Independent Sentencing Review 2024 to 2025 – Call for Evidence

Response by the Criminal Bar Association

January 2025

The Criminal Bar Association

1. The Criminal Bar Association (the 'CBA') represents the views and interests of practising members of the Criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and promote and represent the professional interests of its members.

2. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

3. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

4. Our response to the Call for Evidence is provided from our perspective as practitioners, predominantly working in the Crown Courts. We have focussed on those areas which fall within our expertise. We are conscious that other respondents will be better placed to address the questions arising under Theme 1 by way of statistical evidence, and on Themes 4, 5 and 6 on issues of outcome.

5. In relation to Theme 7, the CBA have reviewed and strongly support the separate submission of Rachel Barnes KC concerning the sentencing of defendants who are neurodiverse and/or neurodisabled. It is our view that this is an important area which is not adequately addressed within the current sentencing framework.

Theme 1 – History and Trends in Sentencing

Question: What have been the key drivers in changes in sentencing, and how have these changes met the statutory purposes of sentencing?

(a) Identifying what has changed

6. In answering this question, the starting point is to identify what has changed, which is complex. The increase in the prison population is well known. The growth predominantly came in the period 1990 to 2000, but has since stabilised. The figures for England and Wales are[1]:

Prison Population – England and Wales	
1990	44,975
2000	64,602
2010	84,725
2020	80,366
Jan 2025	85,689

7. The apparent stability of the prison population over the past 15 years masks a significant change in the profile of sentenced prisoners. In short, far fewer prisoners now receive short sentences of immediate custody, but this has been balanced by an increase in the length of sentences which are being passed for serious offences. A very significant increase has also occurred in the number of prisoners who are recalled to prison during licence periods.

Prison Population by Sentence Length[2] England and Wales – Prisoners sentenced to immediate custody						
	6 months or less	6 to 12 months	12 months to 4 years	4 years or more	Indeterminate	Recall
2009	5,114	2,465	23,778	24,497	12,521	

[1] MoJ Prison Population Weekly Estate figures; HoC Library Prison Population Statistics report July 2024
[2] HoC Library, Prison Population Statistics, July 2024

2014	4,567	2,296	19,823	27,054	12,625	5,191
2019	3,057	1,920	15,802	34,753	9,441	7,179
2024	1,792	1,251	13,492	33,023	8,526	12,344

This means that the proportion of prisoners serving sentences of less than one year has fallen from 11% to 5%. The proportion of prisoners serving sentences of 4 years or more has risen from 36% to 57%. This is also reflected in the increase in Average Custodial Sentence Length noted in the introduction to this section. We understand that this is also reflected by a fall in the number of new receptions into prison.

8. It is also of note that the majority of prisoners are serving sentences of imprisonment for offences which the public would regard as the most serious: 32% for violent offences; 21% for sexual offences; 17% for drug offences; and 8% for robbery. Making a significant change to the prison population would mean altering the sentencing for serious offences.

9. The proportion of children and young adults receiving custodial sentences has fallen significantly. Over the past 20 years, the proportion of prisoners aged under 21 has fallen from 14% to 4%.

10. The UK population in 2010 was approximately 62 million, It is now 69 million. As the tables above show, the number of sentenced prisoners has remained relatively stable in absolute terms during that period. The prison population per 100,000 inhabitants was 189 in 2011, and was 159 in 2021.

11. In the same period, 7,519 prison places were lost by closure and a further 4,132 through dilapidation and 2,009 for other reasons (13,660 total). 9,058 places were created by new prison building, and 5,084 by the creation of additional places at existing prisons (14,142 total). That is a net gain in 15 years of just 482 places[3].

12. The number of prisoners on remand and awaiting trial in 2011 was 7,993. In September 2019 it was 9,708. In September 2024 it was 11,366[4]. This increase, which is in contrast

[3] https://www.gov.uk/government/publications/the-number-of-prison-places-built-and-closed-2010-2024

[4] MpJ Offender Management Statistics quarterly.

with the relatively stability of the sentenced population, largely reflects the backlog in Crown Court trials due to lack of effective sitting days.

13. **The inescapable fact is that the sentenced prison population has <u>not</u> been going up. The current crisis in prison overcrowding is due to the fact a lack of investment both in new prisons and in the proper maintenance of the existing estate, compounded by the backlog in trials.**

(b) <u>Drivers of change – the reduction in short sentences</u>

14. The experience of the profession is that the reduction in the use of short sentences has come about as a result of the following:

    a. <u>Wider availability and use of Suspended Sentences</u>

    Sentencing law took a 'wrong turn' in 1991, when the power to suspend a sentence of imprisonment was restricted to cases where it could be justified '*by the exceptional circumstances of the case'*[5]. This unwelcome restriction was removed by the introduction of Suspended Sentences in the Criminal Justice Act 2003, initially for 51 weeks and later increased to up to 2 years.

    The ability to impose a Suspended Sentence, in particular with conditions attached, has provided an essential tool to enable Judges to avoid short sentences of immediate imprisonment. They allow the Judge to mark the seriousness of the offence, to impose both punishment and rehabilitative conditions, but to avoid the negative consequences of a short sentence of immediate imprisonment.

    <u>The CBA's recommendation is that the use of suspended sentences of imprisonment should be widened further. Our recommendation is that Courts should be able to impose a sentence of up to 3 years imprisonment, suspended for 3 years. See below.</u>

[5] Section 5, Criminal Justice Act 1991 (amending section 22 of PCCA 1973). See <u>R v Okinikan</u> [1993] 96 Cr App R 43 and <u>R v Robinson</u> [1993] 93 Cr App R (S) 559 for examples of the harsh effects of its application.

b. Legislative steer

Since 1982[6], legislation has set a threshold test for the imposition of a sentence of imprisonment. Its current form is Section 230(2) of the Sentencing Act 2020, which provides:

> *(2) The court must not pass a custodial sentence unless it is of the opinion that—*
>
> *(a) the offence, or*
>
> *(b) the combination of the offence and one or more offences associated with it,*
>
> *was so serious that neither a fine alone nor a community sentence can be justified for the offence.*

Judges do pay regard to this provision. The requirement for the Judge to explain the reasons for the sentence invariably requires conscious consideration of this core principle. It has been an effective change.

c. Effective judicial education

Judicial training over the past 20 years has frequently emphasised the negative consequences of short custodial sentences. It is widely understood that the impacts on family, housing, employment and therefore the prospects of rehabilitation are undermined by short sentences.

d. Sentencing guidelines

The development of the framework of sentencing guidelines has ensured consistency in approach. The offence guidelines clearly identify those cases where non-custodial options are appropriate. The overarching guidelines on Imposition of community and custodial sentences (for adults) and Sentencing Children and Young People (for offenders under 18) also provide a useful check on decision making.

[6] Section 1 CJA 1982.

15. Our perspective is that there has already been a widespread reduction in the use of immediate imprisonment for less serious indictable offences, and dramatically so in the sentencing of children under 18. This is to be welcomed. It is also evidence that culture and practice can be changed through the combined efforts of the legislature, the Judiciary and the Sentencing Council. There is limited scope to make a significant reduction in the prison population by targeting the remaining short-sentence cases.

(c) <u>Drivers of change – longer sentences for serious offences</u>

16. Longer sentences are being passed in more serious cases. There is some debate whether the statistics may reflect (at least in part) a change in the cohort of cases coming before the court (ie. the sentences are longer because the cases are more serious). However, as professionals who have been working in the Crown Court over this period we have no doubt that the same defendant being sentenced for the same serious offence is likely to receive a significantly longer sentence in 2025 than they would have done 20+ years ago. This is especially so in cases of homicide, rape and serious sexual offences, serious violence, fraud and drug trafficking. Put bluntly, there has been considerable 'sentence inflation' over the past 30 years. Much of this is for reasons which are clearly justified, but in large part it is a reflection of political and public sentiment that punishments should increase.

17. Judges - and the barristers who appear before them - are experts in identifying relevant features of a case, analysing them and making assessments of the seriousness of that offence in comparison to others. However, the assessment of the relative seriousness of a case is different from the question of how long a prison sentence should be to constitute appropriate punishment for a crime. Whilst recognising the independence of the judiciary in the individual case, it is appropriate for the legislature to provide steer as to public expectations of just punishment. It is important that that is done in a responsible fashion which takes account of all of the purposes of sentencing, not overly swayed by media or populist pressure.

18. We would highlight the following factors which have led to the increase in sentence length.

a. Recognition of victim impact and harm / Section 143 CJA 2003

It is now taken as granted that a sentence must reflect the Court's assessment of the seriousness of an offence, taking into account the factors of culpability and harm. That requirement was first introduced into sentencing legislation by Section 143 of the Criminal Justice Act 2003, and is now replicated in similar terms in Section 63 of the Sentencing Act 2020. These two factors are the core assessments required by Sentencing Council's offence guidelines.

That was not always the case. Until the 1990s, the harm caused by an offence did not carry as much weight in the sentencing exercise. There has rightly been a recognition by both the legislature and the judiciary that the impact of offending should carry considerable weight in the exercise.

An example of the change in thinking is the changes to road traffic offences. When the Road Traffic Act 1988 was passed, the only aggravated form offence was Causing Death by Reckless Driving which carried a maximum sentence of 5 years imprisonment. Reforms over the past 30 years have added aggravated offences of 'Causing Death' by Careless Driving and Driving whilst Unlicensed or Uninsured. There are also now aggravated offences of Causing Serious Injury by Dangerous or Careless Driving. At the same time, the maximum sentence for Causing Death by Dangerous Driving was increased to 10 years, then 14 years and is now life imprisonment.

Similar increases have come about in the sentencing of rape and serious sexual offences (considered below) and in sentencing for Health and Safety Offences and Gross Negligence Manslaughter. These reflect our better understanding of the trauma and impact on victims and their families.

In large part, the increase in sentences for serious offences is the consequence of an **appropriate and welcome focus** on the impact of serious offending.

b. The Impact of Sch 21

It is beyond dispute that Sch 21 has led to a significant increase in the length of sentences, not only for murder but for other cases of homicide and serious violence.

In our experience, the introduction of Sch 21 had an immediate impact on the minimum terms which were imposed in cases of murder. In R v Wood [2009] EWCA Crim 651, Lord Judge CJ said of Sch 21:

> *"...the legislature has concluded, dealing with it generally, that the punitive element in sentences for murder should be increased. This coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before.*"

Sch 21 also led to increases in sentencing for other types of offence. R v Appelby (A-G's Ref No. 60 of 2009) [2009] EWCA Crim 2693, was a guideline case on sentencing for unlawful act manslaughter. The Court of Appeal explicitly referred to Sch 21 and to s.143 CJA 2003 as reasons why the 'tariff' for manslaughter cases should be increased as well. Appelby was a highly consequential case, both in its own right and as a marker of a significant change in judicial thinking on sentencing. The same approach has also followed in relation to sentencing for other forms of manslaughter, for attempted murder and for cases of GBH/unlawful wounding.

c. Legislative Changes

As noted already, there has been a pattern of increases in legislation in the sentencing maxima for many offences. Very often, this not only increases the

maximum sentence passed in the most serious of offences but has an impact across the board in raising the level of sentence for that offence.

d. Public Sentiment / Media

Judges are not isolated from the public discourse. Public concern about certain types of offending – eg. street robbery, gang crime, sexual offences – has an impact (directly or indirectly) on judges' own perceptions about the cases before them.

e. Sentencing Guidelines

In most areas of criminal law, we do not believe that Sentencing Guidelines have (of themselves) inflated the level of sentences for different offences or offence categories. However, they have made it more difficult for a Judge to exercise their discretion take an exceptional course in individual cases.

A notable exception to this is Serious Sexual Offences, where there was a conscious decision to increase sentences following public consultation in 2012 (see below).

(d) Drivers for change - Rape and Serious Sexual Offences

19. Particular consideration should be given to the changes in sentencing for rape and serious sexual offences (RASSO), where significant increases have occurred. RASSO cases comprise approximately 20% of the current backlog of cases before the criminal courts; likewise prisoners sentenced for sexual offences constitute 21% of the current prison population. This proportion may rise: there has been an increase in RASSO

prosecutions by 44%. The number of reported rapes increased 67% between 2016 and 2022, when it stood at 70,330 cases. The current jury conviction rate is 75%[7].

20. In comparison to earlier legislation, the Sexual Offences Act 2003 raised the maximum sentences for a range of offences. See Rook and Ward 6th Edition Appendix A for a table (albeit some offences had their maxima reduced).

21. The dangerousness provisions, including imprisonment for public protection (when in force) and extended sentences, applied to a range of serious sexual offences, leading to an increase in sentence length. Parliament then turned its attention to increasing the length of sentences for RASSO offences again when introducing the notion of 'offenders of particular concern'. Rook and Ward describes the approach to sentencing SSOs as being 'transformed' in the last 20 years – this is accurate and it has been caused by repeated statutory alteration of the approach the Courts are supposed to adopt when sentencing SSOs, plus the evolution of the Sentencing Council's approach.

22. The SGC issued a Guideline for Sexual Offences which came into force in 2007. The Guideline was reviewed in 2012 and an updated definitive Guideline came into force in 2014. When publishing the 2012 Guidelines, following consultation, the Sentencing Council were explicit in saying that the intention was to increase sentences to reflect the long-term psychological harm which was caused to victims. Treacy LJ (then Chairman of the Council) said at the time: *"current [sexual offence] guidelines don't concentrate enough on the perspective of victims".*

23. There has been a broad upward trend in sentence length owing to: - a change in nature of offending (e.g. use of technology to commit / prepare for offences especially against children and the vulnerable), the increase in volume of cases, and a better understanding about harm caused to victims of these offences – hand in hand with a greater focus on the harm caused rather than the nature of the physical activity.

24. The combination of the increases in maxima for many serious sexual offences since 1 May 2004 along with a better understanding of the harm caused by the offending has particularly led to an increase in the length of sentences for historical offences – i.e.

[7] Prof Cheryl Thomas. https://www.ucl.ac.uk/news/2023/feb/juries-convict-defendants-rape-more-often-acquit

those committed in the past but sentenced today: The Sentencing Guideline requires a 'measured reference' to today's sentencing practices when considering the appropriate term for old offending. (The position when sentencing adults today for offences committed when they were children has given the Court of Appeal much work, resulting in the authorities of R v Forbes [2016] EWCA Crim 1388 and R v Ahmed [2023] EWCA Crim 281 which were, in part, a reaction to the increasing length of sentences imposed).

25. There has been widespread public support for increases in sentences for these offences. Just under 17% of adults over the age of 16 report that they have experienced sexual assault, and it is estimated that 1.9 million of the UK population have suffered rape.

(e) **Does current sentencing practice reflect the statutory purposes of sentencing?**

26. We consider those purposes in turn:

a. The punishment of offenders.

Yes.

Imprisonment, suspended sentences of imprisonment and community punishments are serving as effective punishments.

b. The reduction of crime (including by deterrence).

To a limited extent.

It is a trite observation that it is the chances of being caught which has primary deterrent effect rather than the severity of the sentence. An example is sentencing for drugs offences. It is now not uncommon for sentences in excess of 20 years imprisonment to be passed in large-scale cases of drug trafficking and drug importation, yet the offending continues because such cases are very difficult for law enforcement to investigate and prosecute.

c. The reform and rehabilitation of offenders.

No.

In less serious cases in the Crown Court, the prospects of reform and rehabilitation may be a significant feature in the sentencing exercise. There has also been a successful approach to sentencing for cases of possession of indecent images of children, where in less serious cases rehabilitative treatment in the community is recognised as better than a short custodial sentence.

However, in relation to more serious offending there is little if any consideration of issues of reform and rehabilitation. A prison sentence is imposed, and the consequences thereafter are left to an overburdened prison service.

Measures should be introduced to allow the prospects for rehabilitation in prison to be taken into account in the sentencing exercise and/or by way of a subsequent sentence review. The Crown Court can play a part in finding ways to reward prisoners who take active steps to prepare themselves for a return to the community.

A further indication of the lack of recognition of the importance of reform and rehabilitation is the Sentencing Bill 2023. Clause 7 of the bill proposed the removal of early release (both automatic and parole) for serious sexual offences. The impact assessment published with the bill highlights the likely negative effects on the prospect of rehabilitation, the reduction in the period of time in which offenders would be subject to post-sentence supervision and consequential increase in rates of reoffending. The argument in favour of the change was that longer incarceration would increase the protection of the public. The point is that this proposal failed to keep the purposes of sentencing in balance, and took a narrow view of the protection of the public (ie. promoting longer incarceration but conceding a greater likelihood of re-offending).

d. The protection of the public.

Yes, in particular in the sentencing of dangerous offenders.

However, as stated above too little is done to consider the impact of a custodial sentence on reform and rehabilitation, and to focus on the prevention of re-offending.

e. <u>The making of reparation by offenders to their victims.</u>

Yes.

Financial compensation is invariably considered where appropriate.

<u>Restorative justice currently has no formal place within the Crown Court system. We believe that there is scope for initiatives in this area.</u>

<u>Final comment and conclusion:</u>

The fact that sentences for serious offences have increased is indisputable, but as discussed above there are many reasons why those increases were appropriate to reflect our better understanding of the impact of crime.

There is room for debate whether at the top end of the scale the inflation has been too great, in particular in relation to offences of homicide and to non-violent offences such as drug trafficking. For reasons which we discuss below, any fundamental change to the level of sentencing for such offences should be led by legislation.

We are conscious that the Sentencing Review has been initiated at least in part in response to the pressures on the prison estate. As the statistics show, despite the increase in general population, the prison population in England and Wales has been stable for the past 15 years. The crisis which has arisen is due to the underfunding of the Ministry of Justice and the failure to replace a number of prisons which have closed during this period.

Theme 2 – Structure

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

(a) The role of Government and Parliament

27. We believe that fundamental change can only be achieved through legislation. For the reasons discussed above, history has shown that legislative changes have a direct impact on the levels of sentence.

28. If "ensuring a sustainable system" means either reducing the prison population, or at least limiting the rate of increase, that means addressing the fact that the increase in population is due to an increase in the length of sentences passed for serious offences, namely homicide, sexual offences, violence and drugs. Put bluntly, it means accepting the fact that serious offenders would have to spend less time behind bars.

29. We recognise that this would be politically difficult to achieve, and it would have to begin with a frank public debate about sentence inflation and whether any alteration is in the public interest. For reasons which we have set out above, our view is that many of the increases have been entirely appropriate, reflecting society's recognition of the harm caused by serious offences such as homicide, sexual offences and serious violence, together with the prevalence of those offences.

30. If it was considered politically appropriate to do so, sentence lengths could be reducced in a number of ways such as an alteration in the statutory terms of reference of the Sentencing Council, or alterations to parole and early release provisions.

31. The stark (but perhaps realistic) alternative is that there is an inescapable need for much greater investment in the Ministry of Justice, and HMPPS in particular. Both the Government and Parliament must recognise that the current prison estate is wholly inadequate, both in respect of its capacity and in respect of the resources which it has to achieve some measure of reform and rehabilitation. The probation service is likewise underfunded. The Criminal Justice System, in all its

components, is an essential part of safe and democratic society, but it comes at a significant cost.

(b) <u>The Sentencing Council</u>

32. The work of the Sentencing Council has transformed sentencing practice in both the Crown Court and the Magistrates Court immensely. The offence guidelines have provided a clear framework for the approach to sentencing, ensured consistency between different cases in different courts and provided much greater transparency to the process. Overarching guidelines have promoted greater understanding and fairness in dealing with cases involving children, offenders with mental disorders and cases of domestic abuse.

33. However, without a legislative direction to do so, the Sentencing Council cannot unilaterally change the overall approach to sentencing or the general levels of custodial sentence. The starting point for the Sentencing Council in setting guidelines is to consider *"the sentences imposed by courts in England and Wales for offences"*[8]. That primarily means having regard to the guideline cases and other decisions of the Court of Appeal (Criminal Division). In turn, the CACD itself is required to follow its own precedents. Within that framework, the Sentencing Council can make adjustments which help identify the seriousness of an individual offence, the category into which it should be placed and the range of sentence which may be appropriate for that category[9]. It is also required to monitor the operation and effect of the guidelines, and will from time revise them where appropriate. However, the Sentencing Council has no mandate for it to make wholesale changes to the existing guidelines, which have been set in accordance with those precedents.

34. The Sentencing Council has an obligation to take into account the cost of different sentences and their relative effectiveness in preventing re-offending[10]. They must also make a 'resource assessment' when guidelines, or draft guidelines, are published[11]. This

[8] Section 120(11)(a) Coroners and Justice Act 2009.
[9] Section 121.
[10] Section 120(11)(e).
[11] Section 127.

includes the identification of the resources which will be required for the provision of prison places, probation services and youth justice services. In theory, that means that those considerations have already been factored into the framing guidelines themselves, rather than being a separate or additional factor which the Sentencing Judge should take into account. It would not be desirable for the cost of sentencing to become an explicit part of individual sentencing decisions (eg. by adding "reducing cost" to the statutory purposes of sentencing). There is no substitute for proper investment.

(c) <u>The statutory purposes of sentencing</u>

35. We have already commented on the statutory purposes of sentencing above. We see no deficiency in the five purposes which are set out. Our concern is that in practice 'reform and rehabilitation' has not been given appropriate priority, largely due to lack of resources.

(d) <u>The overall hierarchy of sentencing options available, including our understanding of the punitive nature of different sentence types</u>

36. We have no concerns whatsoever with the overall hierarchy of sentencing options or their understanding by the judiciary and the legal professions.

37. Undoubtedly, more work could be done to explain to the public the importance and effectiveness of community sentencing options.

(e) <u>Judicial confidence in available sentencing options</u>

38. Community Sentences and Suspended Sentences are generally considered to be viable and effective sentencing options. As noted above, there has already been a very considerable reduction in the number of offenders serving short custodial sentences.

39. The area of continuing concern is in the resourcing of probation services. Others are more qualified than we are to comment on the current state of provision. From the

limited insight which we have, we are aware of concerns about the consistency of the quality and availability of services in different regions.

(f) Consequences of legislative changes

40. We have already commented on this above.

(g) Impact of the unduly lenient sentencing scheme

41. The CBA considers the ULS scheme to be an important part of the sentencing process. It is essential to retain both public and professional confidence in the sentencing system.

42. There are a very small number of cases each year where significant mistakes are made in assessing the seriousness of a case. The Crown Courts deal with more than 100,000 cases per annum. The number of cases granted permission for referral to the Court of Appeal under the ULS scheme is between 100 and 150 per annum[12]. In the majority of those cases, the sentence is revised upwards. This is a necessary procedure to do justice in those individual cases, and to ensure that public confidence in the CJS is maintained. The fact that the number of cases referred each year under the scheme is so low is testament to the effectiveness of the sentencing process in the Crown Courts.

43. Insofar as the revision of sentences upwards under the ULS scheme may have an 'inflationary' impact, it is balanced by the effect the defendant's ahility to appeal a sentence which is manifestly excessive. A reference by the Attorney-General has undoubtedly been used in the past either by the prosecution or by the Court itself as an opportunity to review a particular offence or offence category and to set guidelines, but that is an appropriate function of the process. Equally, defence appeals have been used to set guidelines.

44. Our only concern about the operation of the ULS scheme at present is the extent to which it has been made available to members of the public, who may have no real

[12] AGO Annual Data 'Outcome of Unduly Lenient Sentence Referrals'

connection with or knowledge of a particular case. At present, any member of the public can send an email to the Attorney General's Office to request that a case is reviewed with a view to a ULS referral, triggering a full assessment of the case. The request could be made by someone who has simply seen a report on the news or a headline on social media. Whilst scrutiny and transparency are important, we believe that this is a step too far. For example, it could be left to the reviewing lawyer who is already familiar with the case to decide whether a referral to the AGO is appropriate.

Theme 3 - Technology

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

45. For the most part, this question is outside the expertise of the CBA and we have only limited comments to make.

46. As detailed below, our view is that there is scope to make greater use of community punishment and community rehabilitation options, whether as part of a Community Order, a Suspended Sentence or during post-sentence licence periods.

47. We would therefore strongly support the use of technological innovations which may facilitate the management of offenders in the community. The use of electronic monitoring of curfews has been a welcome development, and has increased confidence in the use of curfews. There is also scope to use technology for participation in other rehabilitative activities, or to 'check in' to confirm attendance at a place of work.

Theme 4 – Community Sentences

Question: How should we reform use of community sentence and other alternatives to custody to deliver justice and improve outcomes for offenders, victims and communities?

(a) Appropriate use of community punishment

48. For the reasons which we set out in Section 1, our belief is that substantial inroads have already been made into the diversion of less serious offenders, children and young adults from the prison system. Prisoners serving sentences of 1 year or less now form only 5% of the prison population, and in our experience most of those sentences will be cases involving reoffending. With innovation and with greater resources, it may be possible to reduce that small cohort even further.

49. For any significant difference to be made, it would be appropriate to look at the use of community sentences in offences above that one year threshold. MoJ statistics group sentences of 1 to 4 years together, and we are unable to indicate the extent to which there may be cases in the 1 to 2 year bracket where immediate custody might be avoided.

50. In our experience, there are cases which currently fall just above the 2 year threshold where a Suspended Sentence with onerous restrictions might be an appropriate sentence, allowing for both punishment and rehabilitation. This cohort of cases would include, for example, cases of Section 47 assault, cases of fraud and theft and robbery cases involving minimal force or minimal harm. Despite the relative seriousness of those cases, we believe that there is scope to deal with some through community punishment.

The CBA recommends the extension of Suspended Sentences to sentences of up to 3 years, and suspended for up to 3 years.

51. This would bring Suspended Sentences into line with Community Orders, which can now extend for up to 3 years[13].

(b) <u>Offences for which people should be dealt with outside the court system</u>

52. Diversion from the criminal justice system and out-of-court disposals have already had success in the Youth Justice System and the CBA would support the extension of successful schemes nationwide. The CBA would also support parallel adult schemes, in particular in relation to young adults and offenders with disabilities.

53. The CBA therefore strongly supports initiatives for diversion and out-of-court disposals.

(c) <u>Use of fines in the hierarchy of sentences</u>

54. We would be cautious about the wider use of fines in the sentencing of general criminal offences in the Crown Court.

55. It is axiomatic that our sentencing system must treat all offenders on an equal basis, regardless of their social or economic status. If the assessment of the Court is that an offence is so serious that a sentence of immediate imprisonment is necessary, it would undermine confidence in the CJS if wealthier offenders were seen to be able to avoid that punishment by paying a substantial fine. An offender charged with an offence of the same seriousness who could not afford a substantial fine would have to serve a prison sentence instead; alternatively, the Court would have to impose a much lower fine which would not appear to be sufficient punishment.

56. The usefulness of fines as a punishment for more serious offences is limited to those cases where the Court is already minded to impose a Community Order or SSO. In any event, the Court has power to make Compensation and Confiscation orders which in many cases result in substantial sums being paid.

[13] Section 209 Sentencing Act 2020

57. Regulatory offences ('business crime') merit different consideration.

(d) <u>Use of ancillary orders</u>

No comment to add

(e) <u>Wider use of community requirements.</u>

See comments above.

Theme 5 – Custodial Sentences

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

(a) Recalls on licence

58. Under Theme 1 above, we highlighted the significant increase in the number of prisoners who have been recalled to prison under licence. On the evidence of the statistics, this represents a high proportion of the overall prison population, and a significant factor in the current population rate.

59. The precise causes of this change are outside the expertise of the CBA, but clearly call for further investigation. It is not necessarily a negative development. Release on licence subject to conditions, and in particular the use of extended licence, are important measures. It is consistent with good practice and the principles of sentencing for offenders to serve a period of time in prison and then be released subject to the possibility of recall, giving them the opportunity for reintegration and rehabilitation. The availability of recall is a necessary consequence of that process. It is evidence that efforts are being made to allow prisoners to complete their sentences in the community, but that does not always work.

60. The system of fixed-term recalls (14 or 28 days) means that for many offenders the recall will only be for a period which is proportionate to their breach of licence conditions. Again, it is beyond our knowledge the extent to which other prisoners may be subject to standard recall and awaiting a decision on release from the parole board.

(b) The use of minimum and maximum sentences set by Parliament.

61. The CBA do not support any extension to the scope of minimum sentence provisions. The framework of sentencing has been transformed by the creation of the Sentencing Council and the production of offence guidelines. In order to achieve consistency of

sentencing, it is no longer necessary for Parliament to resort to the imposition of minimum sentences for serious cases involving re-offending. Sentencing guidelines are a better way of ensuring that the right sentence is imposed, taking into account previous offending.

(c) The use of short custodial sentences and suspended sentences

62. For the reasons stated above, the use of short custodial sentences is now very limited. Judges in the Crown Court are clearly aware that they should be reserved to exceptional circumstances.

63. The CBA strongly supports the use of Suspended Sentences as an alternative to immediate custody. We support a widening of the availability of Suspended Sentences to a term of up to 3 years imprisonment and suspension for a period of up to 3 years.

(d) Available sentences for the most dangerous offenders

64. We have no submissions to make on the dangerous offender regime, including the use of discretionary life sentences. The legislation and its use is clear and well understood by Judges and the professions. Where an offender has been determined to be dangerous, the additional protections for the public are warranted.

(e) Whether a fundamentally new type of custodial sentence is needed

65. The CBA supports the wider use of community sentencing where appropriate. UK law does not formally recognise "Home Detention" as custodial punishment, but electronically monitored curfews have been used to considerable success for remands on bail, as conditions on Community and Suspended Sentence Orders and for release on licence. The power exists to impose a curfew for up to 16 hours per day, 7 days per week for up to 2 years. Whilst designating this a sentence of "home detention" might in reality be an exercise in re-branding, the use these conditions is already an important option in the sentencing process.

66. It is recognised that this is not a viable option in all cases. Not all defendants have suitable accommodation, including cases where it would not be appropriate to impose the presence of the offender on others. Those concerns are already well understood.

67. Alternative forms of custody have existed for many years in other jurisdictions, such as weekend detention and intermittent custody. There is considerable merit in their use. However, given that the cohort of offenders who might be eligible for such punishment are likely to be those with settled accommodation, they will very be largely the same as those who are eligible for extended electronically monitored curfews.

Theme 6 – Progression of custodial Sentences

Question: How should we reform the way offenders progress through their custodial sentences to ensure we are delivering justice and improving outcomes for offenders victims and communities?

68. The CBA will respond to this question by way of a supplemental submission.

Theme 7 - Individual needs of victims and offenders

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

69. The CBA strongly support and endorse the separate submission by Rachel Barnes KC on defendants who are neurodiverse and/or neurodisabled, which we have reviewed.

70. The CBA will respond further to this question by way of a supplemental submission.

Mary Prior KC

Andrew Thomas KC

Samuel Skinner

James Gray

James Oliveira-Agnew