

Evaluating ‘smarter sentencing’ and ‘smarter punishments’: a view from England

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Introduction

Thank you for this wonderful invitation and opportunity

My plan:

- To summarise the current context in England
- To reflect on the impact of Covid-19
- To review current Government policy initiatives
- To conclude with some pointers for good practice

(but I’ll start with a brief response and tribute to Mr Lee Ying Wai (Jacky))

The English context

- By many standards, the UK (England and Wales) has a very high rate of imprisonment (131 per 100k; Japan: 38 only) – and it doubled between 1994 and 2010! Why?
- Do we have a high level of crime? Very difficult to know: do you look at police records, self-reported crime etc. Which crimes matter most?
- Why have we failed to join up prison and probation services effectively?
- The advantages of comparative studies (and the dangers!)
- The importance of context: historical, political, social, economic ...
- In evaluating a criminal justice system, we have to agree some measures or values

Who and what are drivers of the prison population and of the standards in prisons?

England and Wales: not only a large population, but dreadful conditions exacerbated by 'austerity'

Who pulls the strings/levers? Politicians, judges, policy makers, prosecutors, the media (in that order?).....

Who is responsible for driving up standards? See above, as well as

- Chief Inspector of Prisons
- Independent Monitoring Board
- Prison and Probation Board

NB National Preventive Mechanism (NPM) under OPCAT

The impact of COVID-19

On prison and probation?

- By 31st Oct 2020, 32 prisoners and 23 probation service users had died having tested positive for Covid-19, and 1,529 prisoners had tested positive for Covid-19 + 21 HMPPS staff had died of Covid-19

On wider criminal justice system?

- Huge issues in relation to policing, legal advice, courts etc.

On us all?

- Domestic violence (up)
- Organised violent crime (some up, some down?)
- Fraud (huge)

Prison population down (from 83,957 on 6 March 2020, to 78,029 on 8 January 2021): largely due to closure of courts and limits on trials: front door forces, not earlier releases.

Front door: Judges encouraged to take account of exceptional circumstances: *Manning* [2020] EWCA Crim 592; *Jones* [2020] EWCA Crim 764.

Back door: A new End of Custody Temporary Release (ECTR) introduced but not really used, and ended in August.

Release on Temporary Licence (ROTL) by way of Special Purpose Licence (SPL): only for the duration of the pandemic.

But **CONDITIONS** Let's consider: assaults and self-harm declining? mental health? contacts with friends and families? progression? purposeful activities ?

The real problem: courts not prisons ?

- The remand (pre-trial) population has increased by 28% over the past year (to 12,274) – now at the highest level for around six years?
- Custody time limits (CTL) have been extended
- The CTL National Standard 2020; + a new Protocol for the Effective Handling of CTLs. Interesting argument between a judge and the LCJ:

R (DPP) v Woolwich Crown Court [2020] EWHC 3243 (Admin): D's CTL ended April 2020. LCJ: it had not been open to the Crown Court (in July) to decide that the P had not shown that the need for an extension to the CTL was due to a good and sufficient cause

Current policy initiatives

New Government December 2019:

- The **Terrorist Offenders (Restriction of Early Release) Act 2020**
- Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* (SI 2020/158)
- a new **Counter-Terrorism (Sentencing and Release) Bill** is currently passing through Parliament.

- Now: a White Paper: *A Smarter Approach to Sentencing* (Sept 2020) (and a 'root and branch' review of parole)

The White Paper: *A Smarter Approach to Sentencing* (Sept 2020)

Govt recognises the need for huge improvement, but is there any evidence that the important (smarter) things will happen?

Prison Reform Trust: “There’s nothing smart about rehashing punitive rhetoric and hoping for a different outcome”. <http://www.prisonreformtrust.org.uk/PressPolicy/News/Sentencing>

- What would be a ‘smarter’ approach?

Deeply punitive (and expensive, often inappropriate and unduly complex)

- Longer tariffs for many discretionary life sentences (2/3rds determinate equivalent, not 1/2) – why?
- Increasing the time sex offenders serving the weirdly-named ‘SOPC’ (sentence for offenders of particular concern) must spend in prison – why?
- Abolishing automatic halfway release for most sex and violent offenders who get 4-7 years (already changed for over 7 year sentences simply by S.I.: *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* – why?
- New power to prevent automatic early release for offenders who become a terrorist risk during non-terrorist sentence – why?

- ‘Whole life’ orders extended, including for 18-20 year olds – why? (Maybe unlawful as well as morally wrong? See *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51 and various ECtHR cases)
- Increased starting points for murders committed by children – OH NO!
- Tougher rules on minimum terms for repeat burglars and possessing a knife etc – why?
- Much more ‘tagging’ including ‘House Detention Orders’ (!) and ‘location monitoring’.
- (Prison population expected to be 4,200 higher in September 2026)

Some probably positive (not new ideas; all require significant funding and plenty of ‘piloting’)

- Community sentence treatment requirements
- Some unpaid work hours served in a work-related educational or training capacity
- Criminal records reform: reducing the amount of time some young people are required to disclose criminal records to prospective employers
- Better quality Pre-sentence Reports (PSRs)
- ‘Encourage’ more deferred sentencing
- Reduce use of remand for young offenders
- Problem solving courts.

Some could be positive or negative:

- Out-of-court disposals: reduce the options to two: community resolutions and conditional cautions – but why?
- ‘Empowering’ probation: beware the dangers of unaccountable powers! What weird about-turns in recent years..... (Smart sentencing should see sentencing as a process and not a one-off event.... So let’s explore the lifetime of a sentence and how it is ‘managed’.)

Re-thinking the context

- Many of our prisons are a disgrace, as is the size of the prison population.
- The injustice of social/economic inequality.
- What are prisons for? Let’s re-think the justifications. As or for punishment?
- Rethinking what happens on release: if you want to reduce re-offending, improve support for ex-offenders on release.....
- Is the Government’s ‘root and branch’ review of the Parole Board really a root and branch review? Let’s also think about the rising recall rates
....

What works to reduce re-offending?

- Most offenders (even most persistent offenders) desist, and they do so largely on their own initiative.
- Factors influencing 'pathways into crime' are not necessarily the same as factors influencing 'pathways out of crime'.
- Desistance is often a gradual, fragile, obstacle-strewn process.
- The need to individualise 'treatment' to be effective.
- The need for understanding support and pro-social relationships: cf. lack of effective channels for resolving difficulties.

Purposes and priorities?

Section 57 Sentencing Act 2000 (was s. 142 Criminal Justice Act 2003): any court sentencing an offender must have regard to the following 'purposes of sentencing':

- the punishment of offenders,
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders,
- the protection of the public, and
- the making of reparation by offenders to persons affected by their offences.

BUT no priority. Purpose of prisons? Rule 3 of the Prison Rules 1999: "The purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life"

Some conclusions

Smarter sentencing means

- Recognizing that ‘one size does not fit all’
- Understanding what works to reduce re-offending
- Understanding your aims and your priorities (your values)
- Investing where it helps, and not wasting money where it doesn’t
- Public education and debate really matter

Further Reading !

Dünkel, F, Harrendorf, S and van Zyl Smit, D (2021) *The Impact of Covid-19 on Prison Conditions and Penal Policy* (Routledge)

Padfield, N. (2017) *Parole Board oral hearings – exploring the barriers to release* <https://www.ssrn.com/abstract=3081035>

Padfield, N. (2019) Giving and getting parole: the changing characteristics of parole in England and Wales 11 *Eur Journal of Probation* 153-168.

Padfield, N (2019) ‘Prisoner Resettlement in England and Wales’ in *Prisoner Resettlement in Europe* (ed Dunkel, F, Pruin, I, Storgaard, A and Weber, J (Taylor & Francis) pp 86 - 103.

Weitzdorfer J, Shiroshita, Y and Padfield, N (2018) ‘Sentencing and Punishment in Japan and England: A Comparative Discussion’ in Liu, J. and Miyazawa, S *Crime and Justice in Contemporary Japan* (Springer Series on Asian Criminology and Criminal Justice Research), pp. 189-215.

Thank you, again

- **Questions?**
- Please do email me on nmp21@cam.ac.uk