

'What's Sentencing Got To Do With It?' Understanding the Prison Crisis

Christine Piper and Susan Easton

We began drafting this article the day that the headline in a national newspaper warned us (again) of 'prisons near bursting point' with only 300 spare places, which were likely to be filled within a couple of days.¹ This was not unexpected, as the UK has one of the highest incarceration rates in Western Europe,² and also higher levels of sentencing.³ In the period 1992-2002 there was an increase in the custody rate - the proportion of the total number sentenced who receive a custodial sentence - from 44% to 64%. The average custodial sentence length for adults also increased: that for indictable offences in the Crown Court in 2005 was 25.9 months, compared with 20.8 months in 1995.⁴ Further, the Chief Inspector of Prisons, Anne Owers, has repeatedly expressed concern at the crisis resulting from the current overcrowding and the Prison Service Performance Ratings published in May 2007 showed more deterioration than improvement. Three prisons had moved up a level, and six prisons had moved down, since the previous quarter.⁵

¹ Travis A, 'Blair's justice bill in trouble as prisons near bursting point' *Guardian* 26 May 2007 at 11.

² 150 per 100,000 of population, at end of June 2007 (International Centre for Prison Studies, Kings College London, Prison Brief). The custody rate for indictable offences in the Crown Court in 2005 was 60% (*Sentencing Statistics 2005*, Home Office Statistical Bulletin, (London: Home Office, 2007) at 14.)

³ For example, for burglars. See Davis M, Takal J-P and Tyrer J, 'Sentencing burglars and explaining the differences between jurisdictions', *Br J. Crim* (2004) 44, 741-58, which refers to empirical research suggesting that sentencing of burglars in England and Wales is more severe than in Finland.

⁴ *Sentencing Statistics 2005*, Home Office Statistical Bulletin, (London: Home Office, 2007) at 14.

⁵ There are now 26 public sector prisons at level 4 (the highest rating), 86 at level 3, 14 at level 2 and 1 at level 1 (HM Pentonville): www.hmprison.gov.uk.

Yet, we are told, the next Criminal Justice Bill⁶ will be the fifty-fourth law and order measure since Labour came to power.⁷ It was clearly not the intention of anyone – government, prison reformers, the tax payer, human rights lawyers, or the Prison Service itself – that, despite a plethora of legislative provisions over 10 years, a prison building programme and widespread change within what we have (almost) learnt to refer to as the correctional services,⁸ prison numbers would have passed 80,000⁹ and that a crisis level of overcrowding would again be imminent.

Law and order politics

A key contributory factor is that the ‘tough on crime, tough on the causes of crime’ New Labour mantra is fundamentally flawed as a communication for popular consumption, given its political context. As we are well aware,¹⁰ in the 1990s law and order became increasingly politicised and ‘tough on crime’ – unmodified by any mention of the causes of crime – which was what the media and public appeared to want, and none of the Conservative or Labour governments since the early 1990s has had the courage or desire to let go of the more punitive part of the slogan. So public opinion was a key influence on penal policy in the 1990s and, by reacting to perceived public concern on crime and disorder, governments have, arguably, increased public punitiveness.

This has also perpetuated the belief that crime can, and should, be controlled through punishment, an important element of Labour’s penal policy and one reflected, for

⁶ A Criminal Justice Bill was announced in the Queen’s Speech 2006. The Home Secretary could not give a date when asked on 25 April 2007 (Hansard HC Col 1141W).

⁷ *Op cit* n 1.

⁸ This term covers the National Offender Management Service (NOMS) and the Prison and Probation Services. These are not the responsibility of the Secretary of State for Justice and the new Ministry of Justice created on 9th May 2007.

⁹ On 7th September 2007 there were 80,832 people in prison (Male 76,220, Female 4390) with 222 prisoners being held in police cells under Operation Safeguard. In addition there were 2313 on Home Detention Curfew supervision: www.hmprison.gov.uk.

¹⁰ See, for example, Dunbar I and Langton A, *Tough Justice, Sentencing and Penal Policies in the 1990s*. (London: Blackstone Press 1998); Newburn T, ‘Back to the Future? Youth Crime, Youth Justice and the Rediscovery of “Authoritarian Populism”’ in Pilcher J and Wagg S, (eds) *Thatcher’s Children, Politics, Childhood and Society in the 1980s and 1990s*. (London: Falmer Press, 1996).

example, in a succession of policy documents and reviews, including the White Paper, *Criminal Justice: The Way Ahead*.¹¹ That document affirmed the Labour Government's promise to 'rebalance' the criminal justice system and included a commitment to providing another 2600 prison places. The commitment to rebalancing 'in favour of the law abiding majority', and also to protecting the public from violent offenders and anti-social behaviour, was reaffirmed in a policy paper in 2006,¹² and the (then) Home Secretary's announcement that 8000 new prison places were planned.¹³ More recently, Lord Falconer has said¹⁴ that an additional 1500 prison places and two new prisons will be built and it is likely that some of these will be run by the private sector.¹⁵ Further, the Government appears still wedded to the belief that 'prison works' notwithstanding the discouraging results of empirical work on the effectiveness of prison in reducing re-offending.¹⁶

Yet penal crises, like moral panics about the delinquent young, are not new but, rather, cyclical and so reveal continuities as well as historically contingent factors. Some time ago, in the context of an earlier prison crisis, Andrew von Hirsch criticised as unsatisfactory the explanation of the growth in prison numbers put forward by Nils Christie.¹⁷ Von Hirsch summarised Christie's three explanations as the influence of a crime-prevention 'industry', a growing predominance of proportionality-orientated sentence theories and the 'effort to control and intimidate the "deviant" classes'.¹⁸ Instead von Hirsch commented that 'perhaps prison expansion has occurred because voters are

¹¹ Home Office, *Criminal Justice: The Way Ahead*, Cm 5074 (London: HMSO, 2001).

¹² Home Office 'Rebalancing the criminal justice system in favour of the law abiding majority' (London: Home Office 2006).

¹³ Press release 21st July 2006: <http://press.homeoffice.gov.uk/press-releases/8,000-new-prison-places>.

¹⁴ Announcement to Parliament on 19 June 2007.

¹⁵ Prisons may be built and run by the private sector, and ancillary services within the public sector may also be contracted out. There are now 11 private prisons and 127 public sector prisons. The Prison Service has won contracts competing with the private sector but the use of the private sector will probably continue, not least because the government is signing long term contracts lasting 25 years.

¹⁶ See Cuppleditch L and Evans W, 'Re-offending of adults, results from the 2002 cohort', *Home Office Statistical Bulletin* (London: Home Office, 2005).

¹⁷ Christie N, *Crime Control as Industry* (London: Routledge, 1993) discussed in von Hirsch A, 'The Logic of Prison Growth' (1994) 57(3) MLR 476-482 at 476.

¹⁸ *Ibid.*

willing to have their representatives expend money for that purpose',¹⁹ that there had been no similar increase in prison building and numbers in Nordic countries which had adopted proportionalist policies,²⁰ and that the symbolic and political aspects of imprisonment might be more important than an aim of control.²¹ Von Hirsch's focus on the influence of 'law and order' politics is one we would endorse and also apply to the current increase in custodial sentencing.

This 'populist punitiveness'²² has, on occasions, led to conflict between the government and the judiciary. For example, when the Court of Appeal issued new guidelines for appropriate sentences for domestic burglars in *R v McInerney, R v Keating*²³ there was considerable criticism in Parliament and the press, notably in relation to the guideline advising a community sentence instead of a custodial sentence for some offenders. This guidance was influenced, in part, by the need to reduce prison overcrowding but the Prime Minister, nevertheless, publicly emphasized the need for custodial sentences for repeat offenders regardless of the impact on prison numbers.

Capitulating to public concerns in this way, despite the perceived political gains, has a clear financial, and ultimately political, cost for the government. In addition to capital expenditure on the prison building programme, there are the ongoing operating costs, particularly the high labour costs,²⁴ and indirect costs to the economy resulting from the loss of revenue from productive employees, as well as the additional welfare costs of supporting prisoners' families in the absence of the breadwinner. The increased expenditure on prison places raises, therefore, not only budgetary issues, but also the need to 'sell' the expenditure as both legitimate and cost effective. So the Government has to find the right balance between affirming its punitive credentials and controlling spiralling budgets without losing public support.

¹⁹ at 477.

²⁰ at 478.

²¹ at 480.

²² See Bottoms A 'The philosophy and politics of sentencing', in Clarkson C M V and Morgan R (eds), *The Politics of Sentencing Reform* (Oxford: Clarendon, 1995)

²³ *McInerney and Keating* [2002] EWCA Crim 303.

²⁴ The average cost per prison place in 2006-07 was £28,734 and cost per prisoner was £26,737, HM Prison Service, *Annual Report and Accounts*, April 2006-March 2007, (London: HMSO).

Risk and resource management

An important way in which the government has sought, over the last decade, to achieve this balance has been through policies of risk-management. At the individual level this has entailed an emphasis on the responsibility of those at risk of being victims of crime to minimize the risk to themselves by improving home and personal security. At the level of penal and sentencing policy, it has entailed a concentration of resources on those who commit the most serious offences. A continuing feature of penal policy over this period and originating for all adults in the Criminal Justice Act (CJA) 1991 has, then, been the bifurcatory policies, developed earlier within juvenile justice,²⁵ which distinguish between minor and serious offenders. The CJA 2003 aimed to extend this policy, so that the majority of offenders do not receive (long) custodial sentences but are given community sentences, which are selected in relation to the offenders' rehabilitation needs. There has also been a further bifurcation, namely that between 'risky' and 'normal' offenders.

Public protection, an important element of the sentencing provisions in the CJA 1991,²⁶ is at the heart of this risk-management strategy. It is also reflected in the establishment of Multi-Agency Public Protection Panels (or MAPPAs) and the legal requirement on the police, probation and prison services to set up arrangements to assess and manage risks presented by violent and sexual offenders, to monitor these arrangements and to furnish annual reports.²⁷ Such a risk management approach to control and punishment - reserving prison for the highest risk categories of offenders - requires, however, a means

²⁵ See, for example, Pitts J, *The Politics of Juvenile Justice*. (London: Sage 1998); Pratt, J. 'Diversion from the Juvenile Court' (1986) 26(3) Brit. Jo. of Criminol.212.

²⁶ Sections 1(2)(b) and 2(2)(b) – re-enacted as ss79(2)(b) and 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 – empowered the courts to impose a longer term than one commensurate with the seriousness of the offence if necessary to protect the public.

²⁷ See, for example Probation Circular 54/2004 which extends the guidance issued in 2003 and incorporates the new provisions made under ss 325–327 of the Criminal Justice Act 2003 in relation to prisons. Available at:

<http://www.probation.homeoffice.gov.uk/files/pdf/MAPPA%20Guidance%20Update%202004.pdf>

of selecting the target population, a role filled and prompted by the development of actuarial justice, the New Penology.²⁸ Clinical judgments using expensive professional time have been replaced with assessment tools, constructed on the basis of the evidence from quantitative research about significant statistical correlations, and leading to numerical totals and grids to estimate the risk posed by individuals and sub-populations of offenders and potential offenders.

Other strategies have been devised to manage the risk of harm to the public from known offenders, including a registration system for sex offenders and controls on the movement of individuals perceived to be at high risk. The registration system was introduced by the Sex Offenders Act 1997²⁹ and has been followed by new civil orders, including the sex offender order introduced by the Crime and Disorder Act 1998, now replaced by the sexual offences prevention order in the Sexual Offences Act 2003.³⁰

Registration and ‘tool-based’ assessment are two facets of the pervasive and now long-standing ‘new managerialism’ - the continuing legacy of the Thatcher period - which has impacted on penal policy and sentencing law. It is also reflected in the establishment of the National Offender Management Service (NOMS)³¹ and the persistence of managerialist ideologies in the prison service with the continuation of the prison privatisation programme, the focus on the efficient use of resources, performance-related pay, competitiveness and contestability, transparency through published league tables, the use of Key Performance Indicators (KPIs),³² and a focus on what works in terms of the cost effectiveness of particular strategies.

²⁸ Feeley M and Simon J, ‘The New Penology: Notes on the Emerging Strategy of Corrections and its Implications’, *Criminology* (1992) 30(4) 449-74.

²⁹ Now in the Sexual Offences Act 2003.

³⁰ See Shute S, ‘The Sexual Offences Act 2003(4) New Civil Preventative Orders: Sexual Offences Prevention Orders, Foreign Travel Orders, Risk of Sexual Harm Orders’, *Crim.L.R.* [2004] 419.

³¹ NOMS was set up in June 2004 following recommendations of the Carter Report, most of whose proposals the Government has accepted. See the Government’s response in *Reducing Crime, Changing Lives* (London, Home Office, 2004).

³² Related to issues such as the number of positive mandatory drug tests, the number of assaults and the number of self-inflicted deaths.

This focus on risk management and bifurcation has, however, back-fired in its aim of reducing the overall use of custody. The numbers of those who now come within the definitions of ‘serious’ and ‘a risk to the public’ are substantial; the longer sentences resulting from recent legislation and guidance have had a significant effect on the number of prisoners in custody on any one day and, as we shall see, the new sentencing provisions have raised important rights issues. In brief, what happened during this period was that many offenders who might previously have been given a community sentence were now given custodial sentences, and those who would previously have received a custodial sentence were now serving longer sentences. One of the most surprising features of this expansion of custody is that it has occurred despite the fact that the UK has far more options for alternatives to custody than many other Western European jurisdictions. It has also occurred at a time when, arguably, retributivist principles of punishment have been more important in the UK and yet modern retributivists argue that these principles provide a restraint on excessive punishment.³³

Retributivist sentencing

This article has so far concentrated on aspects of penal policy which cannot easily be fitted into a retributivist rationale for punishment: individual deterrence through harsher sentences, and selective incapacitation through risk-based assessments and disposal, fit squarely into utilitarian justifications. Yet the sentencing scheme introduced by the CJA 2003 is still one where the majority of offenders will be sentenced under the ‘normal’ framework in proportion to the seriousness of their offending. They will get their ‘just deserts’. In that sense, the sentencing framework based on the principles of modern retributivism set up by the CJA 1991 has not been replaced. The CJA 1991 included provisions which set a ‘seriousness’ threshold or ‘hurdle’ for custodial and community penalties. The hurdle for imposing custody stated that a custodial sentence should not be given unless the offence is ‘so serious that only’ such a sentence can be justified; for

³³ See von Hirsch A, op cit n.17 above; see also Easton S and Piper C, *Sentencing and Punishment, The Quest for Justice*. (Oxford: Oxford University Press, 2005) at 60-66.

imposing a community penalty the hurdle was 'serious enough'.³⁴ The Act also imposed a commensurability principle on sentencers: the length or weight of the sentence must be proportionate to the seriousness of the offence. All these provisions were re-enacted in the Powers of Criminal Courts (Sentencing) Act 2000, and are now to be found in the CJA 2003.³⁵

However, as von Hirsch noted twenty years ago, 'a jurisdiction's traditions in punishment, its politics, and its public's degree of fear of crime and criminals probably will affect leniency or severity more than any choice of sentencing theory'.³⁶ The corollary is that whatever theoretical underpinning there is for sentencing, there will be mechanisms by which long-standing social attitudes and current political imperatives will influence outcome. The Achilles heel in the UK has been the construction of seriousness.³⁷

First, in line with perceptions of current socially-held views on the relative seriousness of forms of criminality, the 'tariff' - the normal range of sentence - has been increased in relation to specific offences. For example, in the guidance on firearms offences issued by the Court of Appeal in 1997,³⁸ Lord Bingham C.J. said 'we share the view expressed by the Court on earlier occasions that some of the sentences imposed for these offences in the past, sometimes by this Court, have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse'.³⁹

Secondly, the 1991 Act included no definition of seriousness, and the first case⁴⁰ to interpret the 'so serious that' criterion drew on the approach of the Court of Appeal to a previous similar provision relating to young offenders where Lawton L J noted that the

³⁴ Sections 1(2)(a) and 6(1) respectively.

³⁵ Sections 152-3 and 148.

³⁶ Von Hirsch A, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. (Manchester: Manchester University Press 1986) at 169.

³⁷ For a fuller discussion than is possible here, see Easton and Piper *op cit* n 33 at 66-83.

³⁸ *R v Tony Avis* (1998) 1 Crim App R. 420 (dealing also with the cases of Avis, Thomas, Torrington, Marques and Goldsmith).

³⁹ *R v Tony Avis*, *ibid* at 430.

⁴⁰ *Cox* (1993) 14 Cr App R.(S) 749.

hurdle had been surmounted if ‘right thinking members of the public’ felt custody was necessary for justice to be done. The justificatory analogy he provided was that ‘courts can recognise an elephant when they see one, but may not find it necessary to define it’.⁴¹ Lord Bingham CJ admitted the deficiencies of such an approach in *Howells and related appeals*:

‘[I]t cannot be said that the ‘right-thinking’ members of the public test is very helpful, since the sentencing court has no means of ascertaining the views of right-thinking members of the public and inevitably attributes to such right-thinking members its own views. So, when applying this test, the sentencing court is doing little more than reflecting its own opinion whether justice would or would not be done and be seen to be done by the passing of a non-custodial sentence’.⁴²

Those views would, of course, be reflective of wider, possibly punitive, social attitudes.

Since then the Sentencing Guidelines Council has been established and has issued an increasing quantity of definitive guidance - in accordance with section 170(9) of the CJA 2003 - on seriousness.⁴³ As with all guidelines, every court ‘must have regard’ to their content.⁴⁴ Drawing on previous appellate approaches this guideline deals with the two components of harm and culpability, and it summarises the factors which may aggravate or mitigate seriousness, as well as issues of personal mitigation and the reduction for a guilty plea. It then goes on to state (at para 1.32) that, in applying the threshold test, sentencers should note the following three points: that ‘the clear intention of the threshold test is to reserve prison as a punishment for the most serious offences’; that ‘it is impossible to determine definitively which features of a particular offence make it serious

⁴¹ See, for a fuller discussion, Ashworth A and von Hirsch A., ‘Recognising Elephants: the Problem of the Custody Threshold’ [1997] Crim L R 197.

⁴² *Howells and related appeals* (1999) 1 All ER 50 at 53.

⁴³ SGC (16 December 2004) *Overarching Principles: Seriousness*: http://www.sentencing-guidelines.gov.uk/docs/Seriousness_guideline.pdf

⁴⁴ See CJA 2003 s 172. See also *R v Oosthuizen* [2005] EWCA Crim 1978; (2006) 1 Cr App R (S.) 73 in which the court re-iterated that sentencers have a statutory duty to ‘have regard to’ sentencing guidelines, but also quoted the statement of Lord Woolf CJ (in *Last* [2005] EWCA Crim 106) that ‘have regard to’ did not mean a guideline had to be followed. See also Dingwall G, in this issue of Contemporary Issues in Law.

enough to merit a custodial sentence'; and that 'passing the custody threshold does *not* mean that a custodial sentence should be deemed inevitable'. Points 1 and 3 give a clear reductionist message. Point 2 still allows the widest of discretion in selecting or downgrading factors, and so does not explicitly discourage the giving of less weight to those mitigating factors that might justify placing an offender just below the custody threshold.⁴⁵ Yet there is recent research evidence that mitigation is important in these 'cusp cases' in justifying the imposition of a non-custodial sentence.⁴⁶

Since the 'Seriousness' guideline, the guidance on the sentence reduction for guilty pleas,⁴⁷ issued in 2004, has been reviewed by the Sentencing Advisory Panel and new guidelines were issued in July 2007 by the Sentencing Guidelines Council.⁴⁸ Although the maximum discount remains one third, where the prosecution's case is overwhelming without admissions from the defendant, then a lesser reduction of 20% would be given.⁴⁹ Although such discounts generally affect only the length of the custodial sentence (and, for example, the amount of a fine) it can also have an effect on sentences on the cusp of custody. Either way the new guidance can only increase the custody rate and/or sentence length.

Case law would also suggest that the policy focus on the victim has contributed to the inflation of seriousness - and so the custody rate - in the lower courts, possibly more than guidance justifies. In *R v AP*⁵⁰ the trial judge explained that he had to consider the victim and 'to demonstrate that the court does not tolerate this sort of behaviour'.⁵¹ On appeal more weight was given to the attempted suicides in adolescence and the severe learning and speech difficulties of the appellant, who had indecently assaulted (when aged 16 and

⁴⁵ See the discussion in Piper C, 'Should impact constitute mitigation?: structured discretion versus mercy' [2007] Crim LR 141-155.

⁴⁶ Hough M, Jacobson J and Millie A, *The Decision to Imprison: Sentencing and the Prison Population*, (Prison Reform Trust: London, 2003).

⁴⁷ CJA 2003 s 144.

⁴⁸ *Reduction in Sentence for a Guilty Plea*, effective for all cases sentenced on or after 23rd July 2007: see <http://www.sentencing-guidelines.gov.uk/docs/Reduction%20in%20Sentence-final.pdf>.

⁴⁹ Sentencing Guidelines Council (2007) *Reduction in Sentence for a Guilty Plea*, London, Sentencing Guidelines Secretariat. The new guideline came into effect on 23rd July 2007.

⁵⁰ *R v AP* [2005] EWCA Crim 425.

⁵¹ *Ibid*, Westlaw transcript at 9.

about 22) his younger cousin. Consequently a community rehabilitation order was substituted.⁵²

Retributivist sentencing does not *cause* a high rate of custodial sentencing but the importance of seriousness can, as we have shown, allow non-legal communications to influence sentencing. However, the CJA 1991, particularly when amended and joined by other pieces of legislation in the decade after its implementation, did not establish a purely retributivist framework for sentencing - there were also utilitarian and restorative aspects - and the set of aims introduced by the CJA 2003 has only further diminished the clarity of aims and principles. That also makes it easier to 'fudge' rationales and allow for social attitudes to influence sentencing. This is not to say that all changes in the construction of seriousness are unwarranted. For example, *Cooksley and others* incorporated advice from the Sentencing Advisory Panel (SAP) on sentencing for the offence of causing death by dangerous driving, and endorsed the view that 'briefly dozing at the wheel' should no longer be viewed as indicating a less serious offence. Lord Woolf CJ in his judgment quoted from the SAP's advice that: 'Understandably, [dangerous driving] often leads to calls from the victims' families, and from the wider community, for tough sentencing'.⁵³ However, such 'calls' may misconstrue the relevant issues here.

There is a final point in relation to proportionality. Retributivist sentencing does not justify any particular ranking or amounts of punishments. Provided that particular levels of seriousness always justified particular levels of punishment, those punishments could be exclusively custodial or they might never be custodial. In the UK there appears to be a view that the only 'real' punishment is custody; this is a particular problem in relation to financial penalties but also community penalties. Further, there is a continuing legacy of the Poor Law in an adherence amongst many sections of the population to the idea of 'less eligibility', that punishment (and particularly prison) must be 'worse' than life outside. Such attitudes - where 'just deserts = prison' - will be difficult to change but that change will be a necessary part of the effort to reduce the use of custody. The latest

⁵² *Ibid* at 10.

⁵³ *Cooksley and others*, Attorney General's Reference (No 152 of 2002) [2003]EWCA Crim 996 at para 1.

prison population projections for 2014, based on current sentencing trends, predict a highest figure of 101,900 and a lowest figure of 88,800.⁵⁴

The role of sentencing in prison expansion

The inflation of ‘seriousness’ is one factor accounting for the greater use of custody, but there are other contributory factors which have been particularly influential in allowing penal populism to influence policy, new law and guidance. First, there is the government’s increasing commitment to imposing longer than ‘normal’ sentences on those committing violent and sexual offences, those offences which are now viewed as the most dangerous and potentially most harmful. Secondly, the idea that persistence in offending of any kind should be treated more harshly is again popular⁵⁵ and, thirdly, breaches of any order, civil or criminal, are to be treated more harshly. Whether the focus on the greater seriousness of repeat offending is having an effect is as yet difficult to assess,⁵⁶ and is made more difficult by the lack of a clear baseline for comparison, but there are clearly more prisoners on indeterminate sentences for violent and sex offences and there are more prisoners being returned for breaching licence conditions.⁵⁷ So as well as a ‘revolving door’ for those serving shorter sentences, there is also now a ‘revolving door’ for those who have served longer sentences.⁵⁸

Dangerous offenders

⁵⁴ De Silva N *et al*, (2007) *Prison Population Projections 2007-2014, England and Wales*, London, Ministry of Justice.

⁵⁵ See Flaherty P, in this issue of *Contemporary Issues in Law*. Also, Easton and Piper, *op cit* n 33 at 85-88.

⁵⁶ Although increases are expected because of the impact of another form of sentencing on persistence, that of a mandatory 3 year sentence for a third domestic burglary conviction (PCC(S)A 2000 s 111).

⁵⁷ See De Silva *op cit* n 54 at 4, which notes that one of the factors contributing to the growth in the prison population over the past ten years is the ‘greater number of offenders recalled to prison for breaking the condition of their licence, reflecting legislative changes in 1998 and 2003’. See also HM Inspectorate of Prisons, *Recalled Prisoners* (London: Home Office, 2005).

⁵⁸ The ‘revolving door’ analogy was used by Anne Owers in an article in the *Sunday Times* ‘Sentenced to filth, chaos and mayhem in our jails’, 24th June 2007: <http://www.timesonline.co.uk/tol/news/uk/crime/article1976782.ece>.

The focus on dangerousness has, perhaps, had the most impact on sentencing law and practice. The new sentencing provisions introduced by the CJA 2003 have also been particularly problematic with the public given that the sentences introduced by section 225 (and s 226 for minors) are indefinite, and so require decisions about release on licence - and possible recall to custody – when the minimum period has been spent in prison. Public concern about the ‘justice’ and danger of release has been fuelled by high profile examples of reconvictions on serious crimes, such as Craig Sweeney, who assaulted a child while released on licence, or the case of Anthony Rice who was convicted of the murder of Naomi Bryant in 2005, committed while released on licence. An independent review of the Rice case highlighted several cumulative failings, leading to a situation where the risk of harm was not accurately assessed or acted upon.⁵⁹

Sections 225–228 of the CJA 2003 provide the criteria for ‘life imprisonment’, a new sentence of ‘imprisonment for public protection’ (with comparable forms of detention for offences committed by those under 18 years of age), and a new extended sentence (for under and over 18 year olds). They relate only to offenders convicted of a ‘specified’ offence listed in Schedule 15 of the Act. The sub-group referred to, somewhat confusingly, as ‘serious’ offences are those specified offences which are punishable by imprisonment for life or by a determinate sentence of at least 10 years. If the criteria are fulfilled the court ‘must’ impose the relevant sentence of imprisonment: the new life sentence and the sentence of imprisonment for public protection (IPP) are applicable only to those offenders who have been convicted of ‘serious’ offences as defined in the Act, whilst the extended sentence applies only to non-‘serious’ specified offences.⁶⁰

Crucially, the criteria include the need for the court to be of the opinion that there is a ‘significant risk’ to the public that the offender will commit further specified offences and they will cause serious harm to the public.

⁵⁹ HM Inspector of Probation, *An Independent Review of a Serious Further Offence case: Anthony Rice* (London: Home Office, 2006).

⁶⁰ The extended sentence, in ss 227-8, is a determinate sentence made up of the ‘appropriate’ (commensurate) custodial period and an extension period which must not exceed 5 years for a specified violent offence or 8 years for a specified sexual offence. The whole must not exceed the maximum allowed for the offence.

To an extent, these provisions replace two legislative provisions which had proved particularly contentious; that is, the ‘longer than commensurate’ sentences introduced by the CJA 1991, and the ‘automatic life sentence’ introduced by the Crime (Sentences) Act 1997. The former sentence raised issues about the justification for, and length of, the ‘extra’ custody on the basis of risk, whilst the latter was effectively scuppered by a rights challenge.⁶¹ However, the new sentences are not, it is argued, analogous: ‘The list of qualifying offences for an automatic life sentence numbered eleven, and it needed two before a life sentence was automatic. The list of ‘specified’ offences for an IPP numbers 153 and the sentence can be triggered by a first offence as long as the defendant is deemed dangerous’.⁶² The new sentences may, therefore, mean that an indefinite sentence has to be imposed where a lesser sentence might have been used before their introduction. According to Thomas, commenting on recent IPP cases: ‘The source of the problem is the ill-conceived legislation which deprives courts of discretion in deciding when to use the dangerous offender sentences and when not to do so – it is unlikely in the extreme that any of the offenders in these three cases would have received a sentence of life imprisonment or a longer than commensurate sentence under the earlier legislation’.⁶³ Not surprisingly, the new provisions have raised even more difficulties in their application than did their predecessors.

The latest update (the 3rd edition) to the SGC’s *Compendium of guideline judgments*, first issued in 2005, has highlighted the recent *Reynolds* case⁶⁴ as a guideline for sentencing dangerous offenders, a case in which the Court of Appeal endorsed and ‘reiterated the appropriate approach to the dangerous offender provisions and considered how any mistakes made in their application may be rectified’. The SGC up-date also noted the guidance on the IPP sentence in the *Johnson* case,⁶⁵ when the court ‘considered several issues relating to the assessment of dangerous offenders in order to explain and amplify

⁶¹ *R v Offen* [2001] 2 Cr.App.R.(S).

⁶² Professor Sir Duncan Nichol (Chairman of the Parole Board): Paper presented to the Centre for Crime and Justice Studies, Kings College, London, 14 December 2006. Accessed @ <http://www.kcl.ac.uk/depsta/rel/ccjs/who-should-we-release-2006.doc>.

⁶³ Commentary on *Thomas* [2006] EWCA Crim 2036 and related cases in [2007] Crim LR 171-2 at 172.

⁶⁴ *R v Reynolds and others* [2007] EWCA Crim 538.

⁶⁵ *R v Johnson and others* [2006] EWCA Crim 2486.

the guidance given in the previously very influential case of *Lang*.⁶⁶ *Lang*, the first case to provide extensive guidance on the new provisions, seemed to herald what for many commentators was a welcome restrictive interpretation of the new provisions. Subsequent cases might suggest these principles are not yet clear enough; in *Johnson*, for example, the Court said it was addressing some areas of ‘potential misunderstanding’ in *Lang*.⁶⁷

The major difficulty lies in the application of section 229(3) of the Act, which deals with the assessment of dangerousness. If the offender has committed one or more specified offences already, the court must assume that there is a risk of significant harm unless ‘the court considers that it would be unreasonable to conclude that there is such a risk’. *Lang* made it clear that this ‘assumption’ should not be made lightly: ‘In our judgment, when sections 229 and 224 are read together, unless the information about offences, pattern of behaviour and the offender ... show a significant risk of serious harm ... from further offences, it will usually be unreasonable to conclude that the assumption applies’.⁶⁸ This puts a premium on the provision of good information from pre-sentence reports as well as good legal advocacy. The long section on rectifying mistakes in the latest SGC guidance would suggest there are deficits here.

Breach of community order or licence conditions

In relation to supervision in the community, whether as part of a community sentence or on release from a custodial sentence, government policy, developed over the last two decades through National Standards and now legislation, is that any breach of supervision requirements should lead to certain and severe sanctions. Linked to this is the effect of breaches of the plethora of new civil orders, including sex offender orders, foreign travel orders, risk of sexual harm orders, and anti-social behaviour orders (ASBOs). These may, and do, attract custodial sentences if breached.

⁶⁶ *R v Lang and others* [2005] EWCA Crim 2864: 13 appeals were heard together to form this guideline judgment.

⁶⁷ *R v Johnson* [2006] EWCA Crim 2486.

⁶⁸ *R v Lang*, n 66 at para 15.

The Criminal Justice Act 2003 section 179 deals with the breach, revocation or amendment of a community order by referring to Schedule 8, part 2 of which requires that an officer normally gives a formal warning on a first breach, but if the offender again fails to comply within the next 12 months, he is liable to be brought back to court. The approach crystallized in this legislation has led to criticism from within the probation service. The problem is that ‘offenders who are given probation and community service are often the ones who require that particular disposal in order to help them become more disciplined in terms of time management,’⁶⁹ but the tougher line means time is cut short by the outcome of breach proceedings. Research in the mid-1990s showed that failure to attend at the required time was the most common form of non-compliance and, further, enforcement practice varies.⁷⁰ More recent research has shown that financial problems, drug usage and depression are commonly associated with the absenteeism of probation offenders.⁷¹

The breach of civil orders, particularly anti-social behaviour orders, is now such a significant factor in the increasing use of custody that the Sentencing Advisory Panel issued a *Consultation Paper on Breach of an Anti-Social Behaviour Order (ASBO)* in August 2007. The Paper reports a Parliamentary written answer (25 June 2007, Hansard Col 284W) which admitted that 46% (3440) of the breaches proven in court in 2005 resulted in a custodial sentence, and goes on to suggest guidelines for sentencing such breach cases based on factors of persistence and harm. In particular the Paper suggests a community order for conviction under section 1(10) of the Crime and Disorder Act 1998 where the breach involved no harassment, alarm or distress.⁷² There is clearly an important issue here; tougher policies on breach, when the original action leading to the order may not even have been a criminal offence, are significantly increasing the use of custody ‘by the back door’.

⁶⁹ Eadie T and Willis A, ‘National Standards for Discipline and Breach Proceedings in Community Service: An Exercise in Penal Rhetoric?’ [1989] Crim LR 412-419 at 414.

⁷⁰ Ellis T, Hedderman C and Mortimer E, *Enforcing community sentences: supervisors’ perspectives on ensuring compliance and dealing with breach*, Home Office Research Study No.158. (London: Home Office, 1996).

⁷¹ Farrall S, ‘Long term absences from probation: officers’ and probationers’ accounts’, *Howard Journal* (2002) Vol 41(3) 263-278 at 267-268.

⁷² At p 29.

Will sentencing trends impact on custodial conditions?

In the early to mid-1990s, overcrowding decreased as new prisons were built, but now it has continued to present a major problem. The average rate of overcrowding (that is, the percentage of prisoners held in accommodation units intended for fewer prisoners) in 2006-2007 was 24.1%, against a target of 24%.⁷³ As overcrowding is not evenly distributed, conditions in some prisons may be worse than others. Comparing prisons now with the early 1990s, there clearly has been considerable progress but the concern is that the current period of overcrowding will increase the pressure on prisons and undo some of the progress which has been made.

That progress was due in large part to the recommendations of the Woolf Report,⁷⁴ which was set up following the 1990 riots. The Report emphasised the need to strike the right balance between justice, security and control. Security has increased, with a reduction in the number of escapes in recent years, but prisoners still run a risk of harm from other prisoners.⁷⁵ The Woolf Report also had a significant impact in raising standards. There have been important changes in procedural justice in prisons, for example improvements in disciplinary and grievance procedures. Prisoners also now have access to the Prisons and Probations Ombudsman if they are unable to resolve matters through the internal procedures. Physical conditions have also improved. Prisoners have easier access to phone calls, and improvements in visits. Sentencing planning and personal officers, and national operating standards were also introduced. The Prisons Rules were revised to reflect the various changes. The Key Performance Targets have been a major yardstick of progress, and in recent years there have also been improvements in health care, drug treatment and resettlement.⁷⁶

⁷³ HM Prison Service, *Annual Report and Accounts*, April 2006-March 2007, London, HMSO.

⁷⁴ Woolf H and Tumin S, *Prison Disturbances April 1990, Report of an Enquiry*, Cm 1456, (London: HMSO, 1991).

⁷⁵ Targets on category A escapes were met in 2006-2007, but targets for reducing the number of serious assaults were not met.

⁷⁶ Targets on resettlement and accommodation on release were met in 2006-07.

There has also been improved provision of constructive and purposeful employment, increases in educational provision and the range of educational and offending behaviour programmes. Attention has been focused on improving literacy and numeracy to improve offenders' chances of finding work on release into the community. Targets for completions of basic and works skills awards, and the number of offending behaviour programmes completed, were met in 2006-2007.⁷⁷

As we have seen, procedural justice in UK prisons has improved through the impact of the Woolf Report, and the expansion of public law into penal custody through judicial review, and the UK has also ratified the European Prison Rules.⁷⁸ However, there are still concerns about substantive conditions and, in particular, the impact of overcrowding. This affects not just the physical conditions, but also makes it harder to implement programmes, to assess prisoners and to allocate them to appropriate programmes, or to perform a rehabilitative function, moving prison closer to a warehousing role. It also makes it more difficult for prisoners to forge good relationships with staff and with other prisoners.

The prison league tables also show wide variations, and the experience in prison may depend on local conditions, security rating and location, and on the incentives and earned privileges schemes. For example, conditions in remand prisons are worse than for sentenced prisoners on issues such as work and training. The composition of the prison population may change with increasing numbers of older prisoners, particularly as the impact of guidelines on the minimum term for murder take effect,⁷⁹ which will mean increasing demands for health care. There is also now a larger number of lifers and indeterminate sentenced prisoners with numbers of the latter increasing and more

⁷⁷ HM Prison Service, *Annual Report and Accounts*, April 2006- March 2007, (London: HMSO). A total of 7,921 Offending Behaviour Programmes were completed during the year.

⁷⁸ These rules were revised, updated and adopted by the Committee of Ministers of the Council of Europe on 11 January 2006. See <http://www.coe.int>.

⁷⁹ The Lord Chief Justice has warned that in 30 years time the prisons will be full of geriatric 'lifers'. Lord Phillips' Speech (8 March, 2007), University of Birmingham: *Issues in Criminal Justice – Murder* at 2.

prisoners being recalled following their release on licence. Further, there are concerns about the treatment of mentally ill prisoners.

Re-educating the public

Whilst there is some consensus amongst professionals and policy makers that the rising rate of custody must be halted, there are, as we have noted, a range of factors which are operating to increase the use of custody. Perhaps the most important - and most contentious - is that of 'populist punitiveness', whereby 'the public' responds to perceptions of increasing lawlessness and violence with demands for more punitive sentencing. Yet we know that the public's fear of crime may not correlate with the actual risk of victimization, or with actual increases in the crime rate. The British Crime Survey (BCS) 2006/2007 found that 'relatively high proportions of people continue to believe that crime has risen in the country as a whole and in their local area'.⁸⁰ Whereas, in fact, since 1995 BCS crime has fallen by 42%, and the risk of being a victim is also lower.⁸¹ Research also suggests that the public tend to underestimate the severity of sentencing used to deal with offenders,⁸² and to focus on instances of apparently erratic and lenient sentencing, even if these are atypical.

Research on public attitudes to crime and sentencing is itself problematic; as Hutton has pointed out, responses may be affected by the methodologies employed.⁸³ For example, when detailed information is given about offenders in sentencing scenarios, respondents are relatively lenient in their choice of sentence. However, he argues that 'the ambivalence between punitiveness and a more constructive approach to sentencing is best

⁸⁰ Nicholas S et al, *Crime in England and Wales 2006/07* (London: Home Office, 2007) at 95. Women, older people, members of ethnic minority groups and readers of tabloid newspapers were more likely to perceive high levels of crime in the country as a whole.

⁸¹ *Ibid* at 11.

⁸² Hough M and Roberts J, *Attitudes to Punishment: Findings from the British Crime Survey*, Home Office Research Study No. 179 (London: Home Office, 1998); Mattinson J and Mirrlees-Black C, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey*, Home Office Research Study 200 (London: Home Office, 2000).

⁸³ See Hutton N, 'Beyond popular punitiveness?' *Punishment and Society* (2005) Vol 7(3) 243-258.

seen as an accurate reflection of people's attitudes'; whilst both elements can be artefacts generated by the research tools used, they do both exist.⁸⁴ A key element of any reductionist policy, which aimed to lower the incarceration rate, would be to re-educate the public on actual levels of sentencing, the costs of punishment and the effectiveness of the alternatives to custody. Increasing awareness of the detail of sentencing and punishment would be useful here to boost confidence in the criminal justice system, and has been a theme of the recent *Making Sentencing Clearer* consultation exercise. In particular that Consultation Paper was concerned to make clearer to the public the structure and purpose of each part of both determinate and indeterminate sentences.⁸⁵ However, Hutton would caution against any 'quick fix' in relation to educating the public and increasing public confidence through providing information: 'This lack of confidence may be, at least in part, a reflection of the loss of faith in authority and expert knowledge more generally and not simply a response to the perceived failures of criminal justice institutions in particular'.⁸⁶ It should, then, be part of a package of solutions.

Early release

Another part of that package is a somewhat odd imperative; that is, to resist one particular change frequently mooted. What would worsen the prison crisis would be successful pressure for changes in the early release scheme. The latest revision to that scheme, by the Criminal Justice Act 2003, means that for all determinate sentences of 12 months or more (except for the new extended sentence) there is a duty to release on licence at the half-way stage of the sentence (section 244). This first half of the sentence is the 'requisite custodial period' which has to be served (with different periods for intermittent and consecutive sentences), and the court is now empowered to recommend conditions which should be included in the licence granted to the offender on release (section 238). Early release clearly reduces the numbers in custody on any one day, but is unpopular with the public. Nevertheless there are good reasons to maintain the system which has been justified on the following grounds in addition to the aim of reducing prison

⁸⁴ *Ibid* at 253.

⁸⁵ *Making Sentencing Clearer* (London: Home Office, 2006).

⁸⁶ Hutton, n 82 at 254.

numbers: it provides a means of prison discipline by rewarding good behaviour, and it provides a compulsory period of supervision post-release which can be used to encourage rehabilitation or to allow for possibilities of control in the community. The use of emergency extensions to the scheme to reduce the prison population, which has happened on several occasions, is less justifiable. In 2007, an overcrowding crisis led to a ‘one-off’ release of prisoners; the end of custody licence (ECL), introduced on the 29th June, allowed non-violent offenders to be released on this special licence up to 18 days early.⁸⁷ Previous ‘exceptional’ uses were in 1940 when men were needed for the armed forces, and in 1987 at the height of another prison crisis.

A recent early release issue has arisen in relation to release from indefinite sentences once the minimum period has been served, where release from prison is dependent upon completion of a rehabilitation programme but there are insufficient programmes available. The result is that release is delayed, and so legal challenges have been brought by prisoners who cannot be considered for parole because their prisons do not have the facilities and courses required to assess their suitability for release. In *Wells and Walker*⁸⁸ the High Court said this was arbitrary, unreasonable and unlawful and the issue will be considered later this year by the Court of Appeal with the case of Brett James. In *James*, the High Court said that he should be set free given that he had completed his minimum term but does not have access to appropriate courses, but his release has been deferred pending the Government’s appeal.⁸⁹ This issue also raises human rights questions, under Article 5, and further challenges are anticipated as the number of prisoners imprisoned for public protection has expanded to include more prisoners serving shorter sentences.

Human Rights

⁸⁷ De Silva *op cit* n 51 at 6.

⁸⁸ *Wells v the Parole Board and Secretary of State for Justice*, *Walker v Secretary of State for the Home Department*, EWHC 1835 (Admin), 31 July 2007.

⁸⁹ Mr Justice Collins in *R on the application of Brett James v Secretary of State for Justice* [2007] EWHC 2027 (Admin).

The last decade, since the passing of the Human Rights Act 1998, has seen an increased emphasis on human rights in imprisonment, and we would view the continuance of this as another element of the solution package. The impact of 'rights' jurisprudence in raising standards of treatment within prison and protecting prisoners cannot be over-emphasised. If human rights are entrenched, they can also provide a buffer against populist punitiveness and provide a constraint to a zealous application of the principle of less eligibility. Rights are also potentially enforceable in contrast to Key Performance Targets. Rights have a crucial role in custody, but may also be relevant to challenging detention itself. Moreover, a respect for rights contributes to the legitimacy of the system. A clear system of rights observance is especially important for prisoners because of their isolation from society.

Many of the key Convention Articles are relevant to prison life, including the right to life in Article 2, which has been used to challenge the ways in which deaths in custody are dealt with, and the failure to prevent suicide.⁹⁰ Also Article 3, which offers protection from inhuman and degrading treatment, has been used by prisoners to challenge the conditions in which they are held. Article 5 has been used to challenge conditions of detention by those serving discretionary life sentences, as well as by mentally disordered offenders. Article 6 has been used to challenge procedures in disciplinary hearings as well as access to courts and correspondence with lawyers. In *Ezeh & Connors v UK*⁹¹ in 2002, the European Court of Human Rights ruled that additional days as punishment for disciplinary offences may no longer be imposed by prison governors, but only by independent adjudicators. Article 8, the right to private and family life, has been used in relation to the conduct of prison visits, and to prevent interference with correspondence, and is likely to be increasingly used by prisoners to improve contact with their families.⁹² The right to freedom of expression in Article 10, and the right to marry in Article 12, have also been asserted by prisoners, and Article 3 of Protocol No.1 has been the basis of

⁹⁰ See *Edwards v UK* (2002) 35 EHRR 19, *Keenan v UK* (2001) 33 EHRR 38.

⁹¹ *Ezeh & Connors v UK* [2002] 35 EHRR 28.

⁹² See Brooks-Gordon B and Bainham A, 'Prisoners' families and the regulation of contact', (2004) 26(3) JSWFL 263-80.

a challenge to the denial of the right to vote to convicted prisoners.⁹³ The rights to privacy, home life, procedural justice, access to correspondence, fair treatment during disciplinary hearings and rights to be informed of reasons for transfer or segregation, may all affect the experience of custody, and upholding these rights can make a real difference to prisoners' lives.

The European Convention has been used by UK prisoners with some degree of success. Prisoners clearly retain their rights on imprisonment, and any infringements must comply with the criteria in the Convention and its jurisprudence. Although the European Convention on Human Rights did have an impact on prisoners' rights before the Human Rights Act 1998 was passed, on procedural issues including access to justice, the HRA has grounded rights more securely and enhanced the value of the Convention rights in both public and private sector prisons.⁹⁴

As the Act allows human rights cases to be raised within the domestic courts, they can be heard more quickly, which makes it easier for prisoners serving shorter sentence to raise rights claims, although prisoners may still pursue claims in Strasbourg. The Strasbourg court and the domestic courts have been critical of the UK's treatment of prisoners in a number of areas, although in some cases the government has been slow to respond, for example in relation to voting rights. Settlements have also been reached outside court, and any changes in prison regimes have to be 'Convention proofed'. Furthermore, because of the increased embeddedness of a rights culture in the domestic courts, judges are arguably more receptive to prisoners' rights claims.

However, the fact that some of the Convention rights are subject to limitations, including the prevention of crime, or to protect the rights and freedom of others and in interest of

⁹³ See *Hirst v UK* (No.2) Application No. 74035/01 (6 October 2005).

⁹⁴ Although private prisons have faced similar problems of maintaining standards and disorder as public prisons, and some have been fined for failure to maintain standards stipulated in the contract, others have reached the highest levels in the league tables. The Carter Review of Correctional Services also favoured the continued use of the private sector to improve competition (Carter P, *Managing Offenders, Reducing Crime, A New Approach*, London: Stationery Office, 2003).

national security, may mean that they can justifiably be infringed within the prison context. Rights may be sacrificed to other goals where deemed necessary, for example, the prevention of terrorism, so there is an ongoing conflict here. Further, the growth of prisoners' rights has also been resisted because of the obvious cost implications if compliance entails raising standards, and because of the fears of floodgates operating. The Convention is also limited by lack of social rights which are particularly important in the context of private life - although social rights are becoming more important in international human rights law⁹⁵ - and, importantly, prisoners need a certain level of literacy to bring an action. It seems likely, however, that use of the Convention to challenge the prison regime on a wide range of issues will increase.

Better forms of custody?

Given that the use of custody will not significantly diminish overnight, it might be wise to include in the package pressure to implement new, 'better' forms of custody. Unfortunately, the lack of resources in the Probation Service has been the direct cause of the moth-balling of perhaps the two potentially most useful innovations in the Criminal Justice Act 2003; that is, intermittent custody (IC) and the custody plus sentences.

It is a great pity that the IC order, introduced by section 185 of the Act 2003, has still not been implemented despite the long history of attempts to do so. Such an order was suggested in a Green Paper of 1984,⁹⁶ which argued that it would enable the courts to impose a custodial sentence which did not inevitably disrupt family ties or necessarily entail the unemployment of the prisoner. Similarly the Explanatory Notes to the Criminal Justice 2003 Act state that the aim of the new provision was also to 'maintain jobs, family ties or education, all of which have been shown to play a part in reducing re-offending'. Whilst there was no unfavourable evidence, the IC sentence was withdrawn

⁹⁵ Burca G and de Witte B (eds), *Social Rights in Europe* (Oxford: Oxford University Press, 2005).

⁹⁶ *Intermittent Custody*, Cmnd 9281 (London: HMSO). IC was piloted in 11 probation areas in 2004 with units in set up in HMP Kirkham and Morton Hall.

in November 2006 on the ground that it should be rolled out only when it was possible to implement another new sentence, the 'custody plus' order.⁹⁷

Custody plus - another good idea in section 181 of the Act - would have replaced the existing custodial sentence of less than 12 months with a more flexible 'mixed' custody and community sentence. The introduction of custody plus, originally planned for the end of 2006, has also been deferred.⁹⁸ It is true that both of these sentences - if seen by sentencers as 'softer' - might have encouraged the use of a custodial sentence where a 'straight' community sentence should have been given, although the guidance would not countenance such. The guidance from the Sentencing Guidelines Council on Intermittent Custody⁹⁹ makes clear that the usual custody threshold applies, but that: 'The circumstances of the offender are likely to be the determining factor in deciding whether an intermittent custody order is appropriate... Suitable candidates for weekend custody might include offenders who are: full-time carers; employed; or in education' (para 2.3.10). On the other hand, for custody plus the focus would be on the amount of custodial punishment and community rehabilitation required within the 51 week maximum total.

Allowing the maintenance of family life will assist both male and female prisoners. Given that many women prisoners have dependants, and many male prisoners may also have families economically dependent on them, then clearly a move away from (full-time) custody would have social and economic benefits. In the current regime women may be allocated far from home because of the smaller number of prisons in the women's prison estate, which will cause considerable disruption of family life. Although taking account of impact in sentencing has been resisted by the courts and, where it has been acknowledged, has been dealt with somewhat erratically, there is increasing recognition of the wider effects of custody on family life. Dealing with these issues will have

⁹⁷ See: National Probation Service Bulletin (2006) Issue 41, 084/06: *Intermittent Custody: Withdrawal of authority to supervise offenders*.

⁹⁸ A written answer by Gerry Sutcliffe to a parliamentary question on February 27th 2007 said that no decision has been taken about a date for its implementation.

⁹⁹ SGC (2004) *New Sentences: Criminal Justice Act 2003* section 2 Part 3.

benefits. More research is now being undertaken in the impact of custody on prisoners' families, both children and siblings.¹⁰⁰

In view of these problems, the recently published Corston Report has recommended closing down existing women's prisons, and replacing them with small secure units to enable women to be held nearer their homes.¹⁰¹ The Government has also initiated a Women's Offending Reduction Programme. Campaigning groups such as SmartJustice have also argued that the number of women in custody could be reduced by increasing suitable community punishments for women convicted of non-violent offences, using custody as a last resort.¹⁰²

Conclusions

Lord Woolf has expressed the view that the guidance of the Sentencing Guidelines Council is a contributory factor in the expansion of custody because it reduces the discretion of individual judges.¹⁰³ If the reduction in discretion is allowing more consistency of sentencing, then that is all to the good. But we would argue that the root of the 'over-sentencing' problem lies, rather, in the legislative changes which have emphasized risk and persistence, and which have up-graded the importance and consequences of the breach of orders. These provisions, and the reduced discretion they have accorded, not only to those who sentence but also to those who supervise offenders, have made it difficult for the SGC to give advice which does not accord with the message of the legislation.

¹⁰⁰ See Mills A and Codd H, 'Prisoners' families' in Jewkes Y (ed), *Handbook on Prisons* (Cullompton: Willan, 2007); Codd H, *In the Shadow of the Prison* (Cullompton: Willan, 2007).; Meek J, *When Big Brother Goes Inside: the Experience of Younger Siblings of Young Men in Prison* (London: Howard League, 2006).

¹⁰¹ *The Corston Report: a review of women with particular vulnerabilities in the criminal justice system* (London: Home Office, 2007).

¹⁰² www.smartjustice.org/women/

¹⁰³ BBC News 'Too many people in jail, says top judge' 30 May 2006: http://news.bbc.co.uk/2/hi/uk_news/5028782.stm).

The politics of law and order, coupled with longer-standing attitudes in the UK as to what counts as legitimate punishment, has led to the inflation of seriousness in sentencing. The increasing public and political concern with risk management has led to a focus on the law to ensure custody – and more of it – for those deemed dangerous. At the same time, sentencing law and government policy has encouraged the use of particular forms of community ‘treatment’ and restorative justice programmes. These quite different and conflicting strands to be found in sentencing policy have not been reconciled, either theoretically or in practice. This has meant that the political and professional pressure for a greater use of community sentences and financial penalties has not led to an overall decrease in custody; those messages have been drowned out by the ‘tough on crime’ mantra. In the current climate and with the mix of sentencing rationales in the CJA 2003, the policy of bifurcation is based on a vain attempt to mix disparate and conflicting elements into a coherent whole.

Nothing less than a major effort to provide the public with a better understanding of criminal trends and sentencing issues is required. Further, a major component in revising and ‘selling’ the sentencing framework is a re-invigoration of the fines system with a sensibly planned introduction of unit fines, efficient enforcement procedures but realistic information about ability to pay. Only then can the whole sentencing framework be moved downwards so that the custody line itself is set lower. What is equally important is that the dangerousness provisions introduced by the CJA 2003 are radically re-thought.