Independent Sentencing Review 2024-25

Response to Call for Evidence

9 January 2025

Introduction

JUSTICE is a cross-party law reform and human rights organisation that is committed to strengthening the justice system – administrative, civil, and criminal - in the United Kingdom. In October 2024, the Ministry of Justice commissioned former Lord Chancellor David Gauke to undertake an independent review of sentencing in response to the prisons overcrowding crisis (the "**Review**").

This submission builds on our previous reports on prison and criminal justice reform. Our recent work in the criminal justice sphere has included reports on improving administrative decision making in prisons, building a parole system fit for purpose, racial disproportionality in the youth justice system and the prosecution of sexual offences.[1]

In light of the severe capacity pressures impacting prisons, there is now a real opportunity to take a new approach to the criminal justice system, including the sentencing regime, which is sustainable, effective and serves to build safe and healthy communities. Our response sets out a number of recommendations to improve sentencing in England and Wales in a way which aims to:

1) Increase the effectiveness of custodial sentences

2) Expand the use and effectiveness of alternatives to custody

3) Reduce reoffending and protect the public

4) Utilise technology in an innovative and human rights compliant manner

5) Ensure the needs of vulnerable offenders and victims are met

[1] *Current Work - JUSTICE*

History and trends in sentencing

Call for Evidence Thematic Question 1: "What have been the key drivers in sentencing, and how have these changes met the statutory purposes of sentencing?"

Introduction

1. This section provides an overview of the statutory aims underpinning sentencing and outlines our concerns with respect to two related sentencing trends: (i) 'sentence inflation', whereby the average length of custodial sentences has steadily and dramatically increased;[2] and (ii) the increase in the use of immediate custodial sentences for indictable and either-way offences.[3]

2. When evaluated against all five statutory aims of sentencing, we conclude that, in many circumstances, the use of more and/or longer custodial sentences is not effective. The combination of sentence inflation and the imposition of immediate custody for a greater proportion of indictable and either-way offences has contributed to an ever-growing prison population,[4] culminating in the current crisis. England and Wales now has the highest rate of incarceration amongst western European jurisdictions (145 prisoners per 100,000 heads of population).[5] In contrast, Germany has a prison population rate of 67 prisoners per 100,000 heads of population.[6] At the same time, recidivism rates remain high[7], indicating that the current framework is failing to reduce reoffending and keep the public safe.

The statutory purposes of sentencing

3. The purposes of sentencing (in respect of those who are 18 or over when convicted) are set out in section 57 of the Sentencing Act 2020 (the "**Sentencing Act**") and are as follows: (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public, and (e) the making of reparations by offenders to persons affected by their offences.[8]

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[2] Howard League for Penal Reform, *Sentence inflation: a judicial critique*, (2024) p.5; See also: Jose Pina-Sánchez, Lilly Crellin, Jonathan Bild, Julian Roberts and Mike Hough, *Sentencing Trends in England and Wales* (2002-2022), (2023), p. 3

[3] Jose Pina-Sánchez, Lilly Crellin, Jonathan Bild, Julian Roberts and Mike Hough, *Sentencing Trends in England and Wales* (2002-2022), (2023), p. 3.

[4] *Ibid.*, p. 2-4

[5] Helen Fair and Roy Walmsley, Institute for Crime & Justice Policy Research, World Prison Brief, *World Prison Population List*, (2024), p.12. See also: Georgina Sturge, House of Commons Library, *UK Prison Population Statistics*, (2024), p. 29

[6] Helen Fair and Roy Walmsley, Institute for Crime & Justice Policy Research, World Prison Brief, '*World Prison Population List*' (2024), p.13

[7] The overall proven reoffending rate was 26.4% for the October to December 2022 offender cohort. See: *Proven reoffending statistics: October to December 2022 - GOV.UK*, Ministry of Justice

[8] Sentencing Act 2020, s. 59(2)

4. These purposes are non-hierarchical.[9] The effectiveness and ability of a sentence to fulfil these aims is dependent on the factors in each unique situation[10] and a broad approach should be taken in evaluating whether a particular purpose is fulfilled. For instance, punishment of individuals who have committed offences is not limited to imprisonment: the Sentencing Council recognises that requirements like unpaid work, a curfew or fine are also punitive.[11]

Trends in sentencing

Sentence inflation

5. Average custodial sentence lengths have roughly doubled since 1998.[12] Since 2010, there has also been an increase in the number of custodial sentences of between four to 10 years and 10 years or more in length; meanwhile, the number of sentences of less than four years has declined.[13] Between 2012 and 2023, there was an increase of more than 25% in the length of the average custodial sentence handed down in the Crown Court.[14] The average custodial sentence length for indictable offences increased from 18 months in 2013 to almost 23 months in 2024.[15]

6. Further examples of sentence inflation include:

7. The average minimum term for murder increased from 13 years in 2000 to 21 years in 2021.[16]

8. The average custodial sentence length for manslaughter grew from 5.4 years in 2007 to 8.8 years in 2017.[17]

9. The average custodial sentence length for sexual offences[18] increased by 50% between 2007 and 2017.[19]

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[9] Sentencing Council, *Reconceptualising the effectiveness of sentencing: four perspectives*, (2024)

[10] *Ibid*.

[11] *Sentencing basics*, Sentencing Council

[12] House of Commons Justice Committee, *Public opinion and understanding of sentencing*, HC305, Tenth report of Session 2022-23 (2023), p. 20

[13] *Ibid*., p. 21

[14] Cassia Rowland, Institute for Government, *The crisis in prisons*, (2024). The increase in average sentence length for indictable and either-way offences between 2002 and 2022 was 86%. See also: Jose Pina-Sánchez, Lilly Crellin, Jonathan Bild, Julian Roberts and Mike Hough, *Sentencing Trends in England and Wales (2002-2022)*, (2023), p. 3.

[15] Howard League for Penal Reform, *Sentencing inflation: a judicial critique*, (2024) p. 5

[16] Dr Richard Martin, Sentencing Academy, *Sentencing for Murder: A review of policy and practice*, (2024), p. 2

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid*.

Relative use of immediate custody

10. The proportion of immediate custodial sentences imposed for indictable or triable-either-way offences rose from 25% to 34% between 2002 and 2022.[20] Whilst the relative use of immediate custody in respect of all offences declined slightly over this period[21], it is possible to measure the overall use of custody by means of the 'Imprisonment Index'. The 'Imprisonment Index' is a function of both the relative use of prison sentences as well as their length.[22] It is created by multiplying the probability of an immediate custodial sentence by the average custody sentence length, multiplied by 10. Between 2002 and 2022, the Imprisonment Index increased from 10.0 to 13.7, a 37% increase in the use of imprisonment over this period.[23] The most recent statistics show that the number of individuals sentenced to immediate custody in the year ending June 2024 increased by 13% from the previous year, up to 75,300; the number of people sentenced in that year represented an increase of 6% from the previous year[24], meaning that there was also an increase in the use of immediate custody in relative terms.

11. It is worth noting that the use of suspended custodial sentences also increased as a proportion of all sentences imposed between 2002 and 2022,[25] an increase which was particularly marked in relation to indicatable and either-way offences.[26] Indeed, over this period, suspended sentences went from being a rarely used measure to one which comprised approximately 5% of sentences imposed overall and 20% of sentences imposed for indictable and either-way offences.[27] A key reason for this is likely to be the changes introduced by the Criminal Justice Act 2003 (the "**CJA 2003**") which removed the requirement (under section 5(1) of the Criminal Justice Act 1991) that there must be exceptional circumstances before a custodial sentence could be suspended.[28]

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[20] *Ibid*.

[21] Jose Pina-Sánchez, Lilly Crellin, Jonathan Bild, Julian Roberts and Mike Hough, *Sentencing Trends in England and Wales* (2002-2022), (2023), p. 2

[22] *Ibid*., pp. 3-4

[23] *Ibid*., p.4

[24] Ministry of Justice, Criminal Justice Statistics quarterly: June 2024 (HTML) - GOV.UK, June 2024

[25] *Ibid*., p. 2

[26] *Ibid*., p. 3

[27] Ibid., pp. 2-3

[28] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021)

Key drivers of sentence inflation and the increased use of immediate custody

12. Legislative Changes: The following legislative changes have contributed to **increased sentence lengths**:

(a) Schedule 21 CJA 2003[29]: This provision contributed towards sentence inflation for murder via the introduction of statutory starting points for the minimum term of the mandatory life sentence.[30] For individuals over 18, minimum terms for murder now run from between 15 and 30 years (unless a whole life order is imposed).[31] The impact of Schedule 21 can be observed through comparing sentences for equivalent crimes in Scotland and Northern Ireland: as highlighted by the Howard League for Penal Reform, "life sentences with a minimum term of over 30 years are very rare in Scotland and are unheard of in Northern Ireland."[32]

The introduction of Schedule 21 has also led to the inflation of sentences more generally, as sentences for other offences have also risen to remain commensurate with the sentence for murder.[33]

(b) Other extensions of maximum sentences and impositions of minimum terms. The extension of the maximum sentences for other offences has also taken place, for example the increase to the maximum sentence for many sexual offences brought about by the Sexual Offences Act 2003.[34]

Sentence inflation has also been generated through the introduction of minimum terms to be served for certain offences, like the introduction (by the Criminal Justice and Courts Act 2015) of a minimum term of 6 months for a repeat offence of possession of an article with a blade/point in a public place or on school premises.[35]

13. Public and campaign pressure have also driven **sentence inflation**. As observed by the House of Commons Justice Committee in 2023: *"It is widely recognised that there has been a perceptible hardening of public opinion towards serious crime since the 1990s. Successive governments have increased the maximum sentences for a number of serious offences, often in response to public campaigns arising from*

[29] Now Sentencing Act 2020, Sched. 21

[30] Howard League for Penal Reform, *Sentence inflation: a judicial critique*, (2024), p.10

[31] Criminal Justice Act 2003, Schedule 21

[32] Howard League for Penal Reform, *Sentence inflation: a judicial critique*, (2024), p.10

[33] *Ibid*. See also: Sentencing Council, *Written Evidence form the Sentencing Council of England and Wales*, para. 13

[34] *Ibid*., para. 19

[35] *Ibid.*

individual cases."[36] Examples of such campaigns include 'Harper's', 'Tony's', 'Violet-Grace's' and 'Protect the Protectors'.[37] A recent paper published by the Howard League for Penal Reform (and signed by four former Lords Chief Justice of England and Wales - Lord Woolf, Lord Phillips of Worth Matravers, Lord Thomas of Cwmgiedd and Lord Burnett of Maldon - and Sir Brian Leveson, former President of the Queen's Bench Division) concluded that legislative change driven by single-issue campaigns *"interferes with good sentencing practice*".[38]

14. Low confidence in community-based sentencing options is one factor that is likely to explain the **increased use of immediate custody**. Between 2009 and 2019, the use of suspended sentences across all offences remained roughly stable (at c. 4%) and increased in relation to indictable and either-way offences (from 13% to 18%).[39] However, the overall use of community-based sentences (i.e. community orders and suspended sentence orders)[40] declined over the same period, both across all offences (from 16% to 11%) and across indictable offences (from 45% to 40%).[41] One reason for this is likely to be a decline in sentencer confidence in community orders: some of the possible reasons for this decline are discussed under Thematic Question 4, below. However, more research pertaining to sentencer attitudes to suspended sentence orders in particular is needed.[42] Further research is also needed on whether

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[36] House of Commons Justice Committee, *Public opinion and understanding of sentencing*, HC305, Tenth report of Session 2022-23 (2023), p. 2; See also: Lord Burnett of Maldon, *Sentencing: the Judge's role*, (2020)

[37] "Harper's Law" (Police, Crime, Sentencing and Courts Act 2022, s. 3) was introduced in response to the death of PC Andrew Harper, who was killed while serving as a police officer in 2019. The law introduced mandatory life sentences for anyone convicted of unlawfully killing an on-duty emergency worker whilst committing another offence.

"Tony's Law" (Police, Crime, Sentencing and Courts Act 2022, ss. 122 and 123) was the result of a campaign led by the family of Tony Hudgell who was abused by his birth parents and left severely disabled. The law increased the maximum sentences for causing or allowing the death of a child or vulnerable adult (from 14 years' imprisonment to life imprisonment), causing or allowing a child or vulnerable adult to suffer serious physical harm (from 10 to 14 years' imprisonment) and cruelty to a person under 16 (from 10 to 14 years' imprisonment).

"Violet-Grace's Law" (Police, Crime, Sentencing and Courts Act 2022, s. 86) was introduced following a campaign led by the family of Violet-Grace Youens, a four-year-old who was killed when she and her grandmother were hit by a man driving a stolen car at 80mph in a 30mph zone. The law increased the maximum prison sentences for causing death by dangerous driving and causing death by careless driving when under the influence of alcohol or drugs each from 14 years' imprisonment to imprisonment for life.

The "Protect the Protectors Law" (Assaults on Emergency Workers (Offences) Act 2018) was introduced following a campaign led by emergency service workers seeking to safeguard the physical and mental wellbeing of police officers and other emergency service workers. When it first came into force, it created the new offence of assaulting an emergency worker in the exercise of functions as such a worker ("**AEW**") and had a maximum sentence of 12 months (by contrast, the existing offence of assaulting a police officer in the execution of duty (contrary to Police Act 1996, s. 89) is a summary only offence and has a maximum sentence of 6 months' custody). In 2022, the maximum sentence for AEW was increased to 2 years' custody by Police, Crime, Sentencing and Courts Act 2022, S.2.

[38] Howard League for Penal Reform, *Sentence inflation: a judicial critique*, (2024), p.10

[39] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021), p. 8

[40] Note that whilst a suspended sentence order is on one view 'community-based' it is nonetheless a custodial sentence and must not be imposed unless the custody threshold is passed and immediate custody, rather than a community order, would have been imposed if the power to suspend were not available. See the Sentencing Council 'Imposition of community and custodial sentences' guideline.

[41] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021) pp. 8-9

[42] *Ibid*., p. 2

there is disproportionality in the way that suspended sentence orders are imposed, with reference to ethnicity, socio-economic background and gender.[43]

To what extent do current sentencing practices meet the statutory purposes of sentencing?

15. Long custodial sentences fulfil the statutory aim of punishment in that they significantly reduce an individual's freedom. However, a re-evaluation of the punitiveness of sentences is needed as imprisonment is not the only form of punishment.[44] Fines, curfews, and unpaid work are also punitive[45] and mandatory treatment programs (such as for alcohol or drug addiction) are also punitive to the extent that they involve coercion or the restriction of liberty. In some cases, individuals may perceive non-custodial sentences as more punitive: in a 2022 report, the Sentencing Council found that *"even in terms of providing the greatest degree of punitiveness, it is not necessarily the case that sentences of immediate imprisonment will be superior."*[46]

16. Moreover, there are clear concerns that an excessive focus on delivering punishment through the imposition of (increasingly lengthy) prison sentences fails to achieve an appropriate balance between the various purposes of sentencing.[47] The Sentencing Council observes that *"community orders and suspended sentences may have, in some cases, the double advantage of being suitably punitive and (in consequentialist terms) more effective [than immediate custodial sentences]."*[48]

17. Looking beyond punishment, it is far from clear that the increased use of custody (including longer custodial terms) meets other aims, like the reduction of crime. The Sentencing Council concluded in its 2022 report that: *"The weight of evidence suggests that increased sentence severity does not inherently result in greater general*[49] *deterrent effects... Accordingly, it would seem there is, at present, little evidence to justify increasing a sentence (particularly where this crosses the custody threshold) purely for the purposes of deterrence"*[50] Nor is there strong evidence to suggest that lengthier custodial sentences are effective at reducing reoffending. The Overarching Impact Assessment accompanying the 2020 Government White Paper *A Smarter Approach to Sentencing* noted that: *"Serving longer periods in*

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[43] *Ibid*., p. 14; The Lammy Review, 2017, p. 34

[44] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022), p.47

[45] *Sentencing basics*, Sentencing Council

[46] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022), p. 48

[47] Dr Esther F.J.C. van Ginneken, Howard League for Penal Reform, *The pain and purpose of punishment: A subjective perspective*, (2016)

[48] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022) p. 47

[49] *"A general deterrent would occur where a disposal makes other potential offenders less likely to offend"* whereas *"Specific deterrence is aimed at deterring the individual offender subject to the sentencing disposal from reoffending".* See: Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022) pp. 22, 25

[50] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022) p. 28

custody may mean family breakdown is more likely, affecting prisoner mental ill health and subsequent reoffending risk."[51] As a final point on sentence length, it is crucial to note the following observation of the Sentencing Council: *"...the criticisms of short custodial sentences might erroneously suggest longer custodial sentences are inherently more effective and that the limits apply purely to shorter sentences. In reality, while the evidence against the effectiveness of short sentences amongst the most robust, it would be tenuous to claim longer custodial sentences are more effective."*[52]

18. By contrast, there is some evidence which appears to suggest that suspended custodial sentences rather than immediate imprisonment may have some effect on reducing reoffending amongst those subject to them. In its 2022 report, the Sentencing Council highlighted the need for further research on the potential specific[53] deterrent effect of suspended sentences.[54]

19. Longer custodial sentences may also undermine reparations towards victims. The increase in lengthier prison sentences has "*contributed towards a bottleneck in the court system that has slowed sentencing and resulted in an environment where less serious offences are overlooked because of capacity constraints*."[55]

20. Instead of fulfilling the statutory sentencing purposes, the increased use of ever longer custodial sentences has contributed to the prison overcrowding crisis. The prison population has risen by 93% in the past 30 years,[56] creating a strain on the prison system's capacity. Prison overcrowding has created unsafe conditions with high rates of violence, drug use and self-harm that make rehabilitation in custody virtually impossible;[57] in HMP Pentonville Prison, in March 2024 alone, 104 incidents of self-harm were recorded.[58] It is clear that the prison estate has reached crisis point and urgent action is needed.

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[51] Ministry of Justice, *A Smarter Approach to Sentencing – Overarching IA*, (2020)

[52] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022) p. 38

[53] *"A general deterrent would occur where a disposal makes other potential offenders less likely to offend"* whereas *"Specific deterrence is aimed at deterring the individual offender subject to the sentencing disposal from reoffending".* See: Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022) pp. 22, 25

[54] *Ibid*., p. 61

[55] Rafe Uddin and Clara Murray, *How 'sentencing inflation' fuelled England's prison's crisis*, Financial Times

[56] Prison Reform Trust, *Bromley Briefings Prison*, (2024), p.14

[57] *The sentencing white paper: exacerbating the issues created by sentence inflation*, Clinks

[58] Sima Kotecha, *Violence, overcrowding, self-harm: BBC goes inside one of the Britain's most dangerous prisons*, BBC

Recommendations

21. In many cases, longer custodial sentences fail to meet the statutory aims of sentencing and create an immense burden on the prison system. JUSTICE makes the following **recommendations** to reverse the sentencing trends we identify and enhance the effectiveness of sentencing:

(a) Dynamic Sentencing. As outlined in greater detail below at Question 5 below and in our 2022 report *A Parole System Fit for Purpose*,[59] JUSTICE invites the Review to consider the concept of 'dynamic sentencing' as a solution to sentence inflation. Dynamic sentencing would involve sentences being varied by the Parole Board, meaning that "penalties can be adapted weeks or months after conviction"[60] to accord with factors like an offender's good behaviour or reduction in risk. Dynamic sentencing not only has the potential to shorten sentence lengths but also incentivises progression through the prison system and encourages prisoners to engage with rehabilitative programmes.

(b) Adequate resourcing of the probation service. The ability of sentences that rely on community options to reduce sentence inflation, like dynamic sentencing, are dependent on the proper resourcing of the probation service. There is currently an overall national shortfall of 1,771 probation officers,[61] issues with retaining more experienced probation staff,[62] plus high levels of sickness and exhaustion being reported across the probation service.[63] Without proper resources to support the retention and training of staff who supervise offenders in the community, alternatives to longer custodial sentences may struggle to fulfil their intended rehabilitative function.

(c) A public education campaign on sentencing. Evidence indicates that the public's knowledge of current sentencing practice is limited. A study conducted by the Sentencing Academy discovered that most respondents were not aware that sentence length had increased since 1996, and over half believed that sentence lengths have become shorter.[64] Media attention on controversial sentencing decisions may act as a further barrier to public understanding of sentencing by

[59] JUSTICE, *A Parole System fit for Purpose*, (2024)

[60] Jacqueline Hodgson and Laurène Soubise, *Understanding the sentencing process in France*, (2016) *Crime and Justice* Vol.45(1) 221, p. 248

[61] HMIP, *Annual Report 2022/23*, (2023), p.18

[62] *Ibid*., p.19

[63] Nicola Carr, *Should I stay or should I go? What to do about the probation staffing crisis?*, (2023) *Probation Journa*l Vol.70(3) 221, p. 222

[64] Sentencing Academy, *Public Knowledge of Sentencing Practices and Trends*, (2022), p.7

entrenching these common misunderstandings.[65] However, research suggests that public perceptions that sentencing is generally lenient are often dispelled when individuals are provided with the factors and circumstances of a specific case.[66]

JUSTICE therefore recommends that an initiative be introduced to increase the public's awareness and understanding of sentencing. This should include educational initiatives as a part of compulsory legal education in all schools. By increasing the public's understanding of the current severity of sentencing practice, an educational campaign can instill public confidence in the justice system's ability to appropriately sentence individuals and reduce demands for harsher sentencing.

We recognise that there have been recent efforts to increase the public's understanding of sentencing, such as the Sentencing Council's "You be the Judge" website launched in July 2024.[67] This platform invites users to decide an appropriate sentence for six shortened cases related to burglary, fraud, assault, and possession of drugs, a knife, and a firearm.[68] This initiative is a step in the right direction, and we recommend the introduction of further similar programs that extend education on sentencing to different sections of society.

22. It is also clear that further research is needed in a number of areas so that we can better understand whether sentences are being imposed in the correct circumstances and in a fair and unbiased manner, as well as which sentencing options are most effective and why. JUSTICE therefore **recommends** that the Ministry of Justice commission or conduct research into the following:

23. The attitudes of the judiciary and magistracy towards suspended sentence orders.

24. Whether disproportionately exists in the imposition of suspended sentence orders, with reference to ethnicity, socio-economic background and gender.

25. The potential specific deterrent effect of suspended sentence orders and what aspects of suspended sentence orders are and are not effective at reducing reoffending.

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[65] House of Commons Justice Committee, *Public opinion and understanding of sentencing*, HC305, Tenth report of Session 2022-23 (2023), p. 49, para. 110

[66] *Ibid*., p. 34, para. 75

[67] *You be the Judge: the Sentencing Council's new interactive platform launches*, Courts and Tribunals Judiciary

[68] *Ibid*.

The structure and hierarchy of sentences

Call for Evidence Thematic Question 2: "How might we reform structures and processes to better meet the purposes of sentencing whilst ensuring a sustainable system?"

The purposes of sentencing: striking the right balance

26. Under section 59 of the Sentencing Act, a court must have regard to the statutory purposes of sentencing when passing sentence on an individual (the "**section 59 duty**").[69] However, the applicability of this duty is limited or circumscribed in certain circumstances. Two examples in particular are: (i) the use of minimum sentences for certain offences or certain repeat offences, and (ii) the framework governing the imposition of community order requirements

Mandatory minimum sentences

27. The court need not have regard to the purposes of sentencing in relation to an offence to which a mandatory sentence requirement applies.[70] There are a number of offences which carry mandatory minimum sentences: certain firearms offences, for example, have a mandatory minimum sentence of five years.[71] In respect of some offences, there are mandatory minimum sentences for repeat offences: there is a minimum sentence of 3 years for a third domestic burglary offence[72] and a minimum sentence of 7 years for a third class A drug trafficking offence, for example.[73] The rationale behind the mandatory minimum sentence provisions is to create "deterrent sentences".[74] Deterrent sentences have been defined by the Court of Appeal as: *"sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider."*[75]

28. Whilst a mandatory minimum need not be imposed if the court is "*of the opinion that there are exceptional circumstances relating to the [relevant offence(s) or the individual being sentenced] which*

[69] Sentencing Act 2020, s. 59(2). The statutory purposes of sentencing do not apply in relation to the making of an order under the Mental Health Act 1983, Part 3.

[70] Sentencing Act 2020, s. 59(3) and 399

[71] Sentencing Act 2020, s. 311

[72] Sentencing Act 2020, s. 314

[73] Sentencing Act 2020, s. 313

[74] *R v Rehman and Wood* [2005] EWCA Crim 2056 [4]

[75] *Ibid.*

justify not doing so"[76] such circumstances must be "truly exceptional"[77] and will rarely be present.[78] As such, the ability of the court to reflect the purposes of sentencing other than deterrence is limited significantly. The effect of a mandatory sentence is therefore to prioritise deterrence over the other purposes of sentencing.

29. However, there is a lack of robust evidence as to whether harsher (including lengthier) sentences in general, and minimum sentence provisions in particular, do in fact have the intended deterrent effect.[79] The Sentencing Council has observed that:

> *...while there is evidence about what deterrence theoretically requires, more information is needed to understand what those targeted for deterrence-based sentencing know and understand, (and do not know and do not understand), about sentencing. This includes what they know about guidelines and sentencing practice; what they experience from specific sentencing options...and how perceptions of sentencing might influence offending decision-making in the real world.*[80]

30. JUSTICE emphasises the importance of taking an evidence-based approach to sentencing. Imposing mandatory minimum sentences with a view to deterrence is in our view difficult to justify in the absence of research indicating that these provisions have a deterrent effect, either at all or to a greater extent than a sentencing process in which the section 59 duty applies. Rehabilitation and, relatedly, the overall reduction of crime and protection of the public are fundamental purposes of sentencing and should not be deprioritised without compelling reasons for doing so.

31. We therefore **recommend** that the Review examine whether, given the absence of evidence that minimum sentences are effective at deterring offending, the government should consider their repeal.

Community order requirements

32. When making a community order, the court is required, by virtue of section 208(10) of the Sentencing Act, to include at least one community order requirement imposed for the purpose of punishment (or a fine) unless there are exceptional circumstances relating to the offence or to the offender which would

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[76] See, e.g. Sentencing Act 2020, s. 313(2A). In the case of the minimum sentence for repeat offences committed before the coming into force of the Police, Crime Sentencing and Courts Act 2022, s. 124, the test for departing for the mandatory minimum is that there are particular circumstances which would make it unjust in all the circumstances to impose it (see, e.g. Sentencing Act 2022, s. 313(2)).

[77] See, e.g., the Sentencing Council, *Firearms - possession of prohibited weapon*, Step 3, para. 10

[78] *R v Jordan* [2004] EWCA Crim 3291 [30]

[79] Sentencing Council, *Reconceptualising the effectiveness of sentencing: four perspectives*, (2024)

[80] *Ibid*., p. 14

make it unjust in all the circumstances for the court to do so.[81] There are no comparable provisions which mandate that a community order requirement is imposed in order to further any of the other purposes of sentencing set out in section 57 of the Sentencing Act.

33. The impact of section 208(10) is that the purpose of punishment is afforded overarching weight in the sentencing exercise: in most cases, a requirement specifically aimed at punishment will form part of the sentence, even where that requirement will considerably undermine the degree to which one or more of the other purposes of sentencing are achieved. It is to be welcomed that the Sentencing Act requires courts to ensure, insofar as is practicable, that community order requirements do not interfere with an individual's work or education or conflict with their religious beliefs.[82] However, mandatory requirements imposed for the purpose of punishment often have the impact of weakening the rehabilitative effect of the sentence, and hence the protection provided to the public. In the course of preparing our upcoming report on the probation service, JUSTICE heard evidence from a number of individuals with lived experience of probation supervision. Some individuals had found, for example, that unpaid work requirements had made it harder to obtain or maintain sustainable employment until the conclusion of the community order as the time off work it entails can cause difficulties with employers or prospective employers. The added responsibility of an unpaid work requirement can be particularly difficult to cope with for people experiencing drug or alcohol addiction and can present a barrier to recovery. Curfews can be socially isolating and make it harder for an individual to maintain community ties or fulfil childcare responsibilities.

34. JUSTICE considers that the purpose of punishment must be appropriately balanced with the other purposes of sentencing. Precisely what constitutes the correct balance will be case-specific, however the current framework risks affording disproportionate weight to punishment at the expense of other important aims, such as rehabilitation and the protection of the public.

35. In any event, there is scope to revisit our understanding of what amounts to a punitive measure. Whilst the Sentencing Act does not specify which requirements may constitute a 'requirement imposed for the purpose of punishment' under section 208(10), the Court of Appeal has held that an alcohol treatment requirement, for example, does not do so.[83] However, in our view to the extent that an alcohol treatment (or other) requirement involves a degree of coercion or restriction on an individual's liberty, it can be said to be punitive. Whilst alcohol, drug and mental health treatment requirements can only be imposed if the "consent condition" is met (i.e. that the individual has expressed a willingness to comply with the

[81] Sentencing Act 2020, s. 208(11)

[82] Sentencing Act 2020, s. 208(13). There is a similar obligation on responsible probation officers under s. 214(4).

[83] *R v Gregson* [2020] EWCA Crim 1529

requirement),[84] subsequent refusal to submit to treatment will (in the absence of what in the opinion of the court amounts to a "*reasonable excuse*") constitute a breach of the requirement[85] and the individual may be made subject to breach proceedings. Such proceedings may result in a fine, the addition of curfew or unpaid work requirements to the existing community order, or the individual being resentenced to a more onerous community order or custody.[86] Separating the available community order requirements into those which may be 'for the purpose of punishment' and those which may not is an approach which not only risks undermining the other purposes of sentencing but relies on a distinction which is arguably artificial.

36. JUSTICE therefore **recommends** the repeal of subsections 208(10)-(11) of the Sentencing Act.

Technology: Current and future potential uses

Call for Evidence Thematic Question 3: "How can we use technology to be innovative in our sentencing options, including considering how we administer sentences and manage offenders in the community?"

Introduction

37. The use of technology within sentencing is increasing within the United Kingdom and foreign jurisdictions. It is a reflection of innovation and an opportunity to maximise efficiency, which JUSTICE welcomes in the context of administering sentences and supporting individuals in the community.

38. However, we caution against using technology opportunistically and in an ill designed manner. Any technological innovations must be targeted at a genuine use case which can help deliver better outcomes for the sentencing regime, accompanied by robust safeguards and incorporated in a human rights compliant way.

39. We also consider that all those involved in the deployment of technology within the sentencing regime have a responsibility during the design, development, deployment and monitoring processes to ensure that it is human rights compliant, with human rights considerations built into each stage. This includes identifying risks and interrogating their impact to prevent future harms, and to pause, rethink or stop the use of technology where significant risks or impacts on human rights are identified.

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[84] Sentencing Act 2020, Sched. 9, Part 9, para. 17(1)(c) and 17(4); Part 10, para. 20(1)(d) and 20(5); and Part 11, para. 24(1)(c) and 24(4)

[85] Sentencing Act 2020, Sched. 10, Part 2, para. 12

[86] Sentencing Council, *Breach of a community order by failing to comply with requirements*, (2018)

40. To ensure technology is used to capitalise on opportunities for innovation while guarding against risks, the rule of law and human rights cannot be afterthoughts or distant considerations: they must be embedded, both practically and in policy terms, in the innovation approach adopted. The justice system generally, but sentencing in particular, is not the place to 'move fast and break things' – the stakes are too high with individuals' liberty on the line.

41. We recommend starting simple – technology can have significant impact with relatively low risk to rights in the more mundane areas for example, reducing time consuming and bureaucratic form filling by probation officers. By contrast, we highlight that more complicated and 'advanced' tools may be inaccurate, biased, and non-transparent, posing significant risks to individual rights as well as public trust and confidence.

Technology: positive uses and risks

42. Technology must be used judiciously in sentence administration and must comply with domestic and international law. Under Article 8 of the European Convention on Human Rights ("**ECHR**"), any interference into an individual's privacy must be in accordance with the law, necessary, and proportionate. Technologies like GPS trackers, wearable health monitors, and financial surveillance systems inherently intrude into private lives, and the risk of overreach or misuse is evident. Overbearing restrictions also have the potential to hinder an individual's reintegration into society by stigmatising them or limiting their ability to lead a normal life. Any sentence conditions imposed must be proportionate to both the offence committed and the ongoing risk posed by the individual, without unnecessarily infringing upon their personal autonomy.

43. Furthermore, insofar as technology is used to provide alternatives to custody, JUSTICE considers it vital to ensure that we do not create 'alternatives' to custody which more closely resemble 'virtual prisons' than genuine community-based sentencing options. Conditions attached to community-based alternatives must not be so onerous that individuals subject to them can no longer truly be said to be 'in the community' but are, for all intents and purposes, incarcerated. Care must be taken to accurately identify those aspects of community supervision for which face to face communication is necessary and to ensure that technology does not replace such contact without strong justification.

44. JUSTICE notes that there are international examples of uses of technology which may be instructive to the Review, such as:

45. A wide range of uses for electronic monitoring have been identified in the Netherlands for electronic monitoring,[87] contributing to a reduction in recidivism.[88]

46. In the United States, the non-profit Recidiviz[89] builds technology in partnership both with those who have a role in running the criminal justice system and those who are impacted by it. Recidiviz focuses on creating standardised data layers from disconnected databases. The standardised data layers are then used to power Recidiviz's data tools which are designed to save time and help criminal justice leaders better support those in custody and subject to community supervision. North Dakota, for example, which began its partnership with Recidiviz in September 2019, has used its tools to improve supervision outcomes and navigate the pandemic. Recidiviz reports that over the first two years of the partnership, North Dakota reduced its recidivism by 16%, the probation population by 9% and the prison population by 25%.[90]

47. JUSTICE urges caution before adopting or adapting existing uses of technology from overseas jurisdictions for use in our own system. Before any new technology be is introduced, the possible risks should be fully and independently assessed and safeguards put in place to avoid adverse outcomes (see further our **recommendations** below).

48. We would also highlight that technological advancements are not always beneficial. Notably, in the United States, the use of Correctional Offender Management Profiling for Alternative Sanctions ("**COMPAS**") illustrates some of the difficulties which can arise from the use of technology. COMPAS, a proprietary recidivism prediction tool used by judges in several US states, exemplifies how opaque, for-profit AI systems can influence critical decisions in the criminal justice system. Developed and sold by a private company, Equivant (formerly Northpointe), COMPAS generates risk scores intended to inform decisions on matters such as sentencing, bail, and parole.[91]

49. Though marketed as a scientifically valid tool capable of assisting judges in evaluating an individual's likelihood of reoffending, independent investigations have cast doubt on its fairness and reliability. A 2016 review by investigative journalists at ProPublica highlighted troubling flaws in COMPAS's outputs.[92] While the tool claimed to offer objective risk assessments, the analysis found that only around 20% of those

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[87] Miranda Boone, Matthijs van der Kooij and Stephanie Rap, Utrecht University, *Current Uses of Electronic Monitoring in the Netherlands*, (2016)

[88] *Electronic Monitoring in Europe – the Dutch experience*, Confederation of European Probation

[89] Recidiviz | A Criminal Justice Data Platform

[90] North Dakota | Recidiviz | A Criminal Justice Data Platform

[91] Harvard Law Review, *State v. Loomis Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing*, (2017) *Harvard Law Review Association* Vol.130(5) 1530

[92] Jeff Larson, Surya Mattu, Lauren Kirchner and Julia Angwin, Pro Publica, *How We Analyzed the COMPAS Recidivism Algorithm*, (2016)

predicted to commit violent crimes actually went on to do so.[93] Even more concerning was the discovery that COMPAS was nearly twice as likely to falsely flag Black defendants as future criminals compared to white defendants,[94] reinforcing harmful and long-standing racial disparities in the criminal justice system. These biased predictions risk unjustified harsher treatment for some individuals, undermining the principles of fairness and equality that justice systems are meant to uphold.

50. Compounding these issues is the lack of transparency: COMPAS's methodology is a trade secret. Judges and defendants are unable to scrutinise how risk factors are selected, weighed, or combined to produce a score. Without knowing which elements drive these assessments, it is difficult—if not impossible—for legal professionals to meaningfully challenge or contextualise the results. The Wisconsin Supreme Court has urged "judicial scepticism" in relation to COMPAS scores, but scepticism alone may not be enough to protect defendants' rights.[95] Judicial independence, impartiality, and competence may be compromised if decision-makers rely on opaque, proprietary systems that cannot be tested or explained, undermining confidence in legal decision-making and the fairness of outcomes.

51. Algorithms or technologies used for risk assessment must avoid biases that disproportionately affect certain groups based on race, socioeconomic status, or other protected characteristics. The COMPAS example serves to underline that it is essential to closely monitor all new technologies to ensure that they are accurate and effective and do not entrench or worsen racial disproportionality already present in the sentencing process or have other negative impacts.

52. In conclusion, if technologies are used with the necessary degree of caution, they have the potential to offer great benefits for both the individuals being sentenced and the wider communities. Diligence as to the impact of technology on the system, the individuals within that system and their rights is not a one off but must be monitored on an ongoing basis. We therefore **recommend** that any new technology that impacts how we administer sentences should ideally only be introduced after satisfying the following three conditions:

    (a) Independent Assessment: All proposed technology solutions are independently assessed from an impact and rights-based perspective. Due and proper consideration must be given to the

[93] *Ibid.*

[94] *Ibid.*

[95] *State of Wisconsin v Loomis* 881 N.W.2d 749 (Wis. 2016); See also Katherine Freeman, Algorithmic Injustice: how the Wisconsin Supreme Court failed to protect due process rights in State v Loomis, (2016) *North Carolina Journal of Law and Technology* Vol.18(5) 75

impact on the rights and well-being of the supervised individual, to ensure an appropriate balance between any conflicting rights or interests is struck.

(b) Pilot Testing: All proposed technology solutions should be piloted on similar terms. Piloting technology ensures that technological innovations produce genuine alternatives to custody, rather than recreating custodial prison sentences.

(c) Co-Design with Users: To the extent possible, all proposed technology solutions are co-designed with potential users to mitigate the risk of adverse or unintended consequences on the users, probation officers and the wider public.

Data collection

53. The collection of any data through these technologies must be also justified, targeted, and time limited. Ethical concerns also arise around consent and the potential misuse of data for purposes unrelated to a prisoner's sentence.

54. Technology may have a role to play in helping to identify racial bias: an area in which insufficient data exists and in which current technology is underutilised. In our 2021 report *Tackling Racial Injustice: Children and the Youth Justice System*[96] we highlighted the lack of robust data throughout the youth justice system and the criminal justice system more generally. Often, data is inconsistently collected.[97] In some cases, there is no requirement to report data to a central body,[98] meaning it must be collected from numerous individual organisations, making research unnecessarily onerous. In other cases, data is not recorded at all.[99] This lack of data reduces the ability of researchers to fully understand an issue and its root causes.[100]

55. One particular area in which there is a deficiency in important data is the extent of bias within judicial decision making. Racial disproportionality has been found to exist in the average sentence length for individuals from Black and racialised communities, which is greater than that for their White counterparts.[101] This indicates that greater scrutiny is needed with regard to how sentences are determined. Whilst initiatives such as the Equal Treatment Bench Book[102] (and related Sentencing Council

[96] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System*, (2021)

[97] *Ibid.,* para. 1.15

[98] *Ibid.*

[99] *Ibid*.

[100] *Ibid.*

[101] *Ibid*., para. 4.56

[102] Judicial College, *Equal Treatment Bench Book*, (2024)

guidance on disparity in sentence outcomes)[103] are to be welcomed, there remains a concern that racial bias continues to affect sentencing decisions. The data needed to understand biased decision-making is, however, lacking.[104] Knowledge of whether and how bias permeates decisions throughout the court system is vital in order to understand and develop ways to eliminate it. JUSTICE understands that the data which academics require in order to understand bias in decision making does exist but the Ministry of Justice has been reluctant to share it either publicly or with researchers, even where researchers undertake to keep confidential and anonymised data.[105]

56. JUSTICE therefore **recommends** that:

(a) The Ministry of Justice look at ways to use technology to improve its collection and publication of data and both collect and make available all data that is necessary to fully assess disproportionality in the criminal justice system.

(b) The Ministry of Justice engages with academics who research sentencing data and share the necessary data with researchers to measure bias within judicial decision-making.

Alternatives to custody

Call for Evidence Thematic Question 4: "How should we reform the use of community sentences and other alternatives to custody to deliver justice and improve outcomes for offenders, victims and communities?"

Community sentences

57. As recognised by the House of Lords Justice and Home Affairs Committee in its 2023 report C*utting Crime: better community sentences,* rigorous sentences served in the community can reduce crime as well as ease pressure on prison places.[106] The Committee observed that community orders have the advantage of being particularly flexible as the combination of requirements attached to a sentence can be tailored to suit the individual case.[107] Further, as set out in more detail under Thematic Question 5, the benefits of community sentences as opposed to short custodial sentences are especially significant.

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[103] See, e.g. the Sentencing Council offence guideline for GBH: Sentencing Council, *Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH – Sentencing*, (2021)

[104] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System*, (2021), para. 4.56

[105] *Ibid*.

[106] House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), p. 5

[107] *Ibid.*, p.16

58. There has, however, been a marked decline in the use of community orders in recent years both in absolute and relative terms.[108] The number of community orders issued more than halved in the ten-year period between 2012-22.[109] A similar pattern is present in respect of all community-based sentences (i.e. community orders and suspended sentence orders[110]) are taken together: these declined between 2009 and 2019 both across all offences (from 16% to 11%) and across indictable offences (from 45% to 40%)[111] In fact, this pattern was driven by a decrease in community orders: in relation to indictable offences, for example, the use of suspended sentence orders increased slightly (from 13% to 18%), whilst community orders decreased by 10%, fines decreased by 2% and immediate imprisonment increased by 7%. It therefore appears that immediate as well suspended, custody is increasingly being used in place of community orders (although it must be noted that these statistics do not include information about, for example, changes in the patterns of offence seriousness).

59. More research is needed on sentencer attitudes towards suspended sentence orders (see also Thematic Question 1). However, a number of explanations for the decline in community orders have been advanced. In a 2021 review of community orders,[112] the Sentencing Academy identified a number of factors underpinning this trend. The Transforming Rehabilitation reforms,[113] for example, are understood to have led to or exacerbated a loss of confidence on the part of sentencers, the effect of which has not entirely been reversed.[114]

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[108] *Ibid*., p.23

[109] *Ibid*., p. 24

[110] Note that whilst a suspended sentence order is on one view 'community-based' it is nonetheless a custodial sentence and must not be imposed unless the custody threshold is passed and immediate custody, rather than a community order, would have been imposed if the power to suspend were not available. See the Sentencing Council 'Imposition of community and custodial sentences' guideline.

[111] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021) pp. 8-9

[112] Dr Eoin Guilfoyle, Sentencing Academy, *Community Orders: A review of the sanction, its use and operation and research evidence*, (2021)

[113] "*Transforming Rehabilitation was a major structural reform programme introduced shortly after Chris Grayling MP became Lord Chancellor and Secretary of State for Justice in 2012. The programme implemented in 2014–15 introduced fundamental changes to how probation was organised and delivered. The primary change was the division of service delivery into two parts: • The National Probation Service (NPS)—responsible for managing offenders who posed the highest risk of harm to the public and who had committed the most serious offences. The NPS was organised into seven geographic areas. • Community Rehabilitation Companies (CRCs)—run by a mix of providers from private, statutory and voluntary sectors, contracted to deliver community sentences for medium and low-risk offenders, and paid, in part, for results achieved in reducing reoffending. In 2014, private companies (including Sodexo, Interserve, and MTC Novo) won bids to provide services in 21 CRC areas." In June 2020, CRC contracts were terminated and the Probation Service unified. The House of Commons Justice Select Committee responded: "We welcome the decision to unify the Probation Service once more. We warn, however, that, after the disruption of the past seven years, changes proposed and begun to the probation system must be fully thought through, properly funded and expected to remain in place for a period of decades rather than months or a few years.""* See: House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), p. 27

[114] Dr Eoin Guilfoyle, Sentencing Academy, *Community Orders: A review of the sanction, its use and operation and research evidence*, (2021), p. 13. See also: House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), p. 50; *National Audit Office – Written Evidence (JCS0039)*, National Audit Office

60. The lack of confidence in community orders amongst sentencers has also been attributed to a decline in the quality of Pre-Sentence Reports ("**PSRs**").[115] In preparing our upcoming report on the probation service, JUSTICE convened a roundtable consisting of a number of experts from academia and third sector organisations. The roundtable expressed particular concern about the increased use of fast delivery reports as opposed to standard delivery reports.[116] Between 2012 and the first quarter of 2023, there was a sharp decline in standard delivery reports as an overall proportion of PSRs prepared.[117] In the experience of the roundtable, this often leads to reports which are not sufficiently detailed and do not always accurately identify the specific needs, circumstances and vulnerabilities of an individual. Inspections have also found that too often PSRs fail to adequately identify the needs of individuals with mental ill health,[118] take a sufficiently trauma-informed approach[119] and contain sufficient analysis and detail in respect of individuals from Black and racialised communities.[120]

61. One area in which further research is needed is whether the Sentencing Council "*Imposition of community and custodial sentences*" guideline[121] specifying when a suspended sentence order rather than a community order is appropriate is being correctly applied by courts.[122] This guidance emphasises that: *"A suspended sentence MUST NOT be imposed as a more severe form of community order...Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not a non-custodial sentence should be imposed".*[123] Despite this guidance, the possibility that suspended sentence orders have had a 'net-widening' effect (whereby individuals receive suspended sentence orders when the custody threshold is not met and a community order would have been the appropriate sentence instead) cannot be discounted.[124]

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[115] Dr Eoin Guilfoyle, Sentencing Academy, *Community Orders: A review of the sanction, its use and operation and research evidence*, (2021), p. 13

[116] There are two main types of PSR. 'Standard delivery' PSRs are more detailed and presented in written form. They ordinarily require the court to adjourn for several weeks to allow them to be prepared. 'Fast delivery' reports can either be written or oral, and have a turnaround time of several days in the case of written reports, whereas oral reports are usually delivered on the day of the hearing.

[117] House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), p. 80-81

[118] HM Inspectorate of Probation, *A joint thematic inspection of the criminal justice journey for individuals with mental health needs and disorders* (2021), p. 82-3

[119] *Ibid*., p. 84

[120] HM Inspectorate of Probation, *The quality of pre-sentence information and advice provided to courts – 2022 to 2023 inspections*, (2024), p. 4, 13

[121] Sentencing Council, Imposition of community and custodial sentences – Sentencing , effective from 1 February 2017

[122] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021), pp.12-13

[123] *Ibid*. (original emphasis)

[124] Eleanor Curzon and Julian V. Roberts, Sentencing Academy, *The Suspended Sentence Order in England and Wales*, Sentencing Academy, (2021), pp.12-13

62. JUSTICE therefore **recommends** the following measures to increase the use of community sentences as an alternative to custody[125] and ensure they are being used where appropriate including:

(a) Providing, or making improvements to, training for probation practitioners in the preparation of PSRs, covering: (i) the level of analysis that ought to be included; (ii) taking a trauma-informed approach; (iii) racial disproportionality.

(b) Improving the PSR process by affording probation practitioners more time to undertake detailed interviews with individuals awaiting sentence.

(c) Training developed and provided by the Judicial College for the magistracy and judiciary on the benefits of community sentences (particularly as opposed to short custodial sentences), the available requirements (such as mental health treatment requirements). Training should include, where possible, an opportunity to hear first-hand accounts of community orders which have been successful in assisting an individual to cease offending. Further, training on the "*Imposition of community and custodial sentences"* guideline and when it is appropriate to impose a community order as opposed to a suspended or immediate custodial sentence should be provided or improved as appropriate.

(d) Research conducted or commissioned by the Ministry of Justice on the application of the "*Imposition of community and custodial sentences"* guideline to determine if and and if so why suspended sentences have been incorrectly used in place of community orders.

63. There is also scope to improve the content, form and delivery of community sentences themselves, and to think innovatively about the stage of criminal proceedings at which community intervention or rehabilitative support is provided. Areas where there is scope for reform - including examples of good existing practice which might be built upon or adapted as appropriate - are as follows:

(a) In Northern Ireland, the Department of Justice is trialing an initiative called a Substance Misuse Court ("**SMC**") in Belfast, which offers eligible individuals an opportunity to engage in an intensive treatment programme *before* sentencing, to help them address their addiction.[126] The scheme therefore works as a form of deferred sentencing. Eligibility screening is carried out by probation

[125] The Sentencing Academy has pointed out the need to avoid 'up-tariffing', i.e. the imposition of a community order where a less onerous sentence would have been appropriate instead. See: Dr Eoin Guilfoyle, Sentencing Academy, *Community Orders: A review of the sanction, its use and operation and research evidence*, (2021), p. 13. JUSTICE therefore notes the importance of guidance, training and any other appropriate safeguards so that the Sentencing Act 2020. s. 204(2) (which provides that a community order must not be imposed unless the offence or the combination of the offence and one or more associated offences is serious enough to warrant doing so) is adhered to.

[126] Centre for Justice Innovation, *Belfast Substance Misuse Court*, (2020)

staff and Addiction Northern Ireland.[127] Individuals on the programme are subject to bail conditions and must attend review hearings with the judge to monitor progress. If the judge is of the opinion that progress is not being made, the programme can be terminated and the court can proceed to sentence the individual.[128] The initial pilot achieved positive results: 26 of the 28 individuals who had completed or were nearing completion of the programme at the end of phase 1 showed *"a significant reduction in risk of re-offending and significant increases in self-efficacy, locus of control and well-being."* [129] Similarly positive results were found at the end of phase 2.[130] A key feature of the SMC scheme is that a small ceremony is organised for those who successfully complete the programme, where they are presented with a certificate by the judge.[131]

(b) As set out in further detail below (see Thematic Question 5) Australia has introduced the Intensive Correction Order ("**ICO**"),[132] a community-based alternative to short-term imprisonment which involves community service, curfew and mandatory involvement in personal development and rehabilitation programs.

(c) At present in England and Wales, individuals are permitted to dedicate up to 30% of their unpaid work requirement to completing Education, Training and Employment ("**ETE**") activities.[133] However, in the view of the roundtable convened by JUSTICE for our upcoming report on the probation service, there is real scope to increase this proportion so as to improve the rehabilitative value of community based sentences.

(d) The House of Lords Justice and Home Affairs Committee concluded that: "*lessons can be learned from Youth Offending Services about the management of the probation population in general, and of young adults in particular. YOSs do not only work with smaller caseloads and with more experienced staff but are also embedded in local communities and more effective and communicating with offenders*".[134]

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[127] *Ibid*.

[128] *Ibid.*

[129] *Ibid.* See also: Conor Coyle, *Inside the court where "graduations" are held for offenders with drug and alcohol issues*, The Irish News

[130] Northern Ireland Courts and Tribunals Service, *Evaluation of the Substance Misuse Court – Phase 2*, (2021)

[131] Conor Coyle, *Inside the court where "graduations" are held for offenders with drug and alcohol issues*, The Irish News

[132] *Intensive Correction Orders*, NSW Government

[133] Ministry of Justice, *Unpaid Work Management Information Release Guidance*, (2024)

[134] House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), p. 51

64. JUSTICE **recommends** the evaluation of such examples of good practice when reforming or developing community sentences and other alternatives to custody in England and Wales.

65. JUSTICE notes that in order to increase the use and effectiveness of community sentences it is essential that the probation service is adequately supported, resourced and funded. We urge the Review to encourage the government to make such provision alongside any future reforms so as to ensure their effectiveness.

Custodial sentences: areas for reform

Call for Evidence Thematic Question 5: "How should custodial sentences be reformed to deliver justice and improve outcomes for offenders, victims and communities?"

A presumption against short custodial sentences

66. In 2022, 5% of the sentenced prison population in England and Wales were serving a short custodial sentence (i.e. an immediate custodial sentence of less than 12 months).[135] Short sentences comprised 59% of all immediate custodial sentences imposed in 2022.[136] Despite this, it is well established that short custodial sentences are often counterproductive and less effective at reducing reoffending than community-based sentences.[137] In an Impact Assessment for the Sentencing Bill introduced by the previous government, the Ministry of Justice noted that: *"Sentences of less than 12 months have a proven reoffending rate of 55% and studies suggest that diverting those individuals to community-based sentences could create a c.4 percentage point reduction in reoffending...the evidence suggests that short immediate prison sentences are too often ineffective at reducing reoffending, they have little deterrent effect and are costly."*[138] To the extent possible, this research is adjusted for the fact that those sentenced to short immediate custodial sentences and those who receive community-based sentences are different cohorts.[139] Similarly, the Sentencing Council has found that: *"As far as one can generalise, the collective*

[135] Natasha Mutebi and Richard Brown, UK Parliament Post, *The use of short prison sentences in England and Wales*, (2023), p. 4

[136] Ministry of Justice, Impact Assessment, *Sentencing Bill – Changes on the Presumption of the suspension of short sentences*, (2023)

[137] Ministry of Justice, *Sentencing Bill Factsheet: Short Sentences*, (2023)

[138] *Ibid.* See also: Ministry of Justice, *Sentencing Bill Factsheet: Short Sentences*, (2023)

[139] *Ibid*., p.4; Georgina Eaton and Aiden Mews, Ministry of Justice, *The impact of short custodial sentences, community orders and suspended sentences on reoffending*, (2019); Aidan Mews, Joseph Hillier, Michael McHugh and Cris Coxon, Ministry of Justice, *The impact of short custodial sentences, community orders and suspended sentences on reoffending*, (2015)

evidence casting doubt on the effectiveness of short custodial sentences is robust and cases close to the custodial threshold may often be more effectively dealt with in the community".[140]

67. The effectiveness of community-based sentences as against short custodial sentences is likely to be a result of the fact that they allow individuals to maintain protective factors such as housing, employment and family and community relationships as well as any drug or alcohol support they may be receiving.[141] Short sentences also allow less time and opportunity for rehabilitative support and supervision than community-based sentences.[142]

68. An emphasis on community-based sentences rather than short custodial sentences may well result in long term savings as a result of reduced reoffending.[143] Custodial sentences are also significantly more costly to deliver per individual than community-based sentences.[144]

69. Other jurisdictions have introduced alternatives to short custodial sentences with positive results. For example, Australia has introduced the Intensive Correction Order ("**ICO**"), a community-based alternative to short-term imprisonment which involves community service, curfew and mandatory involvement in personal development and rehabilitation programs.[145] A report by Justice Action notes that data demonstrates that ICOs are effective in achieving rehabilitative sentencing outcomes, reducing recidivism rates and significantly reducing imprisonment costs.[146] Justice Action reports that: "*ICOs have consistently achieved lower rates of recidivism compared to other approaches, including home detention and suspended sentences. A report by the [New South Wales] Bureau of Crime Statistics and Research found that an [individual] on an ICO has a 33% lower chance of re-offending on periodic detention".*[147] The best results were associated with face-to-face contact from community services compared to treatment offering no contact, as well as intensive supervision helping individuals to address issues such as drug and alcohol abuse and anger management.[148]

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[140] Dr Jay Gormley, Prof Melissa Hamilton, Dr Ian Belton, Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending*, (2022)

[141] Ministry of Justice, Impact Assessment, *Sentencing Bill – Changes on the Presumption of the suspension of short sentences*, (2023); David Gauke, Ministry of Justice, *Beyond Prison: Redefining Punishment – a speech by Rt Hon David Gauke MP*, (2019)

[142] Ministry of Justice, Impact Assessment, *Sentencing Bill – Changes on the Presumption of the suspension of short sentences*, (2023)

[143] House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), para. 36-7

[144] Natasha Mutebi and Richard Brown, *The use of short prison sentences in England and Wales,* UK Parliament POST, (2023), p.20

[145] Justice Action, *Intensive Corrections Orders: Moving away from Custodial Sentencing for Better Outcomes*, p. 3

[146] *Ibid.*

[147] *Ibid.*, p. 5. For further information about the operation of suspended sentences in Australia see: *Suspended Sentences in Australia*, Australia National Character Check

[148] *Ibid.*, p. 6

70. JUSTICE therefore **recommends**:

(a) Reviving the proposal contained in clause 6 of the Sentencing Bill which would place a duty on courts to suspend short custodial sentences in the absence of exceptional circumstances.

(b) Reassessing what ought to amount to an 'exceptional circumstance' for the purposes of any such provision and whether any guidance on this is required.

(c) Evaluating which community-based support and supervision is necessary to ensure that the rehabilitative impact of short suspended sentences is maximised.

(d) Ensuring that the probation service is provided with the necessary funding and resources so that it is well placed to deliver support to greater numbers of individuals in the community.

A Norwegian-style queuing system

71. In JUSTICE's 2024 report *Time Better Spent: Improving Decision-making in Prisons*, we recommended the introduction of a Norwegian-style 'queuing system'.[149] Under this system, people sentenced to prison are placed in a queue to await admission to prison at a time when there is space.[150] The system is risk assessed, so that prison places are prioritised for those who present the most risk.[151]

72. A similar approach, which makes use of electronically-monitored home detention curfew for the duration of the waiting period (which is deducted from the subsequent prison sentence) could be implemented in England and Wales to achieve the benefits of the "queuing system" whilst alleviating some of the uncertainty that could arise for those waiting in the queue.[152] Key benefits of the system include:

(a) **Reducing Overcrowding**: By managing the flow of individuals into the prison estate, issues associated with overcrowding are avoided.

(b) **Resource Efficiency**: The queuing system ensures that prison resources are allocated to where they are most needed, improving the effectiveness of the system as a whole.

(c) **Effective rehabilitation**: Developing rehabilitation approaches that work in home detention can assist individuals in the 'queue' to move away from offending on their release from custody.

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[149] JUSTICE, *Time Better Spent: Improving Decision-making in Prisons*, (2024), para. 2.31

[150] *Ibid.*

[151] *Ibid.*

[152] *Ibid.,* para. 2.32

73. JUSTICE reiterates this **recommendation**, and considers that this approach could be adopted and tailored to meet the needs of England and Wales by:

(a) Pausing all new admissions to prisons officially flagged as having urgent and significant performance concerns until these have been properly addressed.

(b) Placing suitably risk-assessed people under electronically monitored home detention curfew while they await a prison place

(c) Ensuring immediate prison spaces for those who pose the most risk

(d) Deducting the time spent on curfew from the time spent in custody

(e) Developing rehabilitative approaches that work in home detention

(f) Not putting more people in a prison if doing so would jeopardise safety and prevent the delivery of appropriate rehabilitative activities.

Custodial sentences: sentence progression

Call for Evidence Thematic Question 6: "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?"

A 'Public Protection Tribunal': strengthening the parole process

74. Ensuring that individuals suitable and safe for release do not remain in custody is key to addressing overcrowding. There are likely to be close to 30,000 people in prison who will appear before the Parole Board to apply for release at some point during the remainder of their sentence.[153] Efficient, effective and well-reasoned parole decision-making is therefore vital.

75. To improve parole decision making JUSTICE **recommends** that the Parole Board is reconstituted as a Tribunal within HMCTS (the 'Public Protection Tribunal' or 'Parole Tribunal') and furnished with case management powers and procedural rules. This recommendation was set out in our 2022 report *A Parole System fit for purpose*, and would ensure **efficient** and **effective** conduct of cases because:

[153] As of 31 March 2024, there were 8,526 'unreleased' and 2469 'recalled' individuals serving indeterminate sentences (IPP and life sentences). The total recall population was 12,199, many of whom are likely to have an upcoming Parole Board hearing (although this figure also includes those subject to fixed term recall, who will be automatically released without the need for a Parole Board hearing). Further, 8,135 people were serving an extended determinate sentence, under which individuals will ordinarily become eligible to apply to the Parole Board for release after serving two thirds of the custodial term. See: Ministry of Justice and HM Prison and Probation Service *Offender management statistics quarterly: January to March 2024*

(a) The Parole Board currently cannot enforce its directions: it must request the issuance of a witness summons from the High Court to give effect to them. The result is that many cases are adjourned or deferred as the Parole Board seeks to have directions met late or at all. This means that a prisoner may remain in custody when otherwise they would have been released.

(b) An independent Tribunal would ease the feelings of distrust that are presently reported and depoliticise controversial release decisions, as these decisions would be the same as any other court processes. A helpful model on which this could be based already exists in the form of the **Mental Health Tribunal**.

(c) The Parole Tribunal should be empowered to consider, when assessing risk, the potentially detrimental and counterproductive impact of continued detention on an individual's rehabilitative progress. This would make parole decisions more conducive to **ensuring public protection** and **reducing reoffending** in the long term.

(d) The Parole Tribunal should be able to direct that arrangements be made for an individual to undertake rehabilitation activity where their progression has been hampered by lack of access to it.[154] Currently, the Parole Board cannot require that certain opportunities or activities be made available to them, even if they are set out in an individual's sentence plan. This would **improve sentence effectiveness** and the **sustainability of the prison system** as a whole.

76. When reconstituted, HMCTS should also establish a dedicated 'helpline' and an assigned Parole Caseworker system so that victims, families, and those going through the parole process are better supported, rendering the parole system fairer, more accessible and more transparent.

Dynamic sentencing

77. JUSTICE invites the Review to consider the concept of 'dynamic sentencing'. This was highlighted by JUSTICE in our 2022 report *A Parole System Fit for Purpose*, when evaluating the advantages of the French legal system's approach.[155]

78. Dynamic sentencing according to the French model entails that "*sentences are varied according to the offender's rehabilitative needs and his or her cooperation with the sentencing bodies... sentencing is seen more as an ongoing process than a one-off event*."[156] It has also been observed that: "*In France, the position is [that] the sentence imposed by the trial judge may simply be the starting point in determining*

[154] JUSTICE, *Time Better Spent: Improving Decision-making in Prisons*, (2024), para. 3.40, 3.44

[155] JUSTICE, A Parole System Fit for Purpose, (2022), para. 5.35-5.43.

[156] Nicola Padfield, *An Entente Cordiale in Sentencing? – Part 1*, (2011) *Criminal Law and Justice Weekly* Vol. 175 239.

the sentence that will be carried out. Sentencing is not a single event but an ongoing process, through which penalties can be adapted weeks or months after conviction, in a closed hearing with a procureur and a sentencing judge, the juge de l'application des peines (JAP)."[157]

79. Currently, the Parole Board has a role in sentence progression, in the form of oversight over the point in a sentence when many individuals are released from custody on licence. The Parole Board can also recommend that the Secretary of State moves an individual serving an indeterminate sentence to open conditions. In our 2022 report, JUSTICE recommended replacing the Parole Board with a Parole Tribunal (see above) and giving the Parole Tribunal greater oversight of an individual's progression throughout prison in line with dynamic sentencing principles.[158]

80. Practically, this means that that the Parole Tribunal would be able to intervene at an earlier stage in the individual's sentence to hold public bodies accountable for their efforts at rehabilitating and preparing an individual for parole. Further work would need to be undertaken to establish precisely what stage in a sentence that oversight should be triggered, as well as how it would be administered in practice. Nevertheless, we consider that the principle for earlier involvement of the Parole Tribunal in the sentence management process would be desirable in ensuring individuals are given the best possible chance at rehabilitation.

81. This would have many advantages. Firstly, it gives greater judicial oversight in the progress of sentences, which, in JUSTICE's view would lead to better rehabilitation outcomes for prisoners and enrich the understanding of the prisoner's experience for the decision-maker.[159] Moreover, the adoption of elements of dynamic sentencing could provide wider society with benefits, by identifying suitable candidates to be released sooner and relieving pressure on HMPPS, which in turn would benefit the public finances.[160]

82. It is important to stress that the success of such a system will be very much dependent on providing individuals in custody with the opportunity to achieve - and demonstrate - a reduction in risk and engage in meaningful rehabilitative activity. HMPs should be fully resourced and funded, so that such opportunities are adequately provided throughout the prison estate.

Recall

[157] Jacqueline Hodgson and Laurène Soubise, Understanding the sentencing process in France, (2016) *Crime and Justice* Vol.45(1) 221, p. 248

[158] JUSTICE, A Parole System Fit for Purpose, (2022), para. 5.41

[159] *Ibid.*, para 5.38

[160] *Ibid.*, para 5.40

83. Everyone released from prison remains liable to be recalled if they have not reached their sentence expiry date. Recalls take place when those on licence are alleged to have breached their licence conditions. This can include poor behaviour, non-compliance, criminal allegations or charges, failure to reside at an agreed address and being out of touch. The Probation Service is responsible for initiating the recall process, which must then be authorised by the Public Protection Casework Section. Some recalled prisoners will be required to complete 14 or 28 days in prison and will then be re-released ('fixed term' recall). The Secretary of State for Justice may curtail this period through the use of Executive Release. However, most 'standard' recalled prisoners are not re-released unless the Parole Board so directs. This is a drawn-out process and can leave those recalled in prison for lengthy periods without any review taking place.[161]

84. The number of recalls has surged in recent years. Between 2017 and 2023 the recall prison population increased by 85%.[162] The recall prison population at 31 March 2024 was 12, 344 (8% higher than 31 March 2023 and also a 31 March 'record high').[163] The number of recall prison admissions between April and June 2024 was 8,974 (41% higher than the same quarter in 2023 and also a 'record high').[164] The majority of recalls (77%) occurred due to non-compliance rather than further offending. The other main reasons for a recall included failure to keep in touch with the supervising officer (36%), a charge for further offending (24%), and failure to reside at approved premises (23%).[165]

85. JUSTICE's 2022 report *A Parole System fit for Purpose* identified a number of serious issues underpinning the surge in recalls.[166] We noted, for example, that recalls can be for minor breaches, a finding which is borne out by the most recent statistics (cited above) on the reasons for recall.[167] Further, due process and the right to liberty are not sufficiently respected during the recall process and there is a lack of procedural safeguards.

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[161] JUSTICE-A-Parole-System-fit-for-Purpose-Report-January-2022.pdf para. 2.34

[162] House of Commons, Draft Criminal Justice Act 2003 (Suitability for Fixed Term Recall) Order 2024, HC Deb 11, Col 3,(2024)

[163] *Offender management statistics quarterly: October to December 2023 and annual 2023 - GOV.UK*, Ministry of Justice and HM Prison and Probation Service

[164] *Offender Management Statistics Bulletin, England and Wales*, Ministry of Justice

[165] *Ibid.*

[166] JUSTICE, A Parole System Fit for Purpose, (2022), para. 2.39

[167] I*bid*. See, also Prison Reform Trust, *No life, no freedom, no future: The experiences of prisoners recalled under the sentence of Imprisonment for Public Protection*, (2020); Revolving Doors, *What next for probation? Findings and recommendations from our Lived Experience Inquiry into Probation*, (2022)

86. JUSTICE therefore reiterates the **recommendation** made in our 2022 report *A Parole System fit for Purpose*[168] for a new recall model which would operate as follows:

(a) 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 reincarceration is appropriate.

(b) In cases where there is an allegation or concern that offending behaviour is imminent or there is an elevated risk, the referral to the magistrates' court will be immediate and the magistrates will have the power to authorise an emergency recall. Within 72 hours of an emergency recall, the Parole Tribunal must make a determination as to whether the risk posed by the individual can be managed in the community. [169]

Meeting the specific needs or vulnerabilities of particular cohorts of victims and offenders

Call for Evidence Thematic Question 7: "What, if any, changes are needed in sentencing to meet the individual needs of different victims and offenders and to drive better outcomes?"

87. The Review acknowledges that the "experience of the criminal justice system varies for those with different backgrounds and characteristics, and we must recognise this within our system."[170] Our submission focuses on the needs of four categories of individuals who may be sentenced: (i) young adults, (ii) older adults, (iii) prolific offenders and (iv) female offenders. We conclude by looking at sentencing from the perspective of victims' needs, specifically focusing on offences against women and girls. Although JUSTICE has decided to separately consider different cohorts impacted by sentencing, we emphasise that sentencing policy must be intersectional to be most effective.

Young Adult Offenders

88. Young adult offenders are defined as individuals between 18-25.[171] Research indicates that the pre-frontal cortex of young adults, which is the part of the brain responsible for controlling attention, inhibition,

[168] JUSTICE, A Parole System Fit for Purpose, (2022)

[169] *Ibid*., para. 2.59-2.64

[170] *Independent Sentencing Review 2024 to 2025: Call for Evidence*, Ministry of Justice

[171] *Imposition - Young Adult Offenders*, Sentencing Council

emotion and complex learning,[172] does not fully develop until the age of 25.[173] Moreover, young adult offenders are especially impressionable;[174] this means that young adults have both higher reoffending rates than adults[175] and a similarly high capacity for desistance and rehabilitation.[176] The developmental capacity of young adults is accounted for through numerous measures across the sentencing regime. Age and lack of maturity is a mitigating factor that may reduce the severity of a sentence[177] and sometimes the immaturity or naivety of the individual to be sentenced - rather than their specific age - is what has been treated as mitigation.[178] The Court of Appeal has even recognised that 18 is not a 'cliff edge' when it comes to sentencing and held that: *"Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays... The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday".*[179]

89. Some offences, like possession of a controlled drug with intent to supply it to another ("**PWITS**"), also treat *"involvement through naivety, immaturity or exploitation"* as a lesser culpability factor,[180] which has the potential to significantly reduce the length of a custodial sentence.[181] Where an individual has committed an offence as a child but has turned 18 prior to conviction, the starting point for the court is the sentence that would have been imposed on the date of the offence (and therefore the Overarching Guideline on *Sentencing Children and Young People*[182] is applicable),[183] although the statutory purposes of sentencing for adults also apply.[184] Lastly, where an individual has committed and been convicted of an offence while a child, but has since turned 18 while awaiting sentencing, they will receive a youth sentence.[185]

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[172] Madeline Harms and Seth Pollak, Emotion Regulation, *Encyclopedia of Adolescence* (Second Edition), (2024), p. 11-124

[173] *Young Adult Development Project*, MIT Human Resources

[174] *Rethinking Sentencing for Young Adult Offenders*, Sentencing Advisory Council

[175] *Youth Justice facts and figures*, Beyond Youth Custody

[176] *Young Adults*, HM Inspectorate of Probation

[177] *Aggravating and mitigating factors*, Sentencing Council

[178] Prison Reform Trust, *Mitigation: the role of personal factors in sentencing*, (2007), p. 21

[179] *R v Clarke, Andrews and Thompson* [2018] EWCA Crim 185, at [5]

[180] *Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another*, Sentencing Council

[181] *Ibid.*

[182] Sentencing Children and Young People – Sentencing

[183] *Sentencing of young offenders who turn 18 after commissioning the offence: Rex v GH*, Youth Justice Legal Centre; *R v GH* [2023] EWCA Crim 160; *R v Ahmed* [2023] EWCA Crim 281 *; R v Ghafoor* [2002] EWCA Crim 1857

[184] *Ibid.*

[185] *Turning 18*, Youth Justice Legal Centre; *R v Dennis Obasi* [2014] EWCA Crim 581

90. JUSTICE recognises that the cumulative impact of these sentencing measures is that age and maturity is a factor that is considered by courts during sentencing. However, we note that the current sentencing regime for young adults does not sufficiently recognise (i) the extent of the rehabilitative capacity of young adults and (ii) the inefficacy of custodial sentences for young adults. Young adults, particularly those between 18-20, have been found to benefit more from community orders than short custody sentences.[186]

91. In most cases, custody should be the last resort for young adults. To facilitate this approach, we invite the Review to consider extending the treatment of maturity as a lesser culpability factor, from PWITS to other suitable offences. We also **recommend** that the Review investigate rehabilitative programs targeted exclusively at young adults in other jurisdictions, such as the evidence-based juvenile justice systems implemented in Washington,[187] to determine whether a similar program would be effective in England and Wales. We urge caution and care in the design and implementation of a rehabilitative programs targeted exclusively at young adults to avoid the issues with quality and safety associated with Young Offender Institutions.[188]

Older Adult Offenders

92. Adopting His Majesty's Prison and Probation Service's definition, older offenders are individuals aged fifty and above.[189] Older prisoners experience greater difficulties with physical health, such as chronic kidney disease and cardiovascular comorbidity,[190] as well as acute mental health needs like depression and dementia.[191] Older prisoners are also at a greater risk of bullying, intimidation and anti-social

[186] *Young Adults*, HM Inspectorate of Probation

[187] Elizabeth Drake and Lauren Knoth-Peterson, *Advancing the Evidence-Based Era: Twenty-Five Years of Lessons Learned in Washington State's Juvenile Justice System*, in Brandon C. Welsh, Steven N. Zane, and Daniel P. Mears (eds), *The Oxford Handbook of Evidence-Based Crime and Justice Policy*, Oxford Handbooks (2024)

[188] *A decade of declining quality of education in young offender institutions: the systemic shortcomings that fail children*, Ofsted and HM Inspectorate of Prisons

[189] *Written evidence from the Ministry of Justice, Department of Health and Social Care, Public Health England, NHS England and Improvement.*, Ministry of Justice

[190] Rachel Hutchings, *What does it mean to be an older person in prison?*, Nuffield Trust

[191] House of Commons Justice Committee, *Ageing prison population*, HC 304, Fifth Report of Session 2019–21 (2020), p.10

behaviour.[192] Reoffending rates amongst older prisoners are also significantly lower compared than their younger counterparts.[193]

93. Older age may be taken into account in sentencing through two routes: (i) as a mitigating factor and (ii) via the Early Release on Compassionate Grounds (the "**ERCG**") Policy Framework.[194] Age is considered a mitigating factor "where it affects the responsibility of the individual defendant."[195] Mental illness or disability, which particularly impacts older offenders, is also a mitigating factor.[196] The ERCG also facilitates the release of older offenders with medical needs where a prisoner is "incapacitated or has health conditions such that the experience of imprisonment causes suffering greater than the deprivation of liberty intended by the punishment."[197]

94. However, neither route is specifically designed for the needs and experiences of older offenders. ERCG is particularly narrow and therefore not available to a majority of the ageing prison population; even in an extreme case where bed-watch in an external hospital or hospice is needed, this will not justify an ERCG under the current policy framework.[198]

95. Therefore, JUSTICE **recommends** expanding the ERCG scheme to older offenders, who are (i) nearing the end of their lives, (ii) require hospice care by virtue of their age or (ii) vulnerable and pose little risk to public safety. Additional opportunities for the reconsideration of a sentence on the basis of old age can be introduced as part of a dynamic sentencing regime. A greater use of non-custodial sentences should be made for older offenders in light of this cohort's lower reoffending rate.

Prolific Offenders

96. Prolific offenders are classified based on their prior criminal history and age at their most recent appearance in the criminal justice system.[199] There are three distinct age categories, each with specific thresholds for the number of previous convictions and cautions: (i) juvenile prolific, (ii) young adult

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[192] *Ibid*., p. 21

[193] *Ibid*., p. 9

[194] *Early Release on Compassionate Grounds (ERCG)*, Ministry of Justice and HM Prison and Probation Service

[195] *Aggravating and mitigating factors*, Sentencing Council

[196] *Ibid*.

[197] *Early Release on Compassionate Grounds (ERCG)*, Ministry of Justice and HM Prison and Probation Service, para. 4.17

[198] *Ibid*., para. 4.20

[199] *Prolific Offenders - Characteristics of Prolific Offenders*, Ministry of Justice

prolific and (iii) adult prolific.[200] 'Hyper-prolific offenders' are individuals who have accumulated at least 45 previous convictions in their lifetime.[201]

97. According to the Ministry of Justice, prolific offenders constituted approximately one tenth of all offenders in 2020-21 (500,000) but were responsible for nearly half of sentencing before the courts (10.5 million).[202] Prolific offenders also received twice as many custodial sentences than the remaining offending population between 2000 and 2021.[203] Previous convictions, which are characteristic of prolific offenders, is treated as an aggravating factor when a court determines a sentence;[204] the court will consider the nature of the offence, its relevance to the current offence, and how recently the offender was convicted of the previous offence.[205] However, there are no sentencing provisions specifically targeted at prolific offenders and address the experiences of mental health issues, substance misuse, and poverty that underpin prolific offending.[206]

98. JUSTICE **recommends:**

(a) the creation of a system of deferred sentencing to target prolific offending. Deferred sentencing offers courts the opportunity to pause the final sentence decision for a fixed period if the offender agrees to meet a series of typically diversionary or restorative conditions.[207]

(b) that the government evaluate recent pilot schemes that use deferred sentencing, like Hertfordshire's 'Choices and Consequences' programme[208], to determine the effectiveness of deferred sentencing and glean any insights that can inform a potential deferred sentencing scheme for prolific offenders.

(c) strengthening existing measures that have potential to highlight the underlying causes of prolific offending in the sentencing process, such as improving PSR templates.

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[200] I*bid.*

[201] Policy Exchange, *The 'Wicked and the Redeemable': A long-term plan to fix a criminal justice system in crisis*, (2022), p. 7

[202] Rajeev Syal, *Specialist courts proposed to break addictions of prolific offenders in England and Wales*, Guardian

[203] *Ibid.*

[204] Sentencing Act 2020, s. 65

[205] *Ibid.*

[206] House of Lords Justice and Home Affairs Committee, *Cutting crime: better community sentences*, HL Paper 27, First Report of Session 2023–24 (2023), para. 105

[207] *Deferred Sentences*, Sentencing Council

[208] *Choices and Consequences (C2) Programme*, Hertfordshire Constabulary

Woman Offenders

99. JUSTICE has chosen to separately discuss sentencing for woman offenders and offences against women and girls. However, we recognise that a majority of female offenders are often victims of sexual violence, domestic and physical abuse themselves.[209] Many female offenders have also experienced mental health problems, substance misuse, homelessness and trauma in their lives.[210] Women are also most often sentenced to custody for non-violent, low-level but persistent offences.[211]

100. The experiences of women in prison have been reflected in sentencing primarily through two measures. First, the introduction of the Female Offender Strategy in 2018 has committed the Government to reducing the number of women in custody and increasing the number of woman offenders in the community.[212] Second, the Sentencing Council introduced a mitigating factor for pregnant and post-natal women in April 2024.[213]

101. Despite the welcome introduction of these sentencing policies targeted at woman offenders, the population of women in prison is expected to rise 16% by November 2027,[214] highlighting that more effective diversionary measures for women are needed. In 2022, over 58% of prison sentences received by women were for less than six months,[215] despite awareness of the general inefficacy of short custodial sentences. As recognised by the justice secretary, Shabana Mahmood, "[a]fter leaving a short custodial sentence, a woman is significantly more likely to commit a further crime than one given a non-custodial sentence."[216]

102. Prison is particularly unsuitable for the mental and physical health of women. Statistics show that for every 1,000 women in prison, 330 have self-harmed in the last 12 months.[217] Prison is especially dangerous for pregnant women, who are five times as likely to suffer a still-birth within prison.[218] Despite policy changes in response to the high-profile stillbirths of Aisha Cleary[219] and Brooke Powell[220] in prison,

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[209] *Majority of women in prison have been victims of domestic abuse*, Prison Reform Trust

[210] House of Commons Justice Committee, *Women in Prison*, HC 265, First Report of Session 2022–23 (2022), p. 13

[211] *Ibid.*, p.5

[212] Ministry of Justice, *Female Offender Strategy*, (2018)

[213] *Sentencing pregnant women and new mothers*, Sentencing Council

[214] *Women's prison population predicted to rise 16% by Nov 2027*, Women in Prison

[215] *Six in 10 women sent to prison serve sentences of less than six months*, Prison Reform Trust

[216] Rajeev Syal, *Prison isn't working for women, Labour says, as it unveils plans for alternatives*, Guardian

[217] *1 in 3 women in prison are self-harming, according to new statistics from Ministry of Justice*, Women in Prison

[218] *It's time to end prison sentencing for pregnant women*, Maternity & Midwifery Forum

[219] Diane Taylor, *The tragedy of Rianna and baby Aisha: why a teenager gave birth all alone in a prison cell*, Guardian

[220] Diane Taylor, *HMP Styal: Prisoner who had stillborn baby 'will never forgive jail'*, Guardian

there has been a recent death of a third baby revealing the insufficiency of the current sentencing framework to properly protect the wellbeing of women in prison.[221]

103. Therefore, JUSTICE **recommends** that custody be treated as a last resort measure for woman offenders and that sentencing be better tailored to the needs of women, pregnant women and mothers. In particular, a new sentencing framework must be introduced that seeks to avoid any part of pregnancy or the 'first 1,001 days' of a child's life from being spent in prison or separated from their mother.[222] We recognise that the introduction of a presumption against short sentences, as recommended above, would also have the welcome incidental effect of reducing the number of women in prison.

Offences Against Women and Girls

104. Violence against women and girls ("**VAWG**") refers to any act of gender-based violence that results in harm to women,[223] including but not limited to domestic abuse, sexual abuse and domestic homicide. The Sentencing Council publishes separate offence-specific sentencing guidelines in relation to sexual offences,[224] domestic abuse,[225] and controlling or coercive behaviour.[226] The sentencing court is obligated to follow relevant guidelines unless it is in the interests of justice not to do so.[227] The prevalence of VAWG indicates that the schema surrounding offences against women and girls is insufficient. 1.6 million women experienced domestic abuse in 2024.[228] The number of recorded offences against women and girls have grown by 37% in the last five years.[229] At least one in every twelve women is expected to be a victim of VAWG every year.[230]

105. JUSTICE emphasises that the solution to VAWG must involve examination of the entire criminal justice system, and not just sentencing. We note, for example, that custodial sentences for sexual offences have already increased by 50% from 2007 to 2017.[231] A critical focus must be on improving and making more effective the proseuction of offences which impact women and girls, as well as adopting measures which

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[221] Level Up, *Response to Independent Sentencing Review 2024 to 2025: Call for Evidence - December 2024*, (2024), p. 2

[222] *Ibid.*, p. 3

[223] Sarah Tudor, House of Lords Library, *Tackling violence against women and girls in the UK*, (2023)

[224] Sexual Offences, Sentencing Council

[225] *Domestic abuse: overarching principles*, Sentencing Council

[226] *Controlling or coercive behaviour in an intimate or family relationship*, Sentencing Council

[227] Sentencing Act 2020, section 59(1)

[228] *Domestic abuse in England and Wales overview: November 2024*, Office for National Statistics

[229] Vikram Dodd, *Violence against women a 'national emergency' in England and Wales, police say*, Guardian

[230] *Ibid.*

[231] Dr Richard Martin, Sentencing Academy, *Sentencing for Murder*, (2024), p. 20

recognise and deal with VAWG as a systemic issue. We **recommend** launching a comprehensive data collection initiative to gain a better understanding of (i) underreported offences against women and girls, like coercive control and (i) the efficacy of existing measures that address VAWG, like sex offender registers.

106. We also echo the **recommendations** in our earlier report, 'Prosecuting Sexual Offences'[232] that address the causes of sexual offending through efforts that focus on the prevention of crime, diversion from prosecution and reduction in reoffending. JUSTICE particularly recommends the adoption of our evidence-based psychoeducational programme to effectively reduce repeated sexual reoffending: completion of the programme would require full-engagement with the programme, attending all five sessions over a four month period, plus a follow-up session eight months later.[233]

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[232] JUSTICE, Prosecuting Sexual Offences, (2019)

[233] *Ibid.*, para. 3.35-3.36