The Halliday Report: opening or closing the revolving door?

Barbara Hudson looks at the Halliday Report's possible implications for the sentencing of minor but persistent offenders.

The Halliday Report, published in July 2001, is both a review of sentencing practices as they developed in the 1990s, and a set of recommendations for sentencing principles and policies in the first decade of the 21st century and beyond. The Report (hereafter HR in citations) notes the drift away from the principles of the 1991 *Criminal Justice Act* in legislation and practice later in the decade, and seeks to restate the principle of proportionality in a way which takes account of the desire of sentencers, the public and politicians to respond to persistence as well as seriousness of offending. Explaining the case for change in sentencing policy, the Report cites first and foremost the inconsistency of treatment of previous record, especially in magistrates courts. Where the current offence is not so serious as to create strong presumptions of custodial sentences of more than 12 months, there is, the Report argues, an unacceptable level of inconsistency, unpredictability, and lack of clarity about sentencing aims: 'persistent offenders whose offences are not so serious as to land them in the Crown Court find themselves 'bouncing around' between a variety of custodial and community sentences, without any clear rationale, continuity, or predictability.' (HR: section 1.12)

Proportionality and persistence

The Report comments on the muddle and dissatisfaction with sentencers' lack of discretion to reflect previous convictions and 'failure to respond' to previous sentences, under the 1991 Act which insists that previous offences should only be taken into account in special circumstances.

These circumstances are when they illuminate the nature of the current offence, for example by demonstrating a pattern of targeting certain sorts of victims, such as the elderly or members of minority communities.

This position was weakened by the 1991 *Criminal Justice Act*, but courts remain uncertain as to their power to increase sentences because of previous record. Despite the uncertainty, the Report's analysis of sentencing statistics reveals a steady increase in the use of short prison sentences for persistent offenders whose offences are not serious enough to warrant substantial custodial sentences.

The number of custodial sentences of less than 12 months for indictable offences for adults of 18 years and over increased from 27,000 to 45,000, an increase of 67 per cent.

The largest increase was in the shortest sentences: sentences of less than three months increased by 176 per cent; those of three months and less than six months increased by 89 per cent (HR: section 3.5). If the principles of the 1991 Criminal Justice Act had been sustained, short sentences should have reduced.

This had already started to happen in the latter years of the 1980s and the beginning of the 1990s, as the ideas behind the 1991 Act influenced sentencers. There was, at the time, near consensus among the criminal justice professionals, Home Office officials, academics and penal reformers that prison should be for serious offences and dangerous offenders: imprisonment should reflect harm done by the crime and/or danger posed to the public were the offender to remain in the community. There was widespread agreement that minor offences should not result in imprisonment, no matter how frequently they were repeated.

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The Minnesota Sentencing Guidelines, with their stepped rather than diagonal in-out line, were much admired, and the notion of 'serious enough' and 'so serious' thresholds for community penalties and imprisonment were intended to import this sort of clear divide into English sentencing policy between offences which warrant imprisonment, and offences which do not, however often committed. During the 1980s, leading up to the 1991 *Criminal Justice Act*, references were frequently made to the so-called 'revolving door syndrome'. Persistent property offenders whose crimes were prompted mainly by pressure of circumstances such as poverty, homelessness, mental illness, social isolation or alcoholism would receive short prison sentences which offered little prospect of help or reform, and then be released to the same circumstances, leading to a repetitive cycle of short periods of custody and

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short periods of liberty.

The intention of most of those involved in sentencing reform in the 1980s was to keep such people out of prison, to shut the revolving door with persistent minor offenders on the outside. The Halliday Report is equally critical of short custodial sentences, and recommends that sentencers should have 'full discretion' to use non-custodial sentences instead of prison sentences of less than 12 months. Where short custodial sentences are used, the Report urges that they be combined with offence-oriented community programmes aimed at public protection and rehabilitation, in the post-release phase of the penalty.

It is these recommendations that have attracted the attention of some press commentators, who have characterized the Report as recommending leniency. The Report, however, is far from unambiguous in recommending community rather than custodial punishments in these sorts of cases.

It does not propose any clear in/out line, with only vague and generalised references to 'penal value' to be achieved in the total sentence package. Community penalty, short custodial sentence, or half-and-half, seem to be equally available for offences not thought serious enough to indicate custodial sentences of 12 months or more. What makes the Report open the way for more custodial sentences for non-violent offences and for property offences of not very great levels of seriousness, is the way in which Halliday redefines the proportionality principle as proportionality to offence plus record. Recommendation 3 is that: 'The existing 'just deserts' philosophy should be modified by incorporating a new presumption that severity of sentence should increase when an offender has sufficiently recent and relevant previous convictions.' (HR, p.iii) This is supplemented by the third clause in recommendation 4, which suggests that: 'In considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.' (HR, p.iii) Previous convictions are, therefore, to play a part both in assessments of offence seriousness and in determinations of sentence severity.

The implication is clear that someone who repeatedly commits minor offences will not remain on the outside: the revolving door will spin first to let them in to reflect commensurate penal value for the seriousness of record as well as offence, and then spin to let them out again to begin the community part of the new 'custody plus' sentence. There are particularly worrying implications of these recommendations for women offenders, and indeed for impoverished and marginalized offenders of either gender.

Reduction of imprisonment for women is frequently argued for on the grounds that women typically do not commit serious or dangerous offences, but commit property crime born out of poverty, addictions, or compulsion by men.

If the penal dividing line between serious and non-serious, dangerous and persistent offending is reduced, then the chances of imprisonment for women are clearly increased.

Minority ethnic offenders, and others with socially disadvantaged circumstances, have increased risks of imprisonment because in making decisions on the margin between imprisonment and community punishment, sentencers will have regard to risk of reoffending assessments. The factors identified for such assessments - poor employment record, unstable family networks, unstable economy, etc. - are clearly correlated with minority ethnicity and with other indices of marginality. There are, of course, many other sections and recommendations in the Halliday Report. It offers a pick and mix of almost every criminal justice idea of the last few years - public protection through incapacitative incarceration; reparation and restoration; curfews and electronic monitoring; treatments and controls.

If it aspires to clarity of purpose, it by no means achieves clarity of means. There is not space here to address all the sections and recommendations of the Report.

I have highlighted the sections on persistence firstly because the Report itself cites them as the main reasons for needing review and reform, and more importantly because it is clearly stated that previous record should count in determining seriousness and deciding sentence.

The implications for those groups of offenders whom previous reforms most wished to keep outside the prison door, are both clear and disturbing.

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References:

Halliday, J., French, C. and Goodwin, C. (2001), *Making Punishments Work: Review of the Sentencing Framework for England and Wales*, London: Home Office.