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Dear consultee

Thank you for taking an interest in this consultation for our 13th Programme of law reform. Your contribution will play a vital part in helping us shape our work programme for the next three or so years. We are enormously grateful to you and every other consultee who takes the trouble to tell us about their ideas.

The Law Commission carries out law reform projects with the aim of making the law fair, simple, clear and cost-effective. The purpose of this consultation is to establish what new areas of law we should review in our next programme. To do this, we are asking: where is the law failing to work properly?

Please use this questionnaire to tell us where you think there is a significant problem with the law. We want to know what you think is wrong and what practical problems arise. Please give us **as much information as you can**, even if you cannot answer all the questions. If we need to know more, we may contact you.

What types of problem will we investigate?

Not all legal reform is suitable for the Law Commission. Please tell us about a problem only if it relates to the law and is:

- causing **substantial unfairness**, or
- **widely discriminatory** or **disproportionately costly**, or
- caused by laws or policies that are **complex** and **hard to understand** or
- caused by laws or policies being **out of step with modern standards**.

Our law reform programme will not include subjects where the considerations are shaped primarily by political judgements (for example, abortion, immigration, membership of the EU, the Human Rights Act, capital punishment, decriminalisation of drug use) or issues of established Government policy, such as taxation. We will not consider problems that relate only to a particular individual's experience of the law as opposed to a more general problem. We do not work on issues that arise only in Scotland or Northern Ireland.

How we make decisions

When considering a potential law reform project, we are guided by our Protocol with Government (which is available on our website). The Protocol is intended to ensure that our recommendations have the best possible chance of becoming law. Some key points that we will look at when considering a project are:

- How **important** is the project: to what extent is the law unsatisfactory (eg, unfair, unduly complex, inaccessible or out of date)? What are the potential benefits of reform?
- Is the independent, non-political Commission the most **suitable** body to conduct the project?
- Are the necessary **resources** (for example, sufficient relevant experience, project-specific funding) available to enable us to carry out the project effectively?
- Would the project require involvement from the Welsh Government and/or the Scottish or Northern Ireland Law Commissions?

We will also assess whether there is likely to be Government support for a project. In order for a project to form part of our programme, a Government department must confirm that it has a “serious intention” to take forward law reform in that area. If Government does not seriously intend to see the law reformed there is no realistic prospect of any recommendations we make becoming law.

What happens next?

We will review all responses before drawing up a list of potential projects, where appropriate working with the relevant Government departments. As set out in the Law Commissions Act 1965, the Lord Chancellor will decide the final contents of the Thirteenth Programme. We expect this to be during 2017.

We are likely to receive a large number of responses but can only accept a small number of projects for the Thirteenth Programme; for our Twelfth Programme we received over 250 responses, which led to nine new projects. We understand you may be disappointed if your proposal is not taken forward but please be assured we are grateful for your contribution. If you have any questions about the consultation process, please contact us on 020 3334 0200 or via programme@lawcommission.gsi.gov.uk.

Our statute law work

Consolidation

Please also tell us if you think it would be beneficial to bring together (consolidate) a number of statutes that all deal with the same area of law into a single new Act. That might just require the relevant legislation to be redrafted or might involve reform of some of the underlying law. Proposals for consolidation that do not involve substantial law reform will be considered separately from the law reform programme, but we are happy to receive suggestions for such work as part of this consultation.

Statute law repeals

Another important function of the Law Commission is to repeal Acts, or parts of Acts, that no longer have a modern function, either because they are spent or have become obsolete. Where such Acts are recorded as still being in force this can be misleading and time consuming for those who come across them. Although it does not form part of our law reform programmes, we are using this opportunity to try and find out if there are areas of law, or particular Acts, that cause people concern and which might be good candidates for consideration by the SLR team.

Please let us know if you have encountered obsolete Acts and the sorts of problems that have resulted.

Kind regards

The Law Commission

<p>Please send us your response no later than 31 October 2016</p>
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Thirteenth Programme of Law Reform consultation response

Please answer as many of these questions as you can, as fully as you can. If necessary, continue on additional sheets. Please also indicate where you are not able to provide an answer.

Please tell us about yourself:

Name: Mark Day

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Tel: 020 7689 7746

k

(Please tick one or more box)

Member of the public

Third sector/voluntary sector

Commercial sector/business

Nature of third sector/business organisation:

Practising lawyer

Academic

Specialist area:

Specialist area:

Member of the judiciary

Government official

Court or tribunal:

Department:

Local authority staff member

Parliamentarian

Other (please state): _____

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at:

<https://www.gov.uk/government/publications/consultation-principles-guidance>.

We treat all responses as public documents in accordance with the **Freedom of Information Act** and we may include the names of respondents and attribute comments in any publication relating to this consultation. If you want your submission to remain confidential, you should contact us before sending your response. (Please note that we disregard automatic IT-generated confidentiality statements.)

1. In general terms, what is the problem that requires reform?

Offenders serving custodial sentences are released from prison on licence to continue serving their sentence under supervision in the community, and can be recalled to prison if they fail to comply with the conditions in their licence. The law relating to release from - and recall to - prison lacks coherence, clarity and fairness. It is a puzzle whose pieces are found in a whole array of different statutes, as well as Prison Service Instructions and caselaw. Different release rules apply to different prisoners, depending in part on the date of their offence and the variety and length of custodial sentence they received. The rules around recall operate in a capricious manner, with some prisoners serving additional parts of their sentence in custody due to charges based on allegations that are ultimately found to be without merit. All this results in a system of release and recall that is not only complex and costly, but also substantially unfair in its operation.

The problem has gained particular significance in recent years. The recall population has grown rapidly in the past three decades, partly as a result of changes in the law increasing licence periods and making it easier to recall released prisoners. In the year to March 2016, a total of 21,455 sentenced offenders were recalled to custody, up 22 per cent from the previous year. Recalled prisoners currently make up 7% of the prison population – 6,617 people. By contrast, in June 1995, only around 150 in the prison population were recalled offenders. The trend looks set to continue, with many individuals continuing to serve virtually indefinite periods at risk of recall under the now abandoned sentence of Imprisonment for Public Protection. A rise in recall has also occurred due to the recent introduction in 2014 of licence conditions and mandatory 'post-sentence supervision' for those sentenced to short custodial sentences. These offenders are at risk of recall for their licence period, and can be sentenced to 14 days' custody for failing to meet their supervisor during the supervision period. In the three months from July to September 2015, recalls were up 28% on the same period in the previous year, due to the 1,800 extra offenders on these short sentences who were recalled following the changes (Offender Management Statistics Quarterly).

This growth in the number of recalled prisoners has come at significant additional financial cost to the criminal justice system. It has also come at significant personal cost to the individuals involved and to their families. Of those determinate sentenced prisoners who are recalled, many do not achieve re-release before the end of the sentence, losing the opportunity to restart their lives with some sort of supervision in the community. For indeterminate sentenced prisoners, recall can add months and sometimes years onto the length of time served in custody, and this can be disproportionate to the reason for recall.

There is a clear case for simplification and codification of the law on release and recall. As Padfield (2011) has highlighted, "The initial sentencing framework is largely to be found in statutes, interpreted and developed in decisions of the Court of Appeal and guidelines from the Sentencing Council (the successor to the Sentencing Guidelines Council). The law on release and recall is built on these complex foundations, and developed in yet more complex statutory provisions, interpreted and developed in court decisions, as well as guided in practice by an array of Prison Service Instructions, Probation Instructions and Circulars, NOMS Agency Instructions, Secretary of State's Directions and so on. Offenders are still being released under laws passed in the Criminal Justice Act 1991, the Crime (Sentences) Act 1997, the Criminal Justice Act 2003, the Criminal Justice and Immigration Act 2008, the Coroners and Justice Act 2009 (s. 145)." Some of the problems occurring in this area of law, with so many rules spread across the statute book, are comparable to those found in sentencing law. The Law Commission's ongoing project to address issues around sentencing is vital, but some of its potential will be lost if the related area of the law on release and recalls is not also examined. The current law produces deeply unfair and highly costly effects. Reform, both in terms of consolidation and rationalisation, is vital here too. The obvious place for a reformed law of release and recall would be within, or appended to, the sentencing code, especially given sentencing judges' duty under s.174(1)(b) of the Criminal Justice Act 2003 to explain the effect of every sentence they pass.

If sentencing is to command public confidence it needs to be intelligible. The overly complex and occasionally arbitrary law around release and recall is poorly understood not only by the public, but by those serving and administering the sentences concerned. This leads to injustice and uncertainty, alongside the associated increase in costs. This is a poor reflection on the state of the law itself, and an indication that reform is urgently needed.

2. Can you give an example of what happens in practice?

For example, if you are a solicitor or barrister, you might describe how the problem affects your clients.

There is one set of release regimes for offences committed between 1991-2005, and another for offences committed on or after 4 April 2005. The particular regime that will apply depends on the length and variety of custodial sentence that is passed. The law can be particularly complex for offenders serving overlapping custodial sentences for different convictions, or where there are multiple possible grounds for their continuing detention (such as remand, recall, and a sentence for a fresh offence whilst on licence). Significant time and resources are expended in prison custody offices, as sentence calculation clerks trace through the different provisions, to calculate release dates (on this see the case of Mrs Noone [2010] UKSC 30). Further, Licence conditions for released prisoners are wide-ranging and constitute significant restrictions on liberty, but there is little effective oversight of their formulation or content. These have even been found to be contradictory and littered with significant errors, having been drawn up in haste. Released prisoners can find themselves recalled based on unproven allegations, and there is no presumption in favour of re-release when charges of fresh offending are dropped, or there is a finding of not guilty. Prisoners then continue to serve lengthy periods of time in custody, as the re-release decision process relates to risk rather than the original basis of recall. The complexity and incoherence of the law in this area therefore results in real unfairness and disproportionate cost.

3. To which area(s) of the law does the problem relate (please tick one or more box)?

Administrative or public law	<input checked="" type="checkbox"/>	Criminal law	<input checked="" type="checkbox"/>
Property or land law	<input type="checkbox"/>	Family law	<input type="checkbox"/>
Trusts and wills	<input type="checkbox"/>	Commercial or contract law	<input type="checkbox"/>
Consumer law	<input type="checkbox"/>	Regulatory law	<input type="checkbox"/>
Planning and environment	<input type="checkbox"/>	Don't know	<input type="checkbox"/>

Other (please state):

4. We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation or journal articles that relate to this problem.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

Statutes

Criminal Justice Act 1991, Crime (Sentences) Act 1997, Crime and Disorder Act 1998, Criminal Justice Act 2003, Criminal Justice and Immigration Act 2008, Coroners and Justice Act 2009, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Offender Rehabilitation Act 2014, Criminal Justice and Courts Act 2015

Statutory Instruments

The Criminal Justice (Sentencing) (Licence Conditions) Order 2015) SI 2015/337

Cases

R. (Noone) v Governor of Drake Hall Prison [2010] UKSC 30

McCreaner v Min Justice [2015] 1 WLR 354

R (Smith) v Parole Board; R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350; [2005] PL 406; (2005) 64 Camb LJ 276

Osborn and Booth v PB [2013] UKSC 61

R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another [2006] UKHL 54

Other

Prison Service Order 6650, Prison Service Order 6300, Prison Service Order 6700, Prison Service Instruction 21/2012, Prison Service Instruction 13/2015

Articles

Padfield, N (2011) Understanding Recall, Paper no. 2/2013, Legal Studies Research Paper Series, University of Cambridge, Faculty of Law

Padfield, N and Maruna, S 'The Revolving Door at the Prison Gate: Exploring the dramatic increase in recalls to prison' (2006) 6 Criminology and Criminal Justice 329.

Padfield, N Understanding Recall (2011)

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201039)

Padfield, N Recalling conditionally released prisoners in England and Wales (2012) 4 European Journal of Probation 34-45

Padfield, N, 'Distinguishing the unlawful from the unjustifiable in the rules on early release from prison' (2007) Camb LJ 255

Padfield, N 'Parole and early release: the CJIA 2008 changes in context' [2009] Crim LR 166

Padfield, N 'The future of parole' [2009] 9 Archbold News 6

5. Can you give us information about how the problem is approached in other legal systems?

You might have some information about how overseas courts or tribunals approach the problem.

See Padfield, N., Van Zyl Smit, D. and Duenkel, F. (eds) (2010) 'Release from Prison - European Policy and Practice', Willan.

6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

All of the above.

7. What do you think needs to be done to solve the problem?

Clearly fresh legislation will not cure all of the problems in this area. Administrative and practical changes will also be required to deal with particular issues. However, a concerted and comprehensive review of the law would provide the necessary foundations and impetus for significant change. First, the complexity of the law could be reduced through a codification of the rules regarding release and recall. It would save time and resources of those consulting the law if it was easily accessible in the same place. Second, consideration should be given to principles underlying release and recall, with the aim of eliminating capricious effects and disproportionate costs. Questions needing answers include: What are the justifications for different release rules for different offenders? What should be the criteria for recall? How should these decisions be supervised? What should the criteria be for re-release? The processes involved in the system should be examined, with a fresh look at the roles of different decision makers following on from the split in the structure of probation work. The potential for options other than recall (i.e. the use of remand where a fresh offence is alleged) should be explored. The different types of recall (fixed term, standard and emergency) are difficult to understand, for both prisoners and some practitioners, and should be reconsidered. The procedure for securing re-release is fraught with difficulty, with no automatic or presumptive release even when charges relating to an alleged fresh offence (i.e. one that triggered the recall) are dropped, or the offender is acquitted. Recent changes have not addressed these problems, but have instead introduced pervasive executive discretions both to re-release recalled prisoners, and to increase the duration of recall. With the annual recall figures showing dramatic increases, a fresh look must be taken at the substantial unfairness that arises when the executive, rather than the courts, effectively determines the extent of punishment. The scope for the time served in prison to be distributively inconsistent (between comparable offenders) and disproportionate to individual infractions (i.e. due to breaches of minor licence conditions) needs to be examined.

8. What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

The recall population has increased hugely over the last 20 years. In the year to March 2016, a total of 21,455 sentenced offenders were recalled to custody, up 22 per cent from the previous year. This continues the previous trend, with recalls increasing by 58% in the year 2006/7, and 30% in the year 2007/8. Recalled prisoners currently make up 7% of the prison population – 6,617 people. By contrast, in June 1995, only around 150 people in the prison population were recalled offenders.

9. What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

The benefits of reform would be manifold. Economic benefits would include savings in prison budgets, as less time would be needed to calculate release dates and work out the applicable release regimes. Less training would also be needed to familiarise professionals with the array of statutory and other sources of the rules regarding release and recall. There would also be savings to court time, due to fewer appeals and less time needed for argument.

However, another important form of benefit would be the social benefit in the reduction in uncertainty and unfairness that is experienced by those affected by the law - whether victims, offenders, or others. Many falling into these categories are vulnerable individuals, whom the law badly lets down in this area due to its complexity and potential for capricious effects. Bringing greater certainty, clarity and fairness to this area of law would be of real benefit to these groups, and to the wider public, who are entitled to expect that the rules around release and recall operate in a fair, cost-effective and transparent manner.

10. If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

There would be costs in terms of retraining legal and penal professionals to use the new law. However, the decrease in complexity of the law would simplify current training in this area, and it would also lead to resource savings through the easier application of the rules by professionals on a day-to-day basis. A more coherent and intelligible system would also produce fewer appeals and less argument, thus saving time and resources.

11. Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

The problems resulting from the current law of release and recall are clearly felt most keenly by those sentenced to custody, and those working within the penal system. However, there is also a very real impact on victims of crime, as the effects of complex provisions are not well understood and can lead to disbelief and dissatisfaction. Members of the wider public in general are clearly also affected, both through funding the costly system via taxation, and through the benefits (and occasionally the risks) associated with offender re-integration and desistance from crime in the community.

12. In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

There is already a considerable amount of existing law regarding release and recall, together with a real lack of clarity in its operation. The Law Commission is the best equipped body to consider the substance, process and functioning of this mass of law, with a view to reducing its complexity, costs and unfairness.

13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

No, other than in general terms as part of our discussions about the use of imprisonment.

14. Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

Not that we are aware

Acknowledgement: PRT is extremely grateful to Tom Hawker of Downing College, University of Cambridge, for drafting the submission, and to Nicola Padfield, Master of Fitzwilliam College, University of Cambridge, for her contribution to the response.

Thank you for your response.
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We would like to know more about what our stakeholders think of the Law Commission and our work, and hear your thoughts on what we might change or improve. If you would be willing to take part in a short survey, please would you give us your email address: