Transform Justice

Transform Justice is a charity and think-tank which advocates for a more humane, open and effective justice system in the UK. This submission is based on recent research done by Transform Justice and others.

The size and make up of the prison population

The England and Wales prison population has risen steadily since 1941, at a far greater rate than the population,

- There are very few years in which the population has fallen. These include 1972-4, 1989-1993 and 1998-2000
- From 2012 to 2017 the prison population stabilised
- In 2017 the prison population started rising again and is predicted to rise 1600 by 2022
- The IPP sentence contributed to a rise in the prison population as the actual length of these sentences was very long. The contribution of IPPs to the prison population will wane but the high number of recalls of released IPP prisoners is slowing that decline.
- The proportion of those on remand has decreased to 12% and is much lower than many other countries and nations including Scotland (18%). Numbers on remand have however recently begun to rise.
- The number of those sentenced to imprisonment has not risen in recent years, but the length of average prison sentences has, particularly sentences over four years.

Sentence inflation

Sentence inflation is the single biggest cause of the recent growth and predicted rise of the prison population. Without sentence inflation, the prison population would have fallen. The Ministry of Justice has published no research on sentence inflation and seems unclear as to why it is occurring. It has mentioned an increase in the seriousness of offences and an increase in sex offences.

Sentences for violent and sexual offences have shown greatest growth over the long term, but in the last couple of years, the average length of a prison sentence (ACSL) for those offences has gone down, whereas the ACSL for six other offence categories (including fraud and arson) has been going up. The only kind of offence where prison sentences have gone down in length is public order. So while sentence inflation is not “across the board”, it is pretty widespread and even the ACSL for theft (which includes shoplifting) has gone up by two weeks since 2007.

Given the lack of research, the causes of sentence inflation are subject to debate. Our contentions are

1) There is no evidence that the offences which are currently given sentences of imprisonment are in nature more serious than previously. This is a suggestion made by MoJ but there is no evidence for it. The offenders being sentenced may have more serious records, but we have no evidence that offences are in general more serious.
2) There are strong indications that sentencing guidelines have led to sentence inflation, and are continuing to do so (see below).

3) Attorney General (AG) references may be fuelling sentence inflation through effectively increasing the tariff for serious offences. There is anecdotal evidence that judges’ behaviour is more likely to be modified as a result of a successful AG ref than as a result of a successful appeal – maybe due to the publicity surrounding each AG ref. AG references were first legislated for in 1988 and have steadily increased in scope.

4) Appeals to sentence have declined substantially recently. The effect of individual successful sentence appeals on the size of the prison population is negligible, but appeals should have an effect of modulating the tariff for all sentences. The decline in the number of appeals to sentence has not been subject to research, but a scoping paper by Dr Jessica Jacobson suggests that cuts to legal aid rates for doing appeals and the financial risks of appealing may be barriers. More recently, the seeming “rigidity” of sentencing guidelines may have dissuaded potential appeals.

5) The problems of TR, and the narrative surrounding them, may have led to some judges to opt for a short prison sentence rather than a community sentence - the previous Lord Chief Justice, Lord Thomas, called for community sentences to be tougher, the quality of pre-sentence reports has declined and inspection reports on CRCs have been very poor.

6) The narrative on the use of prisons has not supported any reduction in its use and in sentence length. The Lord Chancellor has recently said he would like prison numbers to go down, but he has not said the government wishes to reduce the prison population. A number of proposals for new or increased sentences (animal cruelty, dangerous driving, the possession of acid) have been supported by the government, the narrative surrounding which suggests punishment resolves “wicked” social problems – ie that prison works.

7) There are indications that video hearings and/or lack of representation may be leading to higher prison sentences and more remand.

8) Lawyers and campaigners are concerned that the Court of Appeal has been more inclined in recent years to reject CCRC and other appeals, and to agree significant increases in sentences under the expanding Attorney General reference programme. They say this has had an inflationary effect on all Crown Court sentences.

**Sentencing guidelines**

The Sentencing Guidelines Council for England and Wales started work in 2010. It was set up to provide consistency in sentencing at every level. Previously this was provided by case law, and the availability of appeal procedures. Unfortunately, the Sentencing Council appears to have achieved consistency at the expense of sentence inflation.

Since 2010 the Council has issued guidelines on all the most common offences. These have often been described in the press as “tougher”, and the Sentencing Council’s own analysis of the impact of some guidelines indicates that they have caused sentence inflation. “The Council has assessed the impact of its guidelines on assault and on burglary. The first found that, in cases of causing grievous bodily harm with intent (GBH with intent), the average custodial sentence length (ACSL) rose by 17 per cent between the 12 months before and 12 months after the definitive guidelines came into force (from 5.9 years to 6.9 years). “This was substantially in excess of the small increase anticipated by the resource assessment (a rise of 2 per cent and a requirement for between 20 and 60 additional prison places). In addition, the
proportion of sentences greater than seven years increased”¹. The Sentencing Council’s assessment of the impact of their burglary guidelines is equally concerning – it attributes most of the rise in length of sentences to the guidelines, which came into force in 2012.

We need more research, but lawyers, academics and penal reformers are becoming increasingly convinced that the Sentencing Council of England and Wales is playing a (unwitting) role in increasing the prison population. As Professor Nicky Padfield recently wrote “The Sentencing Council hold one of the most important keys to reducing the prison population, but shows little appetite for wanting to use it, even where the evidence might suggest that longer sentences for some offenders can exacerbate the underlying social problems”.²

**Remand**

Transform Justice is currently doing research on the unnecessary use of remand in England and Wales and this evidence is based on emerging findings.

Our remand population is one of the lowest in Europe proportionately, but 9,902 prisoners were in prison on remand at the end of September 2017 and those on remand account for more first receptions than sentenced prisoners (11,180 vs 10,001 in the last published quarter). This means remand prisoners cause disproportionate stress to the overcrowded prison system.

People are deemed innocent until proven guilty so remand should only be used in relatively narrow circumstances, namely if there is a high likelihood of the defendant interfering with witnesses, of failing to appear in court or of committing further serious offences. The nature of the offence is only relevant to remand in certain circumstances and, in theory, someone can be given bail whatever they are charged with.

There are strong indications that the remand decision may be too dominated by the prosecution case and the risk miscalculated. Of those remanded in magistrates court’s, whose cases are entirely dealt with in magistrates’ courts, only 40% go on to get a custodial sentence. 25% are acquitted and 35% get a non-custodial sentence. In the Crown Court 13% of those remanded get a non custodial sentence and 12% are acquitted³. It can be argued that the criteria for remand are different from those of sentencing, but would still seem that too many people who do not pose a high risk to society are being remanded, only to be released.

However there are aspects of remand practice which appear to lead to unnecessary imprisonment:

- A relatively high proportion of those at risk of remand in magistrates’ courts are unrepresented. A Magistrates’ Association survey (published 2015) suggested that in c15% of bail/remand hearings in magistrates’ courts, defendants were unrepresented.
- Little alternative accommodation is available for those who cannot stay at their normal address (eg if accused of domestic violence) or who are homeless

² [Criminal Law Review Issue 1 2017](Criminal Law Review Issue 1 2017)
Once a defendant is remanded, in effect the onus of proof seems to be on the defence to prove their client should be bailed.

- Once on remand, prisoners are often forced to have additional remand hearings on video or the hearings are held in chambers. This means prisoners have little opportunity to communicate with their lawyers and to participate in their own hearings.

- Those with mental health problems are sometimes remanded to facilitate a mental health assessment despite evidence that such assessments are more easily done in the community.

The child custody population

The only sector of the England and Wales custody population to have experienced a significant decline in the last ten years is the child (10-18) custody population which has fallen by two thirds in this period, to a fairly stable population of c800. No one knows quite why the child custody population has fallen but some factors are commonly cited:

- A reversal of police policy in 2008 from chasing “offences brought to justice” targets to diversion, either out of the formal justice system altogether or into out of court disposals

- A growing understanding by judges and magistrates that custody should be reserved for those who have committed serious violent or sexual offences, given the lack of success of prison in reducing reoffending

- A strengthening through legislation of the presumption against using detention and training orders (the lowest level of custodial sentence)

- Reform of the law on remand and financial incentivisation of local authorities to discourage its unnecessary use

- The respect held by judges and magistrates for the expertise and recommendations of youth offending teams

It is to be noted that the child custody population has reduced despite a significant decline in the regimes of most child custody institutions and of their ability to offer rehabilitation. This underlines that the key to reducing prison populations is in preventing people being sentenced to imprisonment, not in improving regimes inside (necessary though that is). Another key is to understand the importance of “down-tariffing” at every stage of the process – the fall in the child prison population correlated with a fall in court prosecutions, a fall in first time entrants and an increase in diversion. The fall in the child custody population also shows that action can be taken to reduce a prison population, without that leading to a rise in crime or to public disapproval.

How to reduce the England and Wales prison population

Imprisonment should be reserved for those who pose a physical danger to the public, and prison sentences could be reduced in number and length while still protecting the public, punishing those who commit crime and achieving rehabilitation. Given MoJ resources, the current prison population cannot be safely and humanely looked after, and opportunities for rehabilitation within prison are minimal. However much rehabilitation in prison is improved (as it should be) this will have a marginal effect on the size of the prison population since a minor decrease in the reoffending of those released from prison has little impact on the

---

4 www.prisonreformtrust.org.uk/Portals/0/Documents/lastresort.pdf
numbers going in. The only way to significantly decrease prison populations is to reform sentencing policy and practice, and the narrative surrounding that. Remand and parole policy have an impact too. In the USA, many states have devised a strategy for decreasing imprisonment. None has relied on improvements in reoffending to bring their prison populations down. All have brought in radical changes to sentencing and/or parole.

We would suggest the following measures for reducing the England and Wales prison population:

1. Reduce recalls through introducing a presumption against the use of recall unless a new offence has been committed.
2. Reduce unnecessary use of remand through strengthening bail supervision and accommodation and through enhanced training or judges and magistrates.
3. Reform the Sentencing Council and evaluate all guidelines for their potential to cause sentence inflation.
4. Introduce a presumption against short prison sentences as the Scottish government has done.
5. Introduce a moratorium on new or increased criminal sentences.
6. Restore faith in community sentences through promoting them publicly, and training judges and magistrates in their efficacy.
7. Ensure criminal appeals to sentence are not impeded by financial barriers, for defendants or lawyers.
8. Limit the scope of Attorney General references.
9. Reform the Court of Appeal.
10. Embrace a narrative which explains that the criminal justice system is neither the only, nor best way of addressing bad and harmful behaviour and that ever lengthening prison sentences do not enhance opportunities for rehabilitation.

December 2017