



Law Society of England and Wales
submission to the Sentencing Review Call
for Evidence

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The Law Society is the independent professional body for solicitors in England and Wales. We are run by and for our members. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

This response to the Sentencing Review is from the perspective of solicitors who represent clients sentenced in the criminal courts. It is based on the observations of members of the Law Society's criminal law committee arising from their practical experience of sentencing as defence and prison lawyers working in courts and prisons throughout England and Wales, and in the Parole Board.

These committee members act for people charged with the broad range of offences from the least to the most serious, resulting in fines, community sentences and terms of imprisonment. They see, and are affected on a daily basis by, the effect of decades of under-resourcing of the justice system, which among other serious consequences has been so clearly demonstrated by the urgent announcement by the Lord Chancellor in July 2024 to release certain prisoners automatically on licence after they have served 40% of their sentence instead of at the half-way point, to reduce pressure on places in the prison estate.

Theme one: history and trends in sentencing: What have been the key drivers in changes in sentencing, and how have these changes met the statutory purposes of sentencing

The political context in which the criminal justice system functions is important in considering why the length of sentences has increased. Governments have enacted longer maximum and minimum sentences, and have created more offences, and these trends have led to increases in sentence length, as the Call for Evidence notes. See also the Institute for Government paper '[The Crisis in Prisons](#)', 3 July 2024; and the Howard League report '[Sentence Inflation: a judicial critique](#)' which directly cites the political agenda as a cause of sentence inflation: "Legislative changes have been obvious drivers of sentence inflation. The introduction of statutory starting points for the minimum terms for murder in Schedule 21 of the Criminal Justice Act 2003 by the last Labour government was one part of a deliberate 'tough on crime' political agenda; it has been described as representing a 'fundamentally flawed' change" (page 10).

The impression created by the media is that sentencing is too lenient, as illustrated by the [Sentencing Council research](#) on public confidence in sentencing. The impression is that if a person has not gone to prison they have not been punished, and that anything other than imprisonment is not a proper punishment. The Sentencing Council research shows that around 70 per cent of the public think sentencing in general is too lenient and the public is particularly likely to regard sentences for serious crimes, like rape and death by dangerous driving, as too lenient. However, this perception tends to lessen noticeably when the public are presented with actual scenarios and sentences, based on real cases. Qualitative discussions indicated that media coverage was particularly influential in perpetuating the impression that sentencing is excessively lenient.

Public education about the multiple purposes of sentencing is needed. Politicians need to accept and publicly acknowledge that ever-harsher prison sentences will not solve all the problems and harms that cause and result from crime, and that community-based penalties can be both punitive and rehabilitative whilst not diminishing victims' own

expectations that justice has been served. There is a need to expose the deterrence myth that holds that if more people are sent to prison for longer periods that will create a safer society. Public opinion towards sentencing, as reflected in academic research studies such as that conducted by the [Sentencing Council in 2022](#), indicates more finessed public opinion on sentencing than the reports in the media would suggest. The House of Commons Justice Committee's [report](#) 'Public Opinion and Understanding of Sentencing' provides a good starting point for ways to improve the public discourse and media reporting concerning sentencing.

In this context, the Review may be interested to know the Law Society is currently working with Frameworks UK on a project, "[Reframe Justice](#)", to understand how the public view law and justice issues, with a view to highlighting the importance of understanding the public's frame of reference on justice issues, and how to leverage this positively to encourage support for new policy approaches.

No doubt the Review will carefully examine the experience of the Netherlands where its prison population fell by 44% between 2005 and 2015. While [research](#) indicates a multiplicity of reasons for this significant decrease, another factor is public attitudes about imprisonment and its negative overall effect on both the prisoner and society, as indicated by Francis Pakes' comments to the [Guardian](#) in October 2024.

The criminal justice system response to the summer's riots demonstrated that a concerted effort across the criminal justice system to quickly detect and prosecute rioters can provide a powerful immediate deterrent effect in a serious public disorder emergency. However, research on deterrence indicates that people who commit criminal offences generally do not think about the consequences and are not deterred by the length of sentence they may receive. Of much greater concern and deterrent effect is the risk of being caught. See Home Office (2001) [Making punishments work: Report of a review of the sentencing framework for England and Wales \(the Halliday Report\)](#), where it is noted that "...[i]t is the prospect of getting caught that has the deterrence value, rather than alterations to the 'going rate' for severity of sentences. The lack of correlation between punishment levels and crime levels is in line with the current literature which analyses these trends in other jurisdictions" (page 8).

Committee members' experience bears out the statistics showing that average sentence length has increased, both with the sentence imposed becoming longer and release on licence coming later. Constant changes to release mechanisms have introduced a great deal of confusion and uncertainty which is unhelpful in terms of planning for release from prison and being able to advise clients. There have been seven significant changes in the four years since 2020.ⁱ

Solicitors' experience is that sentences, particularly for serious drugs offences, have doubled in length over the last 20 years. For example, it is now common for these involved in importation of drugs offences to receive sentences of 20 to 30 years. In cases where a participant in a drugs matter had a relatively minor role the courts are seemingly reluctant to reflect this more minor role in the sentence; for example, while a participant may be described as having a relatively minor courier role, the courts will often characterise this as a serious role.

In drugs and serious weapons/gun cases, courts tend to find that all people involved in the case are 'significantly involved'. In less serious street dealing cases, in the recent past, about 15-20 years ago, sentences of approximately three years were common; now those

sentences are typically 18 months longer. While it is accepted that importation of drugs cases can involve increasing quantities of drugs and have accordingly become more serious, and this is part of the reason why the sentences have increased, clearly even these lengthy sentences are not acting as an effective deterrent.

In the context of serious drug importation offences there is a perception that the Sentencing Council guidelines have resulted in increases in sentences; for example, more and more people are receiving multi-decade sentences for drugs offences, with the average sentence length twice what it used to be 25 years ago. The Court of Appeal has referred to a 'bunching' effect at these higher levels – see [R v Murray and others \[2023\] EWCA Crim 282](#).

It is understood that Sentencing Council Guidelines are not intended to increase sentence length but instead to reflect the current levels of sentences and to ensure consistency in sentencing terms while preserving judges' discretion to adjust where necessary. While the Council says its intent is not to increase sentences, it seems to our committee members that their effect has been to inflate sentences.

We note the Review has asked for ambitious and innovative solutions to the prison crisis. One possible solution to the overall inflation in prison sentence length could be an across-the-board deflation in sentence length, achievable by deducting a percentage slice from all custodial sentences in the guidelines. Given that sentence inflation has doubled in 20 years and the prison population is set to treble, a reduction to a level that would be effective in achieving both sentencing goals and maintaining the prison population at manageable levels, should be considered. It is difficult to determine how much sentences should be decreased in the absence of data that correlates outcomes with prison lengths, but it is at that point of diminishing effectiveness that reductions might be considered.

Nearly 20 per cent of the prison population (some 17,070 on 30 June 2024) are remand prisoners, and while we acknowledge they are out of scope of this Review this sizable proportion is at its highest level since 2008, an effect of the record backlog in the Crown Court (see [justice data 'Offender Management'](#)). The length of time prisoners are on remand awaiting trial or sentence is greater than in the past due to the backlog, which also requires urgent attention.

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

The lack of resources afflicting the entire criminal justice system has badly affected the Probation Service, together with a flawed reform programme in the 2010s. Lack of confidence in the Probation Service has in turn led sentencers to default to sentencing people to prison, because probation is perceived to be unable to offer alternatives to prison; see research on judicial confidence in probation services, ['Whose confidence? Regional leaders' perspectives on building confidence in a reconfigured probation service'](#), Robinson, Annison and SurrIDGE (2023). Clearly the Probation Service needs to be properly resourced to be able to deal with its existing caseload, and if community sentences and post-custody supervision increase, it will need a commensurate increase in resources to deal with an increased caseload.

In some counties, for example in Kent, cuts to services have resulted in the closure of probation offices in one part of the county. This means that people must travel from one side of Kent to the other to access the Service, resulting in missed appointments and an

inability to successfully complete rehabilitation courses. This lack of office resource clearly makes it more difficult for the Probation Service to meaningfully engage with, and rehabilitate, offenders

In the magistrates' court, the emphasis in recent years has been on the speed at which cases are dealt with, at the expense of the quality of sentence decision-making. Courts are keen to avoid adjourning a case at all costs, so whereas once a case may have been adjourned for the Probation Service to prepare a thorough pre-sentence report (PSR), nowadays magistrates and District Judges will instead order a 'stand-down report'. Here the probation officer has a short time, often as little as 15 minutes, to interview the defendant to ascertain their suitability for a community sentence and appropriate conditions, in a busy court environment with several courts asking for their help and many people to be seen. This point is illustrated by data in a recent Inspectorate report on PSRs: ['The quality of pre-sentence information and advice provided to courts - 2022 to 2023 inspections, August 2024, HM Inspectorate of Probation Research & Analysis Bulletin 2024/04'](#).

If people are remanded in custody for reports, the under-resourced Probation Service will itself struggle to get a prison visit, even over a video-link, to interview the defendant, with the crisis in the prisons negatively impacting on its work and, in turn, that of the court.

Initiatives such as the "PSR before plea" protocol, introduced by the Probation Service and supported by the Law Society during the pandemic to enable a PSR to be put in train before defendant's first court appearance, depend on the police and CPS providing case papers in advance, and the defendant seeking early advice from their solicitor. Where either factor is not present the protocol cannot be used, and accordingly it has had limited use.

The result of hasty decision-making and lack of information is that sentencers do not have the opportunity to really consider what would work to prevent future offending, and the Probation Service is unable to offer quality sentencing options and alternatives to prison.

Anecdotally, members are aware of reports that one court recently sought to deal with the lack of Probation Service supervision capability by sentencing a significant number of offenders who otherwise may have been given a community penalty with conditions, to short, suspended sentences of imprisonment. While this option avoided burdening the Probation Service with a group of additional clients, if these offenders breach the suspended sentence orders the result will be automatic custody. It is important that in seeking to navigate the pressures on the system, solutions are not imposed that can ultimately create a gateway to custody, or further time in custody, where it is not warranted. In addition to the potentially inappropriate uses of suspended sentences, committee members are aware that automatic release at the 40% mark of a custodial sentence may result in a person spending the remaining 60% in custody if recalled, so the length of recall sentencing may also require review.

Where magistrates' courts impose a short prison sentence, or a suspended sentence that is manifestly excessive and legally wrong, it is very rare that they are challenged on appeal, as clients are either reluctant to do so for fear of a worse result, or the time taken to appeal is in excess of the sentence. In addition, it is extremely difficult, if not impossible, to instruct an advocate to take the case given the low rates of legal aid funding for such appeals. We note that the Law Commission is intending to publish a consultation on reform of the criminal appeals system. From a practitioner perspective ensuring that the

sentences imposed on their clients are correct is very important. In this regard, having in place the equivalent of s11(3) of the Criminal Appeal Act 1968 that provides an appellant cannot get a harsher sentence on appeal from the Crown Court to the Court of Appeal should also apply in appeals from the magistrates' court to the Crown Court.

In contrast, Intensive Supervision Courts, the latest iteration of problem-solving courts, like the scheme introduced in Liverpool (the North Liverpool Community Court) allow sentencers to properly assess what caused the offender to commit their crime (e.g., alcohol or drug misuse, mental ill health) and to tailor a package of measures with access to appropriate services, to address these causes. The Law Society strongly supports the roll-out of such initiatives whilst also noting the success of Drug and Alcohol Courts in the Family jurisdiction in helping people turn their lives around.

It is hoped that the government's intention, announced in July, to recruit 1,000 additional probation officers will materialise. This may help to ensure courts have sufficient information to make good sentencing decisions, as well as to deal with an increased non-custodial caseload.

Theme three: technology - How can we use technology to be innovative in our sentencing options, including considering how we administer sentences and manage offenders in the community?

Home detention curfew (HDC) could and should be used much more.

In our sentencing system the most severe punishment available is deprivation of liberty. It is well recognised by the courts that tagging with a curfew is a deprivation of liberty, such that hours under electronic curfew are automatically counted as time served. With certain caveats - including the efficacy of tagging systems, the administration of which needs to improve greatly - far greater use of electronic monitoring should be used as an alternative to custody.

Electronic tagging has the obvious benefit of enabling an offender to be deprived of their liberty (if combined with a curfew) without taking up a place in prison and enabling them to continue to contribute to society through work, as well as to attend probation appointments and courses, as required.

While electronic monitoring, even with a curfew, is obviously a far less restriction on liberty than a prison sentence, the experience of some clients suggests there are negative aspects to the wearing of an ankle tag. If the technology is not working as it should this causes fear of breach or being recalled to prison; also, they can cause skin disorders and sleep disturbance. These negative effects suggest the need for research into the psychological and other negative health effects on those subject to tagging.

Could there be a presumption that, unless exceptional circumstances apply, any sentence that is up to two years' custody should be served in the community on tag, with custody as an option for breach? This would also deal with the problematic current position whereby people are sentenced to what appear to be significant sentences but end up spending a very short period of time in prison: for example a person who is sentenced to 2 years but is eligible for release at the 40% point under Standard Determinate Sentence 40 (SDS40) and HDC might be out before 5 months are up, begging the question as to whether there was really any point to the short period in prison, given all the evidence about the problems posed by short prison sentences.

Where custody cannot be avoided, greater use of HDC should be made. As set out below, there have been extensive changes to the scheme in the last few years but there is room for improvement. For example, many people have sentences which make them “presumed unsuitable”: this should be reviewed, as practitioners who work with people in this category find that prisons rarely, if ever, exercise their discretion for this category. The evidence base for excluding whole categories of offenders is unclear and should be made transparent.

Initially, the HDC scheme only ever applied to those serving sentences of less than four years with eligible offences. When it was first introduced, the maximum period of HDC was 60 days. It was extended to a maximum of 90 days in October 2002, to 135 days in April 2003 and 180 days in June 2023. In June 2024, HDC was made available to people serving sentences of four years or more. Many HDC dates were brought forward following the introduction of SDS40 which changed many people’s automatic release dates and therefore their requisite custodial period. It is proposed that the Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024, which was laid in Parliament in November 2024, will extend the maximum period to 365 days.

There is a danger of net-widening through the increased use of electronic monitoring, and while there is scope to expand its use, given that it is a serious imposition, it should only be used where it is considered necessary, whether for public safety reasons or as the punitive component of a serious community penalty. There are also other options that should be considered, such as ‘doorstep’ curfews without a tag. The Court of Appeal has recognised that a curfew requirement that is not monitored by an electronic tag can be credited towards a custodial sentence, even if it is due to a police bail curfew requirement (see, for example, *R v Whitehouse* [2019] EWCA Crim 970).

Theme four: Community sentences - 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?

Intensive supervision courts, newly piloted in Liverpool, Birmingham and Teesside, which are similar to the ‘problem solving’ North Liverpool Community Justice Centre in the 2000s, and more recently the complex case court in Sefton in North Liverpool that works with people with addiction and mental ill health, are a very good way to oversee intensive community sentences. See the evaluation report for NLCJC (which focussed on reoffending and found no statistical difference in reoffending rates compared to other courts); a report on NLCJC by the Centre for Crime and Justice Studies; and this article by the Centre for Justice Innovation on the Sefton complex case court.

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

When it comes to lower-level offending, we note the consensus, and agree that short prison terms tend to be counter-productive, resulting in the loss of employment and housing, yet allowing no time for effective rehabilitation programmes. We see the case for a rebuttable presumption against the imposition of sentences under 12 months but would caution against their abolition. That could have an inflationary effect, in that a court determined to imprison someone may impose a longer sentence.

As report after report from HM Inspectorate of Prisons shows, prison conditions are currently dire and must be improved. They must be sufficiently well staffed to enable

timely contact between lawyers and prisoners, whether in person or via video link, which is a basic human right. In addition, there should be a move towards more humane open prison type conditions for the majority of prisoners who are not considered dangerous or an escape risk. Women prisoners who are pregnant face the additional trauma of poor health care in prisons, and those with children must deal with loss of contact with their children and difficulties accessing legal advice and representation in the Family courts, as Shona Minson's [recent report](#) illustrates.

The current system for recalling prisoners to prison could be improved by judicial involvement, as suggested by JUSTICE in its 2022 report '[A Parole System fit for Purpose](#)'. A requirement for judicial oversight of recalls could prevent at least some unnecessary recalls that currently clog up prisons, where the Probation Service initiates the recall but then it transpires that the breach was not as serious as it at first appeared or that risk can be managed in the community with alternative provision in place. Practitioners have found that recalls may often happen when a person's allocated probation officer is away or following an arrest that is later subject to no further action. While executive release is possible, it is rarely exercised and Parole Board delays now mean that people will often spend many months, sometimes years, in prison awaiting the conclusion of their parole review. According to the [Ministry of Justice](#) between 2017 and 2023, the number of people on recall rose by 85% and the average time spent in prison following recall doubled.

The magistrates' court could remand a person to return in a week, with enquires made in the meantime to establish the facts of the alleged breach, and whether the recall is necessary. If not, the court could order their re-release. Legal aid would need to be available to enable representation at such hearings, and the courts would need to be trained and resourced to deal with recall cases, but such a system could result in fewer prisoners being recalled to prison unnecessarily at all, or for lengths that are overly long.

There has been a marked increase in the number of prisoners serving lengthy extended determinate sentences. The Sentencing Academy report '[Extended Determinate Sentences - a review of the Practical Issues](#)', states that as of 31 December 2023, there were 7,984 prisoners serving extended determinate sentences, a 12% increase compared to the same time the previous year, and they accounted for 9% of the total prison population in 2023. [Recent research](#) on extended determinate sentences by Nicola Padfield and Laura Janes finds that delays in Parole Board processes mean that the sentence does not function as it should, and the sentence is not working as intended.

Clearly, a criminal justice system that relies heavily on imprisonment as a form of punishment cannot operate effectively where demand for prison places exceeds supply. In devising solutions, however, it is essential to guard against short-term fixes that may actually make matters worse. For example, emergency release schemes like SDS40, that allow release from prison at the 40% mark, mean that if their licence is breached - perhaps because the services and facilities to enable a successful release were not in place - those being recalled to prison will serve 60% of their sentence, instead of the 50% they would have otherwise have served.

Theme six - progression of custodial sentences - 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?

The Prison Service needs to ensure that every prison sentence is able to rehabilitate people, with good education and rehabilitation programmes, and work skills to prepare people for their eventual release. Businesses should be encouraged to employ those who have acquired skills in prison. Here Lord Timpson's work to provide offenders with skills and jobs is a very positive example of how lives can be turned around. However, rehabilitative work is made so much more difficult when prisons are over-crowded, understaffed, and lack vital education and training facilities and resources.

Resources also need to be made available for services for prisoners on their immediate release from prison to ensure that, if needed, they have a place to live and funds to support themselves until they can access benefits or work, and their health needs are met.

The lack of sufficient resources to support prisoners to progress and prepare for release as a result of the prison capacity crisis is compounded by the lack of independent support available for people in prison in this regard. Cuts to the scope of legal aid in prison law work in 2013 means that since then there has been no legal aid under the prison law contract to challenge lack of courses or support resettlement. In any event, there is a huge problem with sustainability in legal aid prison law work. The number of solicitors undertaking prison law has shrunk significantly in the face of overall reductions in prison law legal aid rates (an 85% decrease between 2008 and 2022: see the Association of Prison Lawyers [survey report](#) of August 2023).

Lord Bellamy's 2021 Independent Criminal Legal Aid Review recommended that prison law rates should increase by a minimum of 15%. We note the government's announcement on 19 December 2024 that it will be consulting on uplifts to criminal legal aid fees. We will urge that this increase should also apply to prison law rates, as was recommended by the first [annual report](#) of the Criminal Legal Aid Advisory Board. Assisting and advising prisoners at this critical stage in the criminal justice process to enable their timely and appropriate release will improve overall outcomes for the criminal justice system by helping to ensure the finite resource of prison places is used in the most effective way, so that people who are assessed as ready to be released can be.

This has led to people becoming stuck in prison because they cannot access legal advice to make an application to the Parole Board at the point in time at which they become eligible to apply.

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

As we discuss above in our response to theme two, the provision of accurate and thorough information about the background of an offender and the circumstances that led to their offence by way of pre-sentence reports, is essential to meeting their needs and driving better outcomes.

Out of court disposals should be used to keep minor offenders out of the criminal justice system altogether. Where used appropriately, diversionary outcomes such as conditional cautions, and 'outcome 22' (a police administrative code used to indicate that no further action has been taken in response to an offence, but some form of diversionary or educational activity has taken place) can provide a solution that prevents further offending and does not result in a criminal conviction that will negatively impact on the person's future employment prospects.

There should be much greater resourcing of health services in prisons to deal with the epidemic of mental ill health affecting prisoners, which is a significant cause of reoffending. The current state of the prisons, with overcrowding, lack of maintenance affecting plumbing systems, vermin infestations, time spent in cells, all take their toll on the mental health of even previously robust and experienced clients.

Police officers need to be equipped to recognise vulnerability in this regard at an early stage in the criminal process, so that help can be provided immediately to those suffering mental ill health. Consideration can then be given to whether prosecution is an appropriate response to their offending, or whether a diversionary measure that addresses their health concerns can be used instead. If prosecution is necessary, a community penalty that addresses their ill health should be imposed. The NHS Liaison and Diversion Service is a hugely valuable resource that should be expanded.

Young and vulnerable people caught up in crime, typically drugs offending such as being a 'county lines' courier, need to be diverted from the criminal justice system. The focus at this early stage of an offending history should be on finding out the root causes of their offending and dealing with those causes.

Female offenders, where often their relatively minor offending is due to their being victims of domestic violence or coercive control by partners, should be diverted away from the criminal justice system where appropriate. If prosecution is necessary, community-based penalties should be used instead of imprisonment, where such a penalty is commensurate with the offence.

Proposed changes to the Imposition of Community and Custodial Sentences Guideline [consulted](#) on earlier this year may go some way to improving sentencing outcomes for these cohorts.

The Probation Service needs to be properly funded and resourced so all the issues that lead to offending by young people and women can be addressed, with appropriate requirements in community sentences to address the issues that lead to offending.

ⁱ 2020: The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020: Release for adults convicted of certain violent and sexual offences of 7 years or more to release at two thirds point -
2022: Power to detain standard determinate sentence prisoners beyond their conditional release date where the Secretary of State for Justice believes on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of specified offences - s132 the Police Crime, Sentencing and Courts Act 2022.
2023: Discretionary Friday/pre-Bank Holiday Release Scheme Policy Framework, from November 2023 allowing release up to two working days early.
2023: End of Custody Supervised Licence (ECSL) launched first in October 2023, initially for 18 days, was increased to a maximum of 35 days on 8 March 2024 and a maximum of 70 days on 23 May 2024, using compassionate release discretion under the Criminal Justice Act 2023.
2023: The Criminal Justice Act 2003 (Home Detention Curfew) Order 2023: HDC maximum period on tag extended from 135 to 180 days.
2024: HDC 4plus - s68 Victims and Prisoners Act 2024 - removed prohibition on HDC for people serving sentences of 4 years or more.

2024: SDS40 - Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024: replaces automatic release at 50% point to 40% for any eligible sentence.

2024: The Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024 - will extended maximum period on HDC from 180 days to 360 days.