

Prison Reform Trust response to the Ministry of Justice’s call for evidence on Open Justice – September 2023

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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Introduction

We welcome the opportunity to contribute to this call for evidence. Our submission primarily focuses on the following topics:

- the important principle that open justice exists across the criminal justice system—not only courts; and
- the current evidence on public understanding of sentencing and proposals to improve it.

3. What is your view on how open and transparent the justice system currently is?

Much of the discussion within the call for evidence focuses on the principle of open justice within the courts, however it is important to recognise that this should extend beyond the courtroom. As Lord Justice Woolf and His Honour Judge Stephen Tumm recommended in the final report of their inquiry into the April 1990 prison disturbances, there is a need to ensure these principles extend to cover all areas of procedural justice to uphold the legitimacy of the decisions taken which affect prisoners’ lives and liberty.¹ This includes—but is not limited to—behaviour management; adjudications; temporary release; parole; prison transfers; access to legal advice and appeal; and mechanisms to raise concerns about treatment and conditions.

¹ Woolf, H., & Tumm, S. (1991). *Prison disturbances, April 1990: report of an inquiry by the Right Hon. Lord Justice Woolf (Parts I and II) and His Honour Judge Stephen Tumm (Part II)*. HM Stationery Office.

A slew of independent investigations and reports by the prisons inspectorate and other expert bodies suggest that the prison system currently falls far below the standards of openness and transparency that Lord Woolf and His Honour Judge Stephen Tumim deemed essential for a procedural just penal system.²

A particular concern relates to prisoners' access to legal representation within the parole system. Most recently, the Association of Prison Lawyers (APL) have published a report which reveals the damaging impact of cuts to prison law legal aid. Three-quarters of respondents said they do not anticipate being prison law legal aid lawyers in three years' time.³ According to the report, the number of prison law legal aid providers has already been decimated, falling by 85% since 2008. Whilst the workload in prison law legal aid has increased in volume, stress and complexity, pay has decreased in actual and real terms over the last decade.

As Rikki Garg, Chairman of the APL, has commented: "At the same time hearings, before the Parole board, are at an all-time high. The Parole Board have appointed specialist chairs to deal with distinct complex cases and increased its members ... There have been major changes in the last five years making hearings even more complex than ever before. Unless something can be done to address this decline now there is no future in this area of practice. The result of this is that there will be far more unrepresented prisoners navigating a minefield of rules, regulations, guidance and statute which ultimately will result in a denial in access to justice with effective representation."

4. How can we best continue to engage with the public and experts on the development and operation of open justice policy following the conclusion of this call for evidence?

5. Are there specific policy matters within open justice that we should prioritise engaging the public on?

As we examine later in our evidence, public understanding of the justice system, and particularly sentencing, is extremely limited. Given the above findings, and that the law on sentencing, both for particular offences and in general application, is changed with extraordinary frequency, this is perhaps unsurprising. But the hoped-for consequences of change are rarely evaluated, either in terms of their impact on criminal behaviour or on public confidence.

The Independent Commission into the Experience of Victims and Long-Term Prisoners (ICEVLP), chaired by The Right Reverend James Jones KBE, consulted victims and family members affected by crime; prisoners; and conducted a written consultation. It recommended that there should be a national debate on sentencing,

² See for example:

Complaints handling in prisons | *Prisons & Probation Ombudsman*. (2022, February 18). <https://www.ppo.gov.uk/blog/complaints-handling-in-prisons/>

HM Inspectorate of Prisons. (2022). *The experiences of adult black male prisoners and black prison staff*. HM Inspectorate of Prison. <https://www.justiceinspectors.gov.uk/hmiprison/inspections/the-experiences-of-adult-black-male-prisoners-and-black-prison-staff/>

³ Janes, L. (2023). *The silent demise of legal aid prison law: Practitioners speak out*. The Association of Prison Lawyers. <https://www.associationofprisonlawyers.co.uk/the-silent-demise-of-prison-law-legal-aid/>

underpinned by three specific proposals for how this work might be taken forward.⁴

- **A Law Commission review of the sentencing framework for serious offences**

In 2018 the Law Commission completed a review of the sentencing framework which led to the consolidation of the existing sentencing framework into one unified sentencing code. The ICEVLP recommended that a similar exercise is undertaken by the Law Commission to carry out a fundamental assessment of the impact of legislation in this century on the effectiveness of the sentencing framework for the most serious crimes.

- **A Citizens' Assembly on sentencing policy**

Alongside the review, the ICEVLP recommended that a process which engages the public in a measured and transparent debate on sentencing policy in relation to serious crime should be conducted, in recognition that it is often the most high profile and distressing cases which attract media coverage and therefore public attention. This would recognise that striking the right balance in these cases is not a matter of law alone, and would enable the public to become more informed about the realities both of serious crime and how it is punished through a process of open debate and deliberation.

- **Strengthening the role for the Sentencing Council in promoting public confidence in and understanding of sentencing**

The statutory remit of the Sentencing Council includes requirements to promote public awareness of the realities of sentencing, as well as through the publication of its guidelines to promote public understanding of, and confidence in, sentencing and the criminal justice system. The ICEVLP recommended that these responsibilities deserve a higher priority in how the Council's limited resources are deployed, and that the best approach to promoting public confidence would be to seek to address the lack of public knowledge of the realities of sentencing.

Taken together, this package of recommendations could reduce complexity and improve understanding of sentencing legislation and practice; foster a more informed public debate; and foment a more open justice system. We strongly urge the government to take forward these recommendations.

60. What do you think are the main knowledge gaps in the public's understanding of the justice system?

Public knowledge of sentencing policy and practice is poor. Research published by the Sentencing Academy in 2022 found that the majority of people in England and Wales significantly under-estimate the severity of current sentencing practices.⁵ It confirmed to a substantial degree the findings of much earlier work by professors

⁴ Independent Commission into the Experience of Victims and Long-Term Prisoners. (2022). *Making sense of sentencing: Doing justice to both victim and prisoner*. <https://icevlp.org.uk/final-report/>

⁵ Roberts, J. V., Bild, J., Pina-Sánchez, J., & Hough, M. (2022). *Public knowledge of sentencing practice and trends*. Sentencing Academy. <https://www.sentencingacademy.org.uk/public-knowledge-of-sentencing-practice-and-trends/>

Mike Hough and Julian Roberts in 1998 and 2013.⁶ Crucially, the consistent evidence appears to be that the public grossly underestimates the actual severity of sentencing for serious crime, including both the length of sentences and the probability of custody being the outcome in the first place.

These findings need to be read against the equally consistent survey evidence that the public generally wants longer sentences for serious crime.⁷ Although there is good evidence that, faced with the full circumstances of a case in mock sentencing exercises, people tend to be less punitive than in the abstract, there can be no escaping that what politicians hear “on the doorstep” appears to be borne out by the survey evidence.⁸

These findings also demonstrate how decades of lengthening sentences have utterly failed to impress themselves on the public or improve confidence in our justice system. No one has noticed. Every time a minister announces that sentences will be toughened up, it seems likely that what people seem to hear is that they must have been getting softer. A properly informed public debate on how we punish serious crime, as recommended by the ICEVLP, is very long overdue.

Any informed public debate would also need to tackle the complexity of the sentencing framework and its consequences. The Sentencing Act 2020 represents a very significant achievement by the Law Commission, but it codifies rather than simplifies, as even a cursory glance at its provisions will establish.⁹ Since its enactment, sentencing law has been subject to further profound alteration in the Police Crime Sentencing and Courts Act 2022, and through a series of specific changes related to particular offences.

In relation to prison sentences, and the dividing line between the period spent in custody and that served in the community, that line will be drawn differently depending on the type and length of sentence, eligibility for early release on an electronic tag, and the year in which a person was originally sentenced. Even after release, the periods during which people may be recalled to prison, and on what grounds, vary considerably. The complexity of sentencing law means that prisoners are regularly released from prison on the wrong date especially when there are overlapping sentences being served.¹⁰

⁶ Hough, M. and Roberts, J.V. (1998) *Attitudes to Punishment Findings from the 1996 British Crime Survey. Research Findings*, 64. Home Office and

Hough, M. et al. (2013) *Attitudes to Sentencing and Trust in Justice: Exploring Recent Trends from the Crime Survey of England and Wales*. Ministry of Justice

⁷ Marsh, N., McKay, E., Pelly, C., & Cereda, S. (2019). *Public knowledge of and confidence in the criminal justice system and sentencing*. Sentencing Council. <https://www.sentencingcouncil.org.uk/publications/item/public-confidence-in-sentencing-and-the-criminal-justice-system-2022/>

⁸ Cuthbertson, S. (2013). *Analysis of complete ‘You be the Judge’ website experiences #YouBeTheJudge*. Ministry of Justice. <https://www.gov.uk/government/publications/the-publics-understanding-and-views-of-sentencing-and-the-criminal-justice-system>

⁹ *Sentencing Act 2020*. (2020). legislation.gov.uk. <https://www.legislation.gov.uk/ukpga/2020/17/contents/enacted>

¹⁰ Table 1.1. Ministry of Justice. (2023). *HMPPS Annual Digest, April 2022 to March 2023*. GOV.UK. <https://www.gov.uk/government/statistics/hmpps-annual-digest-april-2022-to-march-2023>

In short, if the public really understood the anomalies and confusion within our sentencing framework there is no guarantee that their confidence would be increased. Repeated political promises to increase “honesty in sentencing” when the actual impact of successive governments has been to add to its complexity ring hollow.

In practice, however, much of the debate on sentencing surrounds not the structure of sentences but their perceived severity. In the crude language that has dominated since the mid-1990s, are sentences “tough” enough?

Here there is a good deal more evidence on which to draw. Most obviously, the actual severity of sentencing for serious offending has increased dramatically. The average length of determinate prison sentences for indictable offences, at just over 62 months, is more than two years longer than in 2008.¹¹ The average minimum term for life sentences has risen from 13 years in 2000 to 21 years in 2021.¹² Meanwhile, nearly three and a half times as many people were sentenced to 10 years or more in 2022 than in 2008.¹³

By any measure, and overwhelmingly because successive governments have legislated to make it so, sentencing is much tougher than it used to be. Governments have unquestionably delivered on that promise. The disturbing evidence of surveys on this issue, however, is that this appears to have gone not merely unnoticed but disbelieved.

63. Do you think the government is best placed to increase knowledge around the justice system? Please explain the reasons for your answer.

64. Who else do you think can help to increase knowledge of the justice system?

As we highlight earlier in our submission, there is good evidence that, faced with the full circumstances of a case in mock sentencing exercises, people tend to be less punitive than when asked about sentencing by the courts in the abstract. The government undoubtedly has an important role to play in improving public understanding and trust in the criminal justice system, but it cannot do so in a vacuum.

In a report prepared for the Sentencing Council in 2019, its authors give a nuanced account of how the public gets information about sentencing, and make a series of recommendations in support of a pragmatic aim of greater balance.¹⁴ However,

¹¹ Ministry of Justice. (2023). *Criminal justice system statistics quarterly: December 2022*. <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2022>

¹² House of Lords written question HL7261, 6 April 2022, <https://questions-statements.parliament.uk/written-questions/detail/2022-03-23/hl7261>

¹³ Ministry of Justice. (2023). *Criminal justice system statistics quarterly: December 2022*. <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2022>

¹⁴ Marsh, N., McKay, E., Pelly, C., & Cereda, S. (2019). *Public knowledge of and confidence in the criminal justice system and sentencing*. Sentencing Council. <https://www.sentencingcouncil.org.uk/publications/item/public-confidence-in-sentencing-and-the-criminal-justice-system-2022/>

while much of the frustration of organisations like PRT which campaign for a more moderate use of imprisonment centres on the role of the media, and some sections of it in particular, it would be naïve to imagine that stories about overall trends in sentencing practice are about to supplant lurid headlines about exceptional cases.

However, the Sentencing Council report is coy about the impact of the use of sentencing policy as a party-political weapon. The technique came to prominence in the 1990s with the New Labour mantra of “tough on crime, tough on the causes of crime”, but has been used regularly ever since as a simple way of signalling alleged political difference.

It is easy to understand why high-profile cases can place ministers in an invidious position. No-one doubts the strength of feeling expressed in the messages ministers receive from their constituents or through the media. But it cannot be sensible to respond to public and media outrage by simply ignoring salient facts and making no effort to explain why the system operates as it does. One opportunistic ministerial response under pressure can undo any amount of carefully orchestrated outreach and public education.

65. Which methods do you feel are most effective for increasing public knowledge of the justice system e.g., government campaigns, the school curriculum, court and tribunal open days etc.?

As we have already indicated, we believe that the recommendations of the ICEVLP for a national debate on sentencing would be the most effective means to improve public understanding and confidence in the criminal justice system, and these should be taken forward by the Law Commission, the government and the Sentencing Council.¹⁵

¹⁵ Independent Commission into the Experience of Victims and Long-Term Prisoners. (2022). *Making sense of sentencing: Doing justice to both victim and prisoner*. <https://icevlp.org.uk/final-report/>