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The Future of Prisons

Addressing the Problems of the Prison Estate:

The role of Sentencing Policy[1]

Professor Julian V. Roberts *holds a Chair in Criminology at the University of Oxford and* ***Lyndon Harris*** *is a barrister and academic at the University of Oxford.*

Hospitals and Emergency departments in England and Wales are over-burdened and under-resourced. In fact, they are overburdened *because* they have been under-resourced — relative to the funding necessary to accommodate current patient caseloads. In response, NHS trusts have implemented a range of remedial measures, most of which are diversionary in nature. The objective has been to reduce the volume of patients admitted by screening out those who can be effectively treated in community-based facilities. The measures reflect recognition that hospital and emergency ward treatment is being compromised by over-crowding.

Prisons, too, are failing their clients, most of whom emerge no better off than when they were admitted. Small wonder, then, that ex-prisoners return to offending, resulting in re-conviction and re-admission to custody.[2] Despite this failure of the prisons, no equivalent sense of urgency has arisen in devising solutions to the problem of the revolving prison door. The coalition government imposed spending cuts on prisons and reduced the average spend per prisoner, and stressed the need to reduce recidivism rates. Yet there was no discussion of reducing admissions, reflecting acceptance perhaps, that all admissions to custody must have been necessary, and that no alternative sanctions had been appropriate for these cases. Our contention is that only by reducing the volume of admissions can the prison service devote sufficient time, attention and resources to addressing the needs of the inmate population. The focus of this paper therefore is upon the question of how to reduce the size of the prison estate. Specifically, we address two questions: (i) *who* is responsible for addressing the problem of the high use of imprisonment as a sanction, and (ii) *what kinds* of reforms need to be considered?

Overview of Article

This article contains three parts. Part I summarises recent prison trends and reviews current projections for the future. Part II discusses the causes of the problem, which in large measure consists of an absence of political will and divided responsibility for prison policy. Part III advances some proposals to reduce the number of committals to custody. Numerous academics have advanced a wide range of remedial suggestions; our proposals build upon those prior efforts.[3] What is needed is a more energetic effort to reduce the number of penal 'bed-blockers' who silt up the prison estate, preventing the institutions from doing little more than warehousing prisoners prior to their eventual release.

1. Prison Trends

In December 2016, the prison population was close to its useable operational capacity[4] of 86,834 prisoners.[5] For this reason, an analysis of current trends and annual projections is of particular importance. Last year (2016) saw riots inside numerous prison establishments,[6] leading to claims that the prisons are in crisis.[7] In the year March 2015 to March 2016, there

1. Views expressed herein are solely those of the authors.
2. This is particularly the case for short term prisoners. A recent (2016) publication by the Ministry of Justice reports that 60 per cent of persons released from serving sentences of less than 12 months re-offended within a year (p. 6, Proven Reoffending Statistics, Quarterly Bulletin, January to December 2014.)
3. See for example Allen (2017); British Academy (2014); Howard League (2013) and Ashworth (2012).
4. There are two measures used to define prison capacity. Operational capacity is the total number of prisoners that an establishment can hold without serious risk to good order, security and the proper running of the planned regime. Certified Normal Accommodation (CNA) represents the good, decent standard of accommodation that the Service aspires to provide all prisoners. See HM Chief Inspector of Prisons for England and Wales Annual Report 2014-15, HC 242, for more details < http://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/07/HMIP-AR_2014-15_TSO_Final1.pdf> accessed 7 November 2016.
5. Prison Population Projections 2016 – 2021 England and Wales, Statistics Bulletin, Ministry of Justice, London, 5 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/548044/prison-population-projections-2016-2021_FINAL.pdf> accessed 7 November 2016.
6. Birmingham and Cardiff prisons in December 2016; Bedford prison, November 2016, Lewes Prison October 2016, Lincoln Prison, September 2016.
7. Cavendish, A., 'How the scale of UK's prison crisis is kept under wraps', politics.co.uk, < http://www.politics.co.uk/comment-analysis/2016/08/18/how-the-scale-of-uk-s-prison-crisis-is-kept-under-wraps> accessed 7 November 2016.

were 22,195 assaults on staff and inmates in the prison estate.[8] The rates of suicide and self-harm in prisons are also cause for concern. During the 12-month period to March 2016, there were 105 self-inflicted deaths and 34,586 reported incidents of self-harm in relation to 10,012 prisoners.[9] The average number of incidents per self-harming female was 6.7, an increase from 6.1 on the previous 12-month period.[10]

A recently published Ministry of Justice statistical bulletin projected a small increase in the prison population to 85,400 in November 2016 followed by a reduction in prison numbers, to around 83,700 by 2019.[11] Those figures are to be interpreted against the recent trends in the wider criminal justice system; a reduction in the number of court appearances since 2014 has seen a drop in the size of the remand population, yet 'underlying growth is expected in the determinate population due to recent trends in the offender case mix'.[12] However, a recent Ministry of Justice Statistics Bulletin noted that first-time admissions to custody continue to decline, most significantly in the youth justice system.[13] Changes to sentencing legislation, such as the abolition of the IPP sentence (resulting in more offenders receiving extended determinate sentences) and the addition of post-licence supervision for those released from short custodial sentences have increased in the determinate sentence population. Additionally, an increase in the recall population[14] has contributed to the increased pressure on the prison system. Finally, the government's projections anticipate the over 50, over 60 and over 70 year-old populations will rise both in absolute terms and as a proportion of the total prison population, thereby placing new and greater strain on the already scarce resources.[15] Thus, while the number of cases coming before the courts has declined, the courts are sending more people to prison, and for longer periods.

These statistics make for worrying reading. The Ministry of Justice published a White Paper in November 2016. *Prison Safety and Reform*[16] set out a commitment to 'huge cultural and structural change' and the 'biggest overhaul of our prisons in a generation'. In particular, the paper committed to giving frontline staff 'the time and the tools they need to supervise and support offenders so they can turn our prisons into places of safety and reform'[17] However, former Justice Secretary and Lord Chancellor Ken Clarke MP reacted to the White Paper, commenting that the proposed prison reform would not be successful without a commitment to address the 'prison works' policy of the 1990s which has led to the dramatic increase in sentences of imprisonment in the past two decades.[18] More recently, prominent politicians have also argued that the problems of the prison estate can only be resolved by reducing significantly the volume of committals.[19] It is against this background we briefly explore how these issues could be addressed.

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2. Who's Responsible for Regulating the Prison Population?

A vacuum of responsibility is largely responsible for the seemingly intractable problem of a high prison population. Under the separation of powers, Parliament

8. Wainwright D., 'Are prisons becoming more dangerous places?' BBC News, 7 November 2016 < http://www.bbc.co.uk/news/uk-england-37702964> accessed 7 November 2016.
9. Safety in Custody Statistics Bulletin England and Wales, Ministry of Justice, London, 6, < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543284/safety-in-custody-bulletin.pdf> accessed 7 November 2016.
10. Ibid, 10.
11. Prison Population Projections 2016 – 2021 England and Wales, Statistics Bulletin, Ministry of Justice, London, 5 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/548044/prison-population-projections-2016-2021_FINAL.pdf> accessed 7 November 2016.
12. The statistical bulletin refers explicitly to the rise in sexual offence prosecutions.
13. Criminal Justice Statistics Quarterly Update to March 2016: England and Wales, Ministry of Justice Statistics bulletin, (Ministry of Justice, London).
14. Padfield, N. 'Justifying indefinite detention – on what grounds?' [2016] Crim LR 797, 798.
15. Ministry of Justice (n 2), 9.
16. Cm 9350.
17. Ibid, 5.
18. Travis, A., Ken Clarke: prison changes won't work until sentencing is reformed, The Guardian, 3 November 2016 < https://www.theguardian.com/society/2016/nov/03/ken-clarke-prison-reforms-sentencing-liz-truss> accessed 7 November 2016.
19. Clegg *et al* in Times article.

recognizes the independent authority of the courts to determine sentence in individual cases. The legislature has placed the objectives of sentencing and a number of key principles on a statutory footing, and sentencers apply these objectives and principles. Yet no direction has been given to courts to consider prison conditions or prison effectiveness and costs in their sentencing decisions. Accordingly, it has fallen to the courts to consider this issue as and when it has arisen.

In the 1980s, the then Lord Chief Justice Lord Lane gave two judgments in appeals against sentence to the effect that the fact that the prisons were 'dangerously overcrowded' was a factor relevant to sentence and that the prison overcrowding then present required sentencers to pay particular attention to what has since become known as the custody threshold.[20] In the late 2000s, the issue of overcrowding returned to the Court of Appeal (Criminal Division) when the Lord Chief Justice Lord Phillips restated Lord Lane's comments and noted that sentencers ought to 'properly bear in mind that the prison regime is likely to be more punitive as a result of prison overcrowding'.[21] However, this view quickly fell out favour, as demonstrated by the decision in *R. v Suleman* [2009] EWCA Crim 1138 in which the court (Thomas LJ, Treacy J and HH Judge Stewart QC)[22] described a submission that the sentencing judge had failed to take account of prison overcrowding as 'misconceived'.

Conditions in prisons vary: for example, in July 2016, just over than 60 per cent of prison establishments were overcrowded.

Indeed, it is hard to see how an individual court could reasonably take the prison estate into account; determining sentence requires individualization, while the questions of the prison population are institutional in nature. Conditions in prisons vary: for example, in July 2016, just over than 60 per cent of prison establishments were overcrowded.[23] In September 2016, HMP Kennet was at 180 per cent of its certified normal accommodation, whereas HMP The Mount was at 100 per cent.[24] To maintain a degree of consistency in the application of prison overcrowding as a factor in sentencing, courts would require evidence on which to base any such finding, and guidance would be necessary to provide structure and clarity to the process by which reductions in sentence were awarded. Courts therefore properly sentence blind to the size of the prison estate.

Sentencing law has long been an area of interest for Parliament. With major sentencing legislation in 1991, 1997, 2000, 2003, 2008 and 2012, it is somewhat surprising that Parliament can be criticised for lacking the political will to change the status quo. But such a view belies reality; while there is interest in sentencing law, there appears to be little will to change prison law and policy. This is in part attributable to penal populism and the 'public' nature of sentencing as opposed to the more hidden nature of custody rates, prison conditions and the state of resources in the prison service, resulting in an increase in the prison population.[25] The emphasis on being 'tough on crime' was present in the political right from the 1960s, however, the early 1990s saw the stance also adopted by liberal and social democratic politicians.[26] This desire to tackle crime (and gain favourable press coverage) has resulted in numerous pieces of criminal justice legislation over the past quarter of a century, but, none has stemmed the burgeoning prison population. In fact, the reverse is true. As noted above, the advent of indeterminate sentences in 2005[27] saw a dramatic increase in the prison population. Additionally, the commencement of Schedule 21 of the Criminal Justice Act 2003, significantly increasing sentences for murder, has, rightly or wrongly, intentionally or unintentionally had an inflationary effect upon sentence lengths in other violent crime.[28]

The consequence of all this is that sentencing policy regarding the use of imprisonment drifts, and often in an upwards direction. Moreover, it is moored to a rate of custody which is high relative to other western nations. It is by now trite to observe that the prison

20. *R. v Bibi* (1980) 71 Cr. App. R. 360 at p.361. See also *R. v Upton* (1980) 71 Cr. App. R. 102.
21. *R. v Seed and Stark* [2007] EWCA Crim 254; [2007] 2 Cr. App. R. (S.) 69 at [1] to [5].
22. Thomas LJ is now Lord Thomas, CJ, and Treacy J is now Treacy LJ, Chairman of the Sentencing Council. The view of the Court of Appeal (Criminal Division) is therefore unlikely to change from this position in the near future.
23. Prison Population Statistics: Briefing Paper SN/SG/04334, 4 July 2016, House of Commons Library, House of Commons: London
24. Prison Comparison, The Howard League for Penal Reform, <http://howardleague.org/prisons-information/> accessed 1 September 2016.
25. Pratt, J., (2007) Penal Populism, Routledge: London and New York, p.23.
26. *Ibid.*
27. See Criminal Justice Act 2003 ss.224 et seq.
28. This was recognised by the Court in R. v Wood [2009] EWCA Crim 651 [2010] 1 Cr. App. R. (S.) 2 (p.6) and *Attorney General's Reference (Nos. 60, 62 and 63 of 2009) (R. v Appleby)* [2009] EWCA Crim 2693; [2010] 2 Cr. App. R. (S.) 46.

population in England and Wales is high — relative to other western European countries such as Germany, the Netherlands and France. More offenders are sent to prison and for longer periods in this country.[29] The differences between prison populations between jurisdictions with low rates (e.g., Germany) and high rates (e.g., England and wales; Scotland) cannot be explained by differences in the volume or seriousness of crime trends.

Manifestations of the Problem

Two potential problems may be identified: (i) an excessively high (in comparison to countries with comparable levels of crime) prison population; (ii) a relatively recent uplift in either the volume of prison terms or the length of prison sentences. The question then becomes who can or should address these two trends.

Since the inception of statutorily binding sentencing guidelines, a number of academics and commentators have pointed their fingers at the Sentencing Council. The Council issues offence-specific guidelines which contain sentence recommendations including specific sentence ranges. For example, the guideline for ABH contains 3 category ranges, the middle of which runs from a low-level community order to 51 weeks custody. Amending these sentence ranges would affect the number of offenders sent to prison as well as the duration of time spent in custody. In other words, adjusting the guideline sentence ranges could rapidly increase or decrease the size of the prison population. In many US guidelines, this is possible because all offences are contained within a single grid, and proportionality may be maintained across offences while reducing the volume and duration of prison sentences. This would not be possible in England and Wales, where each offence category carries its own guideline, and amending guideline sentence ranges involves a protracted period of consultation.

The practice of adjusting sentences to reflect prison population changes is also problematic since it allows an unprincipled consideration to determine the severity of sentencing. On a more general level, we may ask whether the Council is the appropriate body to reduce the number of people in prison? We think not and for the following reasons.

First, it has no mandate to implement wider policy changes, such as reducing the overall number of people in prison to, say a level closer to the European norm. The Council's mandate is clearly set out in the **Coroners' and Justice Act 2009**, and the most relevant provision is the following:

(11) When exercising functions under this section, the Council must have regard to the following matters —

(a)the sentences imposed by courts in England and Wales for offences;

(b)the need to promote consistency in sentencing;

(c)the impact of sentencing decisions on victims of offences;

(d)the need to promote public confidence in the criminal justice system;

(e)the cost of different sentences and their relative effectiveness in preventing re-offending;

(f)the results of the monitoring carried out under section 128.

Nothing in the Act provides the licence to amend sentence ranges in order to reduce the size of the prison population.

Nothing in the Act provides the licence to amend sentence ranges in order to reduce the size of the prison population. Subsection 11(e) suggests that Council should ensure that the sentence recommendations reflect the latest research on the relative effectiveness of different disposals, but this is a far cry from adjusting sentence ranges to curb or reduce admissions to prison or prison durations.

The second reason relates to the composition of the Council which is a primarily judicial body. As such it should not be determining sentencing policy — which lies ultimately for the legislature to resolve. The size of the prison population is a matter for the government to manage and parliamentarians should hold the government to account for problems such as the high prison population or worsening conditions in prison. The House of Commons Select Committee, for example, could launch an inquiry into the size of the prison population. Such an inquiry might generate proposals for the government to consider.

The third reason is practical, and addresses the latter of the two problematic trends. Suppose the Council were aware that there had been a recent change in the average severity of, say, sentences for

29. The most recent (11th) edition of the world prison population makes this clear. England and Wales reports a rate of 153 per 100,000 population, significantly higher than most other western European countries. See: http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf

economic crimes. Many steps would have to precede any attempt to correct the courts. Council would have to determine whether there were any legally-relevant factors which might explain the uplift. For example, had the seriousness of fraud cases increased? Had there been any judgments from the Court of Appeal which might justify an uplift by trial courts? Determining that any increase in severity was due simply to a shift towards more punitive sentencing *unrelated to any legitimate influences* would be challenging, to say the least. If the courts were changing their sentencing practices, and becoming more punitive in order to align sentences for a given offence in a way that made them more proportionate, it would hardly be appropriate for the Council to undermine.

In short, there are principled as well as practical problems to be overcome before the Council could serve to correct any unprincipled drift in judicial practice. More tellingly, there seems no scope for the Council to take it upon itself to attempt to reduce the overall rate of imprisonment or the size of the prison population. That is a matter for the legislature.

The Sentencing Council does have discretion to 'promote awareness' in relation to 'the cost of different sentences and their relative effectiveness at preventing reoffending'.[30] On this subject the Council has been relatively quiet. The Council could exercise this discretion in at least two respects; by providing sentencers with up-to-date information regarding the cost and effectiveness of the sentences they impose, and by publishing material to garner public and political support towards rehabilitative disposals as opposed to custodial disposals. A more ambitious approach would entail the development of 'penal equivalents'. This would consist of tables of sanctions in which a given sentence — say 3 months in prison — was accompanied by a typical noncustodial sanction which would carry the same penal value. In this way, courts would have a tool for systematically substituting a community penalty for a short prison sentence.

The Example of Scotland

The Scottish government provides an example for Parliament to follow. In 2010, it recognized that the size of the prison population in that jurisdiction was high — relative to other EU countries — and legislated a presumption against the imposition of short terms of custody. **The Criminal Justice and Licensing (Scotland) Act 2010** introduced a presumption against sentences of less than three months, requiring the court to (i) only pass a sentence of three months or less if no other appropriate disposal is available and (ii) record the reasons for this. If the volume of short sentences were to decline, this would effectively reduce the prison population since a significant number of admissions to custody. To date, the courts have not reduced their use of such sentences, and the Scottish government has launched a public consultation[31] to assess public and professional reaction to proposals to strengthen the presumption against short prison sentences.

The point however, is that the legislature which ultimately must approve legislation to change the size of the prison population is the appropriate authority.

The point however, is that the legislature which ultimately must approve legislation to change the size of the prison population is the appropriate authority.[32] Sentencing guidelines authorities such as the Scottish and English Councils exist to promote more principled and consistent sentencing, and not to determine sentencing policy, or to maintain the prison population at any given level.

Having set out what we consider to be the key causes of the problems facing the criminal justice system in relation to prison numbers, we consider steps which could effect meaningful change. In so doing, we suggest some modest measures which could achieve a reduction in prison numbers even at a time when there is a complete lack of political will to take a lead on reformative prison policy.

3. Remedial Measures

Penal Audit

When academics argue that there are too many people in prison it is often dismissed as representing a partisan view of criminal justice. In 2014, the British Academy sponsored an academic analysis which made the case for reducing the use of imprisonment and proposed a number of specific mechanisms to achieve reductions in the volume of admissions. The report was thorough, comprehensive — and sank without trace. This is another example of the failure of the academy to

30. CJA 2009 s.129(2)(b).
31. See http://www.gov.scot/Publications/2016/03/8624/
32. Scotland also has a Sentencing Council, and it is significant that the government has not assigned the task of reducing the prison population to the Council.

influence penal policy and practice. In light of the fact that many people fail to accept that the use of custody in England and Wales is excessive, a different approach to making the case is necessary.

Returning to the world of hospitals, the British Medical Association has claimed that approximately 40 per cent of admissions to A and E departments in England and Wales were unnecessary — meaning that these patients could have been effectively treated in the community. Can we estimate the penal equivalent of this statistic in terms of the number of prison admissions who could have been effectively held accountable for the crimes by means of a noncustodial sanction? What is needed is a cross-party examination of the prison estate with a view to determining whether there is any consensus about the proportion of prisoners who could have been sentenced to a community-based sanction. This exercise would subject the files of a snapshot sample of prisoners to an independent review, the question being: *Could this person have been sentenced in the community without compromising public safety, or the principles of sentencing?* The review would be carried out by a primarily judicial panel. The findings could then be extrapolated to the general prison population. We would be in a position to conclude that x per cent of the current prison population had been committed to custody when an alternative sanction would have been appropriate.[33]

Could this person have been sentenced in the community without compromising public safety, or the principles of sentencing?

An exercise of this kind would inform the search for solutions in two ways. First, by quantifying the proportion of prisoners for whom a community penalty would have been a credible alternative, and second, by identifying the reason why this case was committed to custody. On the first point, we need to know how much room there is for considering greater diversion away from custody. Are the academics correct in assuming that a significant proportion of the prison population could be diverted, or is the number actually much smaller? On the second point, the audit would identify the cause of committal to prison. For example, was it a case of an offender whose criminal record was so long that the court saw no reasonable alternative to imprisoning the offender? Or rather a case of an offence the seriousness of which convinced the court that the imprisonment of the offender was inevitable? If the former, this may suggest a search for ways of punishing multiple recidivists without custody; if the latter it may suggest putting the case to some kind of community test. Is it the case that the community would have found imposition of an alternative unacceptable? Research using case summaries has shown significant public support for alternative sanctions (e.g., Hough and Roberts, 2012), but a direct test of cases admitted to custody has not been conducted.

Custody threshold and previous convictions

The concept of the custody threshold has for more than two decades troubled the courts, practitioners and academics. Although the clarity of the language used in the statute appears difficult to improve upon, the concept remains vague and problematic.[34] Frequently, the precise meaning of the phrase has been queried, along with more fundamental questions such as whether the concept ought to be rejected entirely.[35] The Court of Appeal has attempted to better define the provision, though this was later held to be flawed and unhelpful.[36] Following much academic and Court of Appeal discussion, it appears that it is not possible to define the custody threshold in its current form. Accordingly, in this brief article we focus on just one aspect of the custody threshold, namely the use of previous convictions to 'push' an offender across the custodial threshold in circumstances where the seriousness of the offence alone would result in a non-custodial penalty.

The custody threshold is contained currently in the Criminal Justice Act 2003 s.152. Subsection (2) reads:

> *The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.*

It therefore appears to concern *offence* seriousness, employing a retributive approach to

33. Independent case reviews are common in other areas of criminal justice decision-making and other jurisdictions.
34. Harris, L. et al, Response to Sentencing Council's consultation paper on the imposition of custody and community sentences, (2016) 1 Sentencing News 12, 15.
35. Padfield, N., 'Time to bury the custody threshold?' [2011] Crim LR 593.
36. *R. v Bradbourn* (1985) 7 Cr. App. R. (S.) 180 and *R. v Howells* [1999] 1 Cr. App. R. (S.) 335.

determining how much punishment to inflict upon an offender based on their offence. However, s.143 — a supplementary section entitled 'Determining the seriousness of an offence' — expands the remit of the custody threshold beyond the offence, including the existence of any previous convictions. Some scholars would argue that this is not incompatible with a retributivist approach, on the basis that an offender with previous convictions who commits an offence is more culpable than one of good character, and so previous convictions are an offence based factor relevant to the determination of offence seriousness. Others would argue it is not a permissible consideration in a purely retributive scheme. Whatever one's view, it is our contention that the role of previous convictions in relation to determination of sentence type — that is whether to imprison or not — ought not to give prominence to the existence of previous convictions. Undue prominence to previous convictions (or any other matter of limited significance to the question of offence seriousness) undermines the principle of proportionality. Legislating to limit the influence of previous convictions at sentencing can therefore be viewed merely as an act of preserving proportionality.

We do not go so far as to suggest that previous convictions should play no role; we merely suggest that their influence should be limited, but with an 'exceptional circumstances' provision enabling a court to depart from the general limitation where it was appropriate to do so. For the persistent petty offender who repeatedly commits low level offences in the tens or even hundreds, we regard it as inappropriate that he or she be sent to custody for their record alone. We regard this measure as a method of reducing admissions to prison but also specifically reducing the number of short term prisoners, which put undue strain on the prison estate and, with the advent of post-licence supervision, the probation case load.[37]

Increased use of suspended sentences

The present regime governing the use of suspended sentences of imprisonment is contained within the CJA 2003. It provides the court with a wide discretion. The court must have already determined that the offence(s) cross the custody threshold and that the appropriate length of the custodial sentence is of at least 14 days and no more than 24 months. In those circumstances, the court may suspend the sentence if it considers it to be 'appropriate'.[38] Since 2005 there has been a sharp increase in the number of suspended sentences, from less than 10,000 in 2005 to 57,000 in 2015.[39] In 2015, suspended sentences accounted for approximately 38 per cent of the number of custodial sentences imposed. In the year ending March 2015, over two-thirds of custodial sentences were of 12 months or less.[40]

In October 2016, the Sentencing Council published its definitive guideline on the Imposition of Custodial and Community Sentences. After a public consultation which urged the Council to provide more guidance, *inter alia*, on the issue of suspension, the definitive guideline provides courts with a 'steer' as to the type of case which might be appropriate for a suspended sentence order. While this undoubtedly advances matters, providing greater consistency and clarity to the issue of short custodial sentences and whether or not they ought to be suspended, we see an opportunity to make a more fundamental change without fettering the court's discretion.

One proposal is to create a presumption that short custodial sentences, perhaps of up to 12 months, would be suspended in the absence of exceptional circumstances. This would focus the court's mind on the issue of suspension, requiring a robust justification for an immediate custodial sentence of up to 12 months and an increase in the number of sentences of less than 12 months which are suspended. The result would be fewer admissions to custody and very few immediate custodial sentences of a short duration.

Conclusion

The continuing high use of imprisonment — relative to comparable EU countries — is likely to remain as long as the government and Parliament decline to accept some responsibility. The inevitable consequence will be more prison disturbances, high recidivism rates and escalating prison costs. The country needs more, and deserves better from its elected representatives.

37. From 1 February 2015, short custodial sentences are now subject to a post-licence supervision regime, breach of which can result in a custodial penalty. See ORA 2014 for more details.
38. CJA 2003 s.189.
39. Final Stage Resource Assessment: Imposition Of Community And Custodial Sentences Guideline, Sentencing Council of England and Wales, October 2016 < https://www.sentencingcouncil.org.uk/wp-content/uploads/Final-resource-assessment-imposition.pdf> date accessed 8 November 2016.
40. Criminal Justice Statistics Quarterly Update to March 2015: England and Wales, Statistics bulletin, Ministry of Justice, London, 16 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453309/criminal-justice-statistics-march-2015.pdf.pdf accessed 8 November 2016.