

A Smarter Approach to Sentencing

Prison Reform Trust critique

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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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Summary

1. The PRT is a member of the Standing Committee for Youth Justice (SCYJ). We have contributed to the SCYJ's submission to the Justice Committee and endorse fully its contents and conclusions. We are also a member of the Transition to Adulthood (T2A) alliance and similarly endorse their submission to the committee. What follows are supplementary points to that submission, born of our experience of working with children and young adults who have previously offended and who have, as a consequence, disclosable records of past convictions.
2. We note the distinction the government makes in this White Paper between the treatment of more serious offences, particularly those of a sexual or violent nature, and other offending. Much of the policy intention behind the treatment of less serious offending is to be welcomed, recognising that prison generally reduces the likelihood of people desisting from crime, undermining all the factors—employment, accommodation, family relationships—which contribute to that process. Those elements of the White Paper seem to recognise the importance of an approach which deals with the complexity of the issues which give rise to offending in individual cases, and recognises that the public is best protected when a person is helped to live a crime free life altogether. The evidence to support that approach, much of it compiled by the Ministry of Justice itself, is solid and persuasive.¹
3. Unfortunately, the sections of the White Paper dealing with the treatment of more serious offending appear to have been written by a completely different author. Its proposals either rely on no evidence to support the claims made for them, or use such evidence as there is selectively and in a way that misleads. In relation to the treatment of young adults, the White Paper ignores evidence which the government has previously acknowledged as persuasive. Its treatment of the discriminatory impacts of its proposals for people with protected characteristics falls far short of the duties placed upon it by law. And its specific proposals on

¹ [Ministry of Justice \(2013\) Transforming Rehabilitation: a summary of evidence on reducing reoffending. London: Ministry of Justice](#)

the treatment of children fail in key respects to observe the policy test which the paper itself sets, that the welfare of the child should be the primary consideration.

4. Far from being the simplification of sentencing claimed, the White Paper adds to the piecemeal and confusing history of sentencing legislation of which it is so critical. It does so without a coherent philosophy to underpin its approach, and guarantees the continuation of general sentence inflation which has played a large role in destroying the capacity of both prison and probation services to deliver the rehabilitative goals which the paper claims to promote. Several of its sentencing proposals, for both adults and children, are plainly inspired by exceptional individual cases and fall into the worst category of reactive policy making which has bedevilled the law in this area for several decades.
5. The incoherence and cruelty of the paper's approach to the treatment of more serious offences cannot be excused by or balanced against the good sense of many of its other ambitions. The state's responsibility to deal fairly and humanely with those convicted of crime applies with exactly the same force regardless of the severity of the offences committed. The White Paper fails that test.
6. This critique now follows the structure of the White Paper, concentrating on those aspects on which the Prison Reform Trust has the strongest interest and knowledge on which to draw.

Foreword

7. Perhaps the most fundamental question to ask about this White Paper is "what is it for?"
8. At a time when both victims and defendants can be waiting for years to have a case heard in a criminal justice system in which allegations of even very serious crime are often not prosecuted at all, it seems curious to devote so much energy and parliamentary attention to sentencing—the final act in a process which is failing at every stage leading up to it. Sentencing reform cannot solve or even mitigate the chronic structural malaise in criminal justice.
9. The Secretary of State's answer in this Foreword section is to assert that this, eighteenth, legislative intervention will succeed where the previous seventeen have failed, and give us a sentencing regime that "really works". It would be reasonable to expect a description of what "really working" means, and evidence of how the system is not "really working" at the moment. But evidence is thin on the ground throughout this White Paper. It asserts that sentencing is:
 - a. "complex"—which is true, but which will be even more true if the proposals in the paper are brought into law.
 - b. "ineffectual", but without analysing which of the statutory purposes of sentencing are not being met or why. Much of the paper dwells on public protection and reconviction rates, but without examining whether it is sentencing that can best deliver improvement in either.
 - c. "difficult to understand"—which many working within the system and on the receiving end of it, never mind victims and the public, would probably agree with. But these proposals do nothing to improve that situation, which in any event is the product to a considerable degree of persistent misrepresentation of the current sentencing regime by the very politicians who have brought it into being.
 - d. insufficiently focused on public safety, but no evidence is presented to support that assertion. By European standards, our sentencing regime is disproportionately geared to the use of preventive detention, with much longer punishment periods and

a far greater proportion of prisoners serving sentences that depend on the prediction of future risk as the condition for release.

- e. “cumbersome and difficult to navigate”, which again these proposals do nothing to improve.
 - f. guilty of “tying judges’ hands”, which is a strange criticism to make when one of the main aims of these proposals is precisely to remove judicial discretion in relation to repeat offences. Giving judges the freedom to send an 18 year old to prison on a whole life term on the basis of a single high profile case and a single remark from one judge is a perverse interpretation of what increasing judicial discretion involves.
10. There is no discussion at any point in the paper of the legal and moral principles that should underpin a just sentencing regime. The Secretary of State asserts, for example, that *“We owe it to the victims, their families and the wider public to ensure that the system does all it can to protect innocent people from any dangerous threat, including sex offenders and those who would harm children”*. But in making such a promise, the paper loads an impossible burden on the sentencing process to deliver that all-encompassing definition of public safety. The example the Secretary of State gives, of people committing terrorist crimes after being released from prison, ignores the so far unanswered questions about whether those crimes could have been avoided if other parts of our criminal justice and security systems had operated differently. It also ignores the crime committed inside prison, both against prisoners and against staff or other people within the walls.
11. Although we use indeterminate sentences on a scale unparalleled in Europe,² the foundation of most sentences remains the principle of “just deserts”—a penalty to be paid that is appropriate to the crime committed, not a form of preventive detention. That principle is central also to the rehabilitative purpose of punishment, and custody in particular, popularly expressed in the metaphor of having paid your debt to society. The absence of any discussion in the paper of its underpinning principles, not even by reference to existing statute, helps to explain the multiple inconsistencies that its different and variously motivated authors have produced.
12. The Secretary of State’s foreword goes on to assert that our prisons are “full” of “low level offenders stuck in a revolving door of crime”. That is simply not true—there are people needlessly in prison who fit that description, but the nature of the prison population has changed dramatically over the last two decades precisely because parliament has increased the severity of sentencing, both by design and by accident. We estimate that sentencing changes alone have added around 16,000 to the prison population since 2003.³ Published statistics show average sentence lengths over two years longer than in 2007, and over a quarter of the prison population serving indeterminate sentences or determinate sentences of 10 years or more.⁴ Were it not for sentence inflation sparked by the ratcheting up of penalties for the most serious offences, the endemic problem of overcrowding would no longer exist. Replacing ineffective short prison sentences with community penalties makes complete sense, but pre-Covid, only around 4,500 prisoners at any one time were serving a sentence of under 12 months. That number has now fallen to under 3,500. A reduction in the number of people sent to prison for “low level offending”, whilst welcome, does not provide an answer to the chronic problems that our prisons face.

² Aebi, M., et al. (2018) Council of Europe annual penal statistics, survey 2016, Strasbourg: Council of Europe; Nellis, A. (2017) Still life: America’s increasing use of life and long-term sentences, Washington: The Sentencing Project; Office for National Statistics; data collected by authors (Van zyl Smit and Appleton).

Note: Data for all countries are from 2016, except Russia, which are from 2014.

³ [Hadjipavlou, S. \(2017\) The impact of the Criminal Justice Act 2003 on the Prison Population, London: Justice Episteme](#)

⁴ Prison Reform Trust (2020) Bromley Briefings Prison Factfile Winter 2019, London: Prison Reform Trust

13. The Secretary of State wants to give courts “*more meaningful options in the sentencing toolkit*”. But there is no evidence that it is a lack of options which prevents courts from handing out sentences which have a better prospect of reducing reoffending than those currently available. The last decade has seen an evisceration of the probation service through misguided central government policy, and a collapse in the provision of case by case advice to courts before sentences are arrived at. The White Paper correctly points to the failings of support from government on the issues that evidence shows make a difference to future offending—including accommodation, employment, substance misuse treatment, mental health support and a proportionate disclosure regime. The commitment to a reinvigoration of pre-sentence reporting and the practical support promised for existing sentencing options—in particular Community Sentence Treatment Requirements—are welcome, but the focus on new unevaluated options for sentencing is not.
14. In summary, the Secretary of State’s personal foreword to the White Paper fails adequately to answer the “what is it for” question. There is no coherent underpinning philosophy or rationale, but rather a collection of manifesto promises designed for electoral gain, and commitments given in the aftermath of high-profile individual crimes. Assertion substitutes for evidence throughout, and the promise of legislation to change sentencing diverts attention from the deep-rooted malaise in the administration of justice at every point before and after that single aspect.

Introduction

15. The introduction reiterates the criticism of previous “piecemeal” reform of sentencing, but these proposals only extend that tradition. Perhaps the last White Paper to do a thorough job of describing a philosophy of sentencing was “Crime, Justice and Protecting the Public”, published in 1990. This was how the then Home Secretary, David Waddington, introduced it to the House of Commons:

“In preparing these proposals for a coherent legislative framework for sentencing, our aim has been to ensure that offenders are punished according to the seriousness of their crimes and receive their just deserts, and to see that the public are properly protected. Really serious crime, especially serious violent crime, has to be followed by really severe punishment, and I am sure the House would agree that the right punishment for serious violent crime is a long prison sentence. But we know that prison can all too often reinforce criminal habits, and many more people convicted of less serious offences could be punished in the community, where they could repay their victims and do tough and demanding work for the community.”

16. The government of the day, incidentally, described its proposals as:

“The most fundamental and far-reaching changes for at least half a century in the way we punish offenders in this country.”

17. All governments since 1990 have signed up to a similar broad approach in theory, but in practice used sentencing as a political stick with which to beat their opponents. “Tough on crime” has always been delivered—“tough on the causes of crime” only rarely. Confusion and unfairness have been the result.
18. However, far from resolving that situation, the current White Paper makes it worse. Its introduction immediately introduces a confusion about “dangerous” offenders. Much of the “piecemeal” legislation since 1990 has been motivated by a desire to protect the public by predicting the risk of some people committing serious further offences. It is an imperfect science, and the blunt instrument of the IPP sentence introduced in 2003 (and since wholly

discredited) has nevertheless been followed by ever more complex provisions based on the same fundamental premise. This White Paper goes a step further in equating the passing of any longer sentence based on the seriousness of sexual or violent crime with the presence of “dangerousness”. In essence, it abandons the idea that an assessment of dangerousness is required before justifying a longer period of incarceration on those grounds, and conflates two entirely separate elements in the rationale for the sentencing decision.

19. The result can only be further confusion. A sentence served predominantly in custody is manifestly more punitive than one in which the custodial period is shorter. The simple calibration of how serious an offence is, reflected in the length of sentence (or tariff) given, will be muddied by these proposals. How is the Sentencing Council expected to advise on the right period for retribution as between different categories of crime, when the punitive content of different sentences has changed so significantly?
20. The introduction does at least attempt to define the problems the White Paper is designed to tackle. The first of these is that the automatic release of some offenders at the halfway point of the sentence has led to criticism of sentencers, and, it is alleged, allowed the commission of avoidable serious crimes. Without any examination of the actual circumstances of the cases involved, the paper cites two terrorist incidents in support of its claim. It remains to be seen whether those crimes might have been avoided had other systems been operating as they should, and of course it is impossible to say whether a longer period in custody would have done anything other than postpone the commission of similar crimes. As the paper points out, the government has in any case already legislated in response to those attacks—somewhat bizarrely in one instance introducing a retrospective parole consideration to a determinate sentence, and in the other removing the possibility of parole altogether. Moreover, as the paper acknowledges, its proposals do not relate to terrorism, but to other violent and sexual offences, for which no examples are given.
21. The second problem identified is that confidence in non-custodial options is said to be low. No evidence is given for that assertion, nor is there any attempt to understand why, if it is true, it might be so. As a result of the government’s disastrous restructuring of probation, it is certainly true that confidence in the probation service (as distinct from sentencing options) has been damaged. It is also plain from published statistics that many offenders routinely do not receive the help they need to find stable accommodation, employment and treatment. Measures in the White Paper to improve that help are all welcome and likely to have an impact if properly resourced. But there is no evidence that what sentencers require is “more choices on the menu”, or that any of the new choices proposed are likely to be effective in reducing crime. The risk the government runs is that in championing new and unproven options on the basis that they appear “tough”, is that the credibility and use of existing options is undermined, which in turn is likely to bring forward the moment at which the least effective of all options—custody—is employed.
22. The third problem cited by the paper is the need to address the causes of offending. Unsurprisingly, the paper makes no reference to the “Rehabilitation Revolution” which was also supposed to tackle the chronically high rates of reoffending, and so contains no analysis of why that previous programme has failed so completely. But no commentator has suggested that it failed through an absence of new sentencing legislation. With no information about how the practical assistance people need is to be funded or provided, the reliance on sentencing as a means to address the root causes of offending looks extremely fragile.
23. The paper’s “vision” starts with the heroic assertion that the public’s alleged confusion can be solved by making sentencing more “nuanced”. It finishes with the unarguable truth that the criminal justice system must be fair, and that the equal treatment of people with protected characteristics is central to achieving that. What it fails to do is mention the equality assessment that accompanies the paper and which demonstrates that its provisions on

sentencing will in fact have a disproportionate adverse impact on people from BAME communities, and that it has no means of assessing their impact on people with disabilities. The “vision” is in reality a hastily assembled amalgam of measures prompted in part by an election, in part by high profile events, and in part by the chronic policy errors of the preceding decade.

Protecting the public from serious offenders

Abolishing automatic halfway release for certain serious offenders

24. As already noted, this provision significantly changes the punitive weight of a sentence where it relates to sexual or violent conduct. The rationale for doing so is confused. The way in which substantive offences are framed and maximum penalties set, together with sentencing guidelines, already allow the length of sentence to reflect factors which affect “seriousness”—sexual and violent conduct included. Sentences for such crimes have already lengthened considerably over the last two decades.⁵ But if the rationale is, as the paper implies, public protection, parliament is being asked to assume that all more serious violent and sexual offences are committed by people who are also “dangerous”, in the sense that they are more likely to commit a similar offence in the future. That is bound to be objectively untrue in some cases, but also calls into question the raft of overlapping sentencing provision (already added to by this government) which does concern itself specifically with offenders who are considered dangerous on a case by case basis.
25. How courts will resolve the conundrum that a person convicted of a violent offence who receives a sentence of just over 4 years will be much more harshly punished than someone who receives a sentence of just under 4 years remains to be seen. Or, indeed, how the government will explain that the person convicted of stealing from a pension fund will be more leniently dealt with than the person who lashes out in a pub fight. Whatever other goals this proposal may achieve, simplification of sentencing is not amongst them.

A new power to prevent automatic early release for offenders who become of significant public protection concern

26. This proposal is plainly triggered by concern over terrorism, and the risks of radicalisation within prisons. But it reflects the muddle the government has created by reaching for hurried sentencing reform as a response to a phenomenon which sentencing is highly unlikely to change. In the process, this proposal creates a constitutional and legal mess.
27. So far, and without any public examination of the failings in the criminal justice and security systems that may have allowed two terrorist attacks in late 2019 and early 2020, the government has prayed in aid public protection in the face of a terrorist threat to allow retrospective sentencing, to introduce parole consideration for some terrorist offenders, but then to rule it out for others. Now it cites it as the justification for executive sentencing, radically changing the nature of a sentence mid-stream on the basis of alleged behaviour that post-dates not just the original offence, but the trial that the offence brought about.
28. Even the criteria to identify cases where the power might be invoked are vague. Two scenarios are envisaged. In the first, a person serving a sentence for a non-terrorist offence is judged to pose a terrorist threat (the radicalisation phenomenon). It is not clear what the evidential test for this would be, the standard of proof required, or why there should not simply be an expectation that the person is prosecuted for an appropriate offence related to their behaviour.

⁵ Ministry of Justice (2020) Criminal Justice Statistics quarterly, England and Wales, July 2019 to June 2020, London: Ministry of Justice

The scope of legislation designed to catch people sympathetic to terrorist causes is wide—the proposal simply appears to be a mechanism to avoid the inconvenience of having to provide evidence and have it tested in open court.

29. The second scenario is that someone is a terrorist but has not been convicted of a terrorist offence. Exactly why the authorities would not bring evidence of terrorism to the sentencing court's attention is not explained, but the fundamental problem is the same. Making release from custody discretionary, and contemplating the possibility that the period in custody could be doubled as a result, is not some minor alteration in the administration of a sentence. It is retrospective sentencing by the executive, a form of internment, circumventing the judicial process and all the protections it confers.
30. Bizarrely, the proposal also appears to contemplate that the outcome in some cases might be that a person considered highly dangerous would end their sentence in custody with no supervision period to follow.

Whole life orders

31. There can be few more depressing examples of how politicians use sentencing as a way of deflecting attention than the growth in the number of whole life sentences over the last three and a half decades. The proposal to add premeditated murder of a child to the list of offences for which a whole life order must now be the “starting point” for the sentencing decision, merely adds to that litany. Despite the effective absence of any meaningful possibility of review, as required by European human rights law, successive government interventions have created a situation in which there were no prisoners serving whole life in 1982, and there are now over 60. Leaving to one side the moral and philosophical arguments that should surely at least be aired before a proposal of this kind is made, its practical impact extends beyond the small number of cases to which it may be relevant, fuelling the sentencing inflation across a wide spectrum of offending which in turn has helped to produce a prison population that no government has been willing to find the resources to treat decently.⁶
32. The second proposal in this section, to allow for the possibility that an 18 year old might receive a whole life tariff, plumbs even greater depths. It is the first of several proposals in the White Paper that fly in the face of evidence on maturity which the government has previously accepted and promised to take into account in its policy concerning young adults in the criminal justice system.⁷ That evidence, supported by neurological studies, establishes that the development of maturity extends well beyond adolescence, and typically into a person's mid-twenties. In its response in 2015 to Lord Harris' report into the deaths of 18-24 year olds in custody, the government agreed that “what is widely known and accepted is that young adults, particularly males, are still maturing until the age of 25”. There has been no change in that evidence, nor, so far as we know, in the government's wish to have regard to it.
33. This second proposal derives entirely from a single recent case. There can be no clearer example of short-term presentational advantage trumping the evidence. The remarks of a single trial judge have been used to present a cruel and inhumane measure as “untying the hands of the judiciary”, where in reality the bulk of the paper's sentencing proposals are designed to do the reverse, or to remove a key aspect of sentencing (the assessment of dangerousness) from judges altogether.

⁶ [Hadjipavlou, S. \(2018\) Analysis of the determinants of the size and composition of the prison population in England & Wales, London: Crest Advisory](#)

⁷ [Ministry of Justice \(2015\) Government response to the Harris Review into self-inflicted deaths in National Offender Management Service custody of 18-24 year olds, London: Ministry of Justice](#)

Longer tariffs for discretionary life sentences

34. This proposal—effectively requiring courts to set longer tariffs in discretionary life sentence cases—is described as a necessary consequence of the change to the release point in longer determinate sentences for sexual and violent offences. Although not stated, it is highly likely also to be a reaction to another single high-profile case in which defendants were convicted of manslaughter, the punishment was disapproved of in the press, but a government sponsored appeal on the grounds that the sentence was unduly lenient was rejected.

Increasing the time those convicted of sexual offences serving a SOPC must spend in prison

35. This provision—also increasing the punitive element of a sentence—is described as a necessary consequence of the emergency legislation the government introduced following terrorist attacks in late 2019 and early 2020. It is, but that only serves to demonstrate the complexity of sentencing law in this area, and the extent to which the government adds to that complexity every time it responds to an individual crime by promising a change in sentencing law. It also shows how the adjustments that inevitably follow rushed and event-specific legislation always ratchet up the length of sentences overall, producing the inflationary effect that drives so many of the intractable problems of our prison system.

Repeat offenders

36. These proposals betray the government’s actual frustration with judges who refuse to have their hands tied. Anyone closely connected with the criminal justice system day to day quickly becomes aware that most of the people who commit offences also carry complex and often deeply disadvantaged histories with them. They also quickly realise that threatening people with ever more serious consequences does not change behaviour. The government’s own research on the management of custodial behaviour recognises that truth.⁸ Nevertheless, successive governments continue to legislate in the mistaken belief that deterrence works, and these proposals follow that pattern.
37. The paper does not explain how it will alter a test that currently prevents judges from taking decisions that would be “unjust in all the circumstances”. Presumably there is no intention to encourage unjust sentences instead. It also chooses to gloss over the impact these provisions will have in relation to the protected characteristics of both age and race. Those consequences are very likely to be that the disproportionate and growing representation of black children and young black men in custody will increase, reflecting the systematic bias disclosed by the Lammy report and which the government is supposedly committed to tackling.
38. The government’s own research on the most effective responses to prolific offending is also at odds with these proposals. This shows that reconviction rates for prolific offenders are lower when agencies persist with the use of community sentences rather than resorting to custody. That impact was even more marked for people with mental health issues.⁹
39. The contrast between these attention grabbing but misconceived proposals and the vacuum of action or policy in relation to persistent low level offenders—“we will continue to consider...ways in which we could tackle their...offending”—could not be more obvious or telling.

⁸ [HM Prison & Probation Service \(2020\) Incentives Policy Framework, London: Ministry of Justice](#)

⁹ [Hillier, J. and Mews, A. \(2018\) Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?, London: Ministry of Justice](#)

Victims of serious and dangerous offenders

40. A concern for the welfare of victims is welcome and appropriate. But the White Paper does nothing to tackle the core problem for most victims that crimes are often not investigated at all, and that the prosecution of serious crime can take months or even years. It also fails to acknowledge the fact that a great many offenders are also victims, and that crime within prisons, particularly in the form of violence against both prisoners and staff, has risen dramatically in the last decade. The simplistic division of the world into offenders and victims bears no relation to reality on the ground, any more than the idea that all victims want the same thing from the criminal justice system or that harsher punishment will always improve either their well-being or confidence.
41. This section of the paper concludes with the assertion that its proposals will improve confidence in the criminal justice system. It provides no baseline against which that improvement might be measured, and no evidence that changing sentencing law is likely to have that effect. What the research (in particular the work of Professors Mike Hough and Julian Roberts, but also the one study used by the government as evidence in this paper) has long shown is that the public does not realise that sentencing is already as severe as it is, typically underestimating the sentences that are passed for serious crime. Politicians of all parties have colluded in misinforming the public over many years, stoking up outrage in the aftermath of notorious individual cases, and this White Paper continues that unhelpful tradition.

Supervising Offenders in the Community

42. This section of the White Paper differs dramatically from the first section in that it starts from a foundation of evidence about what is likely to make the difference it wants to achieve. The ministry's own research shows that community penalties are more likely to lead to reduced re-offending than short prison sentences, and that this effect includes prolific offenders. There is plenty in this section to welcome.

Community Sentence Treatment Requirements (CSTRs)

43. The planned and funded rollout of support for CSTRs to 50% of courts by 2023/24 is welcome, and provides a good template for other community penalties. What the pilots have shown is that courts respond positively to existing sentencing options where those options are supported in a way that guarantees their effective delivery. CSTRs also model the value of interventions which serve more than one purpose—the benefits to public health stand alongside the benefits to public protection, and the joint working between MoJ and DH over several years to produce this outcome provides an example for other cross departmental initiatives.
44. The plans for implementation, outcome evaluation and further development of feedback direct to the sentencing court about the progress of individuals all appear to be solidly based.

Ensuring community requirements are robust and responsive

45. The willingness to give probation officers more scope to vary requirements—in particular curfew requirements—in the light of a person's particular circumstances is welcome. A common complaint from probation clients is that requirements can get in the way of them doing exactly the things which are likely to reduce their likelihood of reoffending. Reporting requirements that mean they must take time off work would be a common example. The ability to impose curfew requirements lasting up to two years is likely to be appropriate very rarely, but it is helpfully described as a means to enable a court to avoid a custodial sentence.

46. Similarly, the ability to use technology to help in tackling specific risk factors—in this case through monitoring alcohol consumption—is welcome provided it genuinely sits alongside the paper’s stated wish to give probation officers stronger backing in the use of professional discretion. Again, there is evidence from pilot areas to support the paper’s proposal.
47. The strong support given to unpaid work as a disposal is welcome, including the emphasis on its rehabilitative as well as punitive potential. And the abolition of attendance centre requirements seems sensible, given how little they are used, and the ability to construct very similar arrangements on an individual basis using other orders.
48. “House Detention Orders” are the oddity in this otherwise evidence-led section of the White Paper. Whilst the proposal appears to have been motivated by a desire to reduce the unnecessary use of custody, its actual impact is more likely to be the displacement of better and well established existing community penalties. Practically, it is very hard to see which cohort of offenders these orders would suit. The paper says that they are aimed at prolific low level offenders, but on the basis that those offenders may be deterred by a “a tough new form of ‘house detention’ that severely restricts liberty”. Yet what we know for certain about prolific offenders, not least from the government’s own research, is that deterrence doesn’t work. By contrast, we know that persistence with community penalties does, and the rest of this section, with its evidence-led concentration on individualised penalties administered with professional discretion represents a far better response to the problem of prolific offending.
49. It also seems improbable that people whose lifestyle is typically chaotic will comply with “lengthy and restrictive” curfew requirements, or that many will have domestic arrangements that would make such requirements tolerable or even safe. If greater discretion for probation officers to make judgements about the complex situations their clients face is to become a reality rather than an aspiration, these are precisely the circumstances in which flexibility is essential.
50. In short, while the paper correctly identifies the need for a more imaginative approach towards the problem of prolific offenders, it makes a mistake in assuming that a new sentencing option is needed. Courts have all the options they need—what is too often missing is the quality of advice they should have before making a decision, and adequate resourcing of the options that should already be available to them. The White Paper’s proposals on pre-sentence reports and on support for existing penalties, if properly resourced, have the potential to deal with the problem without the invention of a new order which, in practice, would be likely to be rarely appropriate and even more rarely completed successfully. The risk is that its failure would quickly be seen as a reason for resorting to custody—which the evidence firmly establishes as the least effective response of all.
51. The paper’s next section, on pre-sentence reports, is also welcome. On the principle that one should rejoice over the prodigal’s return, the government can perhaps be forgiven for glossing over the fact that the only reason PSRs have fallen into disuse is that successive governments have made that their specific policy. It is particularly heartening to see the pilot aimed at women and young adults, as well as those on the cusp of custody. It is good to see the evidence that 18–25 year olds deserve special attention because their maturity is not established being taken into account in forming the policy—though that serves to highlight the perversity of ignoring that evidence in the previous section on sentencing for more serious offending.
52. The support for deferred sentencing is welcome, as again is the specific reference to its potential in cases involving women. The paper is vague about how the encouragement to courts is to be delivered or monitored, however.

53. The proposed simplification of the structure for out of court disposals raises concerns because of the potential for indirect discrimination, which we discuss later in this critique. The enthusiasm for setting conditions does not appear to us to be justified by the evidence and runs the risk of pulling people further and more quickly into the criminal justice system rather than the reverse. We would also argue that neither tier of these disposals should entail the creation of a criminal record. The safeguard that, for the upper tier, the “offence” would become spent after three months is inadequate, principally because it still allows for the “offence” to be disclosable in some circumstances beyond that period.
54. The proposed pilots of problem-solving courts, and the suggested focal points for those pilots are all welcome.
55. The proposed call for evidence on neurodivergence is welcome. The paper chooses to concentrate on the potential impact of neurodivergence on less serious offending, but of course it has equal significance across the board, and even in the most serious cases will sometimes be relevant to whether a person should be being dealt with under criminal justice processes at all. The relationship between this review and Sir Simon Wessely’s review of mental health legislation will need to be made transparent in due course.
56. The final element of this section, prompted by the initial findings of Sir Simon’s review, correctly identifies that the practice of using prison as a “holding pen for people whose primary issue is related to mental health” is indefensible. But its response is disappointing, promising only further analysis, with no timeframe for its completion. The government should take the opportunity to legislate to prevent the practice it so roundly condemns.

Empowering Probation

57. This section of the paper largely just reiterates the plans to dismantle the catastrophic reorganisation of probation undertaken by the government’s predecessors. It is worth noting that all of the ambitions set out in this paper—local responsiveness, flexibility to meet individual need, involvement of the voluntary sector, strong inter-agency working—were shared by the architects of “Transforming Rehabilitation”. The lesson may simply be that organisational restructuring rarely delivers radical changes in practice on the ground, and a degree of scepticism is therefore required about the faith placed in this latest version. What is inescapable this time around, however, is that the responsibility for success or failure will lie squarely with the government, operating through a national organisation of directly employed civil servants answerable to the Ministry of Justice and its political head.
58. One element of the proposals which will require close parliamentary scrutiny is the ambition to give individual probation officers the power to restrict a person’s liberty in ways that go beyond what the court has sanctioned. Given that the consequences of failing to abide by such additional restrictions could involve breach proceedings and even imprisonment, understanding the exact procedure by which such decisions can be made and appealed will be critical.

Reducing reoffending

59. As with the previous section, there is no reflection in the White Paper on why the “Rehabilitation Revolution” promised by its predecessors has failed so comprehensively. Disappointingly, the paper also contains no reference to the evidence base on desistance, and in particular to the emphasis that places on a person’s motivation to lead a better life.
60. Its first proposal is to extend the use of GPS tracking technology to people convicted of acquisitive crime. We are aware that GPS technology has been extensively trialled, but the paper makes no use of any data or evaluation from those trials to support this proposal. Nor is there any detail about what the secondary legislation proposed will provide for. Given the many evidence-based interventions which are starved of resources, we hope that the case for the investment in GPS technology will be properly made out in a way that this paper does not attempt.
61. The prospect of a cross-government strategy to reduce reoffending is welcome. Again, it is necessary to point out that one of the first actions of this government was to dismantle a cabinet committee chaired by the deputy Prime Minister which had exactly that remit, and this paper says nothing about when its new strategy will be produced, nor by what process, how it will be resourced, or how it will be managed and monitored at either a political or administrative level.
62. Nevertheless, if the White Paper signals a willingness to invest in a strategy, rather than just a willingness to produce a new list of ambitions to divert attention from those that have gone before, there are proposals in this section which could make a significant difference.

Employment

63. Given that the evidence cited for the impact of employment on reoffending dates from a study published in 2013, it is disappointing to see no analysis of what there is to learn from the policies of the intervening seven years. An obvious gap concerns the lack of access prisoners have to the internet to conduct job searches, and apply for work or for benefits if work is not available. Similarly, promised increases in the availability of release on temporary licence have turned out to be modest and restricted almost entirely to the open prison estate.
64. The creation of a new Prisoner Education Service is another example of a reorganisation promising dramatic changes in delivery, but the paper sheds no new light on when or why this latest reorganisation of prison education will make a difference. There is nothing new about the desire to use education in prison to build work related skills, but the nature of the prison population has changed dramatically over the last decade, with a much higher number of people who are many years away from release, and for whom education must serve a wider range of needs than those related to work or vocational training. Levels of engagement in education in prison remain low, and the paper has nothing to say about how that phenomenon is to be addressed.
65. The government’s desire to employ people with a criminal record is welcome and necessary, but its record on doing so is not disclosed beyond a mention of apparently employing one person in the Ministry of Justice in 2018. We know that there is more to be said both about what has already been achieved and about plans to do more, and would urge the government—and the Ministry of Justice in particular—to set a much more vigorous example in this area.

Accommodation

66. Again, the ambition in the White Paper is faultless, but there is very little detail of what the government proposes to do differently. The objective of ensuring that no-one is released from prison during the pandemic without accommodation to go to has not been achieved, so it will be crucial to understand why not, given a substantial temporary investment and notably successful initiatives elsewhere in government to reduce rough sleeping during the crisis.

Substance misuse

67. The paper lists a number of current initiatives, but gives little detail on how the integration it wants is to be achieved, and no indication of future funding support. The funding for the pilot at Holme House ends in March 2021, but the evaluation of the work done there is not due until 2023. As with the previous elements of this section, the paper's hopes for better outcomes urgently need the production of a detailed, timetabled, resourced plan for how they are to be met.

Criminal records reform

68. We have seen a comprehensive analysis of these proposals by Unlock, published on 2 December 2020, and support both their analysis and their call for a much more substantial programme of reform in relation to criminal records disclosure. The government's proposals fall well short of previous promises to take a radical approach, and do little to support one of the White Paper's related goals of increasing the employment of people who have offended as a means to reducing re-offending.

Youth sentencing

69. This is a strange and deeply conflicted section of the White Paper. It appears to have been written by completely different authors—one steeped in the evidence, familiar with the youth justice system and producing proposals consistent with the best interests of the child, the other pandering to the basest political instincts and producing proposals that are cruel. In paragraph 292, the paper explicitly suggests that its proposals to inflict appallingly harsh punishments on children near to the age of 18 is in some way offset by reforms it wishes to make in the custodial estate. That is plainly unacceptable—the whole point about having a principled approach is that it is applied in the most difficult and controversial circumstances, as well as in the more normal day to day operation of the system.
70. In particular, and as noted earlier in this critique, the government has adopted a perverse approach to the copious evidence on maturation.¹⁰ That evidence conclusively demonstrates that maturation continues into a person's mid-twenties, but the proposals on sentencing for more serious offences in this section bizarrely adopts 18 as the bar for maturity and proceeds to use that arbitrary and factually untenable position to justify more severe treatment of children approaching 18. Paragraph 329 of the paper, in attempting to justify the current anomaly that a child is denied the opportunity of a tariff review simply because the sentence was passed after their eighteenth birthday and not before, exposes the government's wilful avoidance of the evidence on maturity. Laws made before that evidence was understood are

¹⁰ Howard League for Penal Reform (2017) Judging Maturity: Exploring the role of maturity in the sentencing of young adults, London: Howard League for Penal Reform and Transition to Adulthood (T2A) Alliance.

portrayed as a sound basis for policy where in fact all they demonstrate is an urgent need for a new approach based on new evidence.

71. Similarly, having eschewed the use of “toughness” in every other section of the White Paper, here the word re-emerges as a supposedly desirable element of sentencing in relation to children. We are not aware of any evidence that being “tough” with children helps to achieve any of the objectives this paper sets for the youth justice system, but a good deal of evidence that it may do the reverse, both reducing the prospects of a reduction in reoffending and doing harm to children who have often been traumatised by such an approach before entering the criminal justice system.¹¹
72. Most of the progressive elements come from the more general references to government policy in respect of children. These are either new or welcome restatements.
73. They include:
 - a. The clear and repeated statement that custody should only be used as last resort (e.g. Para 274).
 - b. The clear and repeated statement that children should be treated differently to adults (e.g. Para 273), together with a listing of some of the distinctive elements that approach requires in the delivery of custody for children (Para 284).
 - c. Welcome attempts to define diversion, prevention and early intervention (Para 280) – which would be strengthened further by an explicit acknowledgement that early intervention is the business of more universal, non-justice focused services.
 - d. A statement about what should be the broader aims of the youth justice system (Para 279).
 - e. An acknowledgement of the issue of over-representation of children from BAME communities (Para 280), although the paper goes on to accept the probable consequence that its proposals will exacerbate rather than reduce that over-representation.
 - f. A clear statement about the opening of the first Secure School (Para 286)—with a date for the first time.
 - g. Improvements in respect of criminal records—a start on criminal records reform (Para 288).
 - h. Articulation of key elements of the reform programme for custody (Para 292)—which will facilitate holding the Youth Custody Service to account on these points.
 - i. A (very modest) reference to the possible relevance of problem-solving courts for children (Para 339).
 - j. Commitment to reducing the number of children remanded to custody (Para 276) by reform of remand conditions (Paras 382-388).
74. On the regressive side, there is a mix of the new and restatements of old failed approaches:
 - a. As noted above, the language of ‘tougher’ rather than ‘more effective’ community sentences betrays an approach led by populist instinct rather than evidence

¹¹ [Ross, A. et al. \(2010\) Prevention and Reduction: A review of strategies for intervening early to prevent or reduce youth crime and anti-social behaviour. London: Department for Education and Centre for Analysis of Youth Transitions](#)

This report is just one of many examples of research that demonstrates the futility of deterrence as an approach to preventing offending by children.

- b. Increasing the use of custody in a variety of ways:
 - i. changing the DTO to introduce more 'flexibility' over the release point (Para 300).
 - ii. increasing the release point for certain offences (Paras 307 and 313). The suggestion in paragraph 308 that there may even be some benefit for the child in this because there will be more time to complete courses in custody beggars belief, and exposes the proposal for the political gesture that it really is.
 - iii. increasing the tariffs for DHMP sentences (Para 324), on the grounds that children nearer the age of 18 should receive custodial terms closer to the grossly inflated tariffs the law now stipulates for adults. The proposal completely ignores the evidence on maturity, and the commitment of the previous government to take that evidence into account in determining policy. It invents a new, unevidenced presumption not only that maturation ceases at 18 but that the obligations of the state towards the distinctive approach required in relation to children gradually diminish as they approach that age.
 - iv. reducing the number of tariff review elements for murder (Para 329), on the basis that this spares victims' families distress and that such reviews are rarely successful. The paper acknowledges that the review process is necessary because of the fact of maturation, but then ignores the science that shows that maturation continues into the mid-twenties.
 - v. The introduction of a special sentence for children convicted as terrorists (Para 291).
 - vi. The extension of some YRO requirements that will make breach more likely (Paras 340 onwards).

- 75. The White Paper's conclusion for this section simply reiterates the schism the preceding text has exposed, where a child-centred, evidence-led approach is acceptable unless and until a child is in their late rather than early teens, and has committed a more rather than less serious offence. Sentencing law should not be some kind of trade-off between the treatment of more rather than less sympathetic defendants. It should be driven by principle and evidence, and the White Paper fails conclusively to meet that requirement

Annex A—Race disparity, and the Overarching Equality Statement

76. This Annex to the White Paper and the overarching equality statement provided with it are deeply troubling. Repeatedly, they show that measures will have a disproportionate impact, in particular on the grounds of race, but declare that those impacts are a price worth paying in the pursuit of some other goal. In this section, we examine in detail the context of policy and practice which should be informing the White Paper's analysis of its impact on people with protected characteristics. We expose the yawning gap between the lip service paid to equality and the willingness to pursue policies that might promote it.
77. We suggest there are three underlying themes that should underpin the equality assessment of the White Paper. They are that:
- a. the commitment to “explain or reform” disproportionate outcomes, described in the Lammy report, must be met;
 - b. proposals should address the lack of trust exposed by the Lammy report, rebuilding it where it is lacking and, at a bare minimum, not undermining it further; and
 - c. proposals should be problem solving, which requires both that the data to recognize a problem is routinely obtained, and that the existence of an identified problem is acknowledged and accepted as requiring a response.

Explain or reform

“If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of ‘explain or reform’ should apply to every CJS institution.”

Lammy Review, recommendation 4

78. David Lammy's rule of ‘explain or reform’ is a guide to how to provide remedies when services lead to disproportionate outcomes. Explain or reform depends on the service undertaking the discipline in good faith. As a minimum basis, the state must collect data to monitor outcomes and reveal significant disparities. Acting in good faith, a statistically significant disproportion between ethnic groups will require an examination of the policies and processes that contribute to that outcome. A bad faith response would be to claim, without strong evidence, that the disadvantaged ethnic groups have caused the problem.

Trust

79. David Lammy also spoke of a trust deficit between criminal justice agencies and particular minority ethnic groups.

“Trust is low not just among defendants and offenders, but among the BAME population as a whole. In bespoke analysis for this review which drew on the 2015 Crime Survey for England and Wales, 51% of people from BAME backgrounds born in England and Wales who were surveyed believe that ‘the criminal justice system discriminates against particular groups and individuals’.”

Lammy Review

Problem-solving

80. The first step in resolving a problem is recognising that there is a problem. In its publication, Tackling racial disparity in the criminal justice system: 2020 update, the government acknowledged that racial discrimination is a problem.

“Ultimately, racial disparities do not just hold back individuals in our society, they prevent us as a nation from realising our true collective potential.”

(Rt. Hon. Robert Buckland, MP)

81. The White Paper, in contrast, persistently denies the existence of the problem—leading to the likelihood that discrimination becomes enshrined in law and that disparities in outcomes widen between white and non-white citizens.
82. Throughout the Equality Statement, analyses frequently depend on a small selection of protected characteristics (often ethnicity and sometimes age, but rarely religion, gender, or disability)—even where a proposal may deliver serious disadvantages to the group in question. For example, while proposals about electronic monitoring might have specific implications for people with disabilities, that protected characteristic is not cited in the Equality Statement about electronic monitoring. The number of Muslims in prison has more than doubled since 2002, and they now account for 17% of the prison population. But the Equality Statement makes no mention of the possible effects of any White Paper proposal on this protected characteristic.

The evidence of indirect discrimination

83. The overarching equalities assessment reaches this conclusion on indirect discrimination:

“Our initial assessment recognises that some individuals with protected characteristics are likely to be over-represented in the groups of people the White Paper will affect as a result of the demographics of the existing offender population.”
84. The principle, explain or reform, means that an equality assessment would carefully analyse the factors that contribute to the current levels of disproportionality. It would then recommend measures, linked to that evidence, which provide credible remedies. Alternatively, in the absence of remedies, the assessment would require changes in the proposal (the White Paper) to remove its discriminatory implications. The White Paper’s equalities statement, by stark contrast, takes the existence of current demographics in the population of people entering the criminal justice system and in prisons as an *explanation* of the probable disproportionate impacts of many of the White Paper’s proposals, without going on to the second limb of the Lammy report’s requirement also to “reform”.
85. The existing demographics, as the Lammy report so comprehensively explained, are the product of policies and attitudes that discriminate at every stage of the criminal justice process. Proposals which simply add another layer of indirect discrimination because they apply to a demographic already created by indirect discrimination manifestly fail the Lammy test, and demonstrate the government’s failure to apply it.
86. The Equality statement goes on to look at specific measures in turn.

Proposed automatic release point at 2/3 of the sentence

87. The Equality Statement acknowledges that the proposal to extend the automatic release point from half- to two-thirds of the sentence will have a disproportionate impact on, “Men, people with a Black or Black British ethnicity as well as younger adult offenders (aged 18-24) and offenders over the age of 50”. But it does not describe the impact on these individuals, nor explain the reasons for the disparities. Failing to provide any insight into the causes of this disproportionality, the statement concludes: “we consider that it is unlikely to result in a particular disadvantage for offenders in these cohorts and that, overall, the policy is a

proportionate means of achieving the legitimate aims of protecting the public and achieving consistency within the sentencing framework.”

88. No evidence is provided in support of either of these claims. It seems extraordinary to conclude that a greater likelihood of serving much longer in prison does not amount to a “particular disadvantage”, particularly when the length of sentence that may trigger that impact is so dependent on decisions within the charging, prosecution and trial processes that Lammy exposes as all contributing to discriminatory outcomes.
89. In fact, official evidence suggests that the proposal will definitely result in particular disadvantages for people in the cohorts listed. For example, the system is three times more likely to prosecute someone from a Black ethnic group than from a White group.¹² Black people are 53%, Asian 55%, and other ethnic groups 81% more likely to be sent to prison for an indictable offence at the Crown Court, even when factoring in higher not-guilty plea rates (which themselves may reflect an understandable lack of trust in the system which rewards such pleas).¹³
90. Once in prison, people in some of the cohorts cited in the Equality Statement experience disproportionate obstacles to progression. BAME men are more likely to be placed in high security prisons than white men who have committed similar types of offences. The difference was highest for public order offences, with black men over four times more likely and Asian men over six times more likely to be held in a high security prison.¹⁴
91. Finally, we note a lack of available ethnicity data on sentencing for nearly one in five people in the most serious offence categories — ABH; GBH s18 and GBH s20.¹⁵ The lack of these data suggests a dereliction of the public sector equality duties. Without these data, any assessment of the likely impact on ethnicity of the White Paper’s proposals about on automatic release is incomplete.
92. In short, the proposal is guaranteed to produce disproportionate outcomes, and “particular disadvantage” of a serious and long-lasting kind. The statement’s conclusion that it is not undermines its credibility to a fatal degree.
93. What remains is the Equality Statement’s conclusion that the policy is, “a proportionate means of achieving the legitimate aims of protecting the public and achieving consistency within the sentencing framework ...” but provides no evidence or reasoning to support this claim. Given the absence of evidence in the White Paper to support its claims on public protection as a probable outcome of its proposals, it is hard to see how an unproven approach to sentencing changes can be measured against a set of proven and quantifiable discriminatory impacts. As for the objective of “achieving consistency”, the specific proposal plainly adds a new element of inconsistency to the sentencing framework. All that it guarantees is that people with protected characteristics already disadvantaged because they serve relevant sentences of over 7 years will be joined by people unfairly disadvantaged because they serve over 4.

¹² Ministry of Justice (2019) Statistics on race and the criminal justice system 2018, London: Ministry of Justice

¹³ Hopkins, K., et al. (2016) Associations between ethnic background and being sentenced to prison in the Crown Court in England and Wales in 2015, London: Ministry of Justice

¹⁴ Table 5.4, Uhrig, N. (2016) Black, Asian and minority ethnic disproportionality in the criminal justice system in England and Wales, London: Ministry of Justice

¹⁵ Tables 4, 5, and 6, Sentencing Council (2020) Assault Offences Guidelines, London: Sentencing Council

Changing the threshold for sentences below the minimum term (repeat offences)

94. The second proposal examined in the equalities statement would change the threshold for passing sentences below the minimum term for certain repeat offences. As this proposal would change court practice, its equality impact should include an analysis of disparities arising in current practice. But the Equality Statement acknowledges that the Government does not have data on repeat offending for these offences. The Government is suggesting a 'solution' before it has analysed or even understood the problem.
95. From the perspective of equality duties, the absence of data does nothing to indicate the lack of discrimination, and shows a lack of due regard for the public sector equality duties. Yet, despite producing no evidence to demonstrate that there is a problem, and despite conceding that they lack the data to measure the disproportionate impact, the Government concludes: "this is justified as a proportionate means of achieving the legitimate aims of the policy which is to bring consistency for passing a sentence below the minimum term for repeat offences."
96. If the Government does not know the ethnic distribution among the target cohort (repeat offenders), then doubts must arise about whether the proposed changes can help to bring consistency. Alternatively, if consistency is meant to refer to sentencing policy, then the Government appears to hold consistent implementation of policy to be more important than its statutory duties on equality.

New powers to prevent the release of people deemed terrorists

97. There is abundant evidence that people from minority ethnic groups suffer disadvantages in systems that provide for wide discretionary powers. For example, between April 2018 and March 2019, there were 4 stop and searches for every 1,000 white people, compared with 38 for every 1,000 black people.¹⁶
98. The Government proposes to give the Secretary of State for Justice a wide discretionary power to prevent the early release of anyone who is serving a standard determinate sentence and is considered to pose a terrorist risk or significant risk to society. The scope for error in predicting these behaviours is huge. The proposal is so devoid of practical detail that the Equality Statement concedes: "It is not possible to determine what types of offenders will pose a national security risk or danger to the public." This is offered, perhaps, to explain away the possible objection that the government cannot predict the extent of the disproportionality this proposal would cause. But if this is the case, it confirms the lack of due regard for equality duties.
99. There are no safeguards offered about how a person might challenge the evidence on which such assessments are made, despite widespread evidence of unconscious bias in police and prison services. The sole protection against discrimination is the role of the Parole Board in determining whether the person is safe to release. This suggestion entirely misses the point—namely, that the proposed change (triggering the Parole Board assessment in the first place) is very likely to result in indirect discrimination. The role of the Parole Board may possibly provide some protection against direct discrimination (in the event that a report written about the person is blatantly discriminatory) but the parole board role cannot resolve the problem of indirect discrimination which the proposal would create.
100. Holding people in custody beyond their legitimate threshold, based on suspicion of involvement in terrorism, would provide the Secretary of State for Justice with unaccountable

¹⁶ Home Office (2020) Ethnicity facts and figures: Stop and search. 14 September 2020. Available at <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest#by-ethnicity>

powers. The potential for such measures to increase the distrust between the criminal justice system and people from BAME and Muslim groups is obvious. Yet, the Equalities Statement makes no reference here to the probably impact on trust or the public sector equality duty to foster good relationships. The Lammy Review conducted a survey on levels of trust:

101. "Trust is low not just among defendants and offenders, but among the BAME population as a whole. In bespoke analysis for this review which drew on the 2015 Crime Survey for England and Wales, 51% of people from BAME backgrounds born in England and Wales who were surveyed believe that 'the criminal justice system discriminates against particular groups and individuals'."
102. A key recommendation from the Lammy Review, to increase mutual trust, was that decision-making be 'demystified'. The proposal directly counters this recommendation, undermining consent to the rule of law.

Out of court disposals

103. David Lammy argued that one manifestation of the mutual distrust between criminal justice agencies and people from BAME groups was pleas given in courts. "Black and Asian men were more than one and a half times more likely to enter a 'not guilty' plea than White men. Mixed ethnic men were also more likely to plead not guilty." The Lammy Review provides an evidence-based solution—the deferred prosecution. The scheme produced significant improvements in engagement in programmes, victim satisfaction, and reduced reoffending.
104. The White Paper proposes to give police powers to add conditions to out of court disposals, with the aim of forcing offenders to engage. The Equality Statement clarifies that an offender must admit the offence to qualify for these out of court disposals. Because an admission of guilt is a prerequisite to participation, the Equality Statement suggests, "there is a risk that this may therefore indirectly discriminate against those who are BAME". The evidence should not be dismissed so lightly. To repeat: "Black and Asian men were more than one and a half times more likely to enter a 'not guilty' plea than White men." The proposed requirement of an admission of guilt prior to participation is a clear example of indirect discrimination.
105. The contrast between the Government's out of court disposals proposal and the Lammy advocacy of deferred prosecutions is pronounced. The Government is proposing to ignore concerns about trust, as well as the evidence about the efficacy of the deferred prosecution scheme. Giving police an added power to enforce young people's behaviour is unlikely to foster good relations or reduce the mutual distrust between these two groups. There is no acknowledgement of the strong evidence of unconscious bias within the police; and therefore no remedies for the discrimination which would result from the proposal to extend police powers. The Equality Statement trivialises the probable impact of this policy on relations between the police and young people, demonstrating a lack of due regard for the impact of the proposal on the duty to foster good relations between those with a protected characteristic and others.

Problem-solving courts

106. The Government's response to the Lammy Review states four principles for building trust, one of which is to address needs as well as risks. "Considering needs not just risks. People in the CJS are often assessed for risk, and for good reason given the duty to protect communities from harm. However, our engagement indicated that an exclusive focus on risk makes people feel misunderstood and untrusted. Trusted figures in the CJS were described as those who

had taken the time to get to know an individual, their background and specific needs and vulnerabilities.”¹⁷

107. The White Paper proposes to pilot problem-solving courts. Their focus on underlying needs could contribute to restoring confidence among BAME communities in criminal justice processes.
108. The Equality Statement recognises that the proposal for these courts presents a challenge for equality. Participation requires a guilty plea, so people from Black, Asian and mixed backgrounds are likely to be disadvantaged. The Lammy Review, as stated, draws a clear link between the tendency to plead not guilty and a lack of trust in the criminal justice system. To prevent discrimination, therefore, a pilot of problem-solving courts would necessarily work with people who enter not guilty pleas, and/or add in measures that are likely to increase confidence in the process. The proposal offers neither of these remedies. Instead, the Government says that, “while choosing the locations for the pilot, we will consider the most diverse areas to ensure that the broadest group of offenders are able to benefit from PSCs”. The Government does not explain the link—if any—between the choice of locality and the trust deficit.

Non-custodial options

109. Given that most BAME groups are disproportionately represented among the prison population, a proposal to expand and strengthen non-custodial alternatives has potential to reduce discrimination. If reasonable adjustments are made for disabilities, there are no self-evident threats to a specific protected characteristic. However, the Equality Statement shows a serious lack of due regard in current electronic monitoring practice: “...the available data, which covers only gender and age...” precludes an analysis of how the proposal would affect other protected characteristics.
110. Consistent with other proposals under the White Paper, a lack of data is presented in the Equality Statement as the absence of discrimination, whereas, the inadequate monitoring it reveals demonstrates a failure for due regard to public sector equality duties.
111. The primary concern here is people with disabilities, for whom this proposal raises several problems: First, it is apparent that there are no data on the use of electronic monitoring with people who have disabilities. If so, they are already discriminated against by the lack of regard to the duty to collect evidence. Second, if disabilities are not identified (as implied by the lack of monitoring) there is no guarantee that the service has made adjustments to enable equal access to the provision. Third, where physical disabilities are concerned, needs may require different technologies to adapt the instruments—but there is no measure of how often these are used or, whether a lack of these adapted technologies prevent people with physical disabilities from benefitting. Fourth, it is obvious that people with learning disabilities may need specific tools to make use of electronic monitoring (for example, disability-specific instructions). These practical considerations show the importance of monitoring the electronic monitoring schemes’ outcomes for people with disabilities. The Equality Statement fails to comment on the implications for disabilities of the changes proposed in the White Paper.

Youth sentencing

112. The over representation of BAME children in custody has increased since the publication of the Lammy Review. An overall drop in youth custody has not been as significant for BAME

¹⁷ [Ministry of Justice \(2020\) Tackling Racial Disparity in the Criminal Justice System: 2020 Update, London: Ministry of Justice](#)

children—a decade ago they accounted for a quarter of the population (26%). In August 2020, BAME children constituted 52% of the total custodial population.¹⁸

113. The rising number of children with convictions for serious youth violence has been accompanied by glib assumptions that this reflects a “problematic” cohort of children. The “changing nature of the population” may be more about the circumstances which children are facing in the community than about the children themselves. A genuine attempt to prevent serious youth violence would focus on improving social circumstances as the most logical starting point.
114. “From early years through to adult life, there is evidence that children from Black, Asian and minority ethnic backgrounds fare worse than the general population. Disproportionality is evident in multiple areas—people from Black, Asian, and minority ethnic backgrounds are more likely than the general population to live in inadequate housing and areas characterised by poverty. They are more likely to be diagnosed with mental ill health and to experience poor outcomes from treatment. Furthermore, Black and GRT pupils are more likely to be excluded from school than the rest of the population. Additionally, being from a Black, Asian or minority ethnic background has been identified as a characteristic of being a ‘harder to place’ looked-after child.”¹⁹
115. PRT is a member of the Standing Committee for Youth Justice (SCYJ). In September 2019, in response to the consultation on the proposals for knife crime prevention orders, the Prison Reform Trust supported the SCYJ’s criticisms of the assumption that custodial sanctions could play a constructive role in preventing knife crime. The SCYJ had argued that there is no evidence custodial sentences deter children or young people from committing crime; the ‘public protection’ argument is extremely weak for children; and custody is not rehabilitative but deeply harmful, so ineffective at producing the desired result of reducing crime levels. These objections apply equally to the White Paper’s proposals to make longer sentences available for children as they near 18 years of age. The intention to lengthen custodial sentences fails to fulfil a stated intention to use custody as a last resort, as these children are likely to remain in prison long after their risk to the public has decreased.
116. A recent Freedom of Information request revealed that the number of men serving life sentences received when they were aged 25 or under and with a tariff of 15 years or more , has risen from 895 in 2013 to 1,359 in 2020. Shockingly, 410 of those 1,359 are black. Almost half of the 1,359 come from a BAME background. The rampant inflation in the severity of punishment for the most serious crime is impacting upon a particular group of people characterised by their ethnicity and their youth to a grossly disproportionate extent. Yet the Equality Statement reveals a deep-seated complacency about the racial disparities within youth justice. “While we recognise that there may be indirect impacts on children with certain protected characteristics, we believe that the principle of public protection and the overarching aim of the youth justice system to prevent offending by young people justify the changes outlined.”
117. The Statement makes no attempt to show that the proposals could make so significant a contribution to public protection as to allow the Government to ignore its public sector duties. The likelihood that the proposed changes to youth sentencing will exacerbate the appalling racial disparities in youth justice is not fully acknowledged. As the Equality Statement does not acknowledge the problem, the Government cannot claim to meet its public sector equality duties in the White Paper’s proposals for youth justice.

¹⁸ [Table 6, HM Prison & Probation Service, Youth Custody Report, September 2020, London: Ministry of Justice](#)

¹⁹ [Ministry of Justice \(2020\) Tackling Racial Disparity in the Criminal Justice System: 2020 Update, London: Ministry of Justice](#)

118. In summary, the White Paper's approach to assessing its impact on people with protected characteristics can be summed up as not having the data even to make an assessment in some areas, and in the areas where the data does exist and disproportionate impacts are probable, choosing to ignore it. The public sector equality duty is plainly not fulfilled.

Annex B—Women

119. This annex simply repeats existing promises to reform the treatment of women in the criminal justice system. The overwhelming majority of those commitments have not been implemented, and do not even have a timetable set for their implementation, still less resources to enable that to happen. The White Paper does nothing to advance their implementation or to describe a plan to which the government could be held accountable. Recently published population projections suggest that the government has already concluded that its Female Offender strategy will fail in its central aim of reducing the imprisonment of women.

Overarching impact analysis

120. There is a surprising assumption in this analysis that sentencing behaviours will remain unchanged except in relation to the specific measures outlined in the White Paper. That was the assumption in 2003 when a similar set of proposals designed to increase the use of custody for serious and dangerous offenders was passed. A study²⁰ carried out for PRT estimated that the actual impact of that Act was an increase of around 16,000 in the prison population, 12,500 of which was due to sentence inflation. As the Lord Chief Justice pointed out in a recent speech²¹, this and other governments have created a climate in which sentencing is regularly criticized as too lenient, despite the evidence that sentence lengths have increased dramatically since the turn of the century, along with the use of conditional release arrangements. It is hardly surprising that both the Sentencing Council and individual sentencers have responded to that pressure, and inevitable that the penalties for mid-range offences will increase in severity to close the gap with sentences for the most serious offences of a similar type. The impact at the “top end” of sentencing, where statute has set very high “starting points” for tariff setting is obvious and plainly what parliament intended. But the impact for mid-range related offences—notably for GBH, ABH and common assault—is equally marked, and illustrated in the Sentencing Council’s evaluation of its definitive guideline on assault.²² The failure to make any provision for this known effect undermines both this section and recently published projections for the future prison population. For all the abundance of capital investment promised in new prisons, there is no plan to do away with overcrowding, which systematically undermines all of the White Paper’s ambitions for a more rehabilitative approach.
121. The impact analysis accepts that instability, self-harm, violence and overcrowding are all possible consequences in prisons, and that family breakdown leading to poor mental health and reoffending are possible consequences in the community. It puts no price on those consequences, which unsurprisingly do not get mentioned in the main body of the paper either.
122. None of the benefits which the White Paper says it is designed to deliver are to be measured against any baseline, and monitoring and evaluation merits only a single line at the very end of the assessment. That seems a serious omission in a document that is supposed to be all about the impact of the policies proposed. But it closes the circle: a White Paper that fails to evidence the problem it plans to solve concludes with no intention of measuring whether it ever succeeds.

²⁰ [Hadjipavlou, S. \(2017\) The impact of the Criminal Justice Act 2003 on the Prison Population, London: Justice Episteme](#)

²¹ The Lord Burnett of Maldon, Lord Chief Justice, ‘Sentencing: The Judge’s Role’, Judicial Institute Lecture 2020, University College London—9 December 2020. Available at <https://www.judiciary.uk/wp-content/uploads/2020/12/LCJ-Sentencing-The-Judges-Role-UCL-speech-9-December-2020-f.pdf>

²² [Sentencing Council \(2015\) Assessing the impact and implementation of the Sentencing Council’s Assault Definitive Guideline, London: Sentencing Council](#)