

## **Prison Reform Trust response to the Law Commission consultation on the draft sentencing code – January 2018**

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.

[www.prisonreformtrust.org.uk](http://www.prisonreformtrust.org.uk)

### **Response**

The Prison Reform Trust welcomes the opportunity to respond to the Law Commission's consultation on the sentencing code. The main substance of our response broadly relates to consultation question 10. Do consultees approve of the decisions we have taken with regard to excluding certain provisions from the Sentencing Code? Is there anything which consultees believe necessarily must form part of a functioning and coherent Code? We share the concerns of the Law Commission regarding the lack of a clear, transparent, accessible or coherent sentencing code. We agree with the broad aims of the Sentencing Code project:

- (1) to ensure the law relating to sentencing procedure is readily comprehensible and operates within a clear framework;
- (2) to increase public confidence in the Criminal Justice System; and
- (3) to ensure the Criminal Justice System operates as efficiently as possible.

However, we note that a remit of the project is:

To ensure that the new Code must not restrict Parliament and the Government's capacity to effect changes in sentencing policy. In particular, the penalties available to the court in relation to an offence are not within the scope of this project except insofar as some consideration of them is unavoidable to achieve the wider aim of a single, coherent Code. Similarly, the Sentencing Code should not in general impinge upon sentencing guidelines, and its drafting will be consistent, and in cooperation, with the work done by the Sentencing Council.

We accept that the project of codifying and consolidating existing law and procedure on sentencing is a complex and difficult one. However, to undertake this task without also taking into account the impact of the current sentencing framework on outcomes

in the criminal justice system is a missed opportunity. Indeed, the failure to do so risks consolidating in a revised code the failures of existing penal policy and practice.

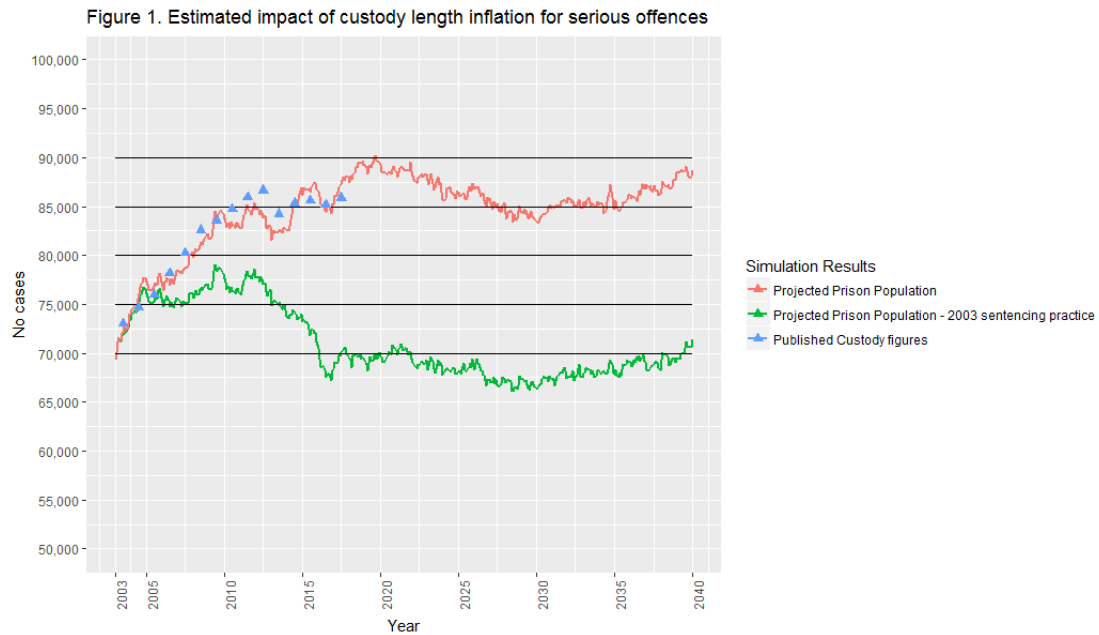
The current sentencing framework has too often been the product of a kneejerk political reaction to the latest media headlines rather than the outcome of measured and considered policymaking. The consequence is a prison population which has nearly doubled in the past two decades and a prison system which is buckling under the weight of a rising prison population and shrinking resources. This approach to penal policymaking has also contributed directly to the existing mess of statute that has necessitated the current consolidation exercise by the Commission.

In a time of austerity, a continuing fixation across the political spectrum with ever longer sentences for an ever longer list of misdemeanours is hard to understand in the absence of any evidence that longer sentences have any impact on either deterring crime or securing better post custody outcomes. All we know for certain is that the startling increase in sentence lengths for serious crime in recent years has been the single biggest factor in ensuring that the size of the prison population consistently outstrips our ability to resource a system capable of delivering a decent or effective service.

Although the use of very short prison sentences has declined in recent years, the need to accommodate people serving those sentences continues to lie behind some of the worst conditions in our most dilapidated prisons, with wholly predictable consequences for violence, self-harm and all the problems associated with illegal drugs. The exponential growth in very long and indeterminate sentences, including a burgeoning population of people recalled from the conditional release element of such sentences, guarantees that a majority of every such sentence is concerned not with rehabilitation but rather with occupying someone's time in the least damaging way possible. The balance we strike between retribution and mercy has changed fundamentally, but through successive and largely opportunistic statutory interventions. The sad state of our prisons is an unintended but wholly predictable consequence.

The Commission may already be aware of some ground-breaking work undertaken by Dr Savas Hadjipavlou (of *Justice Episteme*) to model the impact of both environmental and policy changes on the criminal justice system. His model uses what we know about the typical life histories of people who end up in the criminal justice system, together with what we know about how that system operates, to assess the impact of demographic or other changes on key criminal justice outcomes—including the likely size of the prison population. It allows the impact of particular policies in the past to be estimated, and for the potential impact of current and future policies to be predicted.

PRT commissioned Dr Hadjipavlou to analyse the impact of changes made to the sentencing framework in the Criminal Justice Act 2003 and the Offender Rehabilitation Act 2014 on the prison population. We asked him to estimate what the prison population would have been without changes that have increased time served in custody—essentially the introduction of the IPP sentence, the imposition of mandatory minimum sentences for certain offences and the introduction in 2014 of mandatory supervision for sentences of under 12 months. The model assumes that harsher sentencing practice since 2003, reflected and codified in sentencing guidelines, has taken its cue from the 2003 Act. The outcome of his projection is shown below:



As will be apparent, the model appears to track the actual behaviour of the prison population reliably (the red line represents the model’s prediction without adjustments and follows the actual custodial population from 2003 to the present with remarkable accuracy). Its projection for a world in which governments and parliament had not driven an increase in sentence length is that the prison population now could have been around 70,000, some 16,000 fewer. It is hard to think of any other public service for which a government would choose deliberately to increase its workload during a period of austerity, passing up potential annual savings of some £560m (assuming the cost of a prison place is in the region of £35K).

We do not believe that the aims of current project are achievable without a more comprehensive parallel review of the proportionality and effectiveness of the existing sentencing framework. In particular, in light of the misstep that the IPP sentence represented, there is a pressing need for clarification on the stated purpose of sentencing in relation to public protection. The IPP debacle highlighted the inherent flaws and dangers in the ‘predictive’ model of sentencing versus the more established ‘just desserts’ approach. And yet, although the IPP sentence was abolished in 2012, the predictive model continues to influence public debate on sentencing and its appropriate role in protecting the public. This has arguably led to an overestimation of the extent to which sentencing, in and of itself, can be utilised as an effective measure of public protection, and an underappreciation of the inherent dangers involved in such an approach to fairness, proportionality and due process. It has also led to an undervaluing of other important purposes of sentencing, including reformation and rehabilitation. A more comprehensive review of the sentencing framework would provide a valuable opportunity to restore balance to the debate and conduct a proper assessment of the appropriate role of public protection as one of a number of the stated purposes of sentencing.

Unless the Commission is prepared to conduct the project as part of a wider review of the sentencing framework, there is a risk that any new codification will quickly become obsolete as a result changes to existing policy and legislation. For instance, we note that “Owing to the ongoing review of the Youth Justice System in England and Wales currently under consideration by the Government and in the interests of using resources most effectively and avoiding any duplication, those provisions

relating to specific youth justice orders have been excluded from the draft Sentencing Code.” Such a position is understandable given the Commission’s desire not to enshrine in a new code provision which may become outdated as a result of new policy or legislation. However, it seems contradictory that the Commission has not excluded from its consultation other areas relating to sentencing policy that have been subject to independent review and are currently under consideration by the government. These include:

- The Justice Committee inquiry on young adult offenders
- David Lammy’s independent review on the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System
- The government’s forthcoming strategy on women offenders
- The independent review of the Mental Health Act

Arguably, these developments can only be accounted for as part of a wider review of the sentencing framework. Such a review would be an opportunity for a more fundamental assessment of the impact of recent legislation on sentencing, including the introduction of new offences, the imposition of mandatory minimum sentences and increases in the maximum sentence length for certain offences. It would also be an opportunity to enshrine in legislation existing good policy and practice, including the development by the Sentencing Council of a range of mitigating factors to be accounted for in the sentencing process, such as primary care responsibilities, mental health need, learning disabilities and lack of maturity. Such an exercise may be beyond the scope of the existing project. But it is nonetheless essential if the ambition of a more transparent sentencing code which can secure the confidence of the public and improve the efficiency of the criminal justice system is to be realised.