of socio-economic and other factors, as opposed to the increased use of imprisonment. See for example Toby Davies and Graham Farrell, 'Most crime has fallen by 90% in 30 years – so why does the public think it's increased?' *The Conversation* (13 May 2024) <https://theconversation.com/most-crime-has-fallen-by-90-in-30-years-so-why-does-the-public-think-its-increased-228797> accessed 2 September; and Oliver K Roeder and others, 'What Caused the Crime Decline?' (2015) *Columbia Business School Research Paper*, No. 15-28, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566965 accessed 2 September 2024

9 ONS (n 6) Figures 2 and 5

10 Davies and Farrell (n 8); Matheus Renno Santos and Alexander Testa 'Homicide is declining around the world – but why?' *The Conversation* (4 November 2019) <https://theconversation.com/homicide-is-declining-around-the-world-but-why-125365> accessed 2 September 2024. Within the context of rising incarceration rates, a US study found the impact of imprisonment on declining crime rates to be negligible. See Roeder and others (n 8)

11 Jose Pina-Sanchez and others 'Sentencing Trends in England and Wales 2002-2022', *Sentencing Academy* (2023) <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/10/Sentencing-Trends-in-England-and-Wales-2002-2022.pdf> accessed 2 September 2024

12 MoJ, *Criminal Justice System statistics quarterly: March 2024* (2024) <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-march-2024> accessed 2 September 2024

13 MoJ, *Offender management statistics quarterly: January to March 2024*, Prison population: 30 June 2024, Table 1.Q.14 (2024) <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2024> accessed 2 September 2024

14 Ibid., Table 1.A.29

15 Ibid. and MoJ, *Offender management statistics quarterly: January to March 2024*, Annual prison population: 2002 to 2015, Table 1.Leg.18 (2024) <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2024> accessed 2 September 2024

A large and rising population affects the safe, effective and purposeful management of prisons, especially when appropriate resources are not injected into the system. Overcrowding affects the physical and mental health and wellbeing of people living and working in prisons.¹⁶ HMIP reports make for alarming reading in this regard, with inspectors consistently highlighting continually declining levels of safety in prison – measured by levels of self-harm, suicide and assaults on both staff and those locked up. Prisons today are not fit for purpose.

The financial cost

Prisons are expensive, with costs likely to rise as the population grows.

In 2022/23 HMPPS spent £4.6 billion, with an additional £770 million capital spend.¹⁷ Seventy-two per cent of this, or £3.3 billion, was spent on prisons alone (with the remainder spent on probation and a small proportion on support services).¹⁸ Even providing the minimal regimes of today, the average annual cost of a prison place is £51,724, up from £46,696 in 2021-22.¹⁹ As the prison population rises, so too will the running and capital costs. It is unclear where this money will be found. Having poor quality and ineffective prisons is one thing, but paying this amount for them exacerbates the problem.

Recent policy solutions centre on estate expansion and capacity building as opposed to population reduction. In 2023, the Ministry of Justice announced a £4 billion building programme to create 20,000 new prison places. This comprises a combination of new builds and ‘rapid deployment cells’ which are temporary structures with a life span of approximately 15 years.²⁰ ‘Operation Safeguard’, the last government’s renting of police custody cells, was estimated to cost almost £50 million in 2023.²¹ In its manifesto, the new government pledged an additional 20,000 prison places.

Money spent on keeping more people in prison for longer is money wasted. Expenditure should be directed to reducing prison numbers by providing effective rehabilitation in prison and proper supervision and assistance to those who have served their sentences.

16 For further detail, see: Howard League, *Submission to the Justice Committee inquiry into the future prison population and estate capacity* (2023) <https://howardleague.org/submission-to-the-justice-committee-inquiry-on-the-future-prison-population-and-estate-capacity/> accessed 2 September 2024; Howard League, *Submission to the UN Special Rapporteur on Torture’s call for input on current issues and good practice in prison management* (2023) <https://howardleague.org/submission-to-the-un-special-rapporteur-on-tortures-call-for-input-on-current-issues-and-good-practice-in-prison-management/> accessed 2 September 2024; and HMIP, *Annual Report 2022-23* (n 6)

17 HMPPS, *Annual Report and Accounts, 2022/23* (2023) p29
https://assets.publishing.service.gov.uk/media/656869f25936bb000d316783/15.85_HMPPS_annual_report_2022-23_WEB.pdf
accessed 2 September 2024

18 Ibid. p30

19 MoJ, *Costs per place and costs per prisoner by individual prison. Summary* (2024)
<https://assets.publishing.service.gov.uk/media/65f4229810cd8e001136c655/costs-per-place-per-prisoner-2022-2023-summary.pdf>
accessed 2 September 2024

20 MoJ, *Press release: First Rapid Deployment Cells unveiled to boost prison places* (2023)
[https://www.gov.uk/government/news/first-rapid-deployment-cells-unveiled-to-boost-prison-places#:~:text=New%20modern%20prison%20cells%20that,yesterday%20\(2%20March%202023\)](https://www.gov.uk/government/news/first-rapid-deployment-cells-unveiled-to-boost-prison-places#:~:text=New%20modern%20prison%20cells%20that,yesterday%20(2%20March%202023)) accessed 2 September 2024

21 UK Parliament, ‘Prisons: overcrowding. Question for Ministry of Justice’, *Written questions, answers and statements* (UIN 3849, 27 November 2023) <https://questions-statements.parliament.uk/written-questions/detail/2023-11-27/3849#> accessed 2 September 2024

The human cost

As judges we know all too well that people in prison are individuals, not statistics. The prison population can be broken down statistically (men make up the vast majority of prisoners; over 40% are serving sentences for non-violent offences etc), but consequences of imprisonment on people's lives – in prison and upon return to the community – need to be considered in the whole.

A lack of purposeful and rehabilitative activity is felt particularly acutely by those serving long sentences, and ongoing population pressures severely challenge both the access to and sequencing and timing of education and intervention programmes.²² As highlighted by the charity Clinks, 'sentence inflation fundamentally affects the needs of people in prison and the types of services required to address those needs. Providing enough meaningful activity and motivating individuals who are facing incredibly long and indeterminate sentences to engage with services is its own growing challenge.'²³

Moreover, despite charted increases in sentence lengths, there has been no proportionate adjustment to the timing of interventions such as access to offending behaviour work or higher education, transfers to open prison or release by the Parole Board. These significant junctures in sentence progression continue to be assessed by years from expiry of the sentence tariff; they have not changed proportionately despite sentences becoming much longer.

It is well understood that longer sentences have little deterrent effect.²⁴ While a custodial sentence affects punishment and may successfully protect the public through incapacitation for a period, there is no evidence that lengthy custodial sentences are effective at meeting other aims of sentencing (namely reduction of crime, rehabilitation, and reparation). Evidence suggests that what happens during and after a sentence, including rehabilitative interventions and resettlement support, is more important than sentence length.²⁵ Activity and support which facilitate successful rehabilitation and reintegration must go beyond a temporary or short-term pause in offending, and instead encourage significant and lasting changes in an individual.²⁶ This could include, for example, addressing the literacy and numeracy needs of a significant proportion of the prison population, almost 60% of whom are estimated to have a reading age of 11 or below.²⁷

22 See: Zoe Stephenson and others 'The sequencing of interventions with offenders: views of offender managers and supervisors' (2018) 20, *Journal of Forensic Practice*, 257; and HMIP, *Annual Report 2022-23* (n 6)

23 Clinks, *The sentencing white paper: exacerbating the issues created by sentence inflation?* (2020) <https://www.clinks.org/community/blog-posts/sentencing-white-paper-exacerbating-issues-created-sentence-inflation> accessed 2 September 2024

24 Jay Gormley, Melissa Hamilton and Ian Belton 'The Effectiveness of Sentencing Options on Reoffending', *Sentencing Council* (2022) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-PUBLISHED-FINAL.pdf> accessed 2 September 2024

25 Ibid.

26 Ibid.

27 MoJ, *Prison education: a review of reading education in prisons* (2022) <https://www.gov.uk/government/publications/prison-education-a-review-of-reading-education-in-prisons/prison-education-a-review-of-reading-education-in-prisons#fn:5> accessed 2 September 2024

While there are those in prison who present a real danger to the public, many people entering the system have multiple unmet health and social care needs. Prison exacerbates these vulnerabilities, reducing opportunities for rehabilitation and desistance.

Almost 20 years ago, the Corston report called for a radically different approach to women in the criminal justice system, noting that prisons were unfit to meet women's particular needs. More recently, the Ministry of Justice introduced the Female Offender Strategy Delivery Plan to reduce rates of women's imprisonment.²⁸ It recognises that women in prison are 'among the most vulnerable in society', with complex needs which include trauma, domestic abuse, and mental health and substance misuse problems.²⁹ While women are typically low risk, prison sentences are particularly damaging to them and their families. The harm that women experience in prison is evident in record high self-harm rates, where the rate is eight times higher than in the men's estate.³⁰ Families also suffer. Parental imprisonment is a recognised adverse childhood experience, and the traumatic and long-lasting effects of the separation of parents and children are well-documented.³¹

Mental ill health has reached record levels across the estate, with nine in 10 people having at least one mental health (or substance misuse) need.³² As a legal 'place of safety', prisons often hold people who are acutely mentally unwell. Self-harm in prison is at its highest-ever level. Unmet psychological and care needs extend to people with neurodiverse conditions, who could comprise up to half of the prison population, according to estimates from the Criminal Justice Joint Inspectorate in 2021.³³

28 MoJ, *Female Offender Strategy Delivery Plan 2022 to 2025* (2023) <https://www.gov.uk/government/publications/female-offender-strategy-delivery-plan-2022-to-2025> accessed 2 September 2024

29 Ibid. and Home Office, *The Corston Report* (2007) <https://www.asdan.org.uk/media/ek3p22qw/corston-report-march-2007.pdf> accessed 2 September 2024

30 MoJ, *Safety in custody: quarterly update to March 2024* (2024) <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-march-2024> accessed 2 September 2024

31 Shona Minson, *Maternal sentencing and the rights of the child* (Palgrave Macmillan, 2020)

32 Graham Durcan, 'Prison mental health services in England, 2023' *Centre for Mental Health* (2023) <https://www.centreformentalhealth.org.uk/wp-content/uploads/2023/04/Prison-mental-health-services-in-England-2023.pdf> accessed 2 September 2024

33 Criminal Justice Joint Inspectorate, *Neurodiversity in the criminal justice system. A review of evidence* (2021) <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2021/07/Neurodiversity-evidence-review-web-2021.pdf> accessed 2 September 2024

Prison is also an unfit and unsafe environment for children, many of whom have complex needs.³⁴ In custody, children witness and experience self-harm, assault, and physical restraint. Over two-thirds of these children have special educational needs which can include learning difficulties, speech, language and communication difficulties, and social, emotional, and mental health problems.³⁵ These are often mislabelled, unrecognised and unaddressed. The quality of education for children in custody is often poor, especially in young offender institutions and secure training centres. The national curriculum is not followed, and children rarely get to complete formal qualifications to a high level.³⁶ As in the case of women, the government has recognised that custody must, where possible, be avoided in the case of children and young people and, through diversion, has had some success in achieving this goal.³⁷

At the other end of the life cycle, as sentences get longer, the age profile of people in prison increases. Over 6,000 people in prison are now over 60, with more than 2,000 aged 70 and over.³⁸ The impact of prison sentences on older people, who often struggle with ill health, disability and mental incapacity, also needs review.

Finally, it is worth recognising prison's disproportionate impact on people from ethnic minority backgrounds, who represent 27% of the prison population compared with 18% in the general population.³⁹ In 2017, the now Foreign Secretary David Lammy, in his review of race and the criminal justice system, called for increased understanding of the causes and impact of disproportionality on people in prison.⁴⁰ A recent thematic report of HMIP on race in prison highlighted discrimination and inequitable treatment that should concern us all.⁴¹

34 Youth Justice Board (YJB) and MoJ, *Assessing the needs of sentenced children in the Youth Justice System 2019/20* (2021) <https://assets.publishing.service.gov.uk/media/604a3ee28fa8f540179c6ab7/experimental-statistics-assessing-needs-sentenced-children-youth-justice-system-2019-20.pdf> accessed 2 September 2024

35 Howard League, *Education inside penal detention for children in England: An overview* (2022) <https://howardleague.org/wp-content/uploads/2022/06/Education-inside-penal-detention-FINAL-2.pdf> accessed 2 September 2024

36 Ibid.

37 YJB, *Youth Justice Statistics: 2022 to 2023* (2024) <https://www.gov.uk/government/statistics/youth-justice-statistics-2022-to-2023/youth-justice-statistics-2022-to-2023-accessible-version> accessed 2 September 2024

38 MoJ, *Offender management statistics quarterly* (n 13)

39 Ibid. and ONS, *Ethnic group, England and Wales: Census 2021* (2022)

<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/bulletins/ethnicgroupenglandandwales/census2021> accessed 2 September 2024

40 Prison Reform Trust, *Lammy Five Years On* (2023) <https://prisonreformtrust.org.uk/wp-content/uploads/2023/03/Lammy-five-years-on.pdf> accessed 2 September 2024

41 HMIP, *Thematic review: The experiences of adult black male prisoners and black prison staff* (2022)

<https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2022/12/The-experiences-of-adult-black-male-prisoners-and-black-prison-staff-web-2022.pdf> accessed 2 September 2024. See also: Prison Reform Trust, *Race to the top: A PPN report on race and ethnicity in prisons* (2024) https://prisonreformtrust.org.uk/wp-content/uploads/2024/06/PRT_PPN_Race_to_the_top.pdf accessed 2 September 2024

Causes of sentence inflation

Legislative changes have been obvious drivers of sentence inflation. The introduction of statutory starting points for the minimum terms for murder in Schedule 21 of the Criminal Justice Act 2003 by the last Labour government was one part of a deliberate 'tough on crime' political agenda; it has been described as representing a 'fundamentally flawed' change.⁴² Schedule 21 distorted sentencing proportionality, driving up sentences for other offences. The coalition government's assessment of Schedule 21 in December 2010 described it as 'based on ill thought out and overly prescriptive policy. It seeks to analyse in extraordinary detail each and every type of murder. The result is guidance that is incoherent and unnecessarily complex and is badly in need of reform so that justice can be done properly in each case.'⁴³ Roberts and Saunders described it as 'hastily conceived and insufficiently scrutinised legislation [which had] adverse and unintended consequences on principled sentencing and the prison population.'⁴⁴

Schedule 21 applied only in England and Wales and its impact on sentence lengths is revealed through a comparison with sentences for equivalent crimes in Scotland and Northern Ireland. While custodial sentences for serious offences in both these nations have increased over the past decade, neither has experienced the sentence inflation seen in this jurisdiction. For example, life sentences with a minimum term of over 30 years are very rare in Scotland and are unheard of in Northern Ireland. Our friends in the law in other parts of the kingdom follow with some concern the frequency with which extremely lengthy sentences are imposed by our courts.

But Schedule 21 is only one example. There have been very many Criminal Justice Acts, increasing statutory maxima (for example, for causing death by dangerous driving) and introducing mandatory minimum sentences (for example, for firearms offences, repeat burglary or drug dealing). Indeed, the extent of legislative change has not only made the judge's job much more difficult but represents worrying influences on sentencing law and policy. Many of the changes have been driven by single-issue campaigns which attract emotive media attention. This type of legislation interferes with good sentencing practice. Part of the Sentencing Council's role is to ensure a proportionate structure for sentencing, meaning that the increase in minimum sentences for one crime will necessarily have a knock-on effect across the board.⁴⁵ The result has been ballooning sentences.

42 Julian Roberts and John Saunders, 'Sentencing for Murder: The Adverse and Unintended Consequences of Schedule 21 of the Criminal Justice Act 2003' (2002) 10 *Criminal Law Review*, 895

43 MoJ, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010)

<https://webarchive.nationalarchives.gov.uk/ukgwa/20120119200607/http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf> accessed 2 September 2024

44 Roberts and Saunders, 'Sentencing for Murder' (n 42)

45 The first case in which sentencing guidelines were considered was *R v Turner* [1975] 61 Cr App R 67, which concerned robbery. In arriving at a 15-year starting point for the offence, Lawton LJ found that the public interest required that sentences should 'correlate sensibly and fairly with a sentence for murder'.

In 2023, the Justice Committee of the House of Commons suggested that increased sentence lengths are a result of government-led inflation in response to a perceived hardening of public opinion towards serious crime, often in response to public campaigns arising from individual cases. And yet it is well known that the public has a poor understanding of sentencing, receiving most of their information from media reports on individual catastrophic cases.⁴⁶ We agree with the Justice Committee's conclusion that the public's lack of understanding of inflationary trends in sentencing results in a 'gap between public opinion on sentencing and actual practice', calling into question the validity of a 'tough on crime' agenda based on appeasing public opinion.

Finally, the introduction by the last Labour government of the indeterminate sentence for public protection (IPP) exemplifies the dangers of poor sentencing policy. Abolished nearly 14 years ago, our friend the late Lord Brown described the IPP sentence as 'the greatest single stain on our criminal justice system'. At the time of writing, 2,734 people are still serving an IPP sentence in prison, just over 1,100 have never been released and the remainder have been recalled, most often for licence breaches not involving reoffending.⁴⁷ Of those people who have never been released 64% are now more than 10 years over tariff.⁴⁸ The IPP saga highlights the devastating psychological impacts of ill-advised indeterminate sentencing, as well as the legal complications in remedying a wrong when people have spent so long in prison over-tariff. Though often forgotten, there are also hundreds of people still in prison sentenced under the pre-IPP 'two-strike' sentencing regime, who similarly suffer from not knowing if they ever will be released.⁴⁹

⁴⁶ Justice Committee, *Public opinion and understanding of sentencing. Tenth Report of Session 2022–23* (2022-23, HC 305) <https://committees.parliament.uk/publications/41844/documents/207521/default/> accessed 2 September 2024

⁴⁷ MoJ, *Offender management statistics quarterly* (n 13)

⁴⁸ *Ibid.*

⁴⁹ The 'two-strike' rule legislated by the Crime (Sentences) Act 1997 introduced an 'automatic' life sentence for people convicted of certain serious offences for a second time. This provision was replaced in 2005 by the introduction of the IPP sentence. In 2001 the Court of Appeal judged that the rule had been interpreted in an unduly restrictive manner (see *R v Offen (Matthew Barry) (No 2)* [2001] 1 WLR 253).

What should be done?

The current situation is unsustainable. We welcome the decision of the new government to undertake an urgent independent review of sentencing legislation and practice, which should include consideration of the purpose, realities, and costs (both human and financial) of ever longer sentences.

The problem is acute and it calls for radical solutions. Faced with compelling demands to increase spending on health, education, care for an ageing population, defence, and measures aimed at increasing productivity, the government should be seeking to reduce to a minimum the amount that has to be spent on keeping prisoners locked up. The positive way to achieve this is by investing to reduce offending and reoffending. This could be funded by reversing the trend of keeping people in prison for longer simply to punish them more severely. A policy of reversing this trend should be initiated by a planned release of prisoners who have, according to revised norms, been sufficiently punished.

For those currently serving lengthy sentences, accelerated routes out of custody should be explored and would potentially incentivise people in prison to cooperate with regimes.

These could involve:

- Urgent and decisive action to safely release all IPPs and two-strike prisoners who are over-tariff, with suitable support in the community upon release.
- Review of the sentences of all prisoners serving longer than 10 years at the half-way stage and then at regular intervals, resulting in earlier release on licence or sentence reduction.
- Review of the needs and risk levels of older prisoners upon reaching a certain age, followed by a managed move to a more appropriate secure location if required. Those who are very elderly, dying or suffering dementia should be removed from prison.
- Reinstate the provision that releases those prisoners who must serve two-thirds of their sentences to one-half.
- Given all that is known about maturity, people who committed their index offence before they turn 25 should receive a regular sentence review or expedited parole eligibility.
- Regular review of 'minimum terms' for people serving indeterminate sentences.
- Significantly increase the size and number of the Open (Category D) prison estate to facilitate return to work, education and family community for those serving long sentences. Life sentenced prisoners should be allowed to apply to move to Open prison years earlier than the current three years before release.

Conclusion

The current crisis in prisons has meant that there is now political engagement at the highest levels of government with the question of who goes to prison and for how long. While much of the discussion of the crisis has focused on urgent remedial measures, the source of prison overcrowding in 2024 is decades of sentence inflation. If prisons are to become places of rehabilitation and restoration to citizenship, places where prisoners can receive the support and interventions needed to return safely to the community and desist from offending, there needs to be a fundamental shift in the drivers of sentencing policy.

We call for an honest conversation about what custodial sentences can and cannot achieve; their human and financial costs; and urge a return to more modest proportionate sentences across the board. Without urgent remedial action to address sentence inflation, this country will soon experience US-style mass incarceration.

[A full bibliography can be found here.](#)

Mishcon de Reya

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About the Howard League

The Howard League for Penal Reform is the world's oldest penal reform charity – a membership organisation that combines litigation, campaigning and policy work. Our aim is to build a more humane and effective response to crime that provides justice to all and helps to reduce reoffending.

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