The Bar Council's response to the Independent Sentencing Review Call for Evidence

The Bar Council is the voice of the barrister profession in England and Wales. We lead, represent and support the Bar in the public interest, championing the rule of law and access to justice. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential.

As the General Council of the Bar, we're the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Our qualification to comment

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Independent Sentencing Review Call for Evidence.[1]

2. Each contributor to this report is a criminal barrister. They range from Junior barrister to Silk, and all specialise in the prosecution and defence of criminal cases.

3. Each contributor appears in the Crown courts on a daily basis. They advise both the Crown Prosecution Service (CPS) and defence on sentence, and also on appeal.

Core principles

4. The Government states that that the 3 core principles to ensure a sustainable justice system are:
    - make sure prison sentences punish serious offenders and protect the public, and there is always the space in prison for the most dangerous offenders
    - look at what more can be done to encourage offenders to turn their backs on a life of crime, and keep the public safe by reducing reoffending

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[1] https://www.gov.uk/government/calls-for-evidence/independent-sentencing-review-2024-to-2025/independent-sentencing-review-2024-to-2025-call-for-evidence

- explore tougher punishments outside of prison to make sure these sentences cut crime while making the best use of taxpayers' money

5. The Call for Evidence asks for evidence on 7 key themes
   i) History and Trends in sentencing
   ii) The Structure of sentencing
   iii) The use of technology within sentencing
   iv) Community sentences
   v) Custodial sentences
   vi) The progression of custodial sentences
   vii) The individual needs of victims and offenders

Bar Council Recommendations

Our recommendations are set out in the body of our response. However, for ease of reference we also list them here in the order they appear in our response, as follows:

The Structure of Sentencing

i. The Sentencing Council should create further categories for some offences, such as ABH or burglary, as they have done for other offences.

ii. There should be more flexibility and acknowledgement of judicial discretion to reflect the fact specific cases judges deal with.

The use of technology within sentencing

iii. Cases with an interpreter should not be on CVP.

Community sentences

iv. Greater consideration should be given to the availability of community requirements that are not just concerned with rehabilitation, but also with the creative use of punishment, for example requirements to complete short apprenticeships or trade qualifications.

v. Greater consideration should be given to who is ultimately sent to prison. For example, prison could be reserved for those who have committed violent offences, those offenders that society needs protecting from.

Behaviour orders

vi. A behaviour order should be available for every offence in every case.

Residential programmes

vii. Greater use of 20-hour curfews as a direct alternative to custody.

Conditional cautions

viii. The greater use of conditional cautions to divert those who need to be within the system.

Suspended Sentence Orders

ix. The threshold for suspended sentences should be increased from two to three years.

x. Consideration should be given to re-enacting the previous regime prior to the Criminal Justice Act 2003 which allowed for the imposition of a suspended sentence of any length in exceptional circumstances.

Intermittent custody

xi. Revisit the Criminal Justice Act 2003's proposal to introduce intermittent custody.

xii. Low risk prisoners should be housed in a form of part-time prison.

Halfway houses

xiii. Greater investment in more Halfway Houses, to promote reintegration and support offenders at their most vulnerable time.

Recall

xiv. There should be a renewed focus on recalling only those where there is a real risk of serious harm (broadly defined).

Mental health

xv. Greater use should be made of community orders with a mental health treatment requirement.

Liaison and Diversion schemes

xvi. The use of NHS Liaison and Diversion schemes should be prioritised and supported.

Transparency

xvii. There should be a simplification of available immediate custodial sentences to create a more flexible system which affords judges the discretion to determine how long someone spends in custody, and whether the release mechanism is automatic or conditional upon the Parole Board.

Credit for pleas of guilty

xviii. The fee structure for advocates and litigators should be revisited to ensure that they are remunerated properly.

xix. Courts should return to the pre-Plaku and pre-2017 situation where full credit can be made available, subject to judicial discretion, at the first hearing in the Crown Court (and if appropriate preserved whilst defendants are advised or receive necessary information).

xx. The current regime should be changed to maximise the incentive to guilty offenders to plead guilty and avoid a trial and a *Newton* hearing while ensuring that sentences still result in effective punishment.

Credit for guilty plea in mandatory sentence cases

xxi. Allow credit for a guilty plea in firearms cases in line with the approach in other minimum sentence provisions.

Extension of slip rule

xxii. The slip rule should be extended to 128 days to permit variations to the sentence which do not result in the defendant being treated more severely than at the original sentencing hearing.

Specific reforms

Timetable for sentencing hearings

xxiii. In all indictable cases, there should be a procedural requirement for a timetable to be set for sentencing notes and supporting documents (including defence obtained reports).

Antecedent records

xxiv. Where available, a prosecution opening note and sentencing notes from both parties and written sentencing remarks should be appended to an antecedent record which is available to a sentencing court in the future.

Goodyear indications

xxv. No defendant should be placed into a position where their freedom of choice in respect of plea is genuinely deprived by an unwarranted disparity between the sentence that would be imposed if they plead guilty now, or if they contested the matter at trial.

Delays caused by pre-sentence reports

xxvi. Further roll out the approach taken in some courts where defence solicitors can request a pre-sentence report prior to plea, allowing for a single plea and sentencing hearing, avoiding the need for two hearings.

Victims not sufficiently prioritised in monetary orders

xxvii. Compensation orders should be unlimited in time.

Current aims of sentencing

6. In response to concerns regarding ever increasing complexities in sentencing the Sentencing Act 2020 was introduced. This purported to codify sentencing, bringing together a multitude of provisions in order to reduce errors. The aims of sentencing in respect of adults were set out as follows:

Sentencing Act 2020, s.57

57 **Purposes of sentencing: adults**

(1) This section applies where—

(a) a court is dealing with an offender for an offence, and

(b) the offender is aged 18 or over when convicted.

(2) The court must have regard to the following purposes of sentencing—

(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 reparation by offenders to persons affected by their offences.

(3) Subsection (1) does not apply—

(a) to an offence in relation to which a mandatory sentence requirement applies (see section 399), or

(b) in relation to making any of the following under Part 3 of the Mental Health Act 1983 —

(i) a hospital order (with or without a restriction order),

(ii) an interim hospital order,

(iii) a hospital direction, or

(iv) a limitation direction.

7. The primary purpose of sentencing is to punish offenders. We recognise this but consider that reform and rehabilitation and the reduction of crime should carry equal importance. We also consider that it is by reforming and rehabilitating offenders, and thereby contributing to the reduction of crime, that the protection of the public can best be secured. We therefore agree with the core principles as identified by the Government.

History and trends in sentencing

8. The prison population is currently at approximately 87,900. This is almost double that of 1984, when it was 43,295. In 2004 it was 74,488. The trend has continuously been an increase in the prison population.

9. Sentences have been getting longer, without any empirical evidence that the crime rate is reducing. A number of offences now have mandatory minimum terms, meaning judicial discretion is fettered.

10. The Bar Council feels that the role of the media has played a great part in this increase. Sensationalist headlines from newspapers decrying short sentences have led to a narrative that successive Governments are "soft on crime". Despite the fact this this is narrative is invariably incorrect, no Government wishes to be tarred with that brush and thus sentence lengths have increased.

11. Sentences for murder have increased, owing to the enactment of Schedule 21 of the Criminal Justice Act 2003, likewise sentencing in sexual offences has

increased. However, despite increases in the maximum penalties for various sexual offences (largely arising from the transition from the old Sexual Offences Acts to the Sexual Offences Act 2003), and occasional pronouncements that those convicted of sexual offences were serving longer than ever before,[2] the prevalence of such offences in society, while fluctuating, does not appear to have changed significantly in the last 20 years, according to the Office for National Statistics (ONS).[3]

12. Driving offences in particular have seen a huge increase. New offences, such as causing death by careless driving now carry a sentence of 5 years, the maximum sentence for causing death by dangerous driving has increased to life. This is a huge increase, yet there has never been a sentence of life imprisonment imposed for this offence.

13. The latest data from the ONS shows an increase in nearly every area of crime.

Offence	Number of incidents or offences in YE June 2024	Percentage change compared to YE June 2023	Twenty year timeline to June 2024	Source
Crime survey for England and Wales (incidents)				
Fraud	3,560,000	7% [NS] ▲	2017-2024	CSEW
Theft	2,791,000	6% [NS] ▲	2004-2024	CSEW
Violence with and without injury	1,125,000	26% [NS] ▲	2004-2024	CSEW
Computer misuse	952,000	12% [NS] ▲	2017-2024	CSEW
Criminal damage	668,000	2% [NS] ▲	2004-2024	CSEW
Police recorded crime (offences)				
Robbery	81,931	6% ▲	2004-2024	PRC
Knife and sharp instruments	50,973	4% ▲	2011-2024	PRC
Homicide	562	-3% ▼	2004-2024	PRC

[S] = significant [NS] = not significant

[2] See for example https://www.gov.uk/government/news/sex-offender-sentences-hit-record-levels

[3] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesprevalenceandtrendsenglandandwales/yearendingmarch2022

14. The prison population continues to rise, suggesting that prison is not having a deterrent effect on those intent on committing crime.

15. We feel that the root causes as to why people are committing crimes are not being addressed, be that socio-economic drug addiction, or lack of education. Only by properly addressing these issues will crime reduce.

The Structure of sentencing

16. The Sentencing Council has drafted Guidelines for the vast majority of offences. All guidelines follow the same principles. Firstly, the harm caused is identified, secondly the culpability of the offender is assessed. This produces a "Starting point" for sentence, with a range also identified. Thereafter aggravating and mitigating factors are assessed, as well as credit for any Guilty plea. This will lead to the ultimate sentence.

17. Whilst this approach promotes certainty, and uniformity of approach there is concern from the Bar that this can lead to sentences being mechanistic, there is insufficient flexibility within the guidelines to sometimes reflect aggravating or mitigating factors, and not all offences fall neatly within a prescribed box.

18. **Recommendation**: we encourage the Sentencing Council to create further categories for some offences, such as Actual Bodily Harm or burglary, as they have done for theft and fraud offences.

19. If sentencing structures are too mechanistic there can be an increase in appeals, either for being manifestly excessive, or unduly lenient, whenever a judge strays outside a given guideline.

20. **Recommendation**: we encourage more flexibility and acknowledgement of judicial discretion to reflect the fact specific cases judges deal with.

The use of technology within sentencing

21. We consider there to be three aspects to this. Firstly, the computer software used to assess risk of offending, the Offender Assessment System (OASYS system), secondly the use of technology to enable the sentencing exercise in court, such as the Cloud Video Platform (CVP) system, and thirdly the use of technology to enable different types of sentences themselves e.g. electronically monitored curfews/geographic restrictions etc.

22. OASYS is a system developed by the Probation service to assess risk. The Bar Council does not feel qualified to comment on this area.

23. Since Covid, the courts have used the CVP to enable remote attendance. The system has both advantages and disadvantages.

24. Remote attendance allows advocates to cover more cases, however this should be used thoughtfully. For example, a protocol might be adopted reflecting the need for counsel to attend in person in any case of sensitivity, e.g. those involving a fatality, or with a vulnerable victim who is likely to attend the sentencing hearing.

25. Another issue relates to the attendance of prisoners. CVP is beneficial to prisons as it removes the cost and security issue of bringing prisoners to court, some defendants prefer it to attendance at court it as it means they retain their assigned cell.

26. The courts should however be cautious before considering the use of CVP for defendants in all cases. Many defendants have mental health issues, and for those, having a conference with counsel via CVP can be stressful, and also difficult to manage. Further, some cases are complex, and the time constraints of CVP means insufficient time is allocated to a particular case.

27. **Recommendation**: cases with an interpreter should not be on CVP, the technology is too unreliable to allow for an interpreter in court with a defendant on CVP, and, in our experience, there is too often insufficient provision made for conferences before and after (and on occasion, if necessary, during) sentences with interpreters over CVP in a 'three-way' link.

28. CVP can have a place for defendants who refuse to attend court. There have been a number of high-profile cases, particularly murders, where convicted defendants have refused to attend their sentencing hearing. Physically bringing a defendant to court who does not wish to attend raises safety and security issues for custody staff and can also cause distress to victims and family members at court. The use of technology could alleviate that, it is far easier to bring a defendant from a cell to a video link room within a prison, the camera can be on but the sound muted so that the defendant has no choice but to hear sentencing remarks, however they cannot disrupt the proceedings.

29. The Bar Council cautions against using Artificial Intelligence in any way to consider sentences, each case is fact specific and requires Judicial input.

30. However, we do believe technology can play a greater role in curfews and monitoring and we consider that below.

Community sentences
From the Sentencing Council Guideline:

31. Community orders consist of one or more of the following requirements:
    - unpaid work requirement (40 – 300 hours to be completed within 12 months)
    - rehabilitation activity requirement (RARs provide flexibility for responsible officers in managing an offender's rehabilitation post sentence. The court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete. The responsible officer will decide the activities to be undertaken. Where appropriate this requirement should be made in addition to, and not in place of, other requirements. Sentencers should ensure the activity length of a RAR is suitable and proportionate).
    - programme requirement (specify the number of days)
    - prohibited activity requirement (must consult the Probation Service)
    - curfew requirement
        - for an offence of which the offender was convicted on or after 28 June 2022: 2 – 20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; and maximum term 2 years; or
        - for an offence of which the offender was convicted before 28 June 2022: 2 – 16 hours in any 24 hours; maximum term 12 months

        In all cases, the order must consider those likely to be affected; see note on electronic monitoring below
    - exclusion requirement (from a specified place/places; maximum period 2 years: may be continuous or only during specified periods; see note on electronic monitoring below)
    - residence requirement (to reside at a place specified or as directed by the responsible officer)
    - foreign travel prohibition requirement (not to exceed 12 months)
    - mental health treatment requirement (may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied: (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but is not such as to warrant the making of a hospital or guardianship order; (b) that arrangements for treatment have been made; (c) that the offender has expressed willingness to comply).
    - drug rehabilitation requirement (the court must be satisfied that the offender is dependent on or has a propensity to misuse drugs which requires or is susceptible to treatment. The offender must consent to

the order. Treatment can be residential or non-residential, and reviews must be attended by the offender (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months))

- alcohol treatment requirement (residential or non-residential; must have offender's consent; court must be satisfied that the offender is dependent on alcohol and that the dependency is susceptible to treatment)
- alcohol abstinence and monitoring requirement (where available)

32. There are three principal issues with community penalties:
    (1) they are not necessarily used as creatively as they may be;
    (2) their limitations arguably make the custody threshold too low; and
    (3) the rigour with which compliance is reviewed may vary.

33. Whilst there are a large number of community requirements available to a court, courts almost exclusively use unpaid work, curfew requirements, Rehabilitation Activity Requirement (RAR) and programme requirements (and the related mental health, alcohol and drug requirements). The longest a suspended sentence order can operate for is a period of two years, and a community order three years. Moreover, creating a system in which judges were more directly responsible for the reviews of orders would be a poor use of limited judicial resource.

34. **Recommendation**: Greater consideration should be given to the availability of community requirements that are not just concerned with rehabilitation, but also with the creative use of punishment; ideally by a deprivation of liberty that also results in a societal benefit (which at its core is the tenant behind unpaid work). This could involve, for example, things like requirements to complete short apprenticeships or trade qualifications (that go significantly beyond the hours currently available for unpaid work but which could be remunerated at a basic level, or which could form part of a short residential course). Greater consideration should also be given to a broader range of options in relation to deprivations of liberty. Exclusions from public houses (still technically available under the Licensed Premises (Exclusion of Certain Persons) Act 1980 but almost never used) or from certain public amenities or social events (such as sporting events) may constitute a significant deprivation of liberty in the short term when paired with others. They do not (as current) have to be linked to a particular type of offending. To some extent, the legislative framework allows for these: see prohibited activity requirements or foreign travel prohibition requirements. This would require renewed training (and resourcing) of probation officers as well as judges to

consider more broadly the options open to them, but also a strengthening of these various powers.

35. At a time when the prison population is under great pressure, we should be looking at more ways of using prison for the most dangerous offenders, whilst addressing the issues behind offending to facilitate rehabilitation.

36. **Recommendation**: greater consideration should be given to who is ultimately sent to prison. For example, prison could be reserved for those who have committed violent offences, those offenders that society needs protecting from. If there is a prospect of rehabilitation, i.e. drug offences, and acquisitive offences linked to addiction, then the starting point should be a community order.

37. An obvious point that is nonetheless worth making is that while funding the probation service costs money, any increase in the amount required to fund community-based programmes would likely be less than the cost of the prison place[4] that would otherwise be required to house the offender.

Behaviour orders

38. Problem: By using a system of differently drafted behaviour orders with different availability requirements and different considerations for the imposition of prohibitions/requirements, an order is sometimes not available in a specific case, or there is a convoluted process to vary an existing order where the court may wish to simply impose a new or different type of behaviour order (e.g. breach of Sexual Harm Prevention Orders (SHPO) is not an offence for which a new SHPO is available).

39. **Recommendation**: A behaviour order should be available for every offence in every case. A judge should be encouraged to ask 'what is the most suitable package of sentencing orders', rather than combing through various pieces of legislation to identify what is available. This could be by way of two or three new behaviour orders that replace the raft available. Both requirements and prohibitions should be available.

40. Benefit: A simplification of the hearing with a focus upon imposing a package of orders which best reflect the objectives of the sentencing exercise. Often, it may be that a combination of orders could result in an immediate custodial sentence being avoided, or if it is unavoidable, a custodial sentence of a shorter length being imposed.

[4] https://assets.publishing.service.gov.uk/media/65f4229810cd8e001136c655/costs-per-place-per-prisoner-2022-2023-summary.pdf

41. Consideration should be given to new processes of review. The use of panels analogous to the referral panel system made up of separate local volunteers may provide a way of balancing the resource issue that inevitably results from this. Alternatively, having greater structure to programme requirements and requiring the passing of tests may provide another way of ensuring progress is being made. Giving any review bodies the power to shorten or lengthen orders in small amounts may provide appropriate incentives.

42. Benefit: There are significant benefits to any revision of community penalties that would decrease the prison population (given the huge costs of such a population) and have more beneficial rehabilitative effects. Similarly, the freeing up of judicial resource from the review process will go some way to helping deal with the ballooning court backlog.

The importance of monitoring

43. Key to the success of any attempt of rehabilitation is intensive, consistent and focused monitoring. We are heartened by the early signs from the Intensive Supervision Courts.[5]

44. These courts reflect exactly the sort of joined-up approach that is required if sentences directed towards rehabilitation are to be effective. In their one-stop-shop, high-intensity, regular-review ethos, they echo schemes that have been in operation on an ad hoc basis at various court centres for some time. One such example is the C2 programme[6], run through St. Albans Crown Court.

45. As is noted in the *Guardian* article referred to above, which cites MoJ figures: *"prolific offenders made up about a tenth (500,000) of all offenders in 2020-21 but were responsible for nearly half (10.5m) of all sentencings before the courts"*. Those figures suggest that for every one offender who is diverted from such a criminal lifestyle, twenty prospective offences may not be committed. That would mean twenty fewer cases before the criminal courts and may potentially represent twenty fewer victims of crime. As observed above, an effective way of delivering the valuable objective of public protection is through reducing the risk of reoffending through reform and rehabilitation. It may be that a rewriting of the narrative of punishment and rehabilitation is required to properly make that point to a wider audience. If so, such a rewriting is long overdue.

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[5] Pioneering initiative to force offenders to get clean or face jail time / Specialist courts proposed to break addictions of prolific offenders in England and Wales | UK criminal justice | The Guardian

[6] C2: Choices and Consequences. A different approach to sentencing - 15NBS Chambers
problem-solving-courts-a-delivery-plan.pdf
committees.parliament.uk/writtenevidence/121980/html/

Residential programmes

46. There are many reasons why people commit crimes. These can be the result of addiction, their economic situation, and many other factors.

47. One of the primary reasons for offending is drug use and its associated violence and acquisitive offending. Drug Treatment and Testing Orders (DTTO) do not go far enough. The risk is always that a lack of stability in an offender's personal life will lead them to relapse.

48. In an ideal world, we would encourage the use of residential drug rehabilitation facilities to help people off drugs and assist them in long term abstinence. However, we recognise the financial constraints that we are operating under and thus as a short-term solution suggest that DTTO monitoring is more intensive, with more regular testing, and DTTOs running alongside other programmes such as education, or some form of work training. Unless drug addicts have the skills to obtain work once they are clean, they will relapse and return to offending to fund their addiction.

49. A good example of a community-based, site-specific project helping to rehabilitate offenders who may otherwise receive a short prison sentence – in this case specifically women, including those with children – is the project at Hope Street in Southampton[7].

50. As explained in the FAQ document above:
    - Most women entering prison to serve a sentence (72%) have committed a non-violent offence.
    - More women are sent to prison to serve a sentence for theft than for violence against the person, robbery, sexual offences, fraud, drugs, and motoring offences combined.
    - 51% of women were sentenced to six months and 64% of women were sentenced to 12 months or less April to June 2021.
    - More than 17,500 children were estimated to be separated from their mother by imprisonment in 2020.
    - Nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse. This is likely to be an underestimate because many women fear disclosing abuse.
    - Nearly half of women reported needing help with a drug problem on entry to prison—compared with nearly three in 10 men.

[7] Redesign — One Small Thing
HopeStreetFAQsupdated3.pdf

- Women are much more likely than men to self-harm whilst in prison. In 2020, women made up 22% of all self-harm incidents despite making up only 4% of the prison population.

51. Models based on a holistic approach which supports as well as confines offenders are more likely to break offending cycles for a number of reasons: first, they can provide continuity – of relationships, of accommodation, of employment if available – making reoffending a less attractive option than for those in unsettled circumstances; second, they can provide opportunities – for education, to work, to remain socialised; third, they allow regular, intensive monitoring for compliance with court-imposed orders (for example abstention).

52. This feeds into an element of custodial considerations, those who offend, particularly sell drugs, to fund an addiction, are amongst the most vulnerable, they need far more rehabilitation than the suppliers who sit above them in the chain. Any drug dealer who uses such vulnerable people should face a higher custodial sentence as a deterrent measure. By offering this dual approach of assistance for drug users, and punishment for dealers who are not addicts we could break the cycle of offending.

53. One important factor why people fall into the commission of crime and find themselves offending again and again is as the result of a lack of education. This was considered in the ONS' study *"The education and social care background of young people who interact with the criminal justice system: May 2022"*.

54. This report said "*At both key stage 2 (KS2, end of primary school) and key stage 4 (KS4, typically GCSE stage), attainment was lowest among those who went on to receive custodial sentences, increasing for people who had non-custodial sentences, and highest among those without criminal convictions*."

55. Education can come in many forms. In recent years there has been a rise in the number of prison-based establishments which provide skills training alongside a viable business model – notable examples include:

    - The Bad Boys Bakery[8], set up by Gordon Ramsay back in 2012.
    - The Glasshouse[9] – "a social enterprise offering second chances through horticultural training to women based in UK prisons".

[8] https://insidetime.org/newsround/relaunch-for-best-known-prison-bakery/
[9] https://www.theglasshouse.co.uk/

- XO Bikes[10] "*All of our bikes are donated, recycled, and fully refurbished by professional bike mechanics – who are all prison leavers. … We're open 7 days a week, and all profits go back to training and hiring more ex-offenders*."
- The work done by Lord Timpson in employing ex-offenders in his shops. See also Tesco, Pret a Manger, The Co-Op, Virgin and others.[11]

56. Currently, suspended sentence orders can have several conditions attached to them, but none focussed on education.

57. A further condition which could be of assistance would be an education requirement.

58. The requirement would be attached to a suspended sentence order, exactly like an unpaid work requirement, for a certain number of hours up to 300.

59. This would mean that a suitable candidate, having been assessed by the Probation services, could be ordered by a Judge to undertake education for the amount of time, as directed by Probation.

60. The Probation Service could work with organisations such as the Prisoners' Education Trust at Probation offices or appropriate buildings, perhaps even within prisons if there are not enough staff to accommodate number to deliver these classes and sessions.

61. This will mean that more convicted Defendants who have had limited education in the past, will be able to improve their situation in the short term, perhaps inspire some to continue education after the order concludes, and hopefully even attain qualifications, improving their employment prospects and reducing the risk of recidivism.

62. Curfew requirement – as aforementioned, at present for an offence of which the offender was convicted on or after 28 June 2022: 2 – 20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; and maximum term 2 years.

63. It may be that similar restrictions to those imposed during the Covid-related lockdowns could be introduced as punitive measures (as a direct alternative to custody). But even within the existing legal framework, it is our experience

[10] https://xobikes.com/
[11] Top 9 Companies to Seek a Job from With a Criminal Record — Personnel Checks

that courts do not tend to impose curfews at or anywhere near the permissible limit.

64. **Recommendation**: A greater use of 20-hour curfews as a direct alternative to custody would have a variety of benefits, including the cost of a prison place (which at present practically means the much greater cost of actually constructing a prison). Alternatively, a constructive use of weekend curfews, which would permit a Monday-Friday job but prevent socialising, could be considered, again as a direct alternative to custody.

65. Electronic tagging should be used far more in conjunction with alcohol monitoring. Presently alcohol monitoring tends to be used by Judges treating those with an alcohol problem, but alcohol monitoring should be used more as a punishment, particularly where an offender has been under the influence of drink whilst committing an offence. As with curfews, this would not require any (or any substantial) change in the law, merely a change in approach. It would also cost little, and again, certainly much less than a (new) prison place.

66. As we explain at paragraph 40, consideration should be given to new processes of review.

Conditional cautions

67. **Recommendation**: as a complementary strategy to increased use of community sentences post-conviction, the greater use of conditional cautions to divert those who need not be within the system at all:

    Criminal Justice Act 2003
    Code of practice for adult conditional cautions: part 3 of the Criminal Justice Act 2003

68. These can be administered by a Police Sergeant or more senior officer if the following conditions are met:

    (1) the authorised person must have evidence that the offender has committed an offence;
    (2) the authorised person or relevant prosecutor must determine that there is sufficient evidence to charge the offender with the offence. The authorised person or relevant prosecutor must also determine that a conditional caution should be given to the offender in respect of the offence;
    (3) the offender must admit to the authorised person that he has committed the offence;

(4) the authorised person must explain the effect of the conditional caution and warn the offender that failure to comply with any of the conditions may result in prosecution for the offence; and
(5) the offender must sign a document containing: details of the offence, an admission that the offender committed the offence, consent to be given a conditional caution and details of the conditions attached to the conditional caution.

69. The conditions that can be attached to a conditional caution must have one or more of the following objectives:
    - Rehabilitation – conditions which help to modify the behaviour of the offender, serve to reduce the likelihood of re-offending or help to reintegrate the offender into society;
    - Reparation – conditions which serve to repair the damage done either directly or indirectly by the offender;
    - Punishment – financial penalty conditions which punish the offender for their unlawful conduct.

70. **Rehabilitative conditions** may include attendance at drug or alcohol misuse programmes, or interventions tackling other addictions or personal problems, such as gambling or debt management courses. **Reparative conditions** may include apologising, repairing or otherwise making good any damage caused, provided this is acceptable to the victim. Specific financial compensation may be paid, for example, to a victim. Where the offending has resulted in damage to community property, reparation may take the form of:

    - repairing the damage caused;
    - reparative activity within the community more generally; or
    - a payment to an appropriate local charitable or community fund. At present only one **punitive condition** is available: the payment of a financial penalty.

71. Wider use of conditional cautions would serve to support the objective of rehabilitation while also providing the benefit of potentially removing a tier of low-level offenders from the courts. That would itself have twin benefits: ensuring that their offending was dealt with in a timely manner and freeing up valuable court capacity to deal with more serious offending.

72. Increased use of such diversionary mechanisms would also reflect recent changes in the way that some of the wealthiest defendants in the criminal justice system – companies – are treated through the use of Deferred Prosecution Agreements (tantamount to a conditional caution imposed on a company).

73. It should not be a bar to diversionary mechanisms such as cautions or conditional cautions that the person concerned has not *immediately* admitted the offence. Often in our experience, proper submissions from representatives, at an early stage, that a person's character and offending is suitable for some forms of caution are dismissed because the person 'did not admit the offence in interview' or, worse still, exercised their right to silence in interview. Alternatively, they may have been charged and so a caution-based outcome is deemed unavailable, when it would have been but for the representations being made sooner. The guidance and powers given to those authorising cautions and conditional cautions should allow for much greater flexibility and discretion in the use of these mechanisms.

Custodial sentences
Suspended sentence Orders (SSO)

74. At present, any sentence of less than 2 years duration is capable of being suspended. The Judge must consider factors where it would not be appropriate to suspend a sentence, such as the offender presenting a risk to the public, as against factors in favour of suspending a sentence, such as a realistic prospect of success.

75. **Recommendation**: the Bar Council proposes that the threshold for suspended sentences be increased from two years to three years. We make this proposal for several reasons:
    i) It is incongruous that a person can be subject to a community order for longer than they can be subject to a suspended sentence order. Lengthier periods of supervision would allow for more onerous requirements (and potentially more useful rehabilitative programmes, particularly given the resource stress on some such orders).
    ii) Certain Community programmes have a three-year duration, such as the Horizon program for Sex Offenders. This cannot be imposed alongside an SSO. To protect the public, and to encourage rehabilitation, a three year suspended sentence could be imposed alongside this programme.
    iii) In respect of offences for drug dealers, for those who are involved in low level drug dealing to fund an addiction, the present guidelines make it difficult for a Judge to suspend a sentence. If increased to three years such a sentence could be imposed alongside a Drug Rehabilitation Requirement, fulfilling the dual aims of sentencing as both punishment and rehabilitation.
    iv) Suspended sentences allow offenders to prove themselves, they could be used with enhanced curfews to facilitate home detention, and free up prison spaces for the violent.

v) **Recommendation**: Additional consideration should be given to re-enacting the previous regime prior to the Criminal Justice Act 2003 which allowed for the imposition of a suspended sentence of any length in *exceptional* circumstances. Any such re-enactment could be worded to make clear what does not constitute exceptional circumstances (e.g. guilty plea/remorse).

Intermittent custody

76. Section 183 of the Criminal Justice Act 2003 contained provisions for Intermittent Custody. The purpose was to allow offenders with jobs to serve their sentence on specified days, within a specified time frame – for example 30 days within 6 months, with those days primarily being weekends.

77. This provision was never enacted.

78. **Recommendation**: This provision should be reconsidered. Open prisons could be used to facilitate such sentences. It would allow for custody for those sentences that demand punishment but also allow offenders to retain jobs and homes. Losing jobs and homes are two key factors when it comes to reoffending.

79. The Ministry of Justice published information in March 2024 that confirms that it costs tens of thousands of pounds per prisoner, to keep someone in prison.

80. This is of course over the entire prison estate, which includes everything from Category A prisons to Open Prisons.

81. To ensure that prisoners were still able to retain their protective factors, but serve a custodial sentence, there could be a further type of prison, similar to open prisons.

82. **Recommendation**: Low risk prisoners should be housed in a form of part time prison. Where a prisoner who has been convicted of a non-violent offence, has been assessed by their Offender Manager using OASYS, and any other statistical construction available, to assess risk, likelihood of reconviction, and danger to the public, and the prisoner has been assessed as low risk, then they could be housed at a form of "part-time prison".

83. The prison would serve as accommodation but during the day, the prisoners would be able to leave to attend employment, education, and any other activity or function they wished to, under the guidance of their Offender

Manager, and return to the prison at the end of the working day and to undertake the tasks and chores of maintaining the prison.

84. This would ensure that non-violent prisoners would be able to retain employment and the other protective factors, which will assist rehabilitation, but will also save the prison estate hundreds of thousands of pounds.

85. The Bar Council considered the Swedish model where offenders can be released for leaves of absence "Normal leave of absence is to enable you to maintain contact with your family and your life outside the institution, for example so that you can meet friends or look for work. Before being granted your first leave of absence, you must have completed a certain proportion of your sentence, in other words, the time you have been sentenced to spend in prison. You must have served a quarter of your sentence before you are allowed your first leave of absence. The institution will also check to ensure that it is appropriate for you to be granted leave of absence. It is not an automatic certainty that you will be granted leave of absence after the periods specified in the regulations. The institution's investigation may show that there is a risk that you will abuse your leave of absence, in which case they may say no to your request for leave. With normal leave of absence, the periods of time can vary in length. Your first period of absence by yourself may only last a few hours. After this the periods may become longer and longer but they never exceed 3 days and 3 nights." [12]

86. This model could be deployed, again it would encourage rehabilitation, good behaviour, and make re integration easier in the hope that rates of reoffending would become lower. This system is in place in the US.[13]

Halfway houses

87. One of the greatest challenges facing prisoners is being released with no means of support. Any defendant who has been sentenced to more than 13 weeks will lose Housing Benefit, if they had a home and were reliant on Housing Benefit this means they will come out of prison and be homeless.

88. Although it is possible to claim Universal Credit, this cannot be done until release, it also cannot be done without an address, as noted above if a prisoner has lost their address, then they cannot make any claim. Prisoners receive £89.52 upon release. This is not sufficient to obtain anywhere to live.

[12] https://www.europris.org/wp-content/uploads/Sweden-EN-prisoner-information-sheet.pdf

[13] https://www.uscourts.gov/services-forms/intermitten-confinement-probation-supervised-release-conditions

89. Whilst Probation officers are there to assist prisoners upon release the reality is many fall through the system.

90. **Recommendation**: Investment in more Halfway Houses, accommodation properly supported with resident Probation officers, links to Job centres, and drug rehabilitation officers, to promote reintegration and support offenders at their most vulnerable time. Without any support network, there is a far greater risk of reoffending.

Recall

91. Problem: Offenders are often recalled, for a variety of reasons. Under the Powers of Criminal Courts (Sentencing) Act 2000, courts had a role in determining the period of recall (see s.116). At present, the two-tier system (fixed 28 day recall or standard recall subject to Parole Board consideration) is inflexible and leads to individuals being recalled in circumstances when they arguably do not need to be. This is disruptive to rehabilitation and where the recall is due to an arrest/charge in respect of a new offence, this period in custody does not count as time on remand to be credited against the sentence for the new offence.

92. **Recommendation**: There should be a renewed focus on recalling those only where there is a real risk of serious harm (broadly defined). Additionally, there should be research undertaken to consider whether discounting time on recall entirely from counting as time on remand acts as an incentive or disincentive. The recall system could be re-modelled, so that there is a two-dimensional matrix to determine whether an offender should be recalled under the standard procedure: by using their conviction offence and the reason for the recall (scoring the severity of each), a score above a certain threshold could trigger a standard recall. Those falling beneath that threshold could be subject to management in the community, such as immediate tagging, residence at a bail address and greater supervision.

93. Benefit: This would reduce the recall population and see fewer disruptions to the rehabilitation process of release on licence.

Sentencing in the Youth court

94. Whilst the review appears focussed on adult crime there are aspects of Youth sentencing that could be considered as part of the review.

95. At present, a first offender who pleads guilty and is sentenced in the Youth court can only be made subject to one of two options, either a Referral Order, or Detention. This lack of flexibility does not offer options for offenders who would benefit from a more structured approach, such as an Intensive

Supervision and Surveillance Programme, and consider that this restriction should be removed.

96. There has been an increase in youth offenders convicted of violent offending. We have seen reports of the Oasis Restore Programme[14]:
"Oasis Restore is aligned with Youth Justice Board's Child First principles and guided by the truth that children are different from adults. This means that each child's voice is listened to, valued, and opportunities are created for them to contribute within a school community where adults make the final decisions in the best interests of the child.
Our aim is for children to value their time at Oasis Restore, to enjoy learning, and to leave ready to contribute to society. We acknowledge that traumatic early life experiences, adversity and exploitation negatively affect the children we serve and those around them, including the victims of their crimes. Young people placed at the secure school will need to come to terms with the consequences of their criminal behaviour: the sentence is their punishment. Our job is to listen and understand the stories behind those actions, to support them to start making amends in whatever ways they can, and to help them build the skills they need for a positive future.
In the service of our mission, we will formulate bespoke care plans that meet students' needs, explore and challenge harmful habitual behaviours, develop their strengths and aspirations, and reduce the risk of future harm.
We recognise the magnitude and importance of beginning to address these issues in children, and of piloting work that we hope will influence wider change for children's social care and justice systems."

97. This type of regime is not cheap in the short term, but if it prevents reoffending, and encourages reintegration into society then the long-term financial benefits are clear.

98. We encourage the panel to look at Youth sentencing, as if children can be diverted from the criminal justice system then it will save money in the long term.

Indeterminate Sentences for Public Protection

99. We advocate that all offenders subject to an IPP be carefully examined. We endorse the proposal made by the Lord Chancellor.[15]

Mental health

100. There has been longstanding concern regarding rates of mental disorder in the prison population. In a 2021 report entitled "the future of

[14] https://www.oasisrestore.org/about-us/our-approach
[15] https://questions-statements.parliament.uk/written-statements/detail/2024-09-05/hcws72

prison mental health care in England – a national consultation and review",[16] the Centre for Mental Health stated that "*poor mental health and other vulnerabilities are exceptionally common within the prison population*" (2021, pg 8). The report states:

"Most prisoners experience more than one vulnerability. Both the research of Singleton et al. (1998) and Bebbington et al. (2016) state that 70% of prisoners meet the criteria for two or more diagnoses. With the single possible exception of autism, all of the vulnerabilities listed above have a prevalence rate in prison very much higher than in the general population. Additionally, the experience of trauma and adverse childhood experiences is very common amongst prisoners (Cherie, 2012 and Facer-Irwin et al., 2019). It is therefore reasonable to state that by default, prisoners are vulnerable and have multiple and complex needs" (2021, pg 8).

Increased use of alternatives to custody

101. It is recognised that for some offenders with mental disorder, there is no proper alternative to a custodial sentence. However, greater use could and should be made of alternatives to custodial sentences for some offenders with mental disorder. This necessitates both the availability of sentences that are a realistic alternative to custody and the effective identification of those who are suitable to receive such sentences.

102. The principal sentences through which individuals with mental disorder can presently be diverted from a custodial setting into a healthcare setting are a hospital order (section 37 of the Mental Health Act 1983), a hospital and limitation direction (section 45A of the Mental Health Act 1983) and transfer to hospital of persons serving sentences of imprisonment (section 47 of the Mental Health Act 1983).

103. These sentences provide appropriate alternatives to custodial sentences. Those working in the criminal courts are likely to be well able to identify individuals who are acutely unwell such as to be likely to require hospital treatment. However, there are concerns that once a need for hospital treatment has been identified, there can be significant delays in identifying a suitable hospital placement for that individual.

104. This first raises the issue of there being sufficient resources to provide hospital places for those who need them. But also, it is suggested that improved mechanisms for liaison between the criminal courts and those commissioning and managing hospital places would assist in ensuring those

[16] https://www.centreformentalhealth.org.uk/wp-content/uploads/2021/06/CentreforMentalHealth_TheFutureofPrisonMentalHealthCare_0.pdf

requiring hospital treatment are able to access it and are able to access it in a sufficiently timely way.

105. **Recommendation**: greater use should be made of community orders with a mental health treatment requirement (Sentencing Act 2020, section 16). These orders could be a powerful tool in providing mental health treatment to those who are not so unwell as to require a hospital order, but who have significant mental health needs.

106. A mental health treatment requirement can only be imposed where detail has been provided of the treatment that is to be offered, and if the treatment is to be practitioner-based treatment, the practitioner who is to direct the treatment to be provided must be identified (Sentencing Act 2020, section 16 (3)). Successful use of the mental health treatment requirement therefore depends on effective liaison between those working in the criminal courts and those providing primary and secondary mental health care.

107. Effective mechanisms for such liaison are essential. The outcomes of a Community Sentence Treatment Requirement Protocol implemented in 5 areas in 2019 provide an example of the impact of effective joint working between agencies involved in community sentences[17].

108. Problem solving courts also provide a setting in which several agencies may be brought together in a way that would facilitate the use of community orders with a mental health treatment requirement.

Liaison and Diversion schemes

109. Effective joint working between criminal justice and mental health services is greatly facilitated by the development of liaison and diversion schemes based at police stations, Magistrates Courts and Crown Courts.

110. An example of an effective liaison and diversion scheme is the Greater Manchester Liaison and Diversion Service[18]. Those working within the service are able to provide effective court-based assessments to identify those who may require mental health treatment and support. As the liaison and diversion service is an NHS service, its practitioners can access information from patient records quickly, which allows reports to be provided to the court when requests for information are made. Referrals can also be made swiftly, which helps to avoid delay in accessing treatment.

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[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810011/cstr-process-evaluation-summary-report.pdf

[18] https://www.gmmh.nhs.uk/gm-liaison-and-diversion-service/

111. **Recommendation**: the use of NHS Liaison and Diversion schemes is prioritised and supported.

Mental health treatment in custody

112. In addition to increasing the use of diversion from custody where appropriate, it is also necessary to ensure that effective mental health treatment can be provided in a custodial setting.

113. Providing effective treatment depends on effective identification of needs. It is suggested that robust and proper screening when individuals are first sent to prison is necessary, with sufficient staff being available to undertake such work, and staff having the appropriate training and skills to identify mental health needs. This encompasses awareness of the limited reliability of self-reporting as a means to identify mental health need; an issue that may be particularly acute with those entering a custodial setting, with the inevitable stress that this causes.

114. Access to medication is a key priority. Issues may be encountered with continuity of medication when people move into a custodial setting, or move between different establishments; this being an issue relating to the accessibility of healthcare records, and effective means of communication between prison health care services and community based healthcare services.

115. Prisoners also need to be able to access healthcare professionals within prison, and to do so in a timely way. There must be enough psychiatrists working in prison to provide treatment and assessment. There must also be appropriate services to address the co-existence of mental disorder and substance misuse.

116. A further issue is continuity of care when prisoners are moved between prisons; an issue that is likely to be exacerbated by prison overcrowding. Mechanisms must be in place to facilitate the sharing of information to facilitate continuity of care across prisons.

117. It is also apparent that many offenders with mental disorder, as well as many offenders without mental disorder, have experienced significant trauma and/or adverse childhood experiences. It is therefore suggested that training provided to those working in a custodial setting encompasses trauma awareness, and trauma focused treatment is made available to prisoners.

Transparency

118. We raise the issue of transparency. Sentencing has become increasingly complex, with varying rules as to

i) How much of a sentence each defendant must serve dependent upon sentence and length
ii) At what point they become automatically eligible for automatic release
iii) At what point they become eligible for early release, or Home Detention Curfew
iv) Whether they are subject to an extended licence
v) Whether they are an offender of Particular Concern

119. There is a lack of public understanding about sentencing, including purposes of sentencing, release (and specifically time spent in custody) and the seriousness of offences and the equivalence between different offence types. This leads to public mistrust and misinformation.

120. **Recommendation**: A simplification of available immediate custodial sentences to create a more flexible system which affords judges the discretion to determine how long someone actually spends in custody, and whether the release mechanism is automatic or conditional upon the Parole Board. This would involve a judge selecting a period in custody (perhaps addressed as a 'punishment' element and separately a 'public protection' element, as is sometimes the case in driving disqualification) and being able to choose whether someone is suitable for 'early release' (SDS40 / SDS50); extended detention (two-thirds); conditional release (two-thirds via the Parole Board) based on public protection considerations.

121. It would also allow the judge to select a period of licence to be served upon release (either a determinate term or a life licence). The total of the custodial period and the licence period must not exceed the maximum sentence.

122. Benefit: The sentencing exercise would be simpler, doing away with schedules of offences which make a particular sentence available (which uses past behaviour as a proxy for the assessment of future risk, which is obviously imperfect, and which gives undue consideration to the selection of charges) would place the focus upon public protection. This would remove some complexity of both the sentencing hearing and the exercise of communicating the sentence to the defendant, victims and other interested parties, and the public. It would be more transparent, easier to understand and likely lead to fewer errors of law.

Credit for pleas of guilty

123. From 2007, the Sentencing Guidelines Council had a Definitive Guideline in place on 'Reduction in Sentence for a Guilty Plea' ['the 2007 Guidelines'].[19] That stated that maximum credit for a plea of guilty (of a reduction of one-third) was for those cases where there had been a plea of guilty 'at the first reasonable opportunity'. This point was stated 'to vary from case to case'. Annex 1 gave some examples of how the assessment of 'first reasonable opportunity' could legitimately vary: it might be at the police station in interview, the magistrates' court hearing or at the first hearing in the crown court. The Court was obliged to consider whether the defendant (and their legal advisors) had sufficient information about the allegations.

124. In 2015, the Leveson Review of Efficiency in Criminal Proceedings[20] ['the Leveson Review'][21], described and promulgated the 'National Early Guilty Plea Scheme'. As set out at Section 7.1 and Annex E of the Leveson Review:

"the rationale behind the scheme has been to create a national, consistent process in the Crown Court, eliciting guilty pleas in an efficient manner by producing the most effective opportunities for those who are guilty to plead at the earliest stage. The scheme is also designed to reduce the number of hearings per case across all Crown Court cases, which is not limited to those in which a guilty plea is entered before trial."

125. A system of reductions in sentence for guilty pleas is essential in a criminal justice system which values efficiency. It is important that it is widely understood that such a reduction is made on a transactional basis to reflect the benefits to the system afforded by the defendant's decision to waive their right to a trial.

126. Those benefits are financial (in the saving of tremendous cost to the system involved in the investigation, prosecution, courts, prison service), the avoidance of requiring witnesses to give evidence and to provide victims and the public with a swifter resolution to the case. Those are significant benefits, especially at a time when public finances are stretched greater than ever

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[19] Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Archived-SGC-Reduction-in-sentence-for-a-guilty-plea-2007.pdf

[20] Available at https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf

[21] Not to be confused with the more recent and ongoing Independent Review of the Criminal Courts, announced on 12 December 2024, which Sir Brian Leveson has been appointed to lead, see https://www.gov.uk/guidance/independent-review-of-the-criminal-courts

before, and the time between arrest, charge, first appearance and trial is greater than ever before.

127. The fact that guilty pleas are transactional is reflected in the stepped reductions in sentence contingent upon the timing of the guilty plea. It is therefore important that the regime maximises the incentive to those who are guilty to plead guilty and to do so at the earliest opportunity.

128. Complementing the procedural reforms, the Sentencing Council produced an new Definitive Guideline again on 'Reduction in Sentence for a Guilty Plea' in 2017 ['the 2017 Guidelines'].[22] Those guidelines limited the reduction in sentence of one-third solely to the first hearing where a plea (or indication of plea) was sought and recorded by the Court (namely, as Appendices 1-3 to the 2017 Guidelines made clear, the first appearance at the Magistrates' Court, regardless of whether the case was triable summarily, either-way or on indictment). The rationale for that structure was informed, plainly, by the Leveson Review and the desire to have early guilty pleas at the earliest possible stage: in the magistrates' courts. The reason for that is simple – committals to the Crown Court for sentence attract **much** smaller fees and associated costs than cases sent to the Crown Court for trial, even if those sent for trial in fact plead guilty shortly thereafter, even without a trial date ever being set.[23]

129. Many judges nevertheless were following the spirit of the old guidelines, and the previously accepted norm that it was important that the defendant (and their representatives, if any) had been provided with sufficient information so as to allow for an informed decision about plea to be made.

130. In the case of *Plaku*[24], the Court of Appeal reviewed the 2017 Guidelines and held that, in normal circumstances, only *unequivocal* indications of guilty at the Magistrates' Court stage in respect of either-way or indictable-only offences would attract one-third credit. The Court was of the view that there would be very few occasions where a defendant who had not indicated a plea at the first stage (or did not come within one of the exceptions in the

[22] Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Archived-Reduction-in-sentence-for-a-guilty-plea-Definitive-guideline.pdf

[23] For example only, the current defence advocate's fee under AGFS13 for conducting the sentence in case committed to the Crown Court for sentence is £175 (all cases). A guilty plea in the Crown Court (following the case being sent for trial) for, say, a fraud of between £100,000 and £1,000,000 would attract a fee of £1,645. Higher fees would be paid if the case was a 'crack', i.e. a plea of guilty after a not guilty plea was entered.

[24] [2021] EWCA Crim 568

guidelines) would obtain more than a one-quarter reduction. It followed that even unequivocal indications of guilt entered very shortly after Magistrates' Court (for example by letter) would not obtain the maximum discount. Additionally, it would not normally be correct for any Crown Court judge to be able to order that 'full credit' (in the sense of one-third) be preserved as a result of any adjournment of arraignment.

131. *Plaku* has effectively placed the rules on credit in concrete, and it is clear that is in a way that does not actually encourage suitable early pleas.

132. It is our experience, as advocates actually carrying out the task of reading papers and advising clients every day in the criminal courts, that the laudable aims of the Leveson Review and National Early Guilty Plea Scheme were based on flawed assumptions. Firstly, that proper rates of remuneration would be made available, and maintained in line with inflation, to ensure that work was done early to identify and properly advise those who should be pleading guilty. Secondly, that suitable amounts of information would be made available to defendants and their advisors to enable informed pleas.[25]

133. Additionally, two more factors have increased since Leveson to the detriment of the scheme as currently constructed. Due to pressures on prisons, opportunities for conferences of useful length with legal advisors are too difficult to come by, and so defendants are not being advised properly – or sometimes not seen at all – during the crucial early stages of a case. Secondly, with delays for on-bail trials being what they are (up to or even over 2 years from the Plea and Trial Preparation Hearing (PTPH), a number of defendants are in effect serving any sentence they might receive by means of qualifying electronic curfews whilst on bail, and for all defendants the amount of credit at stake diminishes by a mere 15% over the course of what can now be a very lengthy period (from 25% at PTPH to 10% at day of trial). Both these factors significantly reduce the incentive on guilty people to plead guilty, in our experience.

134. Although reliable data is not easy to come by, it would appear that since 2015, the rate of guilty pleas has remained about the same, at around

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[25] It is simply not realistic to state in response, as is sometimes done, that 'defendants know whether they are guilty'. That trite observation ignores, just for example (i) defendants who do not even remember their actions due to intoxication or mental health (ii) defendants who may have a defence that they cannot assess entirely properly themselves because it involves external considerations such as reasonableness (e.g. self-defence, modern slavery etc). In such cases, any competent advisor would want to see all materially relevant evidence before advising properly on plea, not simply the investigating police officer's own summary of the facts (which is normally all that is provided nowadays by way of initial details of the prosecution case).

two-thirds of all cases (with a blip during the pandemic), but the level of those guilty pleas which are entered early has fallen from nearly 50% to just over 40%.[26]

135. It is accordingly our view that the Leveson-related reforms in credit for guilty pleas have not worked and are certainly not fit for purpose in dealing with the twin pressures caused by the increased criminal courts back-log and prison populations.

136. **Recommendation**: To reverse this, we suggest that

a. the fee structure is revisited (for advocates and litigators) to ensure that they are remunerated properly[27] and
b. the courts return to the pre-*Plaku* and pre-2017 situation where full credit can be made available, subject to judicial discretion, at the first hearing in the Crown Court (and if appropriate preserved whilst defendants are advised or receive necessary information).

137. We believe, based on our direct experience, that the potential loss of 33% at the PTPH, having received full advice from properly briefed lawyers, will focus minds much more than 25% currently does.

138. Such a change can be easily accommodated by a change in the relevant Sentence Guidelines (as *Plaku* only applies to the current wording), and the Sentencing Council could be invited to look at the matter forthwith, taking into account a suitably prestigious review on the topic, as they did with the Leveson Review. Alternatively, or in the meantime, the Attorney General could make it clear in writing that the Law Officers would not seek to review under the Unduly Lenient Sentences scheme any case on the grounds that the sentencing judge afforded 33% credit for a plea of guilty entered at the PTPH stage. Ultimately, Parliament could, relatively swiftly, legislate to impose a scheme itself[28] or amend the requirement on sentencing judges to follow sentencing guidelines[29] to exclude this particular aspect of the relevant guideline.

139. **Recommendation**: the current regime should be tweaked to maximise the incentive to guilty offenders to plead guilty and avoid a trial and a *Newton*

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[26] See https://criminal-justice-delivery-data-dashboards.justice.gov.uk/quality-justice/courts
[27] To be clear, this does **not** mean a reduction in fee, as any reduction in fees will simply exacerbate the exodus of suitably qualified barristers and solicitors from criminal work. We are talking about an increase to 'level-up' the fees and remove potentially unhelpful remunerative structures or incentives.
[28] E.g. by amending s.73 Sentencing Act 2020
[29] S.120 Coroners and Justice Act 2009

hearing while ensuring that sentences still result in effective punishment. This can be done by adopting the following measures:

a. One third credit at the PTPH / first hearing in the Crown Court made available at the subject of Judicial discretion.
b. A steeper decline in the reduction following the first appearance in the Crown Court (to incentivise earlier pleas, by focussing the defence's minds). There should also be less discretion given to the court in determining the reduction between the first appearance, PTPH and day of trial:
    i. One-third at the plea hearing (first appearance in the magistrates' court or first Crown Court hearing subject to judicial discretion)
    ii. 20% up to and including the Stage 2 date (where Stage 1 is complied with)
    iii. 10% up to (but not including) the day of trial
    iv. 5% thereafter

140. A separate quantified reduction for full admissions made in police interview/on arrest where followed by an early guilty plea (perhaps and additional 10%) The costs saved by not having to prepare the matter for trial would be significant.

141. A more formalised approach to reductions for remorse (which shows insight into offending, which is relevant to risk and recidivism)

a. A less generous reduction in sentence where a guilty plea is entered but a *Newton* hearing follows where the issue is resolved in favour of the prosecution case (to further incentivise realistic bases of plea).

142. An additional area of wasted resource is a failure to notify the court and prosecution where a guilty plea will be entered. Engagement between the parties is crucial at an early stage and throughout. Currently, there are often submissions as to whether an indication of a guilty plea was unequivocal (such that it should attract the guilty plea credit from that point in time). We suggest a new Criminal Procedural Rule form to standardise the way in which the defence inform the court and prosecution that there will be a guilty plea.

Credit for guilty plea in mandatory sentence cases

143. Cases to which the minimum sentence for possession of a prohibited firearm applies do not benefit from the usual reduction in sentence for a guilty plea below the minimum (for example in third strike burglary and Class A drug trafficking cases. In such cases, there is therefore a limited

incentive to plead guilty. There is no theoretical justification for this and it yet a further layer of complexity in sentencing legislation.

144. **Recommendation**: Allow credit for a guilty plea in firearms cases in line with the approach in other minimum sentence provisions.

145. Benefit: It is fairer, more consistent, simpler and in line with the theoretical justification for reducing sentence for guilty pleas.

Extension of slip rule

146. Sentencing is now very complex and routinely errors are made arising from a lack of awareness or understanding of some technical aspect of sentencing legislation. Errors happen but they ought to be reduced to a minimum.

147. **Recommendation**: The slip rule (the ability of a judge to correct errors (or 'slips') in his or her decision (eg typographical or calculation errors) which arise by accident or omission) should be extended to 128 days to permit variations to the sentence which do not result in the defendant being treated more severely than at the original sentencing hearing. The 56-day limit should remain for variations of substance (including increase the sentence where there is sufficient reason). The extension of the period would be designed to cater for technical errors. The power should be exercisable by the resident judge of the Crown Court centre where they consider it appropriate to do so (i.e. because the judge who passed the sentence is not available or because it does not involve a challenge to any factual or legal finding).

148. Alternatively, or in addition, the Criminal Appeal Office should be granted a power to certify authority for a slip rule hearing where they identify a perceived legal error but would otherwise have refused leave. This would allow the hearing to be carried out in the Crown Court rather than requiring further argument in the Court of Appeal.

149. Benefit: This would avoid the Court of Appeal and Criminal Appeal Office being required to deal with such matters in sentencing appeals/applications.

The progression of custodial sentences

150. See above re: community orders. Particularly at the point of release from prison there should plainly not be a clean break but a move along a continuum of punishment and rehabilitation. It is important to understand that rehabilitation carries a protective function – it does not merely benefit the offender, but society as a whole.

151. Examples of charities which assist in this progression at present include:

- Finding Rhythm[30]
- Inside Out[31]
- Making Waves[32]

Making Waves supports underserved people in the community by providing one-to-one weekly sessions with a professional producer.
Over the course of 10, 1.5h sessions, participants are empowered to write and record their own music from our private studio space. Alongside this, learners have the opportunity to work towards a Prince's Trust entry Level 3 award in Personal Development and Employability Skills and receive person-focussed mentoring support from our partner organisation, Trailblazers.
Funded by London's Violence Reduction Unit, the programme aims to build participants' confidence, self-belief and transferable skills for employment, preparing them for a better future in society.
The programme is for those who:

- *Are receiving support in the community for risk factors related to violence or offending, or have recently left prison*
- *Are interested in music and want to develop their skills and creativity with support from a professional producer*
- *Age 18+*
- *Are based in London*

Current referral partners include Care Leavers Team, Royal Borough of Greenwich, Catch 22, Department for Work and Pensions, Divert, His Majesty's Prison and Probation Service, JobCentre, London Vanguard, London Pathways Partnership and Switchback.

152. There are a reasonable number of such charities operating with a greater or lesser degree of overlap. It would make sense to consider whether a national framework would assist, or conversely whether it would undermine the ability of these entities to operate with optimal flexibility.

Specific Reforms

Timetables for sentencing hearings

153. Upon a guilty plea or at the conclusion of a trial, a date for sentence is fixed and sometimes, directions for sentencing notes from counsel. Where

[30] About Finding Rhythms - Finding Rhythms
[31] Inside Out
[32] Making Waves 🌊- Finding Rhythms

such directions are made, they are not infrequently ignored or overlooked. What follows is either a rushed sentencing note or a sentencing hearing which proceeds without a note, leading to judicial preparation for hearing taking longer, the hearings themselves taking longer, and sometimes a poorer quality sentencing decision/explanation. On occasions, hearings have to be adjourned because material isn't ready or more time is needed (where material is provided at the very last minute).

154. **Recommendation**: In all indictable cases, there should be a procedural requirement for a timetable to be set for sentencing notes and supporting documents (including defence obtained reports) – this should be subject to judicial discretion if a Judge feels there is no need for such a note. This should be enforced with non-compliance hearings to ensure there is a change in approach from the bar and bench. Hearings should be adjourned where this is not complied with, with the power to order wasted costs against the party responsible (as an enforcement mechanism).

155. Benefit: Hearings are more likely to be concluded efficiently and to a better standard., with adjournments and delays minimised. Further, it should not be seen as requiring more work from an already over-worked profession; the work involved in properly preparing a sentencing hearing involves addressing all aspects that would be necessary to include in a sentencing note. The 'additional' work is therefore simply putting the research/preparation into a word document which can be served on the court and other party/parties. It also avoids cases where (as frequently happens in homicide cases) reports are served by the defence on the day of the hearing, or very shortly before, where it is said the report evidences a lack of maturity on the part of the young offender; the Crown has no time to properly respond and the court is left to deal with the issue at very short notice.

156. This may require a change to the way in which sentencing hearings and committals for sentence are paid. At any rate, the way in which this work is currently remunerated does not reflect the complexity in the work or the time taken to conduct the work properly.

Antecedent records

157. In cases where there are similar offences on a defendant's antecedent record, information is often not always obtained or available to the sentencing court in the current case. This can provide a court with important context or information which may be relevant to risk and punishment.

158. **Recommendation**: Where available, a prosecution opening note and sentencing notes from both parties and written sentencing remarks should be

appended to an antecedent record which is available to a sentencing court in the future.

159. Probation and the parties should be given easier access to Police form MG5 summaries of previous offences.

160. Benefit: A sentencing court would be better equipped to address risk and punishment considerations having available to it, should it wish, the fullest information about previous offences.

Goodyear indications

161. Defendants often want increased certainty before they enter guilty pleas as to what sentence they will face. However, defendants who are contesting their guilt will often not want to ask the court for an indication of sentence because doing so involves a suggestion that they accept guilt. Defendants who contest guilt may make a choice to plead guilty once they know what sentence would be imposed if they did enter a guilty plea. However, the Court of Appeal has repeatedly discouraged courts from giving formal (or informal) Goodyear indications unless sought by the defence. In a number of recent cases, they have even overturned guilty pleas on the basis the Goodyear indication has deprived a defendant of their free choice.

162. **Recommendation**: No defendant should be placed into a position where their freedom of choice in respect of plea is genuinely deprived by an unwarranted disparity between the sentence that would be imposed if they plead guilty now, or if they contested the matter at trial. Similarly, judges should not give indications when they do not have a sufficient understanding of the facts to do so. In cases with sentencing guidelines, judges should have the power to request from the prosecution an indication of the category they would place the case in. If the prosecution feels able to provide such a category, the judge should be entitled to give a binding indication that they would not pass a sentence above the top of that category range prior to credit for plea (and to indicate the level of credit they consider would follow) without a request being made by the defence.

163. More broadly, when giving an established Goodyear indication, if a judge indicates a sentence that is capable of suspension, the judge should have a discretion in an appropriate case to indicate (if they feel able) that any sentence would be suspended or non-custodial.

164. Benefit: The encouragement of guilty pleas where defendants would enter a guilty plea with greater certainty as to sentence; the formalisation of the process would also prevent subsequent appeals.

Delays caused by pre-sentence reports

165. There are frequent delays caused by an absence of pre-sentence reports, whether because the reports have previously been ordered and have not been completed, or simply because despite the case being listed for plea no report has previously been obtained. This not only requires multiple hearings, but in the case of defendants in custody at the time of a report being ordered means defendants can remain in custody as remand prisoners whilst awaiting sentence.

166. **Recommendation**: Some courts have begun a process in which prior to plea defence solicitors can request a pre-sentence report, allowing for a single plea and sentencing hearing, avoiding the need for two hearings. This should be rolled out further across the country. Moreover, capacity for stand-down pre-sentence reports should be increased.

167. Benefit: avoiding unnecessary hearings and helping relieve pressure on the prison estate. We suspect the additional cost of probation officers is far cheaper than the saved prison capacity.

The individual needs of victims and offenders

168. We understand there is a proposal that in some cases individual Counsel are assigned to represent the victim[33].

169. At present victims do not have Counsel, the Crown present the case but do so independently.

170. If there is a conviction, a Victim Personal Statement (VPS) can be read.

171. We do not see what having Counsel for a victim adds a victim's voice is heard through the VPS. There is already a shortage of criminal barristers and having to find, and fund, further Counsel will place demands on an already stretched system.

172. We encourage schemes that allow reparation and meetings between victims and offenders. Offenders need to understand the impact of their actions, victims often needs questions answered, such as why the offender

[33] https://labour.org.uk/updates/press-releases/dramatic-collapse-in-crimes-solved-is-failing-victims-and-demands-reform-labours-charging-commission-says/

committed the crime they did. Any scheme that promotes restorative justice is to be welcomed.

Victims not sufficiently prioritised in monetary orders

173. Currently, a compensation order is made subject to an assessment of the means of the offender and, generally, will not extend beyond a period of three years after the sentencing hearing. Additionally, orders are not generally made where there is an immediate custodial sentence (due to an inability to discharge the order in a short period of time). This often leaves victims out of pocket, with a sense of injustice.

174. **Recommendation**: Compensation orders should be unlimited in time. People routinely enter into financial arrangements which subsist over prolonged periods of time: mortgages, credit cards, loans, car finance, finance arrangements for electrical or white goods. Such arrangements typically last for a period of 5 years, and in the case of a mortgage, decades. Courts should be able to impose an order which enables in most cases the entirety of a loss to be paid back to the victim. This would still be subject to a means test, to ensure orders were not oppressive or imposing too great a financial burden. Orders could be attached to a bank account held by the offender and deducted automatically in a similar way to collection orders/attachment of earnings/application for benefit deductions (see Courts Act 2003 Sch.5).

175. Benefit: This would enable victims to be properly recompensed for losses caused as a result of offending and instilling greater confidence in the system. There may also be a deterrent effect in relation to acquisitive crime if it becomes known that an order can last for the remainder of one's working life.

Conclusion

176. We recognise that many of our suggestions will require radical thinking and initial resources and investment, but in the long term, such diversion and treatment programmes will save money – many times over- on costly prison places. There needs to be a greater focus on why people commit crimes, and how we prevent that in the first place, and address their needs so as to discourage criminal behaviour. We welcome the opportunity to discuss any of these proposals.

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