Transform Justice's response to the Independent Sentencing Review

15 January 2025

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Introduction

Transform Justice's vision is of a fair, open, and compassionate justice system. We believe that evidence about what works to reduce crime and prevent reoffending should be at the heart of policy decisions and embedded in practice. We work to promote change by generating research and evidence to show how the UK justice system works and how it could be improved, and by persuading politicians and policy makers to make those changes.

This response is written by Transform Justice with contributions from Rob Allen, independent researcher and co-founder of Justice and Prisons. Rob has written several reports for Transform Justice including The Sentencing Council and criminal justice: leading role or bit part player? and The Sentencing Council for England and Wales: brake or accelerator on the use of prison? **This response is a revised version of our response submitted to the review on 23 December.**

Transform Justice welcomes the Sentencing Review and its stated aim of reducing the prison population. We too would like the prison population to reduce and acknowledge that sentences and sentencing guidelines can play a part in this. But we would also like to draw attention to three overarching points.

The first is that the England and Wales child prison population reduced without any change in the custody threshold for sentences. The alternatives to custody did not change either - no new community sentences were created. However there was a concerted effort by campaigners, youth justice practitioners and the YJB to persuade sentencers to be more wary of sentencing to custody. And police targets on "offences brought to justice" were abandoned so there was no longer an incentive for police to criminalise children. The only legislation regarding sentencing passed at the time the population was beginning to reduce (the Legal Aid, Sentencing and Punishment of Offenders Act 2012) was statutory guidance that the bench must explain and justify why they had used a custodial sentence rather than a community alternative. Case law has also made clear that the court must consider the use of a community sentence where the child's offence has exceeded the custody threshold. So the most intensive community sentence is a genuine alternative to custody not a "nice to have" for serious offences. We do not think the adult prison population can be substantially reduced

without sentencing reform, but we would urge the MoJ to combine reductions in sentencing with a whole system approach to changing judicial, prosecutorial and public hearts and minds regarding the use of imprisonment.

The second point is that sentences can only ever play a limited part in reducing/increasing reoffending. The drivers of crime and reoffending are societal and long-term. The means of addressing those drivers lie mostly outside the criminal justice system. An individual short-term intervention may trigger or support desistance but is unlikely to be the main cause of someone turning their life around. The main deterrent in criminal justice is the initial encounter - being caught by and getting into trouble with the police. For many people that experience is sufficient to deter them from getting into trouble again.

The third point relates to the framing of the review. As important as the conclusions of the Sentencing Review will be the framing of them. Transform Justice commissioned research from the FrameWorks Institute to guide the criminal justice voluntary sector in how to make the case for progressive criminal justice reform, including reducing the use of imprisonment. The FrameWorks Institute used an anthropological approach to ascertain people's core beliefs about why people commit crime and how to reduce it. These core beliefs are strong and tend to cross classes, ages and regions within England and Wales. They are not based on data or academic evidence. One of the key public beliefs is in "rational actor" - that people who transgress do so because they have decided that the prospective gain from the crime they plan is greater than the punishment if they are caught. This is linked to a strong belief in punishment and deterrence. The respondents also had a strong belief in rehabilitation and acknowledged that crime could be caused by social factors such as poverty. The researchers found that the most effective messages in persuading the public to support reform steered away from implying that those who committed crime were "rational actors" and from overt messages about punishment or robust sentences. The researchers found that if such punitive language was used, it triggered the belief in punishment and particularly in the ultimate punishment - prison. This is not to say that punishment is not important to people. It is simply a recommendation to message about rehabilitation rather than tough/robust sentences if the aim is to garner public support for reducing the use of prison.

Theme 1: History and trends in sentencing

1.1 The key drivers to rising sentence lengths

There are a range of factors which have driven increased prison sentence lengths in England and Wales. There is no study that has analysed the weighting of each factor and some potential drivers (such as the impact of Attorney General's references) have had no research at all. The rise in the sentenced prison population is mainly due to the growth in the number of prisoners sentenced to over ten years. Factors influencing increased sentence lengths and sentence inflation include:

- Multiple parliamentary acts since 1989 which have introduced new offences or increased the minimum and/or maximum tariff for a range of offences, including murder.
- The introduction of the Sentencing Council and its sentencing guidelines (see page 10).
- The influence of a more punitive political and media narrative on judges' and magistrates' decision-making.
- The influence of victims' advocacy groups and individual cases on policy and decision-making.
- The dysfunctionality of the appeal system and strength and growing reach of the Attorney General's reference system (see page 14).

1.2 The statutory purposes of sentencing

1.2.1 Punishment

Most sentences meet just one of the five purposes of sentencing - punishment. The fine is the most used sentence and its only purpose is punishment. As we outline in our response to theme 4, we would question such an extensive use of a purely punitive sanction, particularly given evidence that it punishes poorer people far more than the well-off, and that out of court resolutions are more effective than fines in terms of reducing reoffending.

We accept that the public generally believes those who commit crime should be punished, but don't accept that most believe prison sentences need to be increased (as

they have been) in order to achieve this. The public associates criminal punishment with prison because that is the dominant narrative amongst the media and politicians. All non-custodial sentences are in a sense punitive, since they involve either paying money or a restriction of liberty. Having to attend probation appointments is a restriction of liberty. Restorative justice can also be punitive - it can be painful for someone who has committed an offence to be confronted with the harm they have caused.

1.2.2 The reduction of crime (including its reduction by deterrence)

This should be the most important purpose of sentencing given that reduction of crime leads to fewer victims. However we are not clear that this purpose is clearly evidenced in the sentencing framework. Research suggests that imprisonment leads to an increased risk of reoffending while the criminal sanction with the lowest reoffending rate - the out of court resolution - is not a court sanction. Short custodial sentences are less effective in terms of reducing reoffending than community or suspended sentences. We think judges and magistrates should know the evidence on the effectiveness of sentences in reducing reoffending. Making reducing crime the only purpose of sentencing might distort decision-making, but it should influence sentencing more than it appears to.

We are concerned by the inclusion of deterrence in the purposes of sentencing. The evidence for criminal sanctions acting as a deterrence to individuals is very weak. There is good evidence that being caught by police and something happening is a deterrent, but evidence that the happening needs to be a criminal sanction/sentence or that the punitiveness of the sanction makes a difference is weak. The influence of sentences in terms of deterring the public in general from committing crime is less researched, but given public lack of awareness of individual sentences and tariffs, it seems unlikely that most sentences meted out to individuals are a deterrent to people in general.

1.2.3 Rehabilitation

Only the minority of all sentences are said to be rehabilitative but these include custodial sentences of which few are, in reality, rehabilitative. Short sentences are particularly unlikely to be rehabilitative.

Can prison rehabilitate? It is clear that the current regimes operating in many prisons are not rehabilitative. Drugs are freely available but education and purposeful activity are not. Only those serving long sentences in England and Wales get access to rehabilitative activities and, even then, few are on offer. International examples suggest prisons can rehabilitate but only where the training of staff is of a high standard and sufficient resources are available.

Ultimately, evidence on desistance suggests the drivers to rehabilitation lie mostly outside the justice system. The CJS can best promote rehabilitation by supporting people with convictions to have good health, stable employment, housing and family relationships and to see themselves as citizens rather than people who commit crime.

1.2.4 Public protection

We are not clear why public protection is a discrete purpose of sentencing since the aim of the whole criminal justice system is to keep the public safe. The goal of other purposes - reducing crime and rehabilitation - is to keep the public safe. Imprisonment or detention in a secure psychiatric environment protects the public from an individual while they are detained, but imprisonment can exacerbate risks to public protection if people are released more likely to reoffend. People can be radicalised, build up drug debts and develop severe mental health problems while in prison. All of these may make them more of a threat to the public on release.

1.2.5 Reparation

Reparation is an important purpose of sentencing which is usually only mentioned in association with unpaid work. Reparation provides a means for the person who committed the crime to attempt to repair the harm they caused through giving back to the community (Community Payback) and/or by repairing the harm caused to the victim by compensation or a restorative justice process. Reparation, particularly through properly facilitated restorative justice, should have a higher priority in sentencing.

We recommend the following measures in relation to the statutory purposes of sentencing:

- **Increase the proportion of sentences which are not purely punitive. Widen the definition and framing of punishment in relation to sentencing.**
- **Prioritise the reduction of crime (reducing reoffending) in the design of sentences and train lawyers and judges in the evidence base.**
- **Remove deterrence from the sentencing framework since the evidence for individual or societal deterrence is very weak.**
- **Prioritise rehabilitation in sentencing where there is a strong evidence base for that particular sentence being rehabilitative. Build up the evidence base for what works.**
- **Remove public protection as a separate purpose of sentencing since it is an overriding aim of the criminal justice system.**
- **Increase the use of reparation as a purpose of sentencing, particularly properly facilitated restorative justice and unpaid work which directly contributes to the betterment of the community.**

Theme 2: Structures

A sustainable system of sentencing and sanctions requires reform at six levels:

1. Legislation
2. Sentencing guidelines
3. The sentencing process
4. The appeals process
5. The Attorney General's reference process
6. The criminal records system

2.1 Legislation

The first area of reform concerns the way offences are created and maximum or mandatory sentences introduced by government and parliament.

2.1.1 Offences

Following concern about the proliferation of criminal offences under the previous administrations, the 2010-2015 Government created a "Criminal Offences Gateway" in the Cabinet Office to scrutinise any proposals for new offences. The formal gateway process was dropped in 2015. It has remained "the responsibility of individual departments to ensure that new behaviour is not criminalised without careful consideration, that alternatives to criminal offences are used where appropriate, and that the impacts and cost to the criminal justice system are accounted for." This less structured approach has not provided sufficient scrutiny.

We therefore recommend that the Criminal Offences Gateway is reintroduced to prevent the creation of unnecessary offences.

2.1.2 Sentences

It is widely accepted that the crisis of sustainability in the penal system has in large part been brought about by Parliament (and the courts) willing the ends of more and longer prison sentences but not the means of enforcing them. It is true that, when it is introduced, most but not all criminal legislation is accompanied by an impact assessment which estimates any need for additional prison or probation resources to implement it. The future prison population is projected annually. So legislators and the Executive should have a good idea of what resources are needed. But knowledge of impending pressures in prisons have not stopped governments adding to them, rendering them unmanageable over the last year.

To address this problem, the House of Commons Justice Committee recommended that policy proposals on sentencing should be subject to independent evaluation, so that the resourcing implications are fully recognised before they are enacted. Indeed there are already provisions for the Sentencing Council to fulfil this role, but only when asked to do so by Ministers.

We recommend that the resource implications of any criminal justice legislation should be independently assessed, the assessment published, and the Government required to respond setting out how these will be met.

Ten years ago, the British Academy made a more radical proposal to insulate penal policy making from the short-term political and media pressures which so often prioritise populist initiatives over a principled and sustainable approach. A Presumption against Imprisonment recommended the creation of a Penal Policy Committee (PPC), accountable to Parliament, comprising wide representation and expertise. Distanced from party political competition, the PPC would develop and formulate the approach to who should go to prison and for how long. Others have suggested that criminal justice would benefit from the creation of a new body playing a similar role to that played by the organisation the National Institute for Health and Care Excellence (NICE).

Developing such an approach to penal policy-making would enable full account to be taken of the financial, social and ethical costs of prison as well as its practical availability. The British Academy suggested that the Sentencing Council, working to a revised remit, would then be able to implement the policies on sentencing outlined by the PPC.

It could be argued that the Sentencing Council itself could play this role and undertake a comprehensive downwards recalibration of sentencing levels on the basis of effectiveness and cost. These are factors which it must take into account when producing guidelines. But the Sentencing Council so far has been unwilling to do it.

In 2021 the Council concluded that without a statutory remit it was not its role to reverse any observed trends in the prison population. They argued that "were it to seek, artificially and unilaterally, to raise or lower sentence levels *without good cause* – whether in general or for specific offences – it would rapidly lose the confidence of sentencers, a broad range of public opinion, and no doubt a significant body of opinion within Parliament."

The sustainability crisis has certainly provided good cause for lowering sentencing levels. As a fundamentally judicial body (nine of the fourteen members are judges), the Council's reluctance to lead an exercise to reduce sentence lengths is perhaps understandable. But the outstanding need for an effective, integrated and transparent planning mechanism that reconciles penal capacity with criminal justice policy, identified by Lord Carter in 2007, has been highlighted over the last year. The

Sentencing Council has not been willing or able to fulfil that role. Either it should be given the statutory remit enabling it to do so, alongside the necessary expertise and resources; or the role should be played by a new body.

We consider that an independent body is needed to oversee sentencing along the lines proposed by the British Academy. Whether it is a new Penal Policy Committee or a reformed Sentencing Council, it should undertake a comprehensive recalibration of sentencing levels, accurately assess the resource implications of new and existing initiatives and rigorously monitor trends in sentencing.

There are additional reasons for the sentence inflation which has caused the crisis of sustainability. Some of these are rooted in primary legislation and will deserve consideration by the proposed Penal Policy Committee or otherwise.

Measures which we think could usefully be considered include:

a) **Reducing the maximum sentence lengths for certain offences.**
b) **Removing the requirement that previous convictions must be treated as an aggravating factor when courts assess the seriousness of a crime.**
c) **Revising the extent to which appeals can be made against unduly lenient sentences (see page 14).**
d) **Increasing the scope for courts to depart downwards from the levels of sentence prescribed in Sentencing Guidelines.**

2.2 Sentencing guidelines

The second set of processes which require reform involve sentencing guidelines themselves. Even without the creation of a new body, there is a need for the Sentencing Council to do more to reduce the unnecessary use of prison.

Sentencing guidelines for most offences - other than those where Parliament has increased the maximum penalty - have sought to maintain the existing practice of the courts rather than toughen it up. The increase in sentence severity for most categories of crime since 2010 suggest that they have in large part failed, too often acting as an accelerator rather than brake on the use of prison.

A review of the Council's work in 2017 found that two of its first major guidelines resulted in unexpected increases in sentence severity. One of these was the guideline covering domestic, non-domestic and aggravated burglary. When it reviewed the guideline in 2022, the Council accepted that the aggregate impact of the original guideline was higher than predicted but was "content to retain the current levels for most cases." It would have been more logical to revise the guideline in a way most likely at least to restore sentencing to their previous severity, if not lower still.

To their credit, this is the approach which the Council has taken in respect of assault offences after their guideline produced an unexpected rise in sentence severity.

We recommend that when guidelines are intended to maintain existing levels, they are revised if they fail to achieve that objective.

There have been examples of the Council producing guidelines which do seek to increase sentence lengths even when there has been no increase in the statutory maximum for the offence. A recent example is perverting the course of justice, where the resource assessment anticipates "that at least some offenders currently receiving a fine or community order would receive a custodial sentence under the new guideline."

In some cases, sentence levels in a guideline for a particular offence have risen as a "knock on effect" from increases for other crimes. For example, increasing minimum sentences in particular circumstances of murder cases "have led to some concerns that sentences in the existing guideline for attempted murder are too low. The Council therefore decided that sentences in this guideline should be revised to ensure the gravity of this offence is properly reflected." This is expected to lead to an overall increase of around 5 years to the average final custodial sentence length (from around 15 years, 1 months to around 20 years, 5 months), requiring 300 additional prison places.

While there is an argument for a degree of proportionality between sentencing levels for closely related offences, we do not think that increased severity in dealing with the gravest crimes always requires concomitant changes in the response to lower level offending.

We recommend that the starting points in guidelines should be raised only when there is an explicit and widely accepted rationale for doing so.

For a small number of offences, the Sentencing Council has produced guidelines intended to reduce sentence severity, for example in respect of women convicted of unlawful drug importation. Welcome additional material has also been included in guidelines encouraging courts to take into account the lack of maturity of young adults; and the specific circumstances of women.

There have been many more guidelines which might have afforded greater opportunities for people to receive non-custodial sanctions or shorter terms of imprisonment. The "Overarching principles for sentencing offenders with mental disorders, developmental disorders or neurological impairments" says that the fact that someone has an impairment or disorder should always be considered by the court, but will not necessarily have an impact on sentencing. The resource assessment drawn up alongside the guidelines suggests that the Council does not expect that there will be any impact on sentencing severity; on the use of lower culpability factors and mitigating factors relating to mental health; or the imposition of community sentence requirements.

The guideline states that courts may consider a Mental Health Treatment Requirement (MHTR) attached to a Community Order as an alternative to a short or moderate custodial sentence, and that they may also wish to consider a drug rehabilitation requirement (DRR) and/or an alcohol treatment requirement (ATR) in appropriate cases. Research has found that being sentenced with an ATR, DRR, or MHTR had a positive effect on reoffending outcomes compared with short custodial sentences, although the comparison between those getting community sentences with and without treatment requirements is more complex. The modest results are likely to reflect the low intensity and mixed effectiveness of many of the treatment models offered.

Nevertheless, had the guideline given greater encouragement to the use of high quality community based treatment responses, the Council would have been duty bound to make a proper assessment of the resources required to implement them. The use of sentences comprising healthcare treatment is well known to be constrained by lack of

availability. The Council and its guideline could have helped make the case for an expansion of these approaches, potentially using resources earmarked for prison expansion.

The Sentencing Council has published research which has found that sentencing for some crimes (e.g. drugs offences, kidnap, blackmail and false imprisonment) appears to be racially biased. However it is not clear that guidelines have played a role in reducing these disparities.

We recommend that more guidelines should encourage the use of a wide variety of alternatives to imprisonment and that the Sentencing Council works with the government to ensure appropriate provision is available for those who need it.

We recommend that research is conducted into the causes of, and most effective ways of reducing, racial disparities in sentencing. The findings of the research should inform an action plan involving the Sentencing Council, the Judiciary and the Ministry of Justice.

2.3 The sentencing process

The third process which needs reform is the way in which courts reach their decisions. In order to maximise the opportunities for people to serve their sentences in the community, or serve shorter sentences, there are a number of additional measures that need to be taken.

The first is to ensure that all of those facing a sentence of imprisonment have access to good quality, preferably free, legal advice and representation.

Second, courts should be required to obtain a comprehensive up to date Pre-Sentence Report before imposing a prison sentence. The report should in every case specifically address whether there is an opportunity for a community sentence or suspension and, if not, why not. Short adjournments on bail should be encouraged in order to obtain the necessary information.

Third, expedited opportunities should be made for appeals against custodial sentences, with release on bail more widely used pending an appeal (see section 2.4).

Fourth, when someone has been on bail when they are sentenced to prison, they should not be required to start their sentence immediately but invited to report to prison at a mutually convenient date. Failure to do so would result in arrest. This system works well in several European countries.

2.4 The appeals process

The smooth functioning of the justice process and the accountability of the system relies on an accessible criminal appeals process, but we don't have that. If sentencing is to be reformed, we recommend reforming the process of appealing sentences.

Any defendant can appeal the sentence they received in the magistrates' court but only a tiny number do (2,570 in the year ending September 2024, a decrease from 4,816 in 2014). Some people say that this is because the quality of decision-making is so good. Academics and other observers of criminal courts throw doubt on this - a study of sentences considered by the Court of Appeal found that over a third of sentences appealed were unlawful. There are various barriers to appealing magistrates' court sentences:

- The magistrates' court is not a court of record which makes it hard to gather evidence for an appeal, particularly for unrepresented defendants.
- Few unrepresented defendants understand the intricacies of sentencing guidelines so they don't know whether their own sentence was in accord with them or not. Equally if a sentence was technically within the guidelines, lawyers feel it is not worth appealing since they are unlikely to win.
- Lawyers are paid a tiny amount for an appeal from the magistrates' court and are thus disincentivised from launching one, particularly for a complex case.
- If someone has been sentenced to a short prison sentence, it can seem pointless to them to appeal the sentence given they may be released by the time of the hearing.
- If someone loses a criminal appeal to sentence they must pay costs.

We are not experts on criminal appeals to sentence in higher courts but understand there are many barriers there too. We should not make appealing sentences too easy but it would be helpful to lower some of the barriers. This may have a moderating

effect on sentences, given that many sentence appeals are successful (e.g. 48% of appeals from the magistrates' court). For successful appeals to have maximum moderating effect, judges must receive notification of the results of any of their sentences which have been appealed and analyses of successful appeals should be circulated amongst all judges.

We recommend the following changes to the appeals process:

- **Mandate that no sentence will be increased as a result of a criminal appeal to sentence from the magistrates' court.**
- **Don't charge private payers costs in the case of an unsuccessful appeal from the magistrates' court. Such defendants have a financial incentive not to launch a "frivolous" appeal since they are already paying privately for a lawyer.**
- **Extend the window for launching an appeal.**
- **Launch a fast track appeal system to deal with short custodial sentences and/or provide default bail for those appealing such a sentence.**
- **Ensure that appeals are used as a learning tool for the individual sentencers whose sentences have been appealed, and for judges in general.**

2.5 Attorney General's references

We understand why Attorney General's references were instituted as a system but are concerned at the chilling effect on judges attempting to moderate sentences. We have heard anecdotally that successful Attorney General's reference appeals are discussed amongst judges when successful appeals to sentence may not be.

We urge the government to consider doing research on the practice and impact of Attorney General's references with a view to examining whether the current scope and the criteria for successful appeals are conducive to effective sentencing overall.

It seems odd that anyone can appeal to the Attorney General for relevant sentences to be increased, but only defendants can appeal for a sentence to be reduced.

2.6 Sentences and criminal records

Criminal records are not mentioned in the scoping of the Sentencing Review but many people who are convicted say the criminal record is far more punitive than the sentence. We doubt that many judges or criminal lawyers are expert in the criminal records implications of the sentences that mete out, yet the record for a relatively minor incident where no-one was injured can be life long. A 13 year old girl was recently prosecuted for kicking the door of an asylum seekers' hotel during the riots in July 2024. She pleaded guilty and received the lowest possible sentence, a referral order. But her offence - racially aggravated violent disorder - will appear on any enhanced or standard DBS check until she is 70. If she had been charged with criminal damage this would not be the case. Someone who receives a suspended sentence has the same criminal record as if they had been sentenced to immediate custody. We are concerned that defendants are seldom properly informed of the criminal records implications of sentences and that training and guidelines for judges do not include sufficient information. A criminal record reinforces stigma, is punitive and hinders rehabilitation. Disclosure is a barrier to travel and to gaining employment and promotion. We are not suggesting the abolition of our criminal records system but recommend that criminal record implications should inform sentencing.

We encourage the government to thoroughly review the proportionality and fairness of our criminal records disclosure system. And to ensure that the criminal record is factored into sentence decision-making given its rehabilitative and punitive implications.

Theme 3: Technology

We have no comments on theme 3.

Theme 4: Community sentences

Our response to question 4 focuses on the magistrates' courts where we propose the following reforms:

- Reform court fines and other court costs so that the criminal justice system is not disproportionately punitive to people on low incomes.
- Out of court resolutions - pushing the lowest level of cases out of magistrates' court altogether for the police to resolve using cautions, community resolutions and deferred prosecution. We provide a list of potential offences as a starting point below.

4.1 Court fines and other court costs

Courts have a range of sanctions at their disposal for someone found guilty of a crime. The most common by far is a fine, given to approximately 80% of people convicted in the courts. Besides fines, courts can also require convicted people to pay other costs including compensation to the victim, a surcharge which funds victims' services, and a contribution to prosecution costs.

Fines are not rehabilitative and are often counterproductive if the person's crime was partly or wholly driven by poverty or if the person is poor. Public observers participating in our courtwatching programme were frustrated to see fines being given to defendants where it was obvious they would find it difficult to pay: "A fine given to an unemployed person appears nonsensical to me." Magistrates can and do sometimes adjust fine amounts in light of the defendant's circumstances, or allow payment plans for defendants who would struggle to pay. But courtwatchers observing these cases were not convinced these safeguards were working effectively: "The fine placed on this woman is £20 per month, a fortune out of her meagre Universal Credit. What is the true purpose of such a punishment?"

Research by the Centre for Justice Innovation on the impact of court fines on people on low incomes describes court fines and financial charges as one of the 'quieter injustices' of the criminal justice system, disproportionately impacting the most vulnerable in society. While some people experience fines and charges as an inconvenience or 'manageable hardship', those on the lowest incomes are pushed

further into debt and/or poverty with significant impacts on their physical and mental health.

We recommend that the system for court fines and financial charges needs to be reformed in the following ways:

- **New guidance and powers for sentencers to ensure court fines and financial charges are affordable for the individual involved, as recommended by the Centre for Justice Innovation in their report on court fines for people on low incomes.**
- **Lower total amounts for court fines and costs so that it is more proportionate to people's incomes.**
- **A more compassionate review process for people who have not yet paid their court fines and costs.**

Unfairness in the use of court fines extends to people receiving them through the single justice procedure (SJP), a fast-track criminal court process designed to make the processing of the lowest level of offences speedy and efficient for defendants and for the system itself. Those who are convicted must pay a fine and costs, often regardless of the mitigating circumstances. The total amount is often considerable compared to the value of what was not paid, such as in the case of train fares. For instance, someone had to pay £462 in total for paying £1.60 too little for their train fare. If someone is poor and fills in details of their means, they may get a lower fine. If someone is poor and doesn't respond they will be convicted in their absence and be sentenced to pay the standard fine and costs.

We recommend that the amounts and process for deciding on single justice procedure fines should be reviewed and made more proportionate to income. We also recommend taking some offences which are currently dealt with by the SJP out of the scope of criminal law altogether. For example, prosecution for non-payment of a TV licence, and prosecution of parents whose children are not attending school.

4.2 Out of court resolutions

A pressure to race through cases means magistrates' courts overlook underlying drivers of crime such as homelessness, drug dependencies and mental health issues and do not take them into account when making sentencing decisions.

Where defendants present with one or more of these issues, an effective criminal justice response would address these problems as part of, or alongside, the court sanction so that the person can go on to contribute positively to society. Evidence from our courtwatching programme and from recently published academic research shows that magistrates' courts are far from being able to achieve this aim.

Dr Shaun Yates of the London Metropolitan University researched the impact of over-efficiency in the magistrates' courts through nine months of court observations. He concluded that the court prioritises speed over everything else, including defendant comprehension, verdict accuracy, and fairness.

Dr S Yates found that courts appeared to willfully ignore defendants mental ill health or distress, refraining from investigating these issues when they were raised and continuing with proceedings as normal. District judges responded to defendant mental ill health being raised as a mitigating factor with disbelief or impatience. Where the courts established mental ill health of the defendant as making diversion from court potentially appropriate, sentencers were unclear how to action this.

Courts always considered substance abuse as an aggravating rather than a mitigating factor in sentencing. Sentencers would morally reprimand people for drug-taking even when they were addicted and did not have control over their behaviour. Sentencers supervising drug rehabilitation requirement sentences were an exception - asking defendants about themselves to understand drivers behind the crime. However, magistrates' advice in response was "amateur in nature," amounting to "stay away from drugs."

Decisions in a magistrates' court need to be made carefully or risk miscarriages of justice or a decision that makes matters worse. According to our courtwatching findings, an efficient court system is important to the public, but they also want to see sentencers taking the time to reach pragmatic, productive sentencing decisions which

will reduce the risk of reoffending. They were frustrated by sentences that did not tackle defendants' underlying issues and liked seeing magistrates and judges who asked for more information and appeared to give decisions thoughtful consideration. A speedy, standardised response will not help people who find themselves before the courts to live a crime-free life or address underlying issues.

A better solution is to take the lowest level magistrates' court cases - most of which will end in a fine - out of the courts altogether. Instead these cases should be resolved by the police using out of court resolutions.

Out of court resolutions are a hidden success story in the criminal justice system. They give police discretion to offer an individualised response to victims and those who have committed crime. They are swift, cost effective and have better evidence in terms of reducing reoffending than court sanctions.

Greater use of out of court resolutions can also help address racial disparities in the criminal justice system. Research by the Crown Prosecution Service found disproportionality in its charging decisions; White British suspects had the lowest charge rate compared to all other ethnicities and Mixed Heritage suspects had the highest. The CPS has done good further research to explore the reasons for these disparities, however this problem can also be addressed by resolving more cases out of court, with a particular focus on ensuring out of court resolutions are accessible to people from racially minoritised communities.

The magistrates' courts need more time for each case. Reducing demand on the magistrates' courts would give the courts the time they need to understand the person in front of them and to sentence in a way that supports rehabilitation. Reducing demand has worked well in the youth justice system – youth justice services' caseloads have shrunk and now they are the best performing part of the criminal justice system.

We recommend reducing demand on sentencers by pushing the lowest level of cases out of magistrates' court altogether for the police to resolve using cautions, community resolutions and deferred prosecution. Out of court resolutions are more rehabilitative and reparative than a court fine, have lower reoffending rates than any court sanction and provide a swifter resolution for victims.

We propose reviewing the following list of non-motoring offences as a starting point:

- **Tram or Trolley Vehicle Offence**
- **Television licence evasion**
- **Public Health Offence**
- **Travelling by railway without paying correct fare, failing to show ticket, failing to give name and address, etc**
- **Education Acts - Truancy**
- **Drunkenness, with aggravation - disorderly in a public place**
- **Causing harassment, alarm or distress - summary**
- **Assaulting, resisting or obstructing a constable or designated officer in execution of duty**
- **Possession of a controlled drug - Class B (cannabis)**
- **Possession of a controlled drug - Class A**
- **Possession of a controlled drug - Class B (excluding cannabis)**

Each offence listed above saw a minimum of 1,000 cases in the magistrates' courts in 2023, of which at least three quarters ended in a court fine or discharge. In total the list represents 175,000 cases in the magistrates' courts. By dealing with these cases via out of court resolution as default there is scope to meet the public's desire for punishment while better supporting rehabilitation and preventing further offending.

Theme 5: Custodial sentences

5.1 Reforming custodial sentences

Custodial sentences have increased significantly over the last twenty years, particularly those of 10 plus years. This sentence inflation has not improved outcomes for those who have been convicted, for victims or for communities. Some victims would certainly view longer prison sentences as a good outcome, but this is not the case for all. Most victims want the person who harmed them not to do it again, to them or anyone else. Many also want punishment. But any criminal sanction is a punishment, particularly imprisonment.

The optimum outcome of custodial sentences for prisoners is rehabilitation and support to rebuild their lives. The odds are stacked against imprisonment achieving this given that it breaks employment, housing and family links and given the opportunities for positive activities in prison are so limited. A College of Policing meta-analysis (based on 116 studies) of the effectiveness of imprisonment in terms of reoffending found that "on average, evidence suggests that custodial sanctions increase reoffending compared to non-custodial sanctions." A report commissioned by the Sentencing Council came to a similar conclusion. This suggests that if we wish to prioritise reducing crime, we should use imprisonment sparingly and acknowledge that it is likely to increase reoffending. This is a price worth paying for some people who we need to detain to prevent immediate reoffending and/or to meet the public and victims' desire for punishment. But we should recognise the price paid in increasing reoffending.

In terms of reforming custodial sentences we recommend a review of the maximum and minimum tariff for all determinate sentences. In particular we recommend:

- **Reducing the tariff for many either way offences from a maximum prison sentence of 24 months to 12 months.** Many either way offences are non violent or not very violent. For example, assault emergency worker is the same offence as common assault (which has a maximum sentence of imprisonment 6 months) bar the victim involved. The offence can be someone shouting and, even where there was human contact, does not involve any lasting physical injury. We

propose changing the maximum tariff for a range of either way offences including assault emergency worker. This would significantly reduce the number of cases received by the Crown Court and thus the backlog. We have analysed the either way offences which attract the lowest sentences in the Crown Court, highlighting offences which we suggest could be downtariffed to a 12 months maximum sentence (see appendix 1). This down-tariffing would avoid the need for an intermediate court and reduce the caseload of the Crown Court considerably.

- **Prevent the use of custodial sentences of 12 months and under. Custodial sentences of this length have no useful purpose**. They are long enough to disrupt the fabric of someone's life but not long enough to do any useful rehabilitation. They may give communities or victims "respite" but this respite is very short and not worth having as imprisonment increases the likelihood of offending. "Respite" could also be achieved through non-custodial means e.g. tagging, supervision etc. We recommend using community sentences as the default sentence in place of a short custodial sentence. We are concerned that suspended sentences, if breached, turn into custodial sentences. Technical breaches are often due to mental health issues, neurodivergence, addiction, homelessness and challenges associated with poverty. The criminal record for a suspended sentence is also the same as that of a custodial sentence. We appreciate that reoffending by someone serving a community sentence may trigger a suspended or immediate custodial sentence under 12 months but would suggest each case should be treated individually.
- **Prevent short remands turning into short sentences.** Many short prison sentences are currently directly related to remand. When someone is remanded by magistrates, tried and convicted of a relatively low level crime, the sentence is often one of imprisonment deemed served (it is counted as a short prison sentence). The response is understandable - for this level of crime judges often don't wish to punish the person twice by adding a non-custodial sentence to a period of imprisonment. Curbing the use of short prison sentences would thus also need to address the use of remand and strengthen the "no real prospect" test, which is currently ineffective. If the use of remand for lower level offences

is not addressed, courts will use short sentences "by the back door" i.e. retrospectively.

5.2 Restorative justice

We believe that outcomes for victims, prisoners and communities would improve if restorative justice were better integrated into custodial sentences (for the few who need to be imprisoned). Restorative justice must only ever be undertaken when the victim concerned is willing to do so. When the victim and the person who harmed them have agreed to a restorative conference, a trained facilitator will prepare and manage this. Academic evidence has found that the restorative process has a powerful impact on the ability of both victim and prisoner to move on in their lives. The story of Jacob Dunne shows how powerful it can be. In 2011, he punched someone outside a nightclub leading to the man's death and was sentenced for two and a half years for manslaughter. Mr and Mrs Hodgkinson, the parents of his victim, felt the sentence was too lenient and petitioned via the Attorney General's references to get the sentence increased. They were unsuccessful and after some research turned to restorative justice as a potential route to help them heal. Eventually a restorative justice conference happened in prison which proved to be positively life-changing for both parties. Such prison conferences are relatively rare. **We encourage the review to work out how the use of restorative justice alongside a custodial sentence can be increased.**

5.3 Offender behaviour programmes

The two key mechanisms put forward as promoting rehabilitation via sentencing are offender behaviour programmes (offered by probation and prisons) and probation supervision. Offender behaviour programmes are accredited by HMPPS via an opaque process. They are based on academic evidence of the theoretical effectiveness of cognitive behaviour therapy based programmes in changing behaviour. However most of the specific accredited programmes used by HMPPS currently have no impact evaluation, so no one knows whether they work. This is risky. An impact evaluation for the sex offender treatment programme published in 2017 showed that it had a backfire effect, making those who went on it more likely to reoffend than those who did not.

Lack of compliance with an offender behaviour programme has serious consequences for those sentenced to undertake it. Someone on a suspended or community sentence may be breached if they do not attend sessions and have their sentence increased or be sent to prison. Someone in prison subject to parole for release may have parole denied if they have not taken or completed a specific course. We are very supportive of rehabilitative sentences but cannot support punishment/bar on release for lack of compliance or non completion of a course which has no impact evaluation. **We encourage the Ministry of Justice urgently to commission impact evaluations of the current suite of offender behaviour programmes.**

Supervision by probation is also framed as rehabilitative but can only be so if probation officers have the training and time to supervise with compassion and care. Currently this is frequently not possible.

Theme 6: Progression of custodial sentences

We have no comments on theme 6.

Theme 7: Individual needs of victims and offenders

Our response to question 7 focuses on:

- Whether sentencing should be tailored to specific groups, in particular to young adults
- The views of victims on sentencing
- The sentencing of crimes against women and girls

7.1 Young adults

Overall we support a tailored response to young adult defendants but our report on young adults and maturity in the magistrates' courts shows that even where sentencing guidelines allow for this, it is usually not happening in practice.

The Sentencing Council's general guideline on age and/or lack of maturity recognises the potential impact of low maturity on a person's responsibility for an offence and their ability to cope with a prison or community sentence. It notes that young adults are still developing neurologically and so are less able to evaluate the consequences of

their actions, control impulses and limit risk taking. It also acknowledges they have a greater capacity for change and are more receptive to rehabilitation.

Despite guidelines stating maturity should be factored into the court's consideration of the defendant's culpability for the offence, Transform Justice's report summarising courtwatcher observations of almost 200 magistrates' court hearings involving young adult defendants found that:

- The maturity of the young adult defendant was not even mentioned in two thirds of hearings.
- When maturity was raised, this was not usually in depth – instead, as one courtwatcher said, it was mentioned "to tick a box".
- There were some instances of specific, tailored maturity arguments e.g. in relation to susceptibility to peer pressure, poor judgement of risk, or the defendant being in education or employment which could be disrupted by a criminal justice sanction.
- Maturity arguments, when made, did sometimes lead to changed behaviour by the court e.g. to sentence length or severity, or adjournment for more information.
- But usually comments about maturity were dismissed by the court decision-makers.

Transform Justice believes that young adult defendants should be treated more leniently by the court on account of their immaturity and their potential to change. The fact that this is not happening in practice shows that Sentencing Council guidelines alone are not sufficient to prompt courts to tailor sentencing to specific groups. **We suggest the following additional measures to ensure sentencing is tailored appropriately:**

- **If maturity is put forward in representations before sentencing, magistrates or judges should mention it in their sentencing remarks, stipulating what (if anything) they have taken into account. This would help build a more accurate**

picture of the extent to which maturity is considered in court decision-making.

- **The Judicial College should introduce a module on young adults to the mandatory training for magistrates.**
- **The Magistrates' Association and Judicial College should conduct an audit of magistrates core training and identify where learning points around young adults and maturity could be introduced.**

Recognising the limits of sentencing guidelines and training to change sentencer behaviour, an alternative solution for young adults is to have them heard by youth court specialist magistrates instead. Practically this could be facilitated by all young adult hearings being listed on one afternoon after the youth court sat in the morning. It would not need to follow the format of the youth court (e.g. no special measures), but it could take advantage of the expertise of youth court magistrates and specialist lawyers who have already been trained in the relevance of maturity on offending. Since youth work is decreasing there may be an opportunity for youth court magistrates to play a bigger role in dealing with young adult hearings. **We recommend investigating the potential for a local pilot of grouping young adult hearings together on one day/afternoon per week, involving youth specialist magistrates and lawyers.**

7.2 Victims' views on sentencing

There is little research into what victims want from the criminal justice system or from sentencing in particular. We know victims are often dissatisfied with the criminal justice system but we would urge this review not to assume that the solution lies in changes to sentencing. We are concerned that sentencing policy can be overly influenced by individual victims campaigning for more punitive sentences for particular crimes rather than what is right for victims overall. **We suggest that a better evidence base is built of overall victims' views of sentencing so that sentencing policy is not distorted by individual campaigns. The independent oversight body we propose in theme 2 could play a role in gathering and implementing this evidence.**

One source of evidence that does exist is the victims' commissioner's most recent annual report based on a survey of 3,000 victims. The report does indicate low victim

satisfaction and confidence in the criminal justice system, but this is due to poor communication, long delays and lack of support rather than unhappiness around sentencing. The report suggests that in general, victims would be more satisfied by the whole process if other elements, besides sentencing, were improved - including timely communication from the courts, for the case not to be delayed, and for victims to get support to heal.

In addressing the needs of victims, we suggest prioritising reforms that will ensure victims are kept informed and supported to heal, including being given access to restorative justice.

7.3 Violence against women and girls offences

The review draws particular attention to the sentencing of crimes against women and girls. This is a complex area and needs to take account of the views of all VAWG victims, whether they engage with the criminal justice process or not. The majority of all domestic abuse victims (54.7% as recorded by the police) do not support police action from the beginning. Some victims will resist police action since they are being coercively controlled, but we don't know what proportion. Others may not trust the system or the police, or not want to criminalise their partner. In addition 12% of court processes do not conclude because of complainant issues, usually withdrawal from the process. For a myriad of reasons, it appears that many complainants of domestic abuse do not want (or are persuaded not) to use the criminal justice system to resolve the issue.

The view of some victims that the CJS will not positively address their issue is backed up by evidence. A College of Policing meta-analysis of the role of criminal sanctions in preventing domestic abuse found little positive evidence: "Neither conviction nor sentence severity was found to have any effect on reoffending. The overall evidence is therefore mixed, with the authors concluding that criminal justice sanctions for intimate partner violence have no consistent effect on subsequent offending." More recent quantitative studies have supported this conclusion and have confirmed that the most punitive criminal sanction - imprisonment - increases reoffending.

A 2021 meta-analysis by US academics of 57 studies of the deterrent effects of criminal justice sanctions on intimate partner violence concludes: "The evidence from this research is that there is more - not less - violence against intimate partners when prosecution and conviction are followed by incarceration. These findings provide systematic evidence against the use of incarceration for this offense… The potential harm associated with incarceration cannot be ignored, and those who advocate for more frequent and more severe post-arrest sanctions must either develop alternatives to incarceration or identify other rationales that provide sufficiently large social benefits to outweigh the increased frequency of violence associated with the use of incarceration for intimate partner violence."

Another US study suggests that imprisoning those who have technically breached the conditions of a community sentence for domestic abuse also has the effect of increasing offending. This study is about domestic abuse courts but its conclusions could potentially be extended to the breach of protection orders in England and Wales.

The evidence on the effectiveness of charging alone is more mixed. While the recent US meta analysis study found no deterrent effect for conviction, a recent quantitative study of cases in Greater Manchester found a 5% reduction in recidivism in cases which were charged. The sample sizes in the latter study are however much smaller than in the meta-analysis, so the findings are less reliable.

If criminal sanctions have any potential to be rehabilitative, then those convicted must be referred to evidence based rehabilitative programmes. Unfortunately, as mentioned previously, no HMPPS accredited programme currently in use for domestic abuse has been evaluated for its impact on offending. The best evaluated programme for those who commit domestic abuse is in fact a programme - CARA - used in conjunction with the out of court conditional caution. This has a strong evidence base for reducing recidivism.

Unfortunately the Ministry of Justice has no data on the recidivism associated with criminal sanctions used for domestic abuse crimes. Though the MoJ gathers data on reoffending for all those cautioned or convicted of crime, it doesn't link that data to the domestic abuse "flag" used to identify crimes committed in a domestic context.

Some victims and many victims' groups think prosecution, conviction and imprisonment are effective in reducing domestic abuse. And many victims want the person who harmed them to be punished. However we wonder if, in sentencing domestic abuse, the desire to punish conflicts with the government's (and victims') stated aim to reduce domestic abuse.

If sentencing is to prevent an increase in domestic abuse, then we should curb the use of imprisonment as a sanction wherever possible. We might also reappraise the use of out of court resolutions given that the evidence base for conditional cautions is strong, and that for non-custodial court sanctions is not. We also suggest that any increase in criminal sanctions for domestic abuse is likely to negatively affect women given that an increasing proportion of those prosecuted for domestic abuse are women - 4,372 y/e March 2024 or 8.5%.

We recommend that the government reappraises the use of criminal sanctions, particularly imprisonment, in relation to domestic abuse flagged offences in the light of international evidence of their impact on recidivism. Only by reducing offending can we protect current victims and prevent future victims.

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Appendix 1

Either way offence cases in the Crown Court by offence with proportion ending in discharge/fine/community sentence, year ending December 2023.

Data source: Crown Court data tool from MOJ criminal justice statistics.

Filtered for: offences with over 100 cases in the Crown Court in year ending December 2023; offences where over 20% of cases ended in discharge/fine/community sentence.

Highlights indicate those filtered offences suitable for downtariffing to a 12-month maximum sentence.

Offence	Total appearing in CC for trial/ sentencing	Total outcomes	Discharged/ fine/ community sentence
85 Health and Safety at Work etc. Act 1974	129	92	66%
92E.01 Possession of a controlled drug - Class B (cannabis)	1,024	907	49%
92D.02 Possession of a controlled drug - Class B (excluding cannabis)	134	119	47%
92D.01 Possession of a controlled drug - Class A	864	761	43%
8.02 Owner or person in charge allowing dog to be dangerously out of control in a public place injuring any person	162	122	41%
58D Other Criminal Damage	384	208	38%
84 Trade Descriptions Act and Similar Offences	176	144	38%
10B.2 Possession of firearms offences - triable either way	290	240	38%
8.22 Assault of an emergency worker	2,279	1495	32%
8.13 Racially or religiously aggravated causing intentional harassment, alarm or distress - words or writing	447	316	32%
86.2 Possession of indecent photograph of a child	224	195	28%
8.07 Racially or religiously aggravated common assault or beating	132	78	26%
86.1 Taking, permitting to be taken or making, distributing or publishing indecent photographs of children	2,414	2270	25%

Offence	Total appearing in CC for trial/ sentencing	Total outcomes	Discharged/ fine/ community sentence
8.20 Sending letters etc with intent to cause distress or anxiety	351	271	25%
88E Exposure and voyeurism	276	214	24%
59.4 Threat etc., to commit Criminal Damage - triable either way	220	153	24%
11 Cruelty to or Neglect of Children	347	239	23%
54 Handling Stolen Goods	819	631	23%
66.4 Breach of a non-molestation order	477	361	23%
33 Going Equipped for Stealing, etc.	119	84	23%
66.9 Other Offence against the State or Public Order - triable either way	1,140	986	22%
66.1 Affray	2,063	1696	21%
41 Theft by an Employee	192	163	20%
39 Theft from the Person of Another	698	555	20%