ANNEX A

IMPOSITION GUIDELINE COMMUNITY ORDER REQUIREMENTS TABLE

Requirement	Requirement overview	Volume / Length range	Considerations / Factors to consider
Unpaid work (UPW)		40 – 300 hours to be completed within 12 months	
Rehabilitation activity requirement (RAR)	RAR's provide flexibility for responsible officers in managing an offender's rehabilitation post sentence. The court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete. The responsible officer will decide the activities to be undertaken. Where appropriate this requirement should be made in addition to, and not in place of, other requirements. Sentencers should ensure the activity length of a RAR is suitable and proportionate.		
Programme requirement		Specify the number of days	
Prohibited activity requirement			Must consult National Probation Service
Curfew requirement		For an offence of which the offender was convicted on or after 28 June 2022: 2 – 20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; and maximum term 2 years; or	In all cases must consider those likely to be affected; see note on electronic monitoring below

		For an offence of which the offender was convicted before 28 June 2022: 2 – 16 hours in any 24 hours; maximum term 12 months	
Exclusion requirement	from a specified place/places	maximum period 2 years: may be continuous or only during specified periods	see note on electronic monitoring below
Residence requirement	to reside at a place specified or as directed by the responsible officer		
Foreign travel prohibition requirement		not to exceed 12 months	
Mental health treatment requirement	may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist.		The court must be satisfied: (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but is not such as to warrant the making of a hospital or guardianship order; (b) that arrangements for treatment have been made; (c) that the offender has expressed willingness to comply
Drug rehabilitation requirement	Treatment can be residential or non-residential, and reviews must be attended by the offender (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months).		the court must be satisfied that the offender is dependent on or has a propensity to misuse drugs which requires or is susceptible to treatment. The offender must consent to the order
Alcohol treatment requirement	residential or non-residential;		must have offender's consent; court must be satisfied that the offender is dependent on alcohol and that the dependency is susceptible to treatment

Alcohol abstinence and monitoring requirement			(where available)
For example: *Electronic monitoring requirements*	*Electronic monitoring or 'tagging' can monitor an offender's location or conditions of a court order.* *The electronic compliance monitoring requirement must be imposed with another requirement such as curfew or exclusion requirement.* *The electronic whereabouts monitoring requirement may be imposed without the imposition of another requirement.*		*Ensure safeguarding/risk assessments are done as necessary particularly for curfew.*

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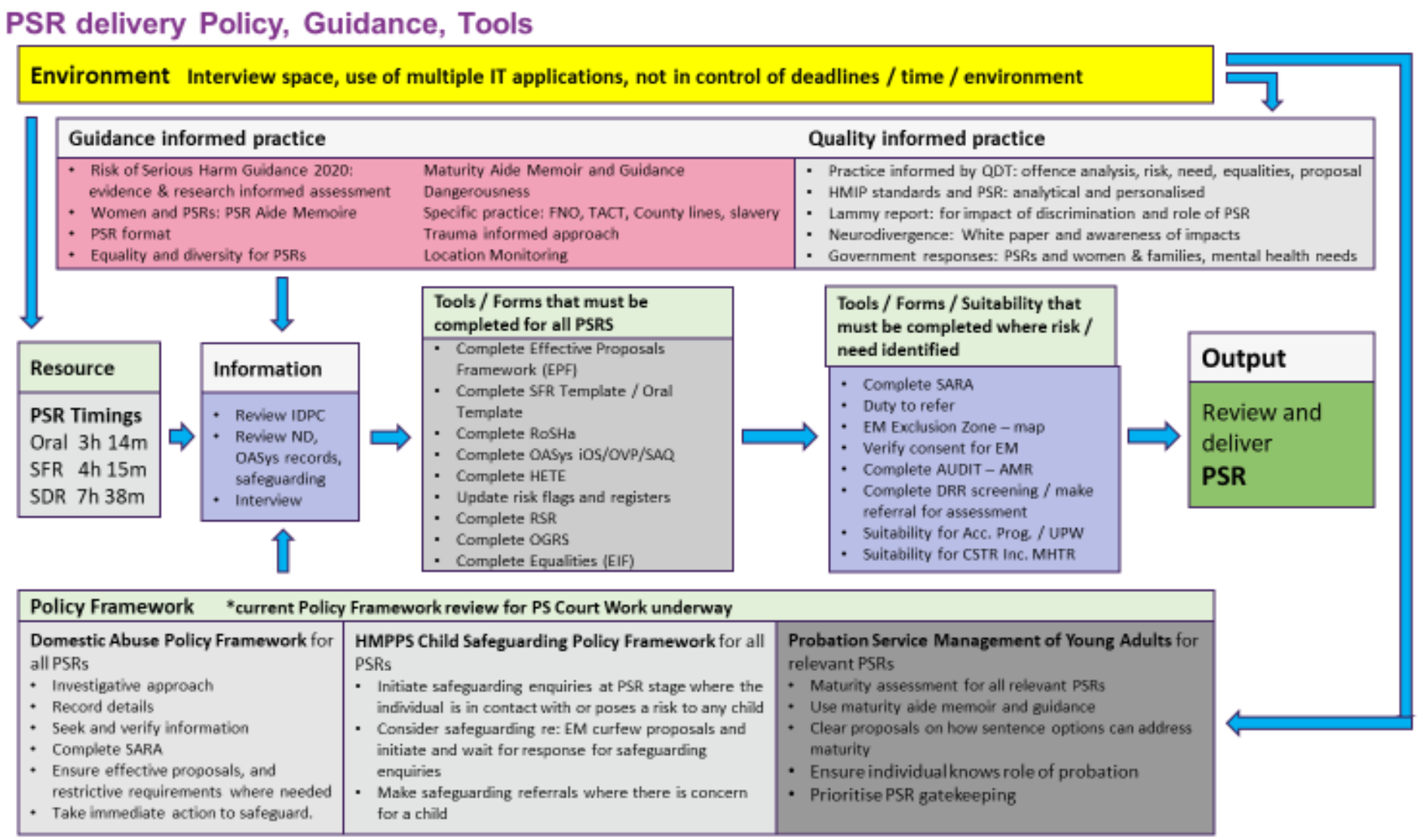
ANNEX B: PSR DELIVERY MAP



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Sentencing Council

The Effectiveness of Sentencing Options on Reoffending

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This information is available on the Sentencing Council website:
www.sentencingcouncil.org.uk

The views expressed are those of the authors and are not necessarily shared by the Sentencing Council (nor do they represent Sentencing Council or Government policy).

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Contents

1. Summary

The Sentencing Council for England and Wales promotes a clear, fair, and consistent approach to sentencing by issuing sentencing guidelines and explanatory materials. The Council is required by the Coroners and Justice Act 2009 to have regard to the cost of different sentences and their relative consequentialist (i.e. forward-looking) effectiveness. While these are not the only aims of sentencing (e.g. punishment is another aim), they were a key point highlighted in Professor Sir Anthony Bottoms' report (2018) on how the Council can best exercise its statutory functions.[1] The Council's commitment to this area of work has recently been restated in its public strategic objectives for 2021-2026.[2] It has committed to publishing research in this area and has an overarching objective to "*consider and collate evidence on the effectiveness of sentencing*."

Accordingly, this literature review was commissioned by the Council to facilitate work and thinking on the effectiveness of sentencing. Notably, this entails a key focus on reoffending and related matters such as desistance and reintegration, deterrence, cost-effectiveness, and equality.

1.1 Key findings

What makes a sentence effective?

- What makes a sentence 'effective' in consequentialist terms is a challenging question made more difficult because key terms (such as reoffending, deterrence, rehabilitation, desistance, and reintegration) take on different meanings in various contexts. Therefore, care is needed when using seemingly intuitive terms.
- The literature suggests several broad objectives that an effective sentence may achieve or facilitate through rehabilitative effects. Foremost amongst these are the related goals of attaining reduced reoffending and promoting desistance and reintegration.
    - Reduced reoffending is an important objective that can facilitate desistance and reintegration. While reducing reoffending is important, in the absence of reintegration or desistance, reductions in offending are less likely to persist. Yet, reoffending can be a more quantifiable metric which has advantages – though care must still be taken as there are different definitions of reoffending.
    - Reintegration into the conventional social world beyond the simple act of reintroducing into the community by virtue of their release and desistance from offending are ambitious objectives sentencing may aim to promote. While there are multiple complex definitions, these terms are generally considered as going beyond a short-term reduction or lull in offending. They can, therefore, entail significant and lasting changes on the part of the offender. However, while strategies focused on sentencing can play a pivotal role, fully supporting desistance and reintegration goes beyond sentencing alone.

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[1] Anthony Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions' (Sentencing Council of England and Wales 2018) <https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf>.

[2] 'Strategic Objectives 2021-2026' (Sentencing Council of England and Wales 2021) <https://www.sentencingcouncil.org.uk/publications/item/strategic-objectives-2021-2026/>.

- Deterrence is another consequentialist goal sentencing may seek to achieve and has a statutory basis as part of the purpose of reducing crime. Deterrent sentences can seek to affect the general population to dissuade them from offending, or the specific offender to dissuade them from reoffending.
    - The evidence does not suggest that using more severe sentences (particularly sentences of immediate imprisonment over other disposals) has significant deterrent effects on the person sentenced or the general population. However, more evidence is needed to assess the deterrent effects of suspended custodial sentences, rather than immediate imprisonment, on those subject to such an order.

How is effectiveness researched?

- Research on the effectiveness of sentencing is diverse. Studies have used quantitative, qualitative, and mixed methods research designs. This diversity of approaches is needed to show what effects sentences have (or do not have) and to understand the reasons for this.
- The most important quantitative studies are those using appropriate statistical techniques to control for differences between offences and offenders. There are perils to inferring too much from data without sufficient controls.
- Statistics on "proven reoffending" are derived from official data. Aspects of reoffending to consider include the proportion who reoffend, the number of reoffences per person, and the seriousness/ harm of reoffending. However, as above, (proven) reoffending is not the only metric and it has limitations.
- In drawing comparisons between different studies on effectiveness careful attention is needed to scrutinise any methodological differences or varying definitions of phenomena such as "reoffending." Such differences can make it difficult to compare the results of various studies. Additionally, some studies use different terminology to refer to sentences.

Which sentences are effective?

- When researching what sentence will be most effective at achieving positive outcomes, considerations include the offender's characteristics (e.g. whether their offending may be linked to mental disorders or addictions and what treatments are available), the nature of the offence (e.g. such as offences committed in a domestic context raise distinct considerations), and the specific interventions available (e.g. various requirements may be part of a community order). There are vast bodies of research on many of these factors.
- Some offences are linked to higher rates of reoffending and a few persons stubbornly engage in low harm, high volume offences (e.g. repeat shoplifting). These offenders may require special consideration as to how to facilitate their desistance journey and reduce reoffending.
- The evidence strongly suggests that short custodial sentences under twelve months are less effective than other disposals at reducing re-offending. There is little evidence demonstrating any significant benefits of such sentences. Indeed, there is a reasonable body of evidence to suggest short custodial sentences can make negative outcomes (such as reoffending) worse.
- The current evidence does not suggest that increasing the length of immediate prison sentences is an effective way to reduce reoffending. Some research suggests that what happens during a custodial sentence (e.g. rehabilitative interventions) may matter more than sentence length.

- Community sentences and suspended sentences appear to have an advantage in avoiding some of the criminogenic effects of imprisonment (e.g. negative peer associations within prisons).
- Certain requirements of community sentences or suspended sentences may be more effective at promoting positive outcomes than others. Further research on the use of (and barriers to the use of) various requirements would be beneficial.
- Some evidence suggests that the effectiveness of sentencing will vary for different ethnic and gender groups. Results for ethnicity are mixed, likely due to methodological differences in study design. Still, there is evidence that the effects of imprisonment for women are different than for men and that there are differences in how best to address offending. Additionally, any disparities in sentencing between groups will have implications for effectiveness.

What are the implications?

- The evidence against the effectiveness of short custodial sentences is amongst the most robust. There is also good evidence on what is effective in certain circumstances (e.g. cases involving addiction or mental health issues).
- As it emerges, further research on the effects of specific disposals (e.g. the effect of various requirements of suspended sentence orders or community orders in terms of matters such as reoffending, net-widening, and cost-effectiveness) will be beneficial. For example, the Council will consider undertaking work with offenders to understand which elements of their sentence may have influenced rehabilitation.[3] Additionally, further research into "what works" for different sectors of the population (e.g. different ethnicities and genders) would be beneficial.
- Some considerations about what is effective will likely need to be taken on a per-guideline/ offence basis in light of the relevant disposal options, the barriers to the use of relevant disposal options, and the typical profile of persons committing the offence (e.g. some offences may be associated with certain defendant needs such as addiction or mental disorders).

[3] 'Strategic Objectives 2021-2026' (n 2) 12.

2. Introduction

2.1 Background

The Sentencing Council for England and Wales promotes a clear, fair, and consistent approach to sentencing by issuing sentencing guidelines and explanatory materials. Guidelines aim to provide clear structures and processes for judges and magistrates to use in court and to promote awareness and understanding of sentencing among victims, witnesses, offenders, and the public. This purpose is underpinned by the statutory duties for the Council that are set out in the Coroners and Justice Act 2009 (CJA 2009). The guidelines can be offence specific[4] or overarching/ cross-cutting that can apply across a wide range of offences.[5]

As part of its statutory duties, the Council is required to have regard to the cost of different sentences and their relative effectiveness. These duties (as well as others) appear in two sections of the CJA 2009: in Section 120, where the Council must have regard to the cost of different sentences and their relative effectiveness in preventing reoffending, and in Section 129, which covers promoting awareness of this. The Council's approach to this in recent years has been to produce regular internal documents outlining the latest evidence which can then be brought to bear when developing guidelines. It also provides information on the operation of sentencing and a useful glossary to which readers of this review can refer.[6]

The Council's commitment to this area of work has recently been restated in its public strategic objectives for 2021-2026[7] which detail the Council's priorities and actions for the next five years. As part of this, the Council has committed to publishing work in this area and has an overarching objective to "*consider and collate evidence on effectiveness of sentencing*." The effectiveness of sentencing was also a point highlighted in Professor Sir Anthony Bottom's report (2018) on how the Council can best exercise its statutory functions.[8] To this end, the Council commissioned this literature review to enable it to facilitate the consideration of the most up-to-date evidence when developing and revising guidelines.

In line with the project specification, we focus on several consequentialist objectives of sentencing. We place a key focus on reducing reoffending and related matters such as promoting desistance, deterring future criminal conduct, cost-effectiveness, and equality. The questions posed by the Council in commissioning this review (in essence asking, "what works?"), are amongst the most complex in the field of sentencing scholarship. The range of what we consider relevant evidence is expansive given the diversity of offences, offenders, and court disposals. This heterogeneity also means that broad generalisations can only go so far. A particular piece of research may focus on certain offences, certain types of offenders, or rely on specific data and its generalisability, or commensurability with other research needs to be considered with care in each case. Additionally, the

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[4] For example, concerning sentencing the offence of assault.

[5] For example, concerning the reduction in sentence for a guilty plea.

[6] The glossary is available at: https://www.sentencingcouncil.org.uk/research-and-resources/glossary/

[7] 'Strategic Objectives 2021-2026' (n 2).

[8] Anthony Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions' (n 1).

research providing evidence and the disposals available to courts are both likely to develop over time. Therefore, this work should be periodically updated to provide an ongoing source of information for the Council and sentencers.

2.2 The aims of sentencing

An effective sentence must be linked, in some way, to the aims of sentencing. There are a disparate range of purposes that a sentence may serve.[9] In passing a sentence for someone over 18 years old, a court must have regard to the purposes of sentencing set out in Section 57 of the Sentencing Act 2020: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.[10]

Several of these purposes may be pursued by a court at the same time in a given case. For example, some sentences may seek to be punitive while simultaneously intending to rehabilitate offenders. However, in some cases, the pursuit of one specific aim may exclude or limit the pursuit of another.[11] In these instances, important decisions must be made about which aim(s) to prioritise. It is for the sentencer, aided by guidance from the Sentencing Council and the Court of Appeal, to ascertain the appropriate aims to pursue based on all the facts and circumstances of the case before them.

Given the various legitimate aims of sentencing, depending on the particulars of a given case, the criteria for what makes a sentence effective in obtaining its purpose(s) can vary markedly. The existence of different conceptions of effectiveness are important since how effectiveness is understood and operationalised in the context of law, policy, and practice can significantly impact the sentencing process.[12]

This report critically analyses the evidence base concerning the effectiveness of sentencing in, generally, consequentialist (i.e. forward-looking) terms. Specifically, we will examine effectiveness in terms of the related questions pertaining to desistance, deterrence, reoffending, cost and effectiveness, and equality. In doing so, we will outline how these questions have been explored in the literature and the general issues identified. Due to time constraints, we place a particular focus on cases concerning adult offenders on or near the custodial threshold as the decision of whether a sentence should include a period of incarceration is often the most difficult one to make given its consequences to the individual and society.[13]

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[9] Andrew Von Hirsch and Julian V Roberts, 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions' [2004] Criminal Law Review 639, 642.

[10] When sentencing someone under 18 years old the court must have regard to the aim of the youth justice system to prevent offending (or re-offending). The duties in relation to a person under 18 years old are contained in other statutory provisions and the Sentencing Act 2020 section 58 expressly retains them.

[11] For example, immediate imprisonment may achieve a retributive aim relevant to punishment but be less effective for reform and rehabilitation than another type of penalty.

[12] "It is important to reach agreement on the aims of sentencing and on any further policies and principles that are to be pursued. Agreement on these issues is fundamental to the drawing up of coherent sentencing guidance and is also a necessary point of reference for sentencers when exercising their discretion". Andrew J Ashworth, 'Sentencing Reform Structures' (1992) 16 Crime and Justice 181, 233–234.

[13] In terms of dates and time constraints, our work commenced in March 2022. The final report was submitted in April for an internal peer-review by Professor Julian Roberts (Oxford) and then to the Council for external peer-review.

2.3 Methodology

This review engages the research literature on sentencing in a number of domains. We examined all relevant academic and library databases, including Westlaw, LexisNexis, HeinOnline, JStor, PubMed, Scopus, and The British Library's catalogue. This search was guided by the expertise of our team members and also by keywords and terms derived from the Sentencing Council project specification and in consultation with the Office of the Sentencing Council. We searched over a period of 20 years (2002-2022). However, in line with the project's aims to examine the current state of knowledge, our focus is on the most recent data. We also examined government sources for reports and publications (e.g. Ministry of Justice (MoJ) data) which may not enter the academic databases and other reputable sources of citations (e.g. SSRN and Google Scholar). Moreover, we spoke to experts in the field to further enhance the identification of key issues and would like to give thanks to Dr Rachel McPherson (University of Glasgow), Professor Fergus McNeill (University of Glasgow), our internal reviewer Professor Julian Roberts (University of Oxford), and our anonymous external reviewer (a professor who is an expert in the field of sentencing and who is familiar with the aims and objectives of the Council).

The literature review covered research related to various topics: such as factors associated with reoffending and desistance; sentencing factors associated with effects on the rates of reoffending; the (direct and indirect) costs of different types of sentences currently available in England and Wales; and how sociodemographic characteristics impact the foregoing issues. Quantitative, qualitative, and mixed design studies were all considered relevant and able to offer different perspectives on the complex questions that arise in considering the effectiveness of sentencing. The review strongly focused on literature in England and Wales, though findings from research conducted in other countries were considered to the extent they could be informative.

Given the profoundness of the questions to which this report is addressed, there are a vast number of relevant research works and sources. For example, a simple search for academic material on "desistance" returned 27,800 results in one query and a similarly simplistic search for "reoffending" returned 44,600.[14] Hence, we had to be selective in our approach given the time constraints of this review. We used more complex search criteria and Boolean operators (e.g. specifying England and Wales) and focused on more recent research available at the time of writing in early 2022. This still left a vast number of sources.[15] Once the search was narrowed, we reviewed abstracts to select sources for further consideration. We also relied on our knowledge of the field and consulted with academic experts to further guide our search.

When considering whether the quality of a source was sufficient to be included, we exercised professional judgment. In making this decision we took into account various factors: such as looking at the credentials of the author(s); whether the work is peer-reviewed; official statistics with appropriate quality controls,[16] observing if there is a match between credentials and the research design employed; reviewing if the methodologies used are appropriate to the research question(s) posed; assessing the overall rigour of the

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[14] This was a single database and we queried multiple databases.

[15] For example, searching for 'reoffending' and 'England' returned about 7,930 results from 2018 onwards in one query.

[16] Governmental statistics on crime can vary in terms of their reliability because of such issues as the regularity with which they record crime, resource availability, ability to merge different data sources, and the impact of periodic events such as internal instability of the country or natural disasters.

research; considering if there is any reason for the author(s) to have any biases or conflicts of interest; scrutinising the reasonableness of conclusions based on the evidence provided; and evaluating the overall transparency of the source.

We analyse the key implications derived from our review under the headings below to provide a resource for those who seek to evaluate the effectiveness of sentencing options in England and Wales. Additionally, we provide an overview of some of the common methods used in the research and their strengths and limitations.

3. Sentencing as rehabilitation: desistance, reintegration, and reduced reoffending

Desistance from offending, *rehabilitation*, *reintegration*, and reduced *reoffending* (sometimes known as *recidivism*) are common terms in both policy and academic literature. These terms represent aspirations for positive criminal justice outcomes: what some argue makes a sentence effective. Therefore, these concepts are vital to assessing evidence on the effectiveness of a sentence in consequentialist terms. However, difficulty can arise as these terms entail complex, and often interlinked, processes. Consequently, to facilitate analysis, here we briefly outline the concepts of desistance, rehabilitation, reintegration, and reoffending.[17]

3.1 Desistance

Desistance from offending is a key term used in discussions concerning the effectiveness of sentencing. However, indeterminacy in the term's definition poses "*one obstacle to understanding desistance from crime*."[18] For some, desistance is a linear path leading to a complete cessation of offending. For many, however, desistance is considered to be a process and there may be lapses along the way: "*those who have lived in both the criminal and the conventional social worlds may walk a zig-zag path between the two*."[19]

This debate over what constitutes desistance matters if it is to be one measure of the effectiveness of a sentence. Too lax a definition will see desistance claimed to be achieved without sufficiently significant changes. Too strict a definition will see notable progress neglected and effective strategies labelled as failures or abandoned. As an illustration of how desistance might be defined, recent research by MoJ defined desistance in relation to reoffending risk:[20]

> *Desistance, in this analysis, was analytically defined as the number of years since completing a custodial sentence or a community order without a further criminal conviction or caution, until the risk of any further conviction or caution (as measured by a hazard rate) fell below the overall criminal risk posed by the general population. A reasonable criminal risk for the general population was determined at 2% – meaning that, on average, there would be a 2% chance someone without a criminal conviction will obtain one.*

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[17] The complexity of the topic is such that entire books have been dedicated to it. For example, see Stephen Farrell and Adam Calverley, *Understanding Desistance from Crime: Emerging Theoretical Directions in Resettlement and Rehabilitation* (Open University Press 2006).

[18] Shadd Maruna, *Making Good* (Washington, DC: American Psychological Association 2001).

[19] Daniel Glaser, *The Effectiveness of a Prison and Parole System* (Indianapolis: Bobbs-Merrill 1964) 54. See also Fergus McNeill, 'Four Forms of "Offender" Rehabilitation: Towards an Interdisciplinary Perspective' (2012) 17 Legal and Criminological Psychology 18.

[20] Noah Uhrig and Katie Atherton, 'Reoffending Following Custodial Sentences or Community Orders, by Offence Seriousness and Offender Characteristics, 2000–2018' (Ministry of Justice 2020) s 1.2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919564/reoffending-custodial-sentences-community-orders-research-report.pdf>.

Scope and time constraints mean that we cannot go much beyond highlighting the complexity of desistance here.[21] Yet, we can note there are other ways it might be defined. For example, Maruna and Farrall (2004) have argued that concepts of primary desistance (an initial break from offending) and secondary desistance (a fundamental progression from any lull in offending or crime-free gap to an identity as a non-offender) should be considered.[22] McNeill (2016) has also identified a third type of desistance pertaining to a person's perception of belonging in the community and how the community views their belonging (called 'tertiary desistance').[23] Additionally, Nugent and Schinkel (2016), in their research, identify three types of desistance: act-desistance (non-offending), identity desistance (internalisation of identity as a non-offender), and relational desistance (recognition by others as a non-offender).[24] Research such as this emphasises the importance of a nuanced view.

While we cannot explore desistance further, we highlight that it can be understood in different ways, take place over a long period of time,[25] and entail internal cognitive processes. Measuring desistance also *"poses a particular problem as it is essentially an issue of 'absence' rather than of 'presence'. That is to say, that an individual is classified as a desister not on the basis of having a particular characteristic, but rather because of the continued absence of this characteristic over a period of time.*"[26]

As such, desistance can be hard to measure and other, narrower, metrics may be used in addition to (or as a proxy for) desistance. Reoffending is one such related metric and will be discussed in this review. However, before that, it is worth highlighting that desistance has links to other key concepts relevant to sentencing's effectiveness. Notably:

> *Studying and supporting desistance eventually forces us to address the complex question not of what people desist from, but what they desist to. In other words, if desistance is a process or a journey, we are eventually compelled to seek to understand and articulate its destination.*[27]

This question of where desistance leads merits a brief discussion of rehabilitation as a vehicle to get there and reintegration as one possible destination.

3.2 Rehabilitation and reintegration

Rehabilitation is another important term that has varied meanings in criminal justice contexts. Indeed, "*the term is often used without a clear referent, and in ways that are consistent with widely divergent conceptions*."[28] For example, rehabilitation can refer to

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[21] The desistance literature itself is vast.

[22] Shadd Maruna and Stephen Farrall, 'Desistance from Crime: A Theoretical Reformulation', *Kolner Zeitschrift fur Soziologie und Sozialpsychologie* (2004) 174. See also, Fergus McNeill, 'Desistance and Criminal Justice in Scotland' [2016] Crime, Justice and Society in Scotland 200.

[23] Fergus McNeill, 'Desistance and Criminal Justice in Scotland' [2016] Crime, Justice and Society in Scotland 200; Hannah Graham and Fergus McNeill, 'Desistance: Envisioning Futures' in Pat Carlen and Ayres França (eds), *Alternative Criminologies* (Routledge 2017).

[24] Briege Nugent and Marguerite Schinkel, 'The Pains of Desistance' (2016) 16 Criminology & Criminal Justice 568.

[25] David Farrington, 'The Duration of Criminal Careers: How Many Offenders Do Not Desist up to Age 61?' (2019) 5 Journal of Developmental and Life-Course Criminology 4.

[26] Farrell and Calverley (n 17) 17.

[27] Fergus McNeill and Marguerite Schinkel, 'Prisons and Desistance', *Handbook on Prisons* (Routledge 2016) 610.

[28] Lisa Forsberg and Thomas Douglas, 'What Is Criminal Rehabilitation?' (2020) 16 Criminal Law and Philosophy 103 <https://doi.org/10.1007/s11572-020-09547-4>.

offenders (something they achieve such as desistance or a reduction in reoffending)[29] or processes offenders undergo and their effects (such as sentences).[30] The same is true for reintegration (such as into the conventional social world), which some argue should be a key objective of sentencing and perhaps the ultimate aspiration for positive criminal justice outcomes.[31] Indeed, "*reducing reoffending through rehabilitation and reintegration*" is part of the 2021 Kyoto Declaration on advancing crime prevention, criminal justice, and the rule of law.[32]

While we do not explore these concepts in detail, we note that some have undertaken work to provide conceptual clarity through identifying and analysing four related forms of rehabilitative processes that seek to achieve four forms of reintegration: personal, legal/ judicial, moral, and social.[33] Notably, these forms of reintegration go beyond the transition from prison to communities and are relevant to all disposals. For example, legal/ judicial rehabilitation relates to the legal situation of the (ex-)offender and matters such as criminal records and how this affects employment prospects and other opportunities;[34] moral rehabilitation relates to mending fractured relationships between offenders, victims, and communities. Achieving all these (or other comprehensive) forms of rehabilitation and reintegration would require a coherent strategy and multi-agency cooperation such as between the Sentencing Council, and MoJ.[35] Coordination is necessary because, while sentencing can play a vital role (e.g. restorative justice may be used pre-sentence or as part of community and suspended sentences to promote moral rehabilitation),[36] it will need further support. We say no more on this point here and simply reiterate that supporting

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[29] As an example, if someone stops offending, we might say "they have been rehabilitated."

[30] As an example, a 'drug rehabilitation requirement' may be said to have 'rehabilitative effects'.

[31] For instance, du Bois Pedain argues for reintegration and that the aims of sentencing should be "focused not just on the seriousness of the offending behaviour but also on the question what undergoing the punishment will mean for and do to the offender." Antje Du Bois-Pedain, 'Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (1st edn, Hart Publishing 2017) 200 <http://www.bloomsburycollections.com/book/criminal-law-and-the-authority-of-the-state/ch9-punishment-as-an-inclusionary-practice-sentencing-in-a-liberal-constitutional-state/> accessed 15 June 2017.

[32] 'Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development' (United Nations Office on Drugs and Crime 2021) <https://www.unodc.org/documents/commissions/Congress/21-02815_Kyoto_Declaration_ebook_rev_cover.pdf>.

[33] See Fergus McNeill and Hannah Graham, 'Conceptualizing Rehabilitation: Four Forms, Two Models, One Process, and a Plethora of Challenges', *The Routledge Companion to Rehabilitative Work in Criminal Justice* (Routledge 2019).

[34] On criminal records and their effects on offenders, see Alfred Blumstein and Kiminori Nakamura, 'Redemption' in an Era of Widespread Criminal Background Checks' (2009) <https://www.ojp.gov/pdffiles1/nij/226872.pdf>.

[35] *"There is scope for enhanced communication between the two bodies [the Council and MoJ] on effectiveness issues."* Anthony Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions' (n 1) para 59.

[36] The White Paper on sentencing noted that "*we believe Restorative Justice is an important part of the justice system and has significant benefits both for the victim and for the rehabilitation of offenders*." See 'A Smarter Approach to Sentencing' (Ministry of Justice 2020) para 363 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf>.

'Restorative Justice and the Judiciary' (Restorative Justice Council 2015) <https://restorativejustice.org.uk/sites/default/files/resources/files/Restorative%20justice%20and%20the%20judiciary%20-%20information%20pack.pdf>; Amy Kirby and Jessica Jacobson, 'Evaluation of the Pre-Sentence RJ Pathfinder' (Institute for Criminal Policy Research, Birkbeck, University of London 2015) <https://core.ac.uk/download/pdf/141223924.pdf>; 'Pre-Sentence Restorative Justice: Secretary of State Guidance for Pre-Sentence Restorative Justice' (Ministry of Justice 2014) <https://www.gov.uk/government/publications/pre-sentence-restorative-justice>.

reintegration is arguably a key task for criminal justice interventions and that a coherent strategy is necessary.[37]

Setting aside the nuance of the terms and the complexity of their inter-relationships,[38] basic concepts of rehabilitative effects (broadly defined) are also worth briefly highlighting here where they invoke a causal connection between sentences and positive outcomes such as a reduction in reoffending, desistance, or reintegration. Keeping causal connections in mind is important as there are many reasons that a person may, for example, desist from offending. Some of these factors may have little to do with the criminal justice system and the sentence given. Indeed, some relevant factors may be largely beyond the control of a sentencing court. For example, social barriers[39] and internal attitudes may play important roles in desistance but be difficult to affect via sentencing alone and require a broader strategy.[40] Moreover, in some cases, the effect of a sentence may be 'criminogenic' in that it makes desistance less likely by interfering with factors linked to positive outcomes: e.g. imprisonment may interfere with employment and damage social ties.[41]

In other words, positive outcomes (such as desistance or reintegration) may be due to a combination of the rehabilitative effects (or despite criminogenic effects) of a sentence and other factors unrelated to the sentence. Unpacking these factors, which can interact in complex ways,[42] to establish a causal connection is one of the key challenges for the sentencing evidence base. As an illustration, we will discuss age as one key factor beyond the control of the justice system that evidence suggests has a bearing on offending.

3.3 Age-crime curve and neurological development

Age has been recognised as a relevant risk factor in terms of reoffending. This link between age and crime is known as the age-crime curve. This age-crime curve is widely recognised[43] as the typical[44] pattern whereby children commit crimes at higher rates as

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[37] For an analysis of the ('muted') impact of criminological research on penal policy and the challenges of translating research into policy, see Anthony Bottoms, 'Desistance Research and Penal Policy' in Tom Daems and Pleysier (eds), *Criminology and Democratic Politics* (Routledge 2020).

[38] For further information on desistance, see Michael Rocque, *Desistance from Crime: New Advances in Theory and Research* (Springer 2017).

[39] For instance, ex-offenders may be stigmatised in communities and find it harder to secure employment, stable housing, and prosocial friendships.

[40] Thomas P LeBel and others, 'The `Chicken and Egg' of Subjective and Social Factors in Desistance from Crime' (2008) 5 European Journal of Criminology 131; Marguerite Schinkel, 'Hook for Change or Shaky Peg? Imprisonment, Narratives and Desistance' (2015) 7 European Journal of Probation 5. Additionally, on the role of social structures, see Stephen Farrall, Anthony Bottoms and Joanna Shapland, 'Social Structures and Desistance from Crime' (2010) 7 European Journal of Criminology 546.

[41] See Section 5.

[42] For example, employment status may be indirectly affected by a criminal conviction and the disposal type.

[43] The current English and Welsh general guideline "Sentencing Children and Young People" has been in effect since 2017: see https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/. The effect of age on offending has also recently been recognised in Scotland and was the rationale for a general guideline on sentencing young persons that came into effect in January 2022. See, Suzanne O'Rourke and others, 'The Development of Cognitive and Emotional Maturity in Adolescents and Its Relevance in Judicial Contexts' (Scottish Sentencing Council 2020) <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>.

[44] Though these are also complex patterns where 'nuance' and regard to offender specifics may be needed. See Susan McVie, 'Patterns of Deviance Underlying the Age-Crime Curve: The Long Term Evidence' (2005) 7 British Society of Criminology e-journal 1.

their age increases into the teens, but then the crime rate peaks at about ages 18-20, with the majority of adolescents who commit crime desisting as they mature into adulthood.[45]

The age-crime curve is in part explained by the neuromaturation process as individuals mature into adulthood. The human brain generally is not fully developed until an individual is in their mid to late 20s.[46] Until synapses between and within brain structures become better connected, young people's cognitive reactions to emotional events may be delayed, which in turn impedes the ability to think and act rationally.[47] The prefrontal cortex, the executive centre of the brain, is generally the last region to evolve.[48] The prefrontal cortex aids in regulating impulse control, providing focus, and allowing for cognitive flexibility.[49] As the brain develops, there tends to be a shift from reliance on the subcortical (limbic) circuitry regarding emotions toward the cortical (prefrontal) circuitry providing control mechanisms.[50] Higher levels of executive functioning as young offenders mature are associated with a transition to desistance, even without significant interventions.[51] Brain maturation may also manifest in personality changes related to desistance, such as increases in self-discipline, conscientiousness, and emotional stability.[52] Changes in certain neurotransmitters are also relevant to higher rates of offending by individuals in their late teens and early twenties. Productions of dopamine[53] and norepinephrine, which are associated with aggressive and antisocial behaviour, begin to decrease in early adulthood.[54] The inhibitory neurotransmitter serotonin[55] increases from the later teenage years into adulthood, with higher levels associated with regulating mood and emotions.[56]

The age-crime curve for England and Wales is shown in Figure 1. It can be seen that offending generally peaks between 18-20 years old and reduces over time for both males and females. However, in terms of effectiveness of sentencing, while ageing itself cannot be affected, it has been argued that "*we should understand this not as a spontaneous and inevitable physiological and psychological process associated with ageing, but rather as a social process which can be enabled or impeded by a person's associates and*

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[45] BJ Casey and others, 'Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders' (2022) 5 Annual Review of Criminology 321; Robert Eme, 'Life Course Persistent Antisocial Behavior Silver Anniversary' (2020) 50 Aggression and Violent Behavior 101344.

[46] Michael Rocque, 'The Lost Concept: The (Re) Emerging Link between Maturation and Desistance from Crime' (2015) 15 Criminology & Criminal Justice 340. For further analysis of the age-crime curve outside the USA, see Ben Matthews and Jon Minton, 'Rethinking One of Criminology's "Brute Facts": The Age–Crime Curve and the Crime Drop in Scotland' (2018) 15 European Journal of Criminology 296. Concerning England and Wales, see Nick Morgan, 'The Heroin Epidemic of the 1980s and 1990s and Its Effect on Crime Trends - Then and Now: Technical Report' (Home Office 2014) n 26 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/332963/horr79tr.pdf>

[47] Anthony Walsh and Cody Jorgensen, 'Evolutionary Theory and Criminology', *The Oxford Handbook of Evolution, Biology, and Society* (OUP 2018) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190299323.001.0001/oxfordhb-9780190299323-e-35>.

[48] Danielle L Boisvert, 'Biosocial Factors and Their Influence on Desistance' (National Institute of Justice 2021) <https://www.ojp.gov/pdffiles1/nij/301499.pdf>.

[49] Boisvert (n 48).

[50] Casey and others (n 46).

[51] Boisvert (n 48).

[52] Casey and others (n 45).

[53] Dopamine is a neurotransmitter tied to reward-seeking behaviour.

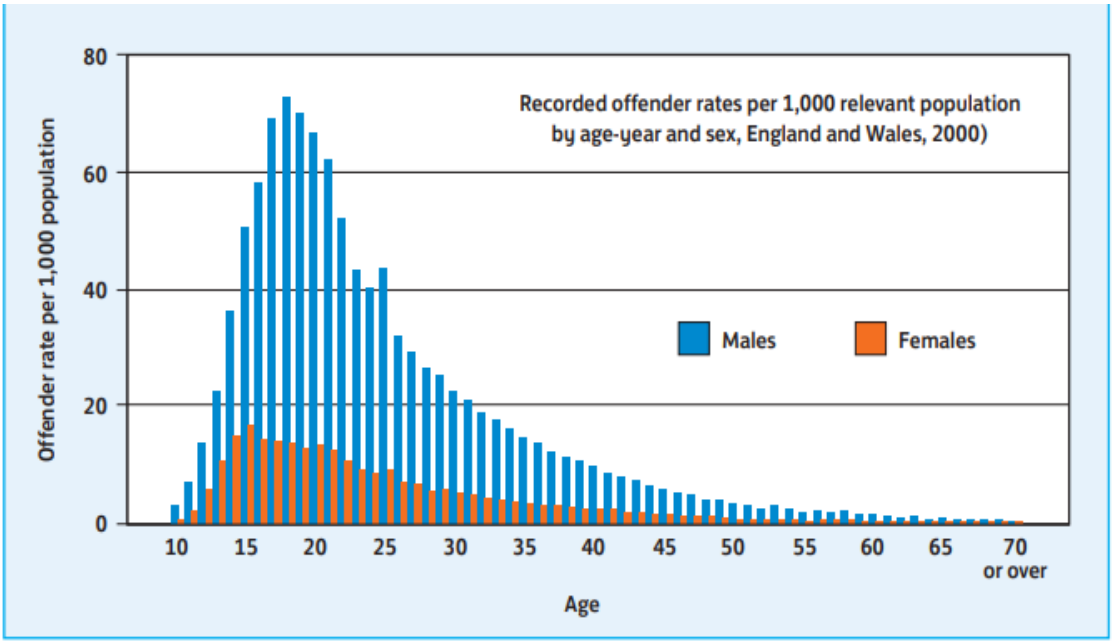
[54] Boisvert (n 48); Claire Nee and Stephanos Ioannou, 'The Neuroscience of Acquisitive/Impulsive Offending', *The Wiley Blackwell Handbook of Forensic Neuroscience* (John Wiley & Sons, Ltd 2018) <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118650868.ch14>.

[55] Serotonin is a neurotransmitter that regulates mood and assists in the cognitive process of controlling impulses and delaying gratification.

[56] Boisvert (n 48); Nee and Ioannou (n 54).

environments."[57] On this basis, by enabling social maturation, and avoiding impeding it, sentences may be able to push the offending in Figure 1 towards the horizontal axis (reducing the volume of reoffending in a criminal career of a given length) or towards the vertical axis (reducing the length of the criminal career).[58]

Figure 1: Age-Crime Curve for England and Wales 2000[59]



3.3.1 The centrality of the individual

In advance of the discussion to come, we note that the trend towards recognising offenders' agency has somewhat shifted rehabilitation efforts from a model of 'doing things to' offenders in terms of treatments and towards a model where the emphasis is on 'doing things with' offenders.[60] Additionally, there may be certain needs or risks that are especially important to target in a disposal (e.g. substance abuse).[61] A recent focus has been on trauma-informed correctional practices considering that studies find a trauma history (in childhood or adulthood) is a relatively common criminogenic risk factor in prison populations.[62] Moreover, when looking at key targets for interventions, it should also be noted that the ability of a disposal to bring about positive outcomes has limits. Where a sentence cannot meaningfully affect risk factors such as those relevant to reoffending (i.e. static risk factors such as age, sex, and prior offending history), an effective disposal may be one that does less to ensure the sentence does not have a criminogenic effect such as

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[57] McNeill and Graham (n 33) 16.

[58] For an analysis of how sentences may promote desistance and their limits, see Michaela Soyer, 'The Imagination of Desistance: A Juxtaposition of the Construction of Incarceration as a Turning Point and the Reality of Recidivism' (2014) 54 The British Journal of Criminology 91.

[59] Anthony Bottoms, 'Crime Prevention for Youth at Risk: Some Theoretical Considerations' (2006) 68 Resource material series 21, 21.

[60] Fergus McNeill, 'A Desistance Paradigm for Offender Management' (2006) 6 Criminology & Criminal Justice 39, 41.

[61] For an overview of the risk-need-responsivity (RNR) model, see James Bonta and Donald Arthur Andrews, *The Psychology of Criminal Conduct* (Routledge 2016) ch 9. For a brief discussion of the Good Lives Model (GLM), see Rocque (n 38) 197–202.

[62] Katarina Fritzon, Sarah Miller, Danielle Bargh, Kerrilee Hollows, Allana Osborne, and Anna Howlett, 'Understanding the Relationships between Trauma and Criminogenic Risk Using the Risk-Need-Responsivity Model' (2021) 30 Journal of Aggression, Maltreatment & Trauma 294.

by cementing a criminal identity,[63] damaging employment prospects, or exposing the individual to a violent environment.[64]

We will discuss imprisonment further in Section 5. However, for now, the point to be made is that, where factors relevant to offending are beyond the meaningful influence of disposal options, the most effective disposal may involve considering what will have the least adverse impact. In other words, penal parsimony (or restraint/ moderation) may, in some cases, be the most effective sentence – particularly as far as custodial sentences are concerned.

3.4 Reducing reoffending

One key metric for evaluating the effectiveness of sentencing is reoffending.[65] The goal of reducing reoffending is related to that of promoting desistance but is less comprehensive: for example, desistance requires more than a lull in reoffending. However, reoffending may be a more quantifiable and measurable metric than desistance (depending on how desistance is defined). Still, it should be borne in mind that various definitions of reoffending exist in academic scholarship and official data. For example, in the Republic of Ireland, reoffending data focus on one-year and three-year reoffending rates by "*examining crime incidents… that lead to a court conviction for the relevant reference period in which the re-offending is being measured*."[66] In Scotland, the focus of official data is on '*reconviction'* and reconviction rates are typically based on a one-year follow-up period.[67]

In MoJ data in England and Wales, "*a proven reoffence is defined as any offence committed in a one-year follow-up period that resulted in a court conviction, caution, reprimand or warning in this timeframe, or a further six-month waiting period to allow the offence to be proven in court*."[68] However, other analyses concerning England and Wales may use variations with differences in features such as the length of follow-up periods and counting rules.[69]

Differences in how reoffending is defined and how reoffending rates (or similar metrics) are generated are important. Different methodologies can result in varying estimates on the effectiveness of sentencing. Notably, a short monitoring period may overestimate the

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[63] Sytske Besemer, David P Farrington and Catrien CJH Bijleveld, 'Labeling and Intergenerational Transmission of Crime: The Interaction between Criminal Justice Intervention and a Convicted Parent' (2017) 12 PloS one e0172419.

[64] McNeill and Schinkel (n 27); Marguerite Schinkel, *Being Imprisoned: Punishment, Adaptation and Desistance* (Springer 2014).

[65] Not all reoffending will be detected, and figures pertain to those that are (such as where there is a reconviction or out of court disposal).

[66] This process has changed over time. For more details see 'Prison Re-Offending Statistics 2011 - 2018' (Central Statistics Office (Republic of Ireland) 2021) <https://www.cso.ie/en/releasesandpublications/ep/p-pros/prisonre-offendingstatistics2011-2018>. Note that these statistics are published under reservation.

[67] 'Reconviction Rates in Scotland: 2018-19 Offender Cohort' (*Scottish Government*, 4 October 2021) <https://www.gov.scot/publications/reconviction-rates-scotland-2018-19-offender-cohort/> accessed 21 October 2021.

[68] 'Guide to Proven Reoffending Statistics' (Ministry of Justice 2021) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006061/Guide-to-proven-reoffending-July21_Final.pdf>.

[69] For example, a person may reoffend multiple times in a given period and questions will arise over whether and how this should be reflected in reoffending statistics. Or an individual may have committed multiple crimes in a single course of action. For the approach adopted by MoJ for multiple offender entries, see 'Guide to Proven Reoffending Statistics' (n 68) 5. Additionally, for an example of how reoffending is considered in the definition of desistance see Uhrig and Atherton (n 20) s 1.2.

effectiveness of sentencing disposals if there is delayed reoffending. However, perhaps even more crucially, if desistance is a 'zig-zag path'[70] marked by a reduction in the frequency or severity of offending over time, then simply counting any instance of reoffending (e.g. some definitions may include cautions, and some may not) may fail to recognise the progress that has been made in the longer term.

The consequence of the foregoing is that while data, such as that from MoJ, is a key resource, it is not the only consideration in determining the effectiveness of a sentencing disposal. Additionally, careful consideration will need to be given to what inferences can be drawn from data with regard to the effectiveness of sentencing: for example, by exploring the proportion of reoffenders, the number of reoffences, and the nature of reoffences.

3.5 Elements of reoffending statistics to consider

MoJ data define proven reoffending widely as 'any' offence within a set period that resulted in a court conviction or caution. This definition, without further elaboration, makes little distinction between the frequency of offending and its seriousness. Therefore, MoJ data seek to be more nuanced. The data are presented in various ways: the number of proven reoffenders; the number of proven reoffences; the proportion of offenders who are proven reoffenders (i.e. the proportion of offenders who reoffend); the adjusted proven reoffending rate for adults (accounting for some of the influence that differences in offender mix can have on reoffending rates); the Offender Group Reconviction Scale (OGRS) average score for adults (OGRS being a tool for assessing the risk of reoffending); the average number of proven reoffences among reoffenders (i.e. the average number of reoffences per reoffender); and the proportion of proven offenders who committed a proven indictable reoffence.[71]

Proportion of those sentenced that reoffend

One way to gain some insight into a disposal's effectiveness is through analysing the proportion of those sentenced who reoffend (also known as the 'binary rate'). However, this requires careful consideration. For instance, evaluating too broad a sample of offenders (or all offenders) without sufficient controls means that important details relevant to effectiveness may be neglected. For example, it may be appropriate to control for age, gender, criminal history, and the predicted likelihood of reoffending. For this reason, more nuance is required.[72]

Thus, it will be necessary to account for factors such as the offence type, the disposal(s), and the characteristics of the offender and how these relate to reoffending rates over time. Indeed, such are these challenges that MoJ figures come with the caution that:[73]

> *Proven reoffending rates by disposal (sentence type) should not be compared to assess the effectiveness of sentences, as there is no control for known differences in offender characteristics and the type of sentence given.*

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[70] Glaser (n 19) 54. See also McNeill, 'Four Forms of "Offender" Rehabilitation: Towards an Interdisciplinary Perspective' (n 19).

[71] 'Guide to Proven Reoffending Statistics' (n 68) 11.

[72] OGRS scores may be helpful to provide additional nuance. See 'Guide to Proven Reoffending Statistics' (n 68) 10.

[73] 'Guide to Proven Reoffending Statistics' (n 68) s 3.2.

Accounting for these variables requires a different methodology that can be used to ensure one is comparing apples to apples.[74] Some method is needed to consider how those given one disposal (e.g., an immediate custodial sentence) differ from those given another (e.g., a suspended custodial sentence). We discuss these methodological considerations further in Section 5.

Number of reoffences

If a person's desistance journey is characterised as a process, then (realistically given the complex needs of many offenders)[75] an effective sentence may also be one that reduces the number of future offences (also known as the frequency rate) rather than preventing reoffending entirely. Therefore, it is necessary to consider the frequency of reoffending in addition to the proportion that reoffend.

Given that people who reoffend may commit multiple offences, reducing the average number of reoffences could lower reoffending - where each offence an individual commits during the relevant period is counted. For instance, "*those that reoffended committed on average 3.63 reoffences*."[76] If certain disposals could reduce that figure, then, even if the number of people reoffending stayed the same, there would be an overall reduction in reoffending.

In terms of the number of reoffences, it is also notable that a significant proportion of reoffending is by a relatively small group of prolific offenders who commit a disproportionately large number of offences relative to their age group. Many of these prolific offences will, in isolation, be relatively minor in terms of severity but, cumulatively, place burdens on the justice system and local communities. Dealing with prolific offenders, and their often numerous but less severe offences, may benefit from different considerations than those relevant to dealing with cases where there is a high risk of harm from reoffending: for example, by establishing whether and how the needs of the groups differ.[77]

Nature of reoffences

In assessing reoffending, there will be circumstances in which it is necessary to consider the seriousness of any reoffending. Even if the proportion of reoffenders and the number of reoffences (called binary and frequency rates, respectively, in MoJ publications) remained static or similar, a court disposal could be effective at reducing the harm caused by an offence (or the risk of serious harm). For example, if interventions reduced future sexual or violent crime, but not other less serious crimes, there would be merit to this. Therefore, evidence on the nature and seriousness of reoffending is also important. Currently, in official data, this can be somewhat reflected in the proportion of reoffending that is related to specific types of offences, such as indictable offences which can be used

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[74] For example, see Georgina Eaton and Aidan Mews, 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending' (Ministry of Justice 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814177/impact-short-custodial-sentences.pdf>; Uhrig and Atherton (n 20).

[75] For example, mental disorders, addiction issues, and socio-economic deprivation.

[76] 'Proven Reoffending Statistics: January to March 2020' (Ministry of Justice 2022) s 3 <https://www.gov.uk/government/statistics/proven-reoffending-statistics-january-to-march-2020/proven-reoffending-statistics-january-to-march-2020>.

[77] 'A Joint Thematic Inspection of Integrated Offender Management' (Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services 2020) s 2.4 <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/a-joint-thematic-inspection-of-integrated-offender-management/>.

as a proxy for more serious offending. However, the appropriate inferences that can be drawn will in large part be curtailed by the data available.

3.6 Conclusions on desistance and reoffending

Desistance and reoffending (and related terms) are terms commonly used in the literature. However, conceptually, these terms are complex, and their meanings are not entirely settled. If seeking to use these terms as indicators for the effectiveness of sentencing, it is important to clarify how the term is being used. Here we do not seek to offer any views on, for example, precisely how desistance ought to be understood. Instead, we seek to draw attention to the richness of the definitions that have been used and the matters to which an effective sentence might be geared.

4. The deterrent effectiveness of sentencing

Whether or not a sentence might deter people from offending or reoffending is another characteristic that may be identified as relevant to an effective sentence. Indeed, the Sentencing Act (2020) notes "*the reduction of crime (including its reduction by deterrence)*" as one aim when sentencing adults. Judgments, in various jurisdictions, also refer to deterrent purposes of sentencing.

In academic scholarship, deterrence is divided into two types: general and specific deterrence.[78] We will discuss these two types of deterrence below to support our conclusion that the evidence does not support using more severe sentences as being effective for the purposes of deterrence.[79] In particular, given time constraints, we will focus on analysing the comparative deterrent effects of using sentences of immediate imprisonment compared with other disposals.

4.1 General deterrence

General deterrence raises some of the oldest questions in criminology. A general deterrent effect would occur where a disposal makes other potential offenders less likely to offend. General deterrence is said to depend on three main factors: the certainty that an offender will be apprehended and punished; the speed of that process;[80] and the severity of the punishment imposed.[81] Here we will focus on the severity of the punishment (whether in real cases or in guideline provisions) as the topic of interest since this is most directly within the power of a sentencing court or guideline issuing body authority.

Despite pervasive "*common sense intuitions*",[82] the evidence for a general deterrent effect related to sentence severity is weak. A caveat to note is the difficulty of researching the general deterrence effects of sentence severity directly. Consequently, we will not go as far as saying there is no possibility of a general deterrent effect linked to sentence severity: whether given in real cases or provided for in guidelines. However, we will say that, based on our literature review, there is no strong evidence to support more severe sentences on the basis of their general deterrent effects. Moreover, we note that some have argued it is time to accept that sentence severity has no effect on the level of crime in society.[83]

There are several reasons why general deterrent effects would seem unlikely to materialise from severe sentences. Notably, a range of evidence on human behaviours and decision-making lends credence to the idea that certainty of punishment is likely a

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[78] Andrew Von Hirsch and others, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (Hart Publishing Oxford 1999).

[79] Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 Crime and Justice 199.

[80] This is often referred to as swiftness or celerity.

[81] For example, Michael Tonry, 'An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony', *Deterrence, choice, and crime*, vol 23 (Routledge 2018) <https://www.taylorfrancis.com/chapters/edit/10.4324/9781351112710-13/honest-politician-guide-deterrence-certainty-severity-celerity-parsimony-michael-tonry>.

[82] Tonry (n 81); Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Bloomsbury Publishing 2021). (The latter concludes that this intuition is better described, given the evidence, as a 'common misconception').

[83] Anthony N Doob and Cheryl Marie Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 Crime and Justice 143.

much stronger driver of deterrence than severity.[84] Ashworth (2019) has identified four "*complications*" that help to explain this finding.[85] All four are related to a potential disconnect between the objective risks of (re)offending and offenders' subjective perceptions of that risk.[86]

First, a severe sentence can only have a deterrent effect if offenders know about and understand it. However, a recent review of research on defendants' understanding found that "*very little is known about the extent to which those being sentenced understand the process and the likely sentencing outcome*" and that "*the limited empirical research in this area suggests that defendants may have limited understanding*."[87] Second, either a real or perceived low risk of detection by authorities will undermine any deterrent effect.[88] Third, deterrence-based policies assume that offenders make at least broadly rational decisions, *"giving some thought to benefits and costs"*,[89] whereas research shows that a myriad of psychological and situational factors mean that would-be criminals very often depart from normatively rational behaviour. For example, offenders have been found to exhibit low self-control,[90] high impulsivity,[91] steep temporal discounting (underweighting consequences

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[84] Anthony A Braga, David Weisburd and Brandon Turchan, 'Focused Deterrence Strategies and Crime Control' (2018) 17 Criminology & Public Policy 205; Aaron Chalfin and Justin McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) 55 Journal of Economic Literature 5; Daniel S Nagin and Greg Pogarsky, 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2001) 39 Criminology 865.

[85] Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) 7 Criminal Law Review.

[86] David A Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4 American Law and Economics Review 295; Robert Apel, 'Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence' (2013) 29 Journal of Quantitative Criminology 67; Gary Kleck and JC Barnes, 'Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a "Collective Wisdom"?' (2013) 59 Crime & Delinquency 1006. But see Kyle Thomas, Benjamin Hamilton and Thomas Loughran, 'Testing the Transitivity of Reported Risk Perceptions: Evidence of Coherent Arbitrariness' (2018) 56 Criminology 59.

[87] Jessica Goldring, 'Defendants' Understanding of Sentencing: A Review of Research' (Sentencing Academy 2021) 2 <https://sentencingacademy.org.uk/wp-content/uploads/2021/11/Defendants-Understanding-of-Sentencing.pdf>. See also, Gary Kleck, 'Constricted Rationality and the Limits of General Deterrence', *Punishment and Social Control* (2nd edn, Routledge 2003) <https://www.taylorfrancis.com/chapters/mono/10.4324/9781315127828-24/constricted-rationality-limits-general-deterrence-stanley-cohen>; Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence' (2010) 100 Journal of Criminal Law and Criminology 765.

[88] Crime detection rates in the UK are currently very low. For example, in London (Metropolitan Police District) in 2019-20, only 4.79% of burglaries and 6.98% of sexual offences were detected and criminally sanctioned. See <https://www.met.police.uk/sd/stats-and-data/met/year-end-crime-statistics-19-20/> accessed 26 March 2022. See also Nagin (n 79).

[89] Derek B Cornish and Ronald V Clarke, *The Reasoning Criminal: Rational Choice Perspectives on Offending* (2017); Ronald V Clarke, 'Affect and the Reasoning Criminal: Past and Future', *Affect and Cognition in Criminal Decision Making* (2013). Clarke's position is that criminals are at least 'boundedly' rational, a concept introduced by Herbert Simon which proposes that people are constrained by the limitations of human cognition to reason their way to solutions that are 'good enough' but not optimally rational (in a normative economic sense. See further, Ashworth (n 85); HA Simon, 'Rational Choice and the Structure of the Environment.' (1956) 63 Psychological Review 129.

[90] David Evans and others, 'The Social Consequences of Self-Control: Testing the General Theory of Crime' (1997) 35 Criminology 475; Terrie E. Moffitt and others, 'A Gradient of Childhood Self-Control Predicts Health, Wealth, and Public Safety' (2011) 108 Proceedings of the National Academy of Sciences 2693; Daniel S Nagin and Raymond Paternoster, 'Enduring Individual Differences and Rational Choice Theories of Crime' (1993) 27 Law & Society Review 467.

[91] Ashlee Curtis and others, 'Swift, Certain and Fair Justice: Insights from Behavioural Learning and Neurocognitive Research' (2018) 37 Drug and Alcohol Review S240.

further in the future),[92] and other neurocognitive deficits.[93] In addition, many crimes (in particular, violent, sexual, and drug-related offences) are commonly committed impulsively, using primarily intuitive, 'hot' cognition driven by emotional arousal (e.g. anger, passion, fear),[94] influenced by simple cognitive rules of thumb or 'heuristics' that can cause bias of various kinds and make offending behaviour more likely,[95] and/ or committed under the influence of drugs or alcohol.[96] In these circumstances, the immediate benefits of criminal behaviour far outweigh any effect of an uncertain legal sanction in the far-off future. Fourth, the relationship between sentence severity and reoffending will be weak if an offender views other, non-legal costs as more important than a potential legal sanction. Relevant social factors include peer-group influence[97] and fear of lost respect or social standing.[98]

Finally, even in situations where certainty and speed are strong enough for severity to exert an influence (an atypical situation for many offences), the strength of this influence is unclear. Severity, combined with certainty and speed will only tip the balance away from offending beyond a certain threshold.[99] Locating such thresholds is likely to be an extremely challenging task. Given the relatively minor nature of most offences, for many the threshold may be met simply by the fact of a criminal conviction and/ or the stresses of

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[92] Yaniv Hanoch, Jonathan Rolison and Michaela Gummerum, 'Good Things Come to Those Who Wait: Time Discounting Differences between Adult Offenders and Nonoffenders' (2013) 54 Personality and Individual Differences 128; Thomas A Loughran, Ray Paternoster and Douglas Weiss, 'Hyperbolic Time Discounting, Offender Time Preferences and Deterrence' (2012) 28 Journal of Quantitative Criminology 607; Chae Mamayek, Ray Paternoster and Thomas A Loughran, 'Temporal Discounting, Present Orientation, and Criminal Deterrence', *The Oxford Handbook of Offender Decision Making* (Oxford University Press 2017) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199338801.001.0001/oxfordhb-9780199338801-e-10>; Christine A Lee and others, 'Longitudinal and Reciprocal Relations between Delay Discounting and Crime' (2017) 111 Personality and Individual Differences 193.

[93] Curtis and others (n 91); Valerie F Reyna and others, 'Brain Activation Covaries with Reported Criminal Behaviors When Making Risky Choices: A Fuzzy-Trace Theory Approach.' (2018) 147 Journal of Experimental Psychology: General 1094; Yin Wu and others, '"Should've Known Better": Counterfactual Processing in Disordered Gambling' (2021) 112 Addictive Behaviors 106622.

[94] Dan Ariely and George Loewenstein, 'The Heat of the Moment: The Effect of Sexual Arousal on Sexual Decision Making' (2006) 19 Journal of Behavioral Decision Making 87; Jean-Louis Van Gelder and others, *Affect and Cognition in Criminal Decision Making* (Routledge 2013); Jean-Louis van Gelder and Reinout E de Vries, 'Rational Misbehavior? Evaluating an Integrated Dual-Process Model of Criminal Decision Making' (2014) 30 Journal of Quantitative Criminology 1; Wen Cheng and Wen-Bin Chiou, 'Exposure to Sexual Stimuli Induces Greater Discounting Leading to Increased Involvement in Cyber Delinquency among Men' (2018) 21 Cyberpsychology, Behavior, and Social Networking 99.

[95] On decision-making heuristics in general, see e.g. Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan 2011); Gerd Gigerenzer, *Gut Feelings: Short Cuts to Better Decision Making* (Penguin Uk 2008). On the influence of heuristics on criminal decision making, see e.g. Megan Eileen Collins and Thomas A Loughran, 'Rational Choice Theory, Heuristics, and Biases' (2017) 6 The Oxford Handbook of Offender Decision Making 10; Thomas E Dearden, 'How Modern Psychology Can Help Us Understand White-Collar Criminals' [2019] Journal of Financial Crime; Greg Pogarsky, Sean Patrick Roche and Justin T Pickett, 'Offender Decision-Making in Criminology: Contributions from Behavioral Economics' (2018) 1 Annual Review of Criminology 379.

[96] Redonna K Chandler, Bennett W Fletcher, and Nora D Volkow, 'Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety' (2009) 301 JAMA 183.

[97] Margo Gardner and Laurence Steinberg, 'Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study.' (2005) 41 Developmental Psychology 625; Jean Marie McGloin and Kyle J Thomas, 'Incentives for Collective Deviance: Group Size and Changes in Perceived Risk, Cost, and Reward' (2016) 54 Criminology 459.

[98] Harold G Grasmick and Robert J Bursik, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 Law & Society Review 837; Travis C Pratt and others, 'The Empirical Status of Deterrence Theory: A Meta-Analysis.'; Per-Olof Wikström, 'Deterrence and Deterrence Experiences. Preventing Crime through the Threat of Punishment' in Shlomo Giora Shoham, Ori Beck, and Martin Kett (eds), International Handbook of Penology and Criminal Justice (1st edn, Routledge 2007).

[99] Ashworth (n 85); Thomas A Loughran and others, 'Differential Deterrence: Studying Heterogeneity and Changes in Perceptual Deterrence among Serious Youthful Offenders' (2012) 58 Crime & Delinquency 3.

being prosecuted.[100] Therefore, more severe sentences may have little deterrent effect for many high-volume crimes even where the likelihood of punishment is high. Furthermore, there is evidence that an offender's sensitivity to harsher penalties in terms of time begins to decrease as the total sentence length increases – meaning the deterring impact gradually diminishes.[101]

4.2 Specific deterrence

Specific deterrence is aimed at deterring the individual offender subject to the sentencing disposal from reoffending. In analysing specific deterrence, the first point to note is that most of the research findings relating to general deterrence also apply to repeat offenders. Reoffenders are equally affected by personal and situational characteristics that reduce the likelihood of them desisting in response to severe sentencing. Therefore, factors such as likelihood of punishment, rather than just severity, will matter.

Repeat offenders are also impacted by their experience of criminal sanctions and the criminal justice system more generally. Although imprisonment will clearly be an extremely aversive experience for many inmates, the research on reoffending reviewed in Section 5 strongly suggests that using more severe deterrent sentences (in particular, custodial rather than non-custodial disposals) does not reduce reoffending. On the contrary, researchers have found evidence for the criminogenic effects of incarceration. Prison is a social environment where prisoners are exposed to pro-criminal attitudes, learn from other prisoners' behaviour, and are incentivised to adjust to prison life and criminality in general.[102] Further, the challenging events inmates experience, such as loss of autonomy and privacy, and victimisation, may trigger psychological strain and provoke criminal coping strategies.[103] Ex-prisoners also suffer from the negative social and economic effects of being labelled as such.[104] Lastly, prison is a subjective experience and may not be as punitively received as expected; some prisoners experience custody as an incidental part of the "*criminal lifestyle*"[105] and thereby become desensitised to the risk of future punishment.[106]

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[100] Jennifer Earl, 'The Process Is the Punishment: Thirty Years Later' (2008) 33 Law & Social Inquiry 735.

[101] Justin T Pickett, 'Using Behavioral Economics to Advance Deterrence Research and Improve Crime Policy: Some Illustrative Experiments' (2018) 64 Crime & Delinquency 1636.

[102] Ronald L Akers, *Social Learning and Social Structure: A General Theory of Crime and Deviance* (Routledge 2017); Patrick Bayer, Randi Hjalmarsson and David Pozen, 'Building Criminal Capital behind Bars: Peer Effects in Juvenile Corrections' (2009) 124 The Quarterly Journal of Economics 105; Anna Piil Damm and Cédric Gorinas, 'Prison as a Criminal School: Peer Effects and Criminal Learning behind Bars' (2020) 63 The Journal of Law and Economics 149; Daniel P Mears and others, 'The Code of the Street and Inmate Violence: Investigating the Salience of Imported Belief Systems' (2013) 51 Criminology 695.

[103] Kristie R Blevins and others, 'A General Strain Theory of Prison Violence and Misconduct: An Integrated Model of Inmate Behavior' (2010) 26 Journal of Contemporary Criminal Justice 148; Shelley Johnson Listwan and others, 'The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism' (2013) 30 Justice Quarterly 144; Janine M Zweig and others, 'Using General Strain Theory to Explore the Effects of Prison Victimization Experiences on Later Offending and Substance Use' (2015) 95 The Prison Journal 84.

[104] David S Kirk and Sara Wakefield, 'Collateral Consequences of Punishment: A Critical Review and Path Forward' (2018) 1 Annual Review of Criminology 171; Christopher Uggen and Robert Stewart, 'Piling on: Collateral Consequences and Community Supervision' (2014) 99 Minnesota Law Review 1871.

[105] Beverly R Crank and Timothy Brezina, '"Prison Will Either Make Ya or Break Ya": Punishment, Deterrence, and the Criminal Lifestyle' (2013) 34 Deviant Behavior 782, 782.

[106] Greg Pogarsky and Alex R Piquero, 'Can Punishment Encourage Offending? Investigating the "Resetting" Effect' (2003) 40 Journal of Research in Crime and Delinquency 95. (finding a 'gambler's fallacy' amongst punished offenders).

For example, a qualitative study of eight repeat offenders (all adult, white males) serving a sentence in an English prison of less than 12 months used semi-structured interviews to enquire about their prison experiences with interventions and support.[107] These participants typically viewed their cycling in and out of prison as contrary to the concepts of deterrence or rehabilitation, but instead contributed to their identities as criminal offenders. Serving multiple prison terms meant these times tended to blend together (i.e., the individuals had difficulty counting their number of incarcerations or length of any of them) and the individuals were often plagued by the lack of services or resources to assist in overcoming the criminogenic conditions they faced when released into their troubled community environments.

Given the above, it is perhaps not surprising that there is little evidence supporting specific deterrence. In fact, there is evidence that sentence enhancements (i.e. increases in sentence severity) for those with prior records do not appear to produce a deterrent effect in terms of reductions in rates of reoffending.[108] For example, in the context of burglary, research with offenders found that assistance with drug misuse (i.e. rather than the deterrent effects of punishment) was the most common reason given for reducing offending.[109] Even the more draconian 'three strikes' rules in the USA (whereby even three relatively minor offences can lead to prison sentences of between 25 years to life) do not seem to be effective in producing deterrent effects.[110] Such evidence may inform the work of the Council,[111] though it is also the case that sentencing rules based on repeat offending may be beyond its power when adjustments for previous convictions are based on a statutory aggravating factor or other repeat offence rules/ minimums set out in statute.[112]

Finally, we can note that, at times, deterrent sentencing has been considered in various jurisdictions for young offenders (even first time offenders) with the aim of dissuading them from reoffending at an early stage: the notion of a 'short, sharp shock.'[113] While the Sentencing Act 2020 does not directly specify deterrence as a purpose of sentencing for those under 18, those over 18 may still be in a formative phase of their life where deterrent

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[107] Rebecca Lievesley and others, 'A Life Sentence in Installments: A Qualitative Analysis of Repeat Offending Among Short-Sentenced Offenders' (2018) 13 Victims & Offenders 409.

[108] Julian V Roberts and Richard S Frase, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford University Press 2019) <https://oxford.universitypressscholarship.com/10.1093/oso/9780190254001.001.0001/oso-9780190254001>; Rhys Hester and others, 'Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences' (2018) 47 Crime and Justice 209.

[109] Security features such as alarms and CCTV also had an effect. See Ian Hearnden and Christine Magill, 'Decisionmaking by Houseburglars: Offenders' Perspectives' (Home Office 2004) 6 <https://webarchive.nationalarchives.gov.uk/ukgwa/20110218135832/http:/rds.homeoffice.gov.uk/rds/pdfs04/r249.pdf>.

[110] Elsa Y Chen, 'Impacts of "Three Strikes and You're out" on Crime Trends in California and throughout the United States' (2008) 24 Journal of Contemporary Criminal Justice 345; Tomislav V Kovandzic, John J Sloan and Lynne M Vieraitis, '"Striking out" as Crime Reduction Policy: The Impact of "Three Strikes" Laws on Crime Rates in U.S. Cities' (2004) 21 Justice Quarterly 207.

[111] For example, "developing an overarching guideline on previous convictions and/ or revisiting the existing overarching guideline on totality" was one recommendation made by Bottoms. See Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions' (n 1) para 78. Notably, effective from 2019, the Council has published "SA1 Previous Convictions" <https://www.sentencingcouncil.org.uk/droppable/item/sa1-previous-convictions>.

[112] For example, there is (except in 'exceptional circumstances') a 7-year statutory minimum for third-time class A drug trafficking offences under section 313 of the Sentencing Act 2020.

[113] On the topic of desistance for young persons, Soyer found that *"the shock of juvenile detention encourages a narrative of self-transformation, yet the punitive aspects of the juvenile-justice system fail to encourage creative agency in relation to the teenagers' future. Without being able to experience a non-deviant identity of their own, teenagers struggle to maintain a life without crime after their release."* Soyer (n 59) 92.

effects are less likely (until as late as 25-30 in terms of neurological development).[114] Additionally, the Sentencing Act 2020 states that the court is "*to have regard to the principal aim of the youth justice system: "which is to prevent offending (or reoffending) by persons aged under 18*". If specific deterrence were effective for this age group's reoffending, then it could be a relevant consideration. However, for various reasons, including those already noted above, specific deterrence for young persons is problematic and more severe punishment may be criminogenic. Indeed, the evidence of 'scared straight' initiatives (using more severe punishments for supposed specific deterrent effects) in the USA is extremely critical of their effectiveness and also suggests the possibility of criminogenic effects.[115]

4.3 Suspended sentences

Above, we have discussed deterrent sentencing as entailing a more severe punishment and the limits of this. However, there is another way specific deterrent effects might be achieved. Instead of increasing a sentence for the aims of deterrence, a judge may pass a less severe sentence with conditions (such as not committing any further crimes or various requirements) that if breached result in a more severe sentence. In other words, within the range of appropriate disposals the judge may err towards the lower end to provide specific deterrence against future offending.

In terms of questions relating to specific deterrence, suspended sentences are particularly interesting. Suspended sentences operate in a variety of jurisdictions, though the implementation can vary.[116] Notably, in England and Wales, there is the suspended sentence order (SSO) that can be used for crimes in which the available period of incarceration is up to two years. While a suspended sentence is formally considered a custodial sentence, if a person refrains from further offending and/ or adheres to certain conditions then they will not be imprisoned. Analyses by the Sentencing Academy found that MoJ research and evidence from several other jurisdictions converges in suggesting that:

> *Offenders sentenced to a suspended sentence are less likely to re-offend than those sentenced to immediate imprisonment or a CO [community order]. It is unclear why SSOs are associated with better re-offending outcomes than short terms of imprisonment, and research would help to identify the reasons for the lower re-offending rates for offenders serving this sentence.*[117]

Though further evidence is needed, and we will discuss the SSO further in Section 5, it has been speculated that deterrent effects may play a role:

> *Almost all common law jurisdictions operate a form of suspended prison sentence, and at the core of these suspended sentences is the principle of deterrence. The deterrent effect of the suspended sentence invokes the*

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[114] O'Rourke and others (n 43). See Section 3.3 for further detail.

[115] Anthony Petrosino and others, 'Scared Straight and Other Juvenile Awareness Programs for Preventing Juvenile Delinquency: A Systematic Review' (2013) 9 Campbell Systematic Reviews 1.

[116] Sarah Armstrong and others, 'International Evidence Review of Conditional (Suspended) Sentences' (2013).

[117] Eleanor Curzon and Julian V Roberts, 'The Suspended Sentence Order in England and Wales' (Sentencing Academy 2021) 11; Melissa Hamilton, 'Effectiveness of Sentencing Options' (Sentencing Academy 2021) <https://sentencingacademy.org.uk/wp-content/uploads/2021/01/The-Effectiveness-of-Sentencing-Options-1.pdf>.

> *image of the 'Sword of Damocles' because the threat of immediate imprisonment 'hang[s] over the offender as an effective deterrent while avoiding the human and financial costs of imprisonment'*[118]

This logic is consistent with the evidence regarding the primacy of certainty and speed over severity. A suspended sentence transforms the prospect of an immediate custodial sentence from an easily discounted future possibility to a very present reality. Additionally, in passing a conditional sentence, a judge may warn an offender that this is their 'last chance' to avoid prison since SSOs are only to be used when cases have passed the custodial threshold. In doing so, the suspended sentence, while still punitive, may weigh more in the mind of the offender, with potentially beneficial results. However, more work with offenders is needed to draw firmer conclusions concerning their perspectives and motivations when suspended sentences are used.

4.4 Conclusions on deterrence

In sum, we have outlined key evidence concerning the notion that more severe sentences can be used to provide either a general or specific deterrent effect. We focused on the possibility that sentences of immediate imprisonment could be used instead of other (notionally less severe) disposals to provide additional punitiveness and, hence, deterrent effects. The weight of evidence suggests that increased sentence severity does not inherently result in greater general deterrent effects. Much more important are factors such as the perceived likelihood of punishment. Empirical research has identified many situational and psychological factors that may help explain why severe sentences do not appear to be a significant deterrent of criminal behaviour.

Accordingly, it would seem there is, at present, little evidence to justify increasing a sentence (particularly where this crosses the custodial threshold) purely for the purposes of deterrence. This finding is in line with that of Roberts and Frase (2019) who examined more severe/ enhanced sentences. The authors conclude that:

> *The net crime-preventive benefits of [sentence] enhancements are very limited, and unlikely to be cost effective… Indeed, many studies suggest the opposite of a specific deterrent effect: there is actually a mild but detectable criminogenic short-term effect of imprisonment—compared to community-based sanctions, prison is associated with slightly higher re-offending rates. Similarly, increments in sentence length appear to have little or no demonstrable increased deterrent effects on subsequent re-offending; for some offenders, longer prison terms increase the odds of further crime.*[119]

However, an area of key interest in terms of specific deterrence is suspended sentences where a less severe sentences than might otherwise be given is issued.[120] Certainly, as will be detailed further in Section 5, SSOs may be more effective in terms of reoffending than sentences of immediate imprisonment. Some of this effectiveness may be due to the specific deterrent effects where the person subject to the SSO knows it is their 'last

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[118] Curzon and Roberts (n 117) 4.

[119] Roberts and Frase (n 108) 88.

[120] Community orders may also have similar effects. However, suspended sentences are only to be used where an offence has crossed the custodial threshold. Therefore, in theory, these should all be 'last chance' disposals.

chance.' This would seem to a be a key area for future enquiry and research with offenders: to ascertain what works and why with regards to reducing reoffending through deterrent effects.

5. Assessing quantitative data on sentencing

A challenge for research is to isolate the causal effects of a sentence on outcomes such as reoffending. For example, as well as the sentence that is given (which itself may consist of various disposals), a multitude of other factors may affect a person's propensity to reoffend: such as the nature and severity of the offence, their age, family and social circumstances, and prior offending history.[121] The possibility that any of these other factors explain (to whatever degree) the apparent relationship between a sentence and reoffending is the main threat to the validity of a study's findings.

Research has used both quantitative and qualitative methods. While both methods are important, to illustrate how research has attempted to overcome this challenge, we provide a review of some quantitative methods used to explore the relationship between sentencing options and reoffending.[122] We also highlight the trends of the evidence with regard to the effectiveness of short custodial sentences compared with suspended and community sentences. However, first it is important to make a few brief general points about the statistical data available in England and Wales.

Generally, the statistical data provide breadth over depth as large-scale statistical data can never capture every relevant variable. Indeed, perhaps the most comprehensive set of statistical data on sentencing are the datafiles compiled by the United States Sentencing Commission (USSC), which contain 100,000 variables.[123] The USSC dataset provides individual-level data which allows one to analyse and/ or control for sociodemographic characteristics and specific sentencing guideline calculations, enhancements, and mitigations. Yet even the USSC data omit some variables that may be relevant (e.g. concerning representation in court, type of community sentence provisions).

The main current source of statistical data that is publicly available in England and Wales is that provided by MoJ.[124] While MoJ publish data containing many variables of interest, they are still far less comprehensive than the USSC data. For example, MoJ datasets do not provide any individual-level data (i.e. specific information about each individual or the facts and circumstances of the individual case), which is an unfortunate barrier for independent research to provide perhaps useful information about the effectiveness of sentence options and potential for equalities issues. Additionally, many persons are convicted and sentenced for multiple offences. However, datasets typically only reflect one offence (the 'principal offence').[125] The consequence of this is that the data may not

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[121] For an overview of some of these factors, reference can be had to the general and offence specific guidelines. See https://www.sentencingcouncil.org.uk.

[122] Various quantitative and qualitative methods are employed to investigate how and why particular sentencing options may influence offenders' decisions to re-offend (or not). While we cannot explore them all here, throughout this report we draw on research using methods beyond those noted where appropriate (e.g. qualitative interviews with judges, lawyers, and offenders).

[123] The USSC variable codebook for cases involving individual offenders can be found here: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY21.pdf.

[124] In the past the Crown Court Sentencing Survey (CCSS) run by the Sentencing Council was a valuable source of data. While the CCSS is no longer used, the data are still available online.

[125] In essence this means that where more than one offence is sentenced at the same time, only the most serious offence is recorded.

always accurately reflect the whole case that was sentenced when the other crimes of conviction are consequently ignored.

The Sentencing Council itself does have data - from the Crown Court Sentencing Survey and from more recent bespoke court surveys - that contains more variables (e.g. information that includes the harm and culpability involved in the case, aggravating and mitigating factors, guilty pleas entered and previous convictions etc). However, although this data contains more variables, it cannot cover everything that might be relevant to the sentencing decision. Therefore, there are likely latent variable problems, meaning important information that may affect sentencing outcomes is not captured and, therefore, cannot be analysed.[126]

5.1 Quantitative methods examining reoffending

As a preliminary issue, it is important to evaluate how key variables have been specified in any study. For example, which sanctions have been included within the definition of custodial and non-custodial sentences and why? How is 'reoffending' defined? Over what timescale has reoffending been measured? How has reoffending been defined: re-conviction, re-arrest, or something else? Does reoffending include committing any offence or only certain offence types? All of these questions can greatly affect the conclusions of the study.

A randomised controlled trial (RCT) is sometimes considered the 'gold standard' design for empirical research. This involves randomly selecting offenders to receive, for example, either a custodial or a non-custodial sentence. Any difference in reoffending found between the custodial and non-custodial groups could then be attributed to the sentence type received.[127] However, conducting such an experiment in practice is seldom possible due to obvious ethical and legal considerations.[128] Therefore, experimental designs are only rarely possible (for example where a particular set of events produces a 'natural

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[126] In some instances, data may be held but contained in different published datasets. For example, MoJ make publicly available two different datasets of interest to questions concerning the effectiveness of sentencing. The first includes the sentence type assigned (e.g. immediate custodial, suspended, community order) and for custodial penalties it provides the length thereof. This dataset also includes known reoffending statistics which one can cross-reference to the type of disposal, for example, to compare the reoffending rates for those who received a community order versus those who received a custodial term of fewer than 12 months. The second provides data points on known reoffending along with a variable for ethnicity (a matter of key importance discussed in Section 7). Thus, both datasets include known reoffending rates, but the type of sentence disposal and ethnicity variables are not both in either dataset. Such a situation leaves a gap in being able to determine if reoffending rates by sentence disposal vary by ethnicity. See Ministry of Justice, 'Proven Reoffending Index Disposal Tool' (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1049656/index-disposal-data-tool-jan-20-mar-20_Final.xlsx> accessed 23 March 2022. See also Ministry of Justice, 'Proven Reoffending Overview Data Tool' (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1049655/Overview-data-tool-jan20-mar20_Final.xlsx> accessed 23 March 2022.

[127] While the population of offenders may differ across many variables, which might influence whether they re-offend or not, random assignment to groups should ensure that there are no systematic differences in any relevant variables between the two groups.

[128] A rare example of an experimental research design on sentencing is Martin Killias and others, 'How Damaging Is Imprisonment in the Long-Term? A Controlled Experiment Comparing Long-Term Effects of Community Service and Short Custodial Sentences on Re-Offending and Social Integration' (2010) 6 Journal of Experimental Criminology 115. This research took place in Switzerland and compared community sentences against short sentences of up to 14 days imprisonment. It found little difference in reoffending. This finding raises some interesting questions. However, England and Wales have little in the way of a directly comparable disposal to the one examined in Switzerland. Not only was the maximum Swiss sentence exceptionally short, but *"most were eligible for serving their time in a half-way house, i.e., they were allowed to leave the correctional facility every working day to pursue their job, and spent leisure time and weekends in isolation from other inmates."* (p.127).

experiment').[129] Additionally, there has been criticism of the validity of RCTs in the context of criminal justice systems and some argue that "*the right strategy for getting closer to answers is not to invest in a huge programme of randomized controlled trials*."[130] For example, the disposal or programme under evaluation may be better resourced than real-world routine counterparts.[131] Therefore, some argue that such methods are better at providing a proof of concept for what can work rather than showing what will work in practice.

Another option is to use a quasi-experimental design, which typically involves analysing pre-existing sentencing datasets. The scope of such research is necessarily limited by the depth and quality of data available. Historically, this has been a significant issue for researchers, but more and more data have become easily accessible over the past decade. There are several methodological challenges to inferring any effects of sentencing sanctions on reoffending from non-experimental data.[132] In particular, offenders who are given custodial sentences usually differ from offenders serving non-custodial sentences on a number of important characteristics, including their criminal histories and the seriousness of the crime for which they were sentenced.[133] This potential for systematic differences between the groups means that there is only limited value in comparing reoffending rates between custodial and non-custodial cases without further statistical adjustment, since any difference found could be biased by the impact of variables other than the type of sentence received.

Two main statistical approaches have been used to take account of the impact of other potentially relevant variables, or 'covariates' when comparing custodial and non-custodial sentences. Regression-based approaches use various types of multivariate regression models to estimate the relationship between custody and reoffending, while controlling for a set of covariates. Typically, the predictor variable is sentence type (custodial versus non-custodial), and the outcome variable is whether the offender reoffended or not (as defined in that particular study). As to which covariates are included in the model, this will partly depend on what is available but Nagin and colleagues (2009)[134] identified what they described as a "*minimal set*" consisting of previous convictions, offence type, age, ethnicity, and gender.[135] Regression models have been used in many studies of

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[129] Francesco Drago, Roberto Galbiati and Pietro Vertova, 'The Deterrent Effects of Prison: Evidence from a Natural Experiment' (2009) 117 Journal of Political Economy 257. (reporting findings following the early release of 20,000 inmates from Italian prisons in 2006).

[130] Mike Hough, 'Gold Standard or Fool's Gold? The Pursuit of Certainty in Experimental Criminology' (2010) 10 Criminology & Criminal Justice 11, 19.

[131] Evaluations may focus on a novel programme. It has long been recognised that various reforms in criminal justice systems may be better supported and more effective in their initial stages than in the long term. See, Malcolm M Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (Quid Pro Books 2013).

[132] Daniel S Nagin, Francis T Cullen, and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38 Crime and Justice 115.

[133] This is not surprising, given that previous convictions are almost universally viewed as an aggravating factor and, as a general rule, the severity of punishment received is proportionate to the seriousness of the crime committed, with custodial sentences considered more severe than community-based options. See https://www.sentencingcouncil.org.uk/droppable/item/sa1-previous-convictions/

[134] Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38 Crime and Justice 115.

[135] Regression analysis requires large datasets to produce reliable results, especially when there are many predictor variables included in the model, but this is not usually an issue in sentencing research where the datasets typically involve thousands rather than hundreds of cases.

reoffending but have also been criticised for their inability to represent properly the relationship between age and reoffending and for other technical limitations.[136]

Matching-based approaches are aimed at ensuring that individuals in the custodial and non-custodial groups are as similar as possible. Matching can be further divided into exact matching (known as precision or variable matching) and propensity-score matching (PSM). Exact matching involves trying to match pairs of cases on all key covariates. While this approach is very effective, it is limited by the "*tyranny of dimensionality*",[137] whereby the availability of cases that can be matched on multiple dimensions rapidly declines as the number of dimensions increases.[138] As a result, exact-matching studies tend only to include a limited number of covariates and generate smaller sample sizes which may be less representative of the offender population as a whole. PSM involves using a logistic regression model to calculate a propensity score for each offender based on as exhaustive[139] a set of potential confounding variables as the data will allow. The propensity score produced is the conditional probability of receiving a custodial sentence rather than a non-custodial sentence, given the observed variables. Cases can then be matched based on their propensity score rather than the value of multiple variables, removing the issue of dimensionality. Whichever matching process is used, the reoffending rates of the matched groups can then be compared directly, and any difference calculated.

Both regression analysis and matching methods are sensitive to the number of covariates included in the model and the precise type of model used,[140] and not only the magnitude of the effect but the existence of an effect at all can be impacted.[141] In addition, even where PSM is used and takes account of a large number of variables, there could still be other, unmeasured, factors that play an important role in any effect identified. Therefore, care is needed when interpreting the results of quasi-experimental studies or reaching conclusions based on those results.

An additional important research method is the meta-analysis. This is an extremely useful technique for determining whether a research finding is robust across different studies, time periods, offender groups, and jurisdictions. A meta-analysis involves identifying a sample group of studies and statistically aggregating their findings to produce a mean effect size across all the studies: each individual study is treated as a datum in the statistical analysis. Meta-analyses can mitigate the limitations of any individual study and

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[136] Nagin, Cullen and Jonson (n 134); Gerald G Gaes, William D Bales and Samuel JA Scaggs, 'The Effect of Imprisonment on Recommitment: An Analysis Using Exact, Coarsened Exact, and Radius Matching with the Propensity Score' (2016) 12 Journal of Experimental Criminology 143.

[137] See Nagin, Cullen and Jonson (n 134) 138.

[138] In other words, the more features (or factors) upon which you try to compare people in a sample, the less matches you will have.

[139] The number of variables used to calculate propensity scores can be as large as the dataset allows. For example, Eaton and Mews used over 150 variables. See Eaton and Mews (n 74).

[140] William D Bales and Alex R Piquero, 'Assessing the Impact of Imprisonment on Recidivism' (2012) 8 Journal of Experimental Criminology 71; Damon M Petrich and others, 'Custodial Sanctions and Reoffending: A Meta-Analytic Review' (2021) 50 Crime and Justice 353. Models with more covariates have been found to produce smaller effect sizes.

[141] Gaes, Bales and Scaggs (n 136).

can also be used to evaluate the extent to which the methodology used, or other aspects of study design, influenced the results produced.[142]

From the foregoing, it should be clear that the questions to which this review is addressed are extremely complex. There is no panacea in terms of a single statistical method to provide an answer. However, when utilised appropriately, these methods (and others) can provide answers to specific questions. Indeed, we note that there are reviews of the evidence base in comparable jurisdictions that have drawn on research using various methods, both quantitative and qualitative.[143] As such, a mixture of methods (quantitative and qualitative[144]) will almost certainly be necessary to address the various questions raised when seeking to assess the effectiveness of sentencing. As Maruna and Mann (2019) argue:

> *The science of crime reduction is simply too difficult… we need all the science we can get – programme evaluations and narrative desistance studies – to make sense out of the complexity of crime. We need to strive to make both types of work as robust and rigorous as possible, and, crucially, we need to learn to merge the two types of evidence together.[145]*

Examples of potentially informative qualitative methods are interview, survey, observational, focus group, and case studies. These approaches may be better able to tease out such details as to what motivates or deters offenders, how they experience different types of penalties, and their responsivity to specific sentencing processes. Qualitative methods such as these underpin the analyses of rehabilitation, desistance, and reintegration noted in Section 0.

5.2 Evidence on short custodial sentences of immediate imprisonment versus others

This section will focus on comparing custodial sentences and non-custodial sentences in terms of costs and outcomes. Given the costs of custody (see Section 6) and concerns about the high use of imprisonment in England and Wales,[146] this area is of great importance. One methodological consideration here is that some sentence options are typically used as the principal sentence for particular types of offences or offenders. For

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[142] For a recent large-scale example, see Petrich and others (n 140). The research included 981 effects across 116 studies on the relationship between custodial sanctions and re-offending and found a mean positive correlation between custody and re-offending, with custodial sanctions associated with an 8% increase in re-offending rates. There were also small differences between studies using regression modelling and those using matching methods, with matching studies producing a lower mean effect size than regression studies (suggesting matching controlled for covariates was somewhat better).

[143] Ian O'Donnell, 'An Evidence Review of Recidivism and Policy Responses' (Department of Justice and Equality (Ireland) 2020) <https://www.justice.ie/en/JELR/An_Evidence_Review_of_Recidivism_and_Policy_Responses.pdf/Files/An_Evidence_Review_of_Recidivism_and_Policy_Responses.pdf>; Maria Sapouna and others, 'What Works to Reduce Reoffending: A Summary of the Evidence' (Scottish Government 2015) <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>; Karen Gelb, Nigel Stobbs and Russell Hogg, 'Community-Based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions' (Queensland Sentencing Advisory Council 2019) <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0003/615018/edited-final-literature-review.pdf>.

[144] For example, in Section 3 we drew on narrative desistance studies.

[145] Shadd Maruna and Ruth E Mann, 'Reconciling "Desistance" and "What Works"' (Her Majesty's Inspectorate of Probation 2019) 9 <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2019/02/Academic-Insights-Maruna-and-Mann-Feb-19-final.pdf>.

[146] 'Highest to Lowest - Prison Population Rate' (*World Prison Brief*) <https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14> accessed 4 October 2021.

example, guidelines promote typical sentences for some offences and a fine is far more likely to be used as the principal sentence for a minor offence. Given that the typical use cases for some types of disposals (such as fines and imprisonment) are vastly different (in terms of offence and offender combinations), they are more difficult to compare meaningfully.

Where comparisons are more readily available are in instances where (for a given offence and offender combination) there are multiple disposals available. Notably, for comparative purposes, cases that sit on or near the custodial threshold (where a sentence of immediate imprisonment is a distinct possibility but not necessarily inevitable) have been of interest to researchers. These cases on the custodial threshold are likely to entail a choice between suspended sentences (or high tariff community orders) and short custodial sentences.

Criticism of the effectiveness of short custodial sentences is not new. Over two decades ago the Halliday Review (2001) prominently noted "*the inability of short prison sentences (those of less than 12 months) to make any meaningful intervention in the criminal careers of many of those who receive them*."[147] Similarly, interviews with Scottish prisoners suggest they too view short sentences as devoid of meaning and ineffective at bringing about change:

> *Short prison sentences thus appeared to be both too easy and too hard, that is, inflicting both too little and too much pain through the long-term repetition of a short-term experience, a paradoxical state of affairs akin to the situation of the film Groundhog Day. But unlike the movie, where the protagonist reacts slightly differently to the same brief moment until he reaches an epiphany that changes his life, these prisoners were re-living identical moments of mind numbing monotony that offered little opportunity to move on with one's life.*[148]

More recent evidence from England and Wales continues to cast doubt on the effectiveness of short sentences of immediate imprisonment compared with other sentences.[149] For example, using matched samples and official data, Eaton and Mews (2019) found that "*short term custody with supervision on release in 2016 was associated with a statistically significant increase in proven reoffending compared to if community orders and/ or suspended sentence orders had instead been given*."[150] These findings are reflected in Table 1, which shows differences in reoffending when short sentences of immediate imprisonment are compared with community orders and suspended sentence

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[147] John Halliday, Cecilia French and Christina Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office London 2001) para 0.2 <https://webarchive.nationalarchives.gov.uk/+/http:/www.homeoffice.gov.uk/documents/halliday-report-sppu/chap-1-2-halliday2835.pdf?view=Binary>.

[148] Sarah Armstrong and Beth Weaver, 'Persistent Punishment: User Views of Short Prison Sentences' (2013) 52 The Howard Journal of Criminal Justice 285, 300.

[149] Aidan Mews and others, 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending' (2015) <https://www.gov.uk/government/publications/the-impact-of-short-custodial-sentences-community-orders-and-suspended-sentence-orders-on-reoffending>; Eaton and Mews (n 74); 'Reoffending Analysis for Participants Sentenced to an Enhanced Combination Order (October 2015 to December 2016): Bulletin 36/2018' (2018); Uhrig and Atherton (n 20); Joseph Hillier and Aidan Mews, 'Do Offender Characteristics Affect the Impact of Short Custodial Sentences and Court Orders on Reoffending?' (Ministry of Justice 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf>.

[150] Eaton and Mews (n 74) 10, 16.

orders. In both cases, it can be seen that reoffending is about four percentage points higher when a sentence of less than 12 months' custody is used.

Table 1: Percentage point differences in reoffending by type of sentence

Matched group pairs			Difference
Custody < 12 months	vs	Community orders	+3.7
Custody < 12 months	vs	Suspended sentence orders	+4.1

Similarly, an analysis published in 2020, using a definition of desistance based on reoffending risk[151] found that "*offenders who completed a custodial sentence of six months or less never reached the general criminal risk of the general population within the window of observation (from 2000 to end of 2018), regardless of age at sentence*."[152] In other words, those subject to short custodial sentences appeared to remain at greater risk of reoffending than the general population. Although it should be noted that the study was not designed to measure the effectiveness of a sentence (and conclusions on effectiveness must be appropriately tempered),[153] this is yet another study where short custodial sentences appear to have a limited efficacy.

One potential explanation is that the prison environment may not be as conducive to rehabilitation goals as might be expected. Interviews with 27 male and female prisoners in four English prisons revealed their thoughts on prison rehabilitation.[154] Generally, they reported feeling a lack of support in finding appropriate rehabilitative opportunities, yet when a programming activity was mandated they felt unmotivated because it was involuntary. In either case, the respondents tended to feel staff were not driven by rehabilitative concerns and thus there appeared a lack of institutional support to support personal change and development.

Still, perhaps the environment of the specific prison to which an individual is assigned may mediate the experience. A study using a large sample (24,508 prisoners) from prisons in England and Wales employed qualitative and quantitative methods[155] to provide "a well-grounded and empirically informed understanding" of how prison life relates to

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[151] Noted in Section 3.1.

[152] Uhrig and Atherton (n 20) 3.

[153] Among the caveats to note, the researchers highlight that the findings suggest a need to consider the nature of the offending behaviour as "'low harm, high volume" persistent crime may be a factor: meaning that the short custodial sentence group committed more crimes, but most were minor in nature. Another limit for present purposes is that the data did not allow for consideration of treatment or therapeutic factors of custodial and community sentences (see Section 5.3). Moreover, the research excluded a significant number of offenders because they reoffended before completing their sentence. While this is valid for the aims of the research, it does mean the results do not speak to some matters that could be considered important for assessing the effectiveness of a sentence. Additionally, the result of the inclusion criteria was that (since those with longer custodial or community sentences had to refrain from reoffending for longer periods to be included) those included may have been different from those who were excluded. Indeed, the number of exclusions is notable: the analysis of custodial sentences excluded 30,500 (leaving 34,000) and the analysis of community sentences excluded 45,200 (leaving 60,000).

[154] Karen Bullock and Annie Bunce, '"The Prison Don't Talk to You about Getting out of Prison": On Why Prisons in England and Wales Fail to Rehabilitate Prisoners' (2020) 20 Criminology & Criminal Justice 111.

[155] This involved a survey (to examine the quality of prison life) as well as looking at proven reoffending statistics.

reoffending.[156] The authors concluded that the moral climate of the prisons in which offenders serve time is related to reoffending rates upon their release. Spending time in prisons that were perceived as morally intelligible in terms of legitimacy, humanity, safety, and being well policed led to better outcomes on release.

5.3 Imprisonment: evidence on effectiveness from other jurisdictions

Comparisons with other jurisdictions require careful consideration of potential differences between the law and criminal justice systems to ensure that appropriate inferences can be drawn. However, where comparisons are appropriate, they can be highly informative.[157] Scotland, a jurisdiction similar to England and Wales in various respects, has also found that the effectiveness of short custodial sentences appears, particularly when the cost is also considered, limited. Scotland has gone as far as introducing rebuttable presumptions against short sentences.[158] While a detailed analysis of Scotland's rebuttable presumption against short sentences on real sentences is beyond our scope, we draw attention to it here to highlight the evidence base around it: including criticisms that, while well-intentioned, it adds little of substance to sentencing practice compared with other approaches - such as that in England and Wales[159] or even the prior approach in Scotland.[160]

Looking further afield, jurisdictions in the USA have produced a significant body of research examining imprisonment and reoffending. While there are caveats to be noted concerning how the USA can vary from England and Wales (in terms of the operation of sentences and the penal system),[161] it is nonetheless notable that in a recent review of the evidence of imprisonment for various sentence lengths, Loeffler and Nagin (2022) find that:

> *Most studies we review, in fact, find that the experience of postconviction imprisonment has little impact on the probability of recidivism. A smaller*

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[156] Katherine M Auty and Alison Liebling, 'Exploring the Relationship between Prison Social Climate and Reoffending' (2020) 37 Justice Quarterly 358.

[157] Jay Gormley and others, 'The Methodological Challenges of Comparative Sentencing Research' (Scottish Sentencing Council 2021).

[158] Scotland introduced a presumption against short custodial sentences (that now applies to sentences of less than 12 months) with the Criminal Justice and Licensing (Scotland) Act 2010. See also Simon Anderson and others, 'Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences' (Scottish Government 2015) <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences/> accessed 12 October 2021.

[159] See 'Definitive Guideline - Imposition of Community and Custodial Sentences' (Sentencing Council of England and Wales) < https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf>. This states that *"a custodial sentence must not be imposed unless 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."* (Available online at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf).

[160] For a critical analysis of the Scottish presumption against short sentences and why its impacts on sentencing practice may be muted, see Cyrus Tata, 'Sentencing & Penal Policy: Ending Prison as the Default' [2019] Probation Quarterly 33.

[161] Treatment programmes can be diverse and the evidence base surrounding these is beyond our present scope. For further details, see https://www.gov.uk/guidance/offending-behaviour-programmes-and-interventions. As an example of one historically notable programme from Scotland to illustrate diversity, see Ian Stephen, 'The Barlinnie Special Unit: A Penal Experiment', *Imprisonment Today* (Springer 1988).

> *number of studies do, however, find significant effects, both positive and negative.*[162]

The authors highlight the complexity of custodial sentences as an important consideration and note that:

> *The effect of incarceration on recidivism depends on not only what goes on within the prison walls but also the treatment of former prisoners in the larger society and the alternatives to which incarceration is being compared.*[163]

Similarly, researchers who recently conducted a methodologically strong meta-analysis in the US found that:

> *Every review has reached nearly the same conclusion: compared with noncustodial sanctions, custodial sanctions, including imprisonment, have no appreciable effect on reducing reoffending. The studies tend to show that placing offenders in custody has a slight criminogenic effect, although this association is not sufficiently robust to argue for its certainty. In most analyses, including ours, some moderator factors may influence effect sizes, but they do not qualify the central conclusion regarding custodial sanctions.*[164]

Reflecting on the available literature in the past two decades, these researchers concluded that it was now an established 'criminological fact' that imprisonment fails to impact reoffending. Indeed, while our focus here is on short sentences of immediate imprisonment, some of this evidence is broader. Therefore, next we will briefly outline some of the evidence concerning the effects of the length of a custodial sentence.

5.4 Evidence on sentence length in England and Wales and reoffending

Though touched on above, this section provides a brief discussion of the evidence concerning the length of custodial sentences. The reason for this concise analysis is that the criticisms of short custodial sentences might erroneously suggest longer custodial sentences are inherently more effective and that the limits apply purely to shorter sentences. In reality, while the evidence against the effectiveness of short sentences is amongst the most robust, it would be tenuous to claim longer custodial sentences are more effective. The evidence suggests that, *at best* custodial sentences (as in whether they are ordered and their length) fare no better than other disposals. However, the question is complex.

To begin with it is important to understand the terminology used to describe sentences and the complexities therein. For example, some sources describe suspended sentences as court orders while others describe them as custodial sentences. Moreover, while it is self-evident that sentences of immediate imprisonment differ in length, what may not be

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[162] Charles E Loeffler and Daniel S Nagin, 'The Impact of Incarceration on Recidivism' (2022) 5 Annual Review of Criminology 147.

[163] Loeffler and Nagin (n 162) 148.

[164] Damon M Petrich and others, 'Custodial Sanctions and Reoffending: A Meta-Analytic Review' (2021) 50 Crime and Justice 353. The authors used multilevel modelling with moderating variables.

obvious (especially to the public) is how a custodial sentence's length affects release, the period spent on licence,[165] or the disclosure periods for criminal convictions. Indeed, in describing custodial sentences we can consider variations such as: life sentences and whole life orders; indeterminate[166] and determinate sentences; suspended sentences; home detention curfew; and extended sentences.

Therefore, different lengths of custodial sentences and other matters may have implications beyond what notional headline figures suggest. With that caveat noted, Table 2 lists the known reoffending rates and the average number of reoffences for individuals sentenced to various lengths of custodial prison sentences in England and Wales for the period of April 2019 to March 2020.

Table 2: Known reoffending rates by custodial terms, April 2008 - March 2020[167]

Length of custodial term	Reoffending rate	Average number of reoffences per person
6 months or less	61.5%	5.4
From 6 months up to 12 months	49.3%	4.7
From 12 months up to 2 years	33.7%	3.4
From 2 years up to 4 years	24.0%	2.9
From 4 years up to 10 years	15.3%	2.6
More than 10 years	5.3%	1.8

Ministry of Justice, n = 53,136

Overall, from Table 2, it would appear that lengthier sentences are associated with reduced proven reoffending as there is a linear direction of a decreasing reoffending rate and average number of reoffences. For example, for custodial terms of six months or less, the reoffending rate is 61.5 per cent and the average number of reoffences is 5.4. As the length of the custodial term increases, the reoffending rates and average number of reoffences decrease. For custodial sentences in the highest group in Table 2 (more than 10 years), the reoffending rate is 5.3 per cent and the average number of reoffences is 1.8. However, the utmost caution is recommended as these bald statistics are not provided with any risk-relevant controls. For instance, those serving longer custodial sentences are

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[165] Changes in post-release supervision may be relevant when comparing sentences of immediate imprisonment over time.

[166] The ability to issue an indeterminate sentence for public protection (IPP) was abolished in 2012, but existing IPPs were unaffected. The known reoffending rate for those who were sentenced to an IPP was 9.2% with an average number of 2.4 reoffences.

[167] Ministry of Justice, 'Proven Reoffending Index Disposal Tool' (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1049656/index-disposal-data-tool-jan-20-mar-20_Final.xlsx> accessed 23 March 2022.

likely to be older when released and, thus, the typical age-crime curve (see Section 3.3) might play a role in the seemingly lesser reoffending rates. Additionally, those sentenced to shorter periods in prison may, overall, be a fundamentally different cohort with a different pre-existing propensity to reoffend. For example, those receiving short custodial sentences may have different patterns of criminal behaviour or criminal careers such as low harm but high volume offending.

Therefore, better evidence than bald figures is required. As Roberts and Frase (2019) note, there are "*perils*" to simply making comparisons between groups of offenders without statistical controls. What appear to be significant differences can "*evaporate*" when proper controls are added.[168] For instance, a sophisticated analysis (with controls) of UK sentences over one-year in length found that those imprisoned were significantly more likely to reoffend.[169] Other studies with controls have drawn similar conclusions. For instance, Wermink et al. (2018) conducted research with Dutch prisoners. They concluded that their findings are consistent with other recent statistical analysis using controls to account for confounding variables.[170]

A further (substantial) body of statistical data and quantitative analyses with controls are from the US. Although caveats concerning the multifaceted nature of imprisonment (and what happens within prison)[171] apply, arguably appropriate inferences can be drawn. For example, evidence from the US, with controls, suggested that Federal sentences could be reduced by 7.5 months without adversely affecting reoffending rates.[172] Therefore, it is prudent not to assume the effectiveness of longer custodial sentences. However, this is a hugely complicated area and one where more evidence is needed to support firmer conclusions. This complexity is illustrated in another US study that examined the relationship between time served in prison and reoffending. The research took a sample from Florida felony offences between 1994 and 2002 and utilised a generalised propensity score analysis.[173] The results found a roughly inverted U-shaped relationship between time served and reoffending, meaning lower reoffending rates at the shortest and longest periods of incarceration and higher rates in the middle: (a) from one to 12 months, greater time served was associated with an increase in reoffending rates; (b) from 13-24 months, the trend reversed where greater time served was associated with a decrease in reoffending; (c) reoffending rates remained relatively level with time served from 25-60 months; and (d) for those with prison stays of six years or more, the likelihood of reoffending slowly but steadily decreases with longer periods of time served. This study,

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[168] Roberts and Frase (n 108) s 3(c). See Section 5.1 for a discussion of controls.

[169] Darrick Jolliffe and Carol Hedderman, 'Investigating the Impact of Custody on Reoffending Using Propensity Score Matching' (2015) 61 Crime & Delinquency 1051. Note that data on length was not available but given that those in the sample were on probation it is assumed the sentences were at least 12 months (see page 1058).

[170] They reported that their results *"are largely in line with those of previous studies. The few existing new-generation studies [using propensity score to examine the dose-response relationship to recidivism] examining the effects of length of imprisonment have reported little evidence of a relationship between length of stay and recidivism."* See Hilde Wermink and others, 'Short-Term Effects of Imprisonment Length on Recidivism in the Netherlands' (2018) 64 Crime & Delinquency 1057, 1080.

[171] For an analysis of the effects and effectiveness of imprisonment, see Alison Liebling, 'Prisons, Personal Development, and Austerity', *The Routledge Companion to Rehabilitative Work in Criminal Justice* (Routledge 2019).

[172] William Rhodes and others, 'Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points' (2018) 17 Criminology & Public Policy 731.

[173] Daniel P Mears and others, 'Recidivism and Time Served in Prison' [2016] The Journal of Criminal Law and Criminology 83.

which had the benefit of controlling for several risk-relevant characteristics, indicates that there is no single effect of time served on reoffending.

5.5 Data on non-custodial and suspended sentences

The Ministry of Justice provides known reoffending rates and average number of reoffences for those who have committed new crimes. Table 3 shows outcomes of reoffending rates and the average number of reoffences (per person) by disposal type for the most recent fiscal year available. We will discuss these as they are the most recent figures available. However, it must be stressed that Table 3 consists of descriptive statistics without controls. Thus, firm conclusions cannot be drawn from this data.

Table 3: Known reoffending rates and average number of reoffences for sentences without immediate custody, April 2019 - March 2020[174]

Disposal type	Reoffending rate	Average numberof reoffences per person
Caution	13.0%	2.6
Fine	21.2%	3.5
Absolute/ conditional discharge	26.5%	3.7
Suspended sentence with requirements	25.8%	3.4
Suspended sentence without requirements	43.8%	4.7
Community order	29.0%	3.8

Ministry of Justice, n = 300,746

In Table 3, overall, cautions are associated with the lowest reoffence rate and average number of reoffences. Cautions, fines, and discharges have lower rates of reoffending and average number of reoffences than either community orders or suspended sentences. Whether suspended sentences are more often associated with a higher reoffending rate depends on a supervisory requirement: compared with community orders, suspended sentences with a requirement have a slightly lower reoffence rate while suspended sentences without requirements have a higher reoffence rate. From these data, it appears that suspended sentences are more effective when requirements are attached than when they are not.

MoJ also provides the known reoffending rates and average number of reoffences for those receiving community orders by type. Table 4 shows outcomes of reoffending rates

[174] Ministry of Justice, Proven Reoffending Statistics (2022).

and the average number of reoffences (per person) by the type of requirement attached to a community order.

Table 4: Known reoffending rates and average number of reoffences for those receiving community orders by type, April 2008 - March 2020[175]

Type of community order	Reoffending rate	Average number of reoffences per person
Unpaid work	16.9%	3.1
Curfew	32.4%	4.0
Curfew and unpaid work	18.3%	4.0
Accredited programme	27.4%	3.2
Accredited programme and unpaid work	23.8%	2.7
Accredited programme and curfew	30.0%	--
Attendance centre	35.0%	3.0
Attendance centre and unpaid work	32.2%	--
Exclusion	49.7%	6.4
Alcohol treatment	44.6%	4.7
Drug rehabilitation	64.2%	5.9

Ministry of Justice, n = 24,310. -- Data missing in original datafile.

While the lack of controls limits the conclusions we can draw, some information can be gleaned from Table 4. Based on the data in

Table 4, it appears that:

- Alcohol and drug treatment are among those community orders with the highest reoffending statistics. The other high reoffending type is the exclusion order.
- At times, combining two types of community order is associated with lower rates of reoffending than just one of them, but this is not always consistent. For example, a curfew and unpaid work are associated with a significantly lower reoffence rate than just a curfew, but the combination is associated with a higher reoffence rate than just unpaid work.
- There is some evidence here that unpaid work has a greater benefit than a curfew. These same effects are observed when combined with accredited programmes. An

[175] Ministry of Justice, 'Proven Reoffending Index Disposal Tool' (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1049656/index-disposal-data-tool-jan-20-mar-20_Final.xlsx> accessed 23 March 2022.

accredited programme with a curfew has a higher reoffence rate than just an accredited programme, compared with the combination of an accredited programme with unpaid work which is associated with a lower reoffence rate than just an accredited programme.

- A consistent finding for unpaid work is observed with a requirement of an attendance centre, which when combined with unpaid work, is associated with a lower recidivism rate than just an attendance centre requirement.[176]

In sum, from this dataset with no controls, it appears that unpaid work is associated with the most positive outcomes in reducing recidivism, even in combination with another type of order. However, due to the lack of controls, we should not infer too much from the data in Tables 3 and 4. There is, from these data as they are presented, simply no way to be sure that meaningful comparisons are being made across disposal types or requirement types. For instance, a systematic review of research available in 2008 concluded there was weak evidence for the positive impact of unpaid work,[177] which seems inconsistent with the foregoing findings.

Adding to our concerns, some of the tenuous implications of these data run contrary to older but more sophisticated analyses. For example, a meta-analysis of non-custodial sentence studies found an overall reduction in reoffending when some form of supervision was ordered,[178] but here it appears that not all supervisory conditions have similar effects. Likewise, an MoJ study with a propensity matched design found that combining a programme with unpaid work was associated with a lower reoffending rate than unpaid work alone, whereas the simple statistics in Table 4 showed the opposite effect.[179] Moreover, Bewley's work suggested some requirements (or combination of requirements) may have different effects on reoffending with some suggestion that curfews and supervision[180] had beneficial effects on reoffending.[181]

In sum, concerning the effectiveness of non-custodial or suspended sentence disposals, at the very worst, they seem to fare as well as short custodial sentences in terms of reoffending. Yet, there are gaps in the data. An important point to note in discussing the effectiveness of non-custodial sentences (and suspended sentences) is that these are more diverse than sentences of immediate imprisonment. There are a wide range of requirements that may be attached to community orders or suspended sentences to tailor their effects.[182] For example, various criminogenic factors that may be desirable targets for

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[176] There was not in the dataset an option for attendance centre and curfew.

[177] Robert C. Davis, Lila Rabinovich, Jennifer Rubin, Beau Kilmer, and Paul Heaton (2008) 'A Synthesis of Literature on the Effectiveness of Community Orders' RAND Corp. <https://www.rand.org/pubs/technical_reports/TR518.html>.

[178] Andrew Smith and others, 'The Effectiveness of Probation Supervision Towards Reducing Reoffending: A Rapid Evidence Assessment, [2018] 65 Probation Journal 407.

[179] Mews and others (n 149).

[180] Prior studies in England and Wales on the effectiveness of different types of community orders are not as relevant today as they tended to use supervision orders as a comparator. Supervision requirements were eliminated by the Offender Rehabilitation Act 2014. In 2015, the Rehabilitation Activity Requirement superseded both the supervision and specified activity requirements.

[181] Helen Bewley, 'The Effectiveness of Different Community Order Requirements for Offenders Who Received an OASys Assessment' (2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217383/niesr-report.pdf>.

[182] For example, see 'Definitive Guideline - Imposition of Community and Custodial Sentences' (Sentencing Council of England and Wales 2017) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/>.

intervention might be best addressed through various requirements and it would be beneficial to know more about this.[183] Therefore, while there is good evidence supporting the effectiveness of non-custodial and suspended sentences,[184] there is scope to examine these further, with their specific requirements (which may be combined), and how they may be best used to support desistance and reduce reoffending.[185]

5.6 Conclusions on quantitative data

Statistics are at their best when appropriate controls are used to account for other factors that may affect outcomes. There is a wave of new research employing advanced techniques to improve the evidence base by providing better controls. While these techniques cannot entirely overcome the limitations of existing data, they can help to reduce the perils of drawing inapposite conclusions. Moreover, these insights from quantitative analyses are now better complemented by high-quality qualitative data (such as narrative desistance studies) from various research studies. Indeed, it is with both qualitative and quantitative insights that the most robust conclusions can be drawn.

As far as one can generalise, the collective evidence casting doubt on the effectiveness of short custodial sentences is robust and cases close to the custodial threshold may often be more effectively dealt with in the community. For longer sentences the evidence is less definitive, but still suggestive in favouring community sentences. However, for longer sentences, questions over what happens in prison (e.g. programmes) become even more important.[186] Indeed, some key aspects of what might make a disposal effective are not an inevitable consequence of that disposal. For example, O'Donnell (2020) argues that:

> *On balance, the evidence points to a significant treatment effect associated with cognitive behavioural interventions delivered both in community and custodial settings. For substance misuse, public health-based harm-minimisation approaches seem to hold most promise.*[187]

Therefore, beyond just the type of disposal (e.g. custody or community) or its quantum (e.g. length), more detailed questions may be asked about what is being done with offenders in particular contexts. A detailed review of what occurs or may occur during a sentence is beyond our present scope.[188] However, we can note other analyses of 'what works' have also argued that "*drug treatment programmes generally have a positive impact on reoffending and offer value for money*" and that "*cognitive-behavioural programmes can lead to modest reductions in reoffending especially when they are rigorously implemented and combined with support in solving practical problems*." Other

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[183] Bonta and Andrews (n 61) 288–289; 'The Risk-Need-Responsivity Model' (Her Majesty's Inspectorate of Prisons 2020) <https://www.justiceinspectorates.gov.uk/hmiprobation/research/the-evidence-base-probation/models-and-principles/the-rnr-model/>.

[184] For example, Mews and others (n 149); Eaton and Mews (n 74). Additionally, much of the work noted discussing custodial and non-custodial or suspended sentences is also relevant to this point.

[185] For example, how co-morbidities (e.g. addiction and mental disorders) that may be reoffending risk factors might be best addressed.

[186] Yvonne Jewkes and Kate Gooch, 'The Rehabilitative Prison: An Oxymoron, or an Opportunity to Radically Reform the Way We Do Punishment?', *The Routledge Companion to Rehabilitative Work in Criminal Justice* (Routledge 2019).

[187] O'Donnell (n 143) 12.

[188] Sapouna and others (n 143) 8, 44.

research also suggests cognitive therapy and drug treatment are beneficial.[189] However, this is not an exhaustive list and there are more measures that may be effective: such as 'restorative justice'[190] practices and 'problem solving courts'

[189] Robert C Davis and others, *A Synthesis of Literature on the Effectiveness of Community Orders* (RAND Corporation 2008) <https://www.rand.org/pubs/technical_reports/TR518.html>; Howard White, 'Policy Brief 4: The Effects of Sentencing Policy on Re-Offending' (Campbell Collaboration 2017) <https://www.campbellcollaboration.org/better-evidence/campbell-policy-brief-sentencing-effects-on-re-offending.html>.

[190] For information on Restorative Justice, see Tania Nascimento, 'How Can Restorative Practices Become More Embedded in Scotland?' (Restorative Solutions 2021) <https://www.restorativesolutions.org.uk/news/how-can-restorative-practices-become-more-embedded-in-scotland> accessed 8 October 2021; 'Restorative Justice and the Judiciary' (n 36).

6. Cost-effectiveness of sentencing

Cost-effectiveness is another term with varied meanings. Some may equate cost-effectiveness to the pecuniary costs associated with a particular disposal, court action, prosecution, prison places, or treatment programme. This may entail, for example, considering the costs of a short sentence of immediate imprisonment against the costs of another disposal like a suspended sentence order: such as the costs of the prison placement and the costs, say, of mental health treatment. Others may take a different approach and also consider the wider social costs of crime and punishment,[191] and the effects on outcomes such as reoffending.[192] Consequently, precisely how one should define cost-effectiveness is neither settled nor straightforward.[193] Here we briefly examine short and long-term considerations for cost-effectiveness.

6.1 Short term cost-effectiveness

The pecuniary costs of a disposal will vary depending on its type (e.g. custodial or non-custodial) and conditions (e.g. the length of a custodial sentence or the requirements attached to a community sentence). However, in general terms, immediate custodial sentences are the most expensive with the average cost per prison place in England and Wales having increased to £48,162 per year in 2020-21.[194]

This cost of immediate imprisonment is significant and makes these much more expensive than other sentences. Indeed, HM Prison and Probation Service's (HMPPS's) net expenditure on prisons (2020-2021) was £3,219,000,000 (£3.2 billion out of £4.6 billion) and is by order of magnitude the biggest expense in terms of the split of resource of departmental expenditure limits between custodial and community services and support services.[195] This high cost of imprisonment means that a key benefit of other disposals, such as suspended sentences and community orders, is that each *"costs much less than immediate imprisonment*."[196]

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[191] Some research has worked to provide numerical costs to physical and emotional harms. This approach has been used in various cost analyses in England and Wales. For example, see Paul Dolan and others, 'Estimating the Intangible Victim Costs of Violent Crime' (2005) 45 British Journal of Criminology 958.

[192] See Mike McConville and Luke Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19 The International Journal of Evidence & Proof 172.

[193] For examples, see Matthew Heeks and others, 'The Economic and Social Costs of Crime: Second Edition' (Home Office 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732110/the-economic-and-social-costs-of-crime-horr99.pdf>; Alexander Newton and others, 'Economic and Social Costs of Reoffending: Analytical Report' (Ministry of Justice 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814650/economic-social-costs-reoffending.pdf>.

[194] Ministry of Justice, Costs Per Place and Costs Per Prisoner by Individual Prison (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1050046/costs-per-place-costs-per-prisoner-2020_-2021.pdf>.

[195] 'Annual Report and Accounts 2020/21' (HM Prison and Probation Service) 16 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041628/HMPPS_Annual_Report_and_Accounts_2020-21.pdf>.

[196] Curzon and Roberts (n 117) 4.

6.2 Punitiveness and cost-effectiveness

Presently, we are focused on consequentialist aims of punishment (i.e. forward looking or utilitarian) goals. As such, retributivist aims concerned with punishment are largely beyond our current scope. However, for the sake of completeness, we highlight here that one aim a sentence may pursue is the goal of punishment.

In some cases, the reason for a sentence may be found in the intent to punish an offender. In such cases, consequentialist considerations (such as desistance, reducing reoffending, or cost-effectiveness) may not be the sentence's objective. Indeed, the community and custodial thresholds depend upon the seriousness of the offence and not the effectiveness of the disposal.[197] Moreover, retributivist aims of punishment are, perhaps, most evident in exceptionally serious offences such as those where whole life orders are given. Whole life orders, given the nature of the offenders subjected to them, can promote public protection. However, they go further as even if the risk abates the sentence endures: there is never an option to apply to a Parole Board who would otherwise only release an offender once it is safe.[198]

Therefore, in some contexts, the fact that a sentence is punitive is the objective, rather than effectiveness in terms of cost or other consequentialist considerations. Yet, moving away from the exceptionally serious side of the offending spectrum towards the more common offences, it can be highlighted that non-custodial/ suspended sentences are also punitive. Indeed, all community orders since 2012 entail punitive components.[199] Therefore, community orders and suspended sentences may have, in some cases, the double advantage of being suitably punitive and (in consequentialist terms) more effective. Indeed, the Sentencing Council's guideline on community and custodial sentences notes that:

> *Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.*[200]

For some, the requirements of community or suspended sentences might mean they can "*actually be the more dreaded penalty*."[201] Indeed, the onerous nature of the conditions attached to some non-custodial sentences (particularly where these are tailored to the causes of offending) can lead some to prefer imprisonment as the easier option. For

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[197] 'Definitive Guideline - Imposition of Community and Custodial Sentences' (n 182).

[198] For an overview of life sentences, see https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/life-sentences/.

[199] For further detail, refer to the Sentencing Council guideline: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/.

[200] 'Definitive Guideline - Imposition of Community and Custodial Sentences' (n 182).

[201] Joan Petersilia and Elizabeth Piper Deschenes, 'Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions' (1994) 74 The Prison Journal 306, 306. See also Joan Petersilia, 'When Probation Becomes More Dreaded than Prison' (1990) 54 Fed. Probation 23; Fergus McNeill, 'Punishment as Rehabilitation BT - Encyclopedia of Criminology and Criminal Justice' in Gerben Bruinsma and David Weisburd (eds) (Springer New York 2014).

example, in research on SSOs one Crown Court judge suggested that people may view 'just' 12 months in custody as less arduous than the requirements of an SSO.[202]

Therefore, even in terms of providing the greatest degree of punitiveness, it is not necessarily the case that sentences of immediate imprisonment will be superior. Instead, as with other matters noted here, a complex picture emerges. To this end, a greater understanding of how punishment is experienced would be beneficial in formulating guidance that strikes the best possible balance between retributivist and consequentialist objectives – including cost-effectiveness.

6.3 Long term cost-effectiveness

The total annual estimated economic and social cost of reoffending (based on a 12 month period starting in 2016) has been estimated at £18.1billion.[203] Therefore, in the medium to long term, when considering the pecuniary costs of disposals, the effectiveness of a sentence in terms of consequences for reoffending may be part of cost-effectiveness. Indeed, in Northern Ireland, the non-custodial disposal known as the Enhanced Combination Order has seen positive offender outcomes and less cost than custody, meaning that it was considered to represent "*excellent value for money*."[204]

Newton and others (2019) have analysed the costs of reoffending by index disposal (the disposal type for a proven offence that leads to an offender being included in the cohort) and cost category. Their results are reflected in Figure 2. These costs include those in anticipation of crime (e.g., actions taken to reduce the risk of being victimised such as crime prevention and insurance), as a consequence of crime (physical or psychological injury, value of stolen property), and in response to crime (e.g., police investigation, court costs, imprisonment). However, because different disposal types are used with different frequencies not reflected in the data, Figure 2 cannot be used to compare the cost effectiveness of one disposal against another. Instead, what it can do is suggest the savings that may accrue if disposals could be effectively tailored to reduce reoffending. From Figure 2 it can be seen that even small reductions in reoffending would have significant benefits.

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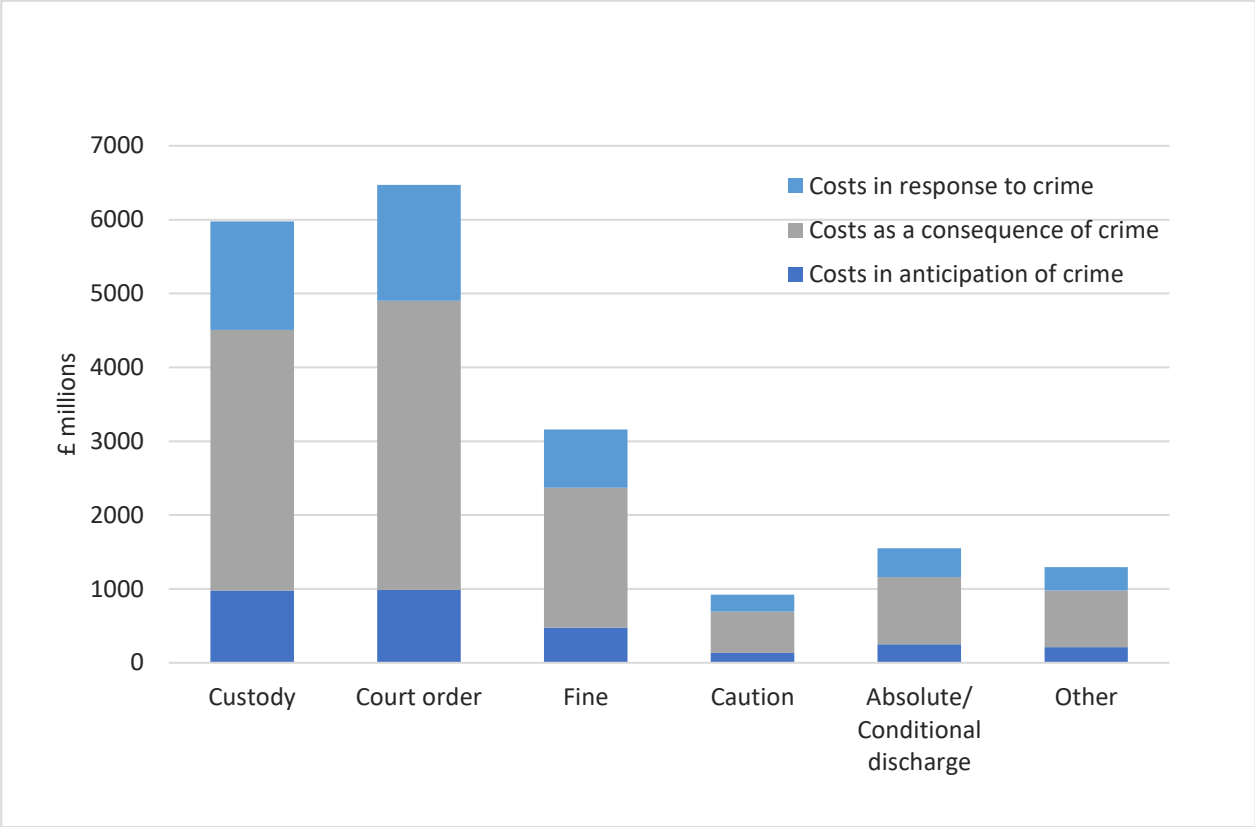
[202] George Mair, Noel Cross and Stuart Taylor, 'The Community Order and the Suspended Sentence Order: The Views and Attitudes of Sentencers' (2008) 29. See interviewee CCJ13. More generally on offender perspectives see Esther FJC van Ginneken and David Hayes, '"Just" Punishment? Offenders' Views on the Meaning and Severity of Punishment' (2017) 17 Criminology & Criminal Justice 62.

[203] The total estimated economic and social cost of reoffending has been estimated at £18.1 billion. See, Newton and others (n 193). Data from Table 3.

[204] Northern Ireland Statistics and Research Agency, 'Evaluation of the Enhanced Combination Order Pilot' (2017) para 1.1.

Figure 2: Estimated economic and social costs of reoffending by adults in England and Wales, by index disposal and major cost category (2018-2019)[205]



In Figure 2, it can be seen that the index disposal of (immediate) custody has associated reoffending costs of about £6,000 million. Therefore, for instance, if different sentences could improve reoffending costs by even 5 per cent, this would save about £300 million. Importantly, the research noted in Section 5.2 found little indication that custodial sentences (especially short custodial sentences) were more effective in terms of promoting desistance or reducing reoffending. Indeed, in various jurisdictions, "*there is clear evidence that community sentences are a more effective and cheaper alternative to prison*" in many cases.[206] Moreover, as we discuss further in Section 5.2, imprisonment may even be criminogenic in some cases[207] and, in that way, less effective than community sentences.[208] Therefore, greater use of suspended sentences and community orders could result in substantial savings. Likewise, in Figure 2, the index disposal of 'court order' includes both suspended sentences and community orders. The costs of reoffending for these disposals are over £6,000 million. Given that there is evidence that some interventions or combinations of interventions may be more effective in reducing

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[205] Newton and others (n 193) fig 7.

[206] Paul Doran, 'Enhanced Combination Orders' (2017) 14 Irish Probation Journal 133, 134.

[207] Gary Kleck and Brion Sever, *Punishment and Crime: The Limits of Punitive Crime Control* (Routledge 2017) 305. *("A good deal of evidence indicates that incarceration, on average, increases offending of those incarcerated. While it may reduce the subsequent offending of some inmates, it apparently increases the offending of more inmates. Incarceration reduces the inmate's chances for marriage, increases divorce among those already married, impairs subsequent employment prospects, and reduces income. A prison term may also harden the inmate's pro-criminal attitudes or sharpen his criminal skills, but there is little systematic evidence bearing on these issues.")*

[208] Concerning the factors associated with desistance in the literature that imprisonment may interfere with and the evidence on reoffending see Section 5.

reoffending there is, again, potential to see significant savings if sentencing can reduce reoffending (see Section 5.5).

6.4 Conclusions on cost-effectiveness

What is cost-effective depends on what one considers to be effective. Here we have taken cost-effectiveness in largely pecuniary terms. These pecuniary costs are an important consideration, even if not the sole consideration, and analysing them (albeit briefly) in isolation is illuminating. In sum, in the short-term, per offender, sentences of immediate imprisonment are the most expensive by a significant margin. In this sense, they are not cost-effective where another disposal (e.g. a suspended sentence or community order) is suitable. In the long-term, the cost-effectiveness of sentences of immediate imprisonment are not improved when considering the evidence on reoffending.

Of course, this is not to say custodial sentences are never appropriate. However, it would seem they are most obviously appropriate in the most serious cases. For example, there is no community order or suspended sentence disposal in England and Wales appropriate for the gravest offences. As an illustration, the sentencing range in the rape guideline is at the very lowest end 4 years' immediate imprisonment – most sentences will be much higher in the range. However, where careful consideration is needed, in light of the points raised here, is where custodial sentences are used for less serious offences. Strikingly, 75 per cent of prison receptions in 2020 were for sentences of twelve months or less and 64 per cent were for six months or less.[209]

A factor contributing to the high numbers of short custodial sentences may be a perceived lack of credible alternatives in many cases. If this is a key factor, then it means that imprisonment is used not because it is the appropriate disposal given the seriousness of the offence, but because it is the only disposal left to the court: for instance if a person has failed to comply with a community order. While such an eventuality may make sense given the needs of the courts to dispose of cases, it would leave room to improve cost-effectiveness. Accordingly, a better understanding of why so many short sentences are used and the barriers to a disposal other than a short custodial sentence[210] seems of the utmost importance to help devise more cost-effective solutions. Depending on the factors at play, the solution may entail a combination of guidance (e.g. on the benefits of other disposals and how to deal with intransigent offenders) and reconsideration of the disposals open to the courts (e.g. where there is some gap in the current range of disposals).[211]

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[209] Ministry of Justice, 'Prison Receptions: 1990 to 2020', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983553/Receptions_2020.ods.

[210] Issues to examine might include the use of remand and where a person fails to pay a fine, and/ or fails to comply with a community or suspended sentence.

[211] Northern Ireland's Enhanced Combination Order is one example of a recent disposal option intended to reduce reliance on custodial sentences and improve the effectiveness of sentencing. Paul Doran, 'Enhanced Combination Orders' (2017) 14 Irish Probation Journal 133.

7. Equality

We end our discussion on the effectiveness of sentencing by considering questions of equality. Equality is a key rule of law principle and fundamental to the legitimacy of sentencing. The Council has committed to placing a consideration of issues relating to equality and diversity at the heart of all its work and has dedicated a specific objective to this in its strategic plan.

In terms of the effectiveness of sentencing within our remit, there are two considerations. Firstly, if different sentences have distinctive effects, then any disparities in sentencing between groups may impact the effectiveness of sentencing. Secondly, if various groups have different needs or experience sentences differently (for example, if custodial sentences are less effective for female offenders), then this has implications for the effectiveness of sentencing. Indeed, there is evidence that desistance journeys in the UK may be different for different ethnic groups and that there may be "*cultures of desistance*."[212] The presence of such differences "*underlines the significance of attending to both socio-structural location and the cultural contexts within which desistance takes place*" to ensure sentences are effective.[213]Accordingly, below we outline the available data with regard to ethnicity[214] and gender.

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[212] Adam Calverley, *Cultures of Desistance: Rehabilitation, Reintegration and Ethnic Minorities* (Routledge 2012). See also Section 7 of this review.

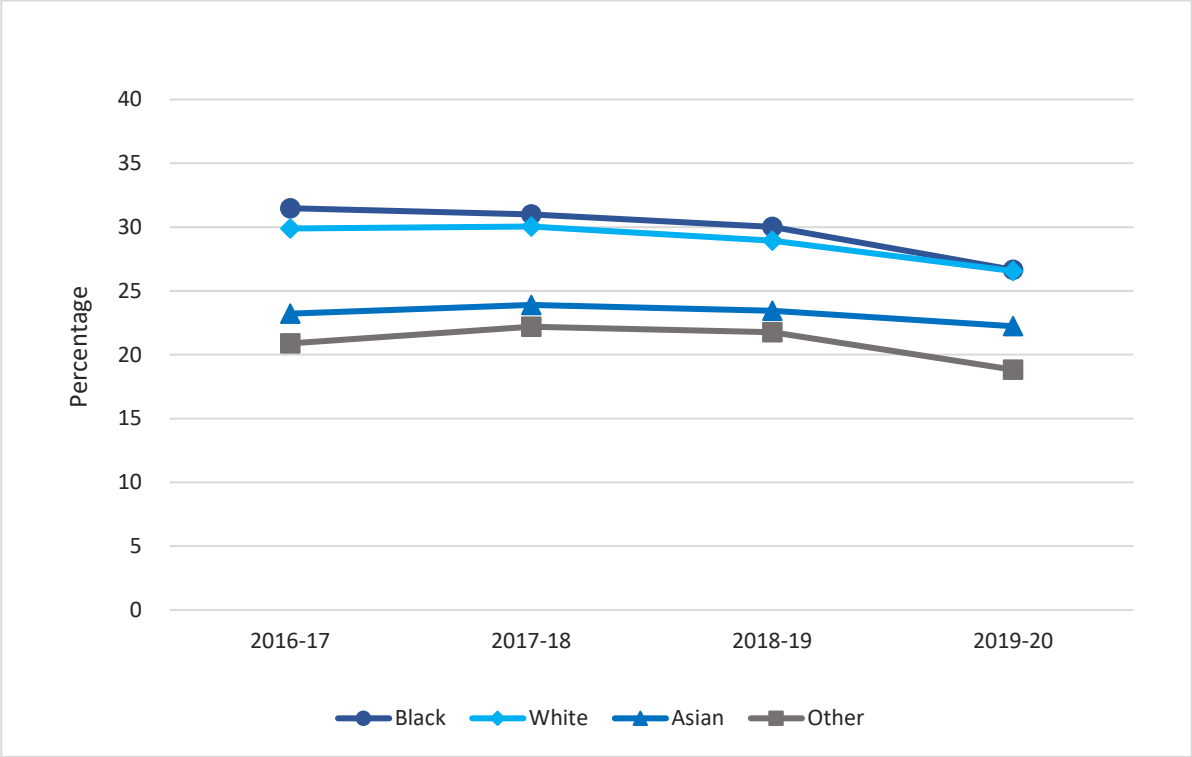
[213] Elizabeth Weaver and Fergus McNeill, 'Changing Lives? Desistance Research and Offender Management' (2010) < https://www.sccjr.ac.uk/publication/changing-lives-desistance-research-and-offender-management/> 50.

[214] Note that some official statistics formerly used categories of 'race' rather than 'ethnicity.'

7.1 Ethnicity

Figure 3 provides the proven reoffending rates annually for individuals in the community after sentencing for prior offences and by ethnicity group.

Figure 3: Proven reoffending rates ethnicity group (2016-2020)[215]



Ministry of Justice, n = 1,500,776

Figure 3 shows that Black individuals reoffended at the highest rates compared with other ethnic groups with the exception of the latest fiscal year in the available data (2019-20) where the reoffending rates between the Black and White groups were similar. Asian individuals were associated with lower reoffending rates for each year, with the remainder in the Other[216] group placing at the lowest risk of reoffending. It is noted, however, that as these statistics do not include controls, any differences between ethnicities could be explained by factors that are not then accounted for (e.g. income, geography, offence type, criminal history).[217]

Figure 4 provides the known reoffending rates for the fiscal year 2020 by ethnicity and age grouping.

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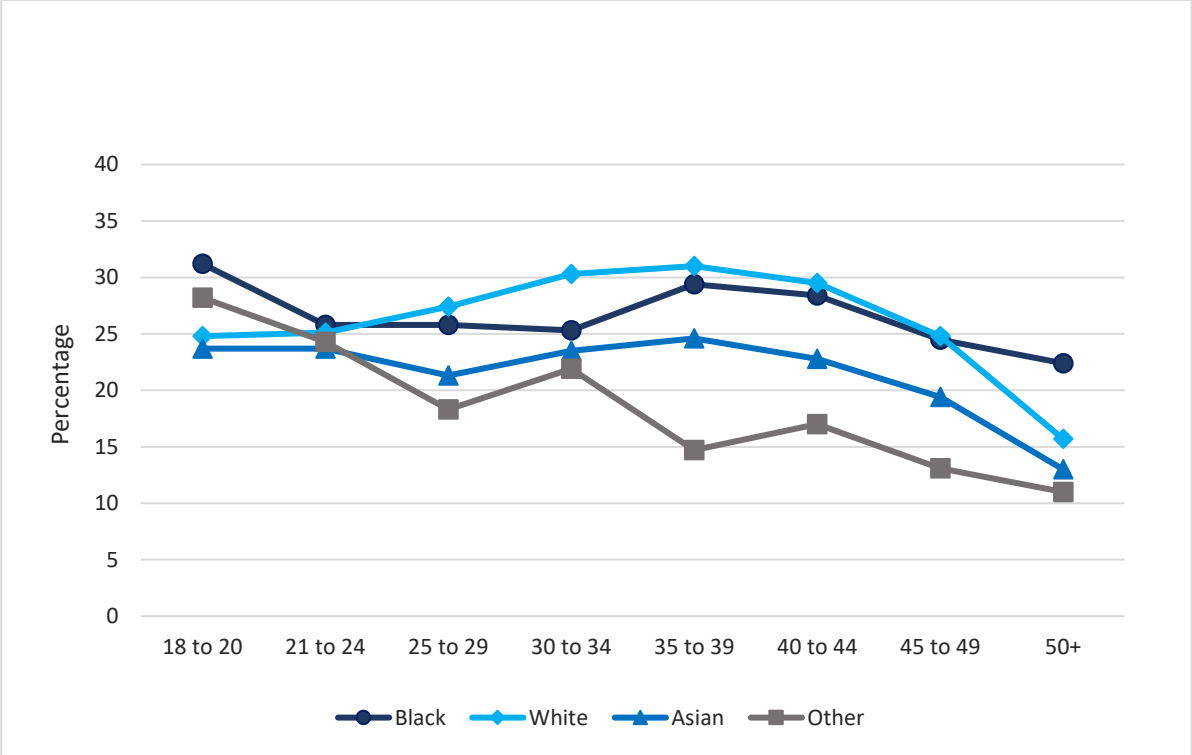
[215] Figure compiled from data within the Excel spreadsheet in the Proven Reoffending Overview Data Tool, Ministry of Justice <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1049655/Overview-data-tool-jan20-mar20_Final.xlsx> accessed 21 March 2022.

[216] 'Other' includes ethnicities not covered under the previous heading. In 2021 there was a change whereby Chinese is now classified as Asian instead of Other.

[217] 'Statistics on Ethnicity and the Criminal Justice System 2020: A Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991' (Ministry of Justice 2021) <https://www.gov.uk/government/statistics/ethnicity-and-the-criminal-justice-system-statistics-2020>.

Figure 4: Known reoffending rates for fiscal year 2020 by ethnicity and age



Ministry of Justice, n = 668,739

As Figure 4 reveals, reoffending rates for Asian and the generic group of Other ethnicities were generally the lowest. Compared with Whites, Black individuals had a markedly higher rate of reoffending at the youngest age groups (18-20) and oldest (50+), but otherwise the rates were lower or similar. Notably, the reoffending rates for Whites do not reflect the age-crime curve with rates increasing from the youngest groups into ages in the twenties and thirties, though there is a drop-off from age 40.

Annual statistics on the rate of reoffending by ethnicity and by type of sentencing disposal are not made publicly available. Still, an MoJ report provides some information. This study tracked a large cohort of first-time entrants to the criminal justice system in England and Wales in 2000 who were released. The methodology involved a long follow-up period of 19 years. The models controlled for various factors, such as offence-related characteristics (e.g. offence type), risk-relevant factors (e.g. age at first offence), demographics (e.g. gender, age), and custodial length. Black, Asian, and Minority Ethnic (BAME)[218] individuals (combined as a group) who completed a custodial sentence were 9 per cent less likely than Whites to reoffend.[219] But for community sentences, the odds for BAME individuals to reoffend were 10 per cent higher than Whites. The report did not speculate as to the reasons for this variation.

The result that minorities given community sanctions were more likely to reoffend is consistent with a meta-analysis of seven studies from different countries which expressly

[218] We recognise the limitations of the category of 'BAME' in combining groups of ethnicities that have risk-relevant differences.

[219] Uhrig and Atherton (n 20).

included ethnicity (defined as non-White) as a factor.[220] The pooled statistic indicated that, for those with community sanctions, the odds of minority individuals reoffending were 70 per cent higher than the odds of Whites reoffending. Why this may be the case (for example, due to disparities in treatment or social inequalities)[221] is not ascertainable from the statistical data.

Other data on ethnicity and criminal justice also suggest a need to carefully examine the intersection between ethnicity and sentencing and how it may impact effectiveness.[222] Moreover, it is important to consider potential disparity in sentencing. If different disposals vary in their effectiveness, then it would influence effectiveness if the use of disposals varies between ethnic groups.

Analyses conducted by the Sentencing Academy in 2021 used custody rates and average custodial sentence lengths to create a bespoke measure of punitiveness for indictable offences: the 'Expected Custodial Sentence.'[223] The research combined published MoJ data on custody rates and custodial sentence lengths to examine trends between 2009-2019. The analysis found that the figure for White offenders was consistently lower than for other ethnic groups. The results are shown in Table 5. It can be seen that the Expected Custodial Sentences for the Asian and Black groups are the highest at over 10 months. The lowest Expected Custodial Sentence is in the White group which is 6.6 months.[224] Other groups have an Expected Custodial Sentence of 8.5 and come in between the White group and the Asian and Black groups. If, for instance, the less punitive sentences are more effective, this has profound implications. Yet, these results are complex, and the Sentencing Academy also found that "*the overall Expected Custodial Sentence figure masks considerable variation across offence categories, with the greatest divergence evident for violent offences against the person*."[225] Indeed, the Academy concluded that current data are insufficient to provide greater clarity into the nature and extent of the problem and that "*fresh research is also required*."[226]

Table 5: Expected custodial sentence by ethnicity

Ethnicity	Expected custodial sentence (months)
Asian	10.2
Black	10.1
Chinese and other	8.5

[220] Denis Yukhnenko, Nigel Blackwood, and Seena Fazel, 'Risk Factors for Recidivism in Individuals Receiving Community Sentences: A Systematic Review and Meta-Analysis' (2020) 25 CNS Spectrums 252.

[221] On equality, see David Lammy, 'The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (UK Government 2017).

[222] Lammy (n 221).

[223] The Expected Custodial Sentence combines the probability of imprisonment with the average custodial sentence length.

[224] Julian Roberts and Jonathan Bild, 'Ethnicity and Custodial Sentencing: A Review of the Trends, 2009-2019' (Sentencing Academy 2021) 2 <https://sentencingacademy.org.uk/wp-content/uploads/2021/06/Ethnicity-and-Custodial-Sentencing-1.pdf>. See Table 3 from the analysis.

[225] Roberts and Bild (n 224) 2.

[226] Roberts and Bild (n 224) 17.

Mixed ethnicity	8.5
White	6.6

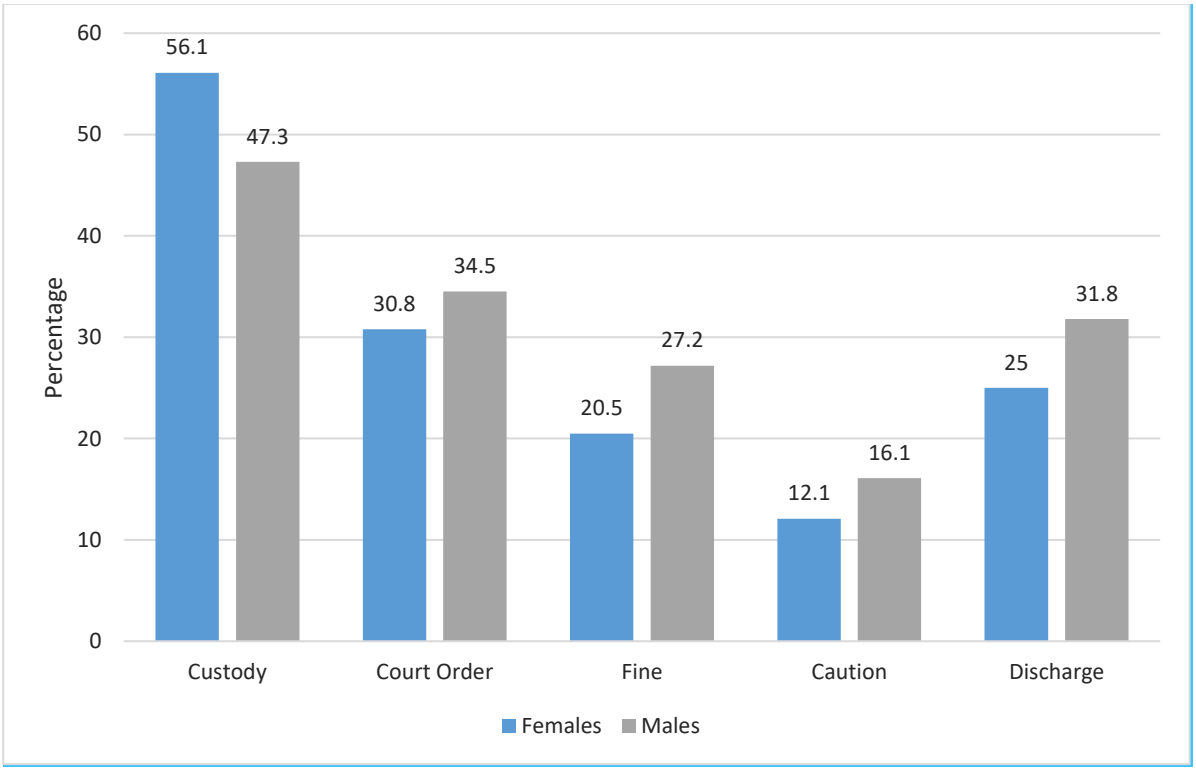
7.2 Gender

This section will highlight key areas relevant to sentencing female offenders. For reasons noted below, there are a number of distinctive issues to consider with regards to effectively sentencing females. Firstly, we note the distinctive aspects of female (re)offending. We then examine the evidence around how females experience sentencing disposals and their desistance journeys. Finally we note the complexity emerging from the context of violence against women and girls (VAWG). All of this can impact the effectiveness of sentences.

7.3 Female offending

In 2018 the Ministry of Justice submitted its *Female Offender Strategy* to Parliament in which it compared the known reoffending rates by gender across sentencing options given, with the results reflected in Figure 5.[227]

Figure 5: Known reoffending rates (per cent) by disposal type (April - June 2016)



Ministry of Justice, *Female Offender Strategy* n = 36,399

As Figure 5 indicates, females are least likely to reoffend when formally cautioned (12.1 per cent) and most likely when given a custodial sentence (56.1 per cent). Rates of reoffending for fines, discharges, and court orders varied between 21 and 31 per cent.

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[227] Ministry of Justice, 'Female Offender Strategy: Supporting Data Tables' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719770/supporting-data-tables-for-the-female-offender-strategy.ods> accessed 20 March 2022 (based on Table 7.1a).

Court orders in this table include community orders and suspended sentences. Women have lower reoffending rates than men, with the exception of custodial sentences where the one-year reoffending rate for women was 56.1 per cent compared with 47.3 per cent for men. Another finding from the same dataset compared rates for those serving a sentence of fewer than 12 months, with the one-year reoffending rate for women of 70.7 per cent compared with 62.9 per cent for men.[228] However, this study was based on a small sample of those who were sentenced or released from custody between April and June 2016 and without matching or controls applied, thus making it a rather weak study design to allow for firm conclusions.

Another MoJ study, using a methodologically novel approach (employing a repeated random effects model), followed a large cohort of first-time entrants to the criminal justice system in England and Wales in 2000 who were subsequently released.[229] This study is relatively unique in having a lengthy 19-year follow-up period. The controls were individual-level factors (e.g. age and ethnicity), offence-related factors (e.g. type, group), and other factors that could influence the likelihood of reoffending (e.g. criminal history, sentence length). With these controls, compared with the odds of males for reoffending, the odds of reoffending for females who completed a custodial sentence and a community order, respectively, were lower by 9 per cent and 37 per cent, respectively. In sum, the model with multiple controls and a longer follow-up period indicated that females were less likely (with statistically significant results) to reoffend than men given either a custodial or community sentence.

Other researchers used a propensity score matched sample in which they paired 320 women released from a custodial sentence with 320 beginning a community sentence in England between 2005-2009, with a one-year follow-up period.[230] In comparing reconviction rates, results showed a higher conviction rate for women with custodial sentences (55.3 per cent) compared with community orders (48.8 per cent), though the difference was statistically nonsignificant. The women released from custody were associated with a higher mean number of new offences, with a statistically significant result. In both groups, just over half of the new offences were theft, with few implicating serious violent crimes. This study further conducted a cost-benefit analysis of the two sentencing options for women, concluding that the additional costs of sending the 320 women to prison were, at a conservative estimate, £3.6 million.

7.4 Females and the impacts of disposals

Research has suggested females have different criminogenic needs.[231] This may have implications for the effectiveness of sentencing and what works to reduce reoffending. Notably, in 2007, the influential *Corston Report* called particular attention to the plight of vulnerable women caught up in a criminal justice system that was largely designed for

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[228] Ministry of Justice, 'Female Offender Strategy' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf> accessed 20 March 2022.

[229] Uhrig and Atherton (n 20).

[230] Carol Hedderman and Darrick Jolliffe, 'The Impact of Prison for Women on the Edge: Paying the Price for Wrong Decisions' (2015) 10 Victims & Offenders 152. Table 3 shows the variables considered for the model.

[231] For example, see Carolyn Rebecca Block and others, 'Long-Term Patterns of Offending in Women' (2010) 5 Feminist Criminology 73; Ivana Bacik, 'Women and the Criminal Justice System' [2002] Criminal Justice in Ireland 134; Dana D DeHart, 'Women's Pathways to Crime: A Heuristic Typology of Offenders' (2018) 45 Criminal Justice and Behavior 1461.

men.[232] Accordingly, imprisonment may be a less effective sentence for women if it fails to address their needs.

Additionally, women may experience prison more harshly due to their histories of trauma and feeling greater discord at being distant (both farther away geographically than males due to fewer women's prisons and physically in a personal relationship perspective) from family and children.[233] This different experience may also mean that custodial sentences have different effects based on gender. Concerningly, the negative effects of imprisonment may be amplified for females. Indeed, officials are concerned with the high rate of women committing self-harm in English prisons, with almost 12,000 self-harm incidents recorded in the fiscal year ended 2021.[234] It is also relevant to the general lack of female-oriented treatment programming such that any such services typically offered to females were originally designed for men, despite there being treatment-relevant differences between the genders.[235] A further difference is of relevance, as indicated in an MoJ report. In the two years ending in fiscal 2021, MoJ found that women were more likely than men upon release from custody to be either homeless or rough sleeping[236] and less than half as likely as men to be employed.[237]

In its 2018 *Female Offender Strategy*, MoJ laid out an agenda to focus on community-based solutions for women and to make custodial penalties more effective for them, acknowledging the special vulnerabilities of women in custody.[238] However, a Prison Reform Trust report in 2021 determined that only 31 of the 65 commitments in the strategy had been fully achieved.[239] Accordingly, for females, some criminogenic effects of imprisonment risk being amplified and the potential for rehabilitation undermined.[240]

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[232] 'The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System' (Home Office 2007) <https://webarchive.nationalarchives.gov.uk/ukgwa/20130206102659/http:/www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf>.

[233] For further information on women's experiences, see Claudia Vince and Emily Evison, 'Invisible Women: Understanding Women's Experiences of Long-Term Imprisonment' (Prison Reform Trust 2021) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Building%20Futures/invisible_women.pdf>.

[234] 'Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to December 2021 Assaults and Self-Harm to September 2021' (Ministry of Justice 2022) <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-september-2021/safety-in-custody-statistics-england-and-wales-deaths-in-prison-custody-to-december-2021-assaults-and-self-harm-to-september-2021>.

[235] Vince and Evison (n 233).

[236] Ministry of Justice, 'Community Performance Annual, Update to March 2021: Accommodation Circumstance Tables' (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006532/accommodation-202021.ods> accessed 20 March 2022 (using Table 11).

[237] Ministry of Justice, 'Community Performance Annual, Update to March 2021: Employment Circumstance Tables' (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006536/employment-202021.ods> accessed 20 March 2022 (using Table 11).

[238] Ministry of Justice, 'Female Offender Strategy '(2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf> accessed 20 March 2022.

[239] 'Why Focus on Reducing Women's Imprisonment' (Prison Reform Trust 2017) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/whywomen.pdf>.

[240] See also, 'Why Focus on Reducing Women's Imprisonment?' (Prison Reform Trust 2021).

7.5 Female Desistance journeys

Far less is known about the desistance process for women and most of the research focuses on males. Still, the available evidence, as compiled in a review of 44 studies on female desistance, indicates male-based theories of desistance generally apply to female offenders, though with some differences.[241] Comparatively, having children and supportive relationships are more strongly correlated with desistance for women. For men, being employed is a stronger factor in desistance, while having criminal friends is more likely to inhibit desistance. In studies focused on women, positive factors in predicting desistance are economic independence, absence of drug problems, and having individual agency.

7.6 Violence against women and girls (VAWG)

Finally, we can briefly note the complications that emerge from the broader issues of VAWG. Firstly, an effective sentence in this regard may be one that appropriately protects victims of domestic abuse and recognises the severity of the conduct. To this end, the Council has issued an overarching guideline on domestic abuse.[242] Such guidelines, and their monitoring, may prevent limitations such as those recently identified in Scotland, which does not yet have such a guideline. McPherson (2022), following an analysis of Scottish intimate partner femicide cases, found a tendency to embed sentencing decisions in domestic homicides in a "*love narrative*" rather than being explicit about domestic abuse.[243] This has implications in terms of responding to domestic abuse appropriately, which is vital to the effectiveness of a sentence.

A second issue related to VAWG is that females are more likely to experience some overlap between committing crimes that are affected by being victimised, such as by domestic and sexual abuse, and to suffer from trauma, substance abuse, and mental health issues as a result.[244] Some have argued that the law unfairly punishes those who are survivors of VAWG.[245] For example, at the time of writing, Claire Wade is conducting a review of the law concerning domestic homicide for MoJ. This review will "*consider whether the law could better protect the public and ensure sentences reflect the severity of these crimes*."[246]

7.7 Conclusions on equality

This section has highlighted some key issues relevant to equality and effectiveness. This is a complex area, and we cannot cover it fully. For example, we did not cover that the system of sentence reductions for guilty pleas may potentially risk creating sentencing disparities among ethnic groups.[247] Additionally, we do not cover questions over

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[241] Elanie Rodermond and others, 'Female Desistance: A Review of the Literature' (2016) 13 European Journal of Criminology 3.

[242] 'Overarching Principles: Domestic Abuse' (Sentencing Council of England and Wales 2018) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>.

[243] Rachel McPherson, 'Reflecting on Legal Responses to Intimate Partner Femicide in Scotland' (Violence Against Women 2022) <https://journals.sagepub.com/home/vaw>.

[244] Vince and Evison (n 233).

[245] 'Double Standard: Ending the Unjust Criminalisation of Victims of Violence against Women and Girls' (Centre for Women's Justice 2022) <https://www.centreforwomensjustice.org.uk/double-standard>.

[246] See the press release: https://www.gov.uk/government/news/spotlight-on-domestic-homicides-as-independent-reviewer-appointed.

[247] Jay Gormley and others, 'Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research' (2020).

intersectionality such as where gender and ethnicity interact. Accordingly, whether there might be disparities in sentencing or variations in the effectiveness of sentencing between groups (and, if so, what the nature of these differences are and for which offences or in which circumstances they are most prevalent), are key questions warranting further attention. However, we can highlight that there are aspects of these questions relevant to our focus on the effectiveness of sentencing.

8. Conclusions

This review has focused on the effectiveness of sentencing options in consequentialist terms. A key component of this has been examining the effects of sentencing options on reoffending and related matters that will be of use to the Council in the areas of desistance, deterrence, cost-effectiveness, and equality. There are several points that are worth emphasising.

8.1 The aims of effective sentences: reoffending, desistance, and reintegration

A sentence focused on rehabilitation may seek to achieve several objectives: helping to reduce reoffending, promoting desistance from offending, or facilitating reintegration into the conventional social world, beyond the simple act of reintroducing into the community by virtue of their release. While these objectives are related, desistance and reintegration are the most comprehensive.[248] Certainly, in an ideal world, full reintegration would arguably be the gold standard for a positive criminal justice outcome.[249] However, it would also be the most difficult to achieve and, while sentencing can play a key role, reintegration would almost certainly require more than sentencing considerations: at the very least necessitating unprecedented cooperation between many stakeholders. Indeed, given these challenges and that much may depend on factors beyond sentencing, pragmatically, sentencing policy may focus more narrowly on reducing reoffending. This may mean aiming for fewer offences being committed, or less serious offences being committed. This goal may be more manageable and could help contribute to desistance and rehabilitation – with related benefits for public protection, etc.

8.2 Sentencing's effects on reoffending

Many factors influence reoffending. Not all of these are within the control of any sentencing disposal.[250] Addressing all the relevant factors will require strategy and cooperation between the Council, MoJ, and others. Of the factors that can be influenced by the courts, some sentences will improve these while others will exacerbate them. Therefore, it is advantageous to examine contexts in which disposals may be tailored to better address elements related to offending both within and outside of prison (e.g. treating relevant mental disorders or addiction issues). It is also important to consider what does not work (or work well) to reduce reoffending.

8.3 Short sentences of immediate imprisonment

The evidence is most critical of the effectiveness of short sentences of immediate imprisonment. Compared with suspended sentences and community disposals, short sentences may be criminogenic, hinder positive outcomes, and make reoffending more likely. Further work is needed to understand why, in light of the various limitations, there

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[248] We discuss the complexity of the terminology in Section 3.

[249] 'Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development' (n 32).

[250] It is sometimes argued that imprisonment will prevent offending through 'incapacitation.' However, this neglects two points. Firstly, criminal offences can and do take place within prison. Secondly, almost all of those imprisoned will be released meaning incapacitation is only temporary.

are so many short sentences of immediate imprisonment and what the barriers are to the use of other disposals. While most of the Council's guidelines recommend sentences under two years as part of the matrix, this is always tempered by reference to the possibilities of the sentencer nonetheless moving back to a community disposal or suspending the sentence. A greater understanding of particular offences and circumstances which generate short custodial sentences would assist the Council with the magistrates' guidelines (of particular relevance since the increase in their powers to 12 months) and perhaps other guidelines such as breach of orders. In this regard, the use of remand[251] and failures to comply with other orders or barriers to the use of other orders (such as fines, community orders, and suspended sentence orders) would be avenues of enquiry as factors that may be explanatory. For example, to understand the prevalence of short sentences research might explore judicial views of a defendant's rehabilitative prospects and the efficacy of various disposals. Research may also wish to explore the effects of sentence starting points and reductions (e.g. for a guilty plea) on the use of short custodial sentences of immediate imprisonment.

8.4 Deterrence

The evidence strongly suggests that using short custodial sentences for a (general or specific) deterrent purpose is ineffective – they may even be criminogenic. However, using suspended sentences rather than immediate imprisonment may have some effect in reducing reoffending. The potential specific deterrent effect of suspended sentences merits further research with offenders.

Additionally, there could be benefits from research concerning how the authority of the court might be used to support deterrent effects and transform the prospect of punishment and accountability from an easily discounted future possibility to a very present reality. Notably, some court orders will not definitively set a final outcome and will require the offender to return to court at a later time to be evaluated.[252] Having the offender return to court provides an opportunity for sentencers to see the short-term to medium-term behaviour of the offender after conviction. Defendants, knowing that they will be returned to court, might behave differently and this could impact rehabilitation and/ or individual deterrence.

8.5 Cost-effectiveness

In terms of short-term costs, imprisonment is by far the most expensive disposal. Considering the evidence that imprisonment generally fails to better facilitate reintegration, desistance, or reduce reoffending, its cost effectiveness, in consequentialist terms, is dubious. Where prison may provide something for its cost is in terms of retributivist aims such as punishment. Especially for the most serious cases, which are not high volume crimes, prison serves a unique role. However, while prison can also serve punitive aims for less serious offences, it does not have the same monopoly on this. Notably, other

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[251] Remand raises a number of questions relevant to sentencing. For an overview, see Elaine Player and others, 'Remanded in Custody: An Analysis of Recent Trends in England and Wales' (2010) 49 The Howard Journal of Criminal Justice 231.

[252] Section 293 of the Sentencing Act 2020 provides the power to review a suspended sentence order periodically and section 5 allows a sentence to be deferred. On the latter see Julian Roberts, Elaine Freer and Jonathan Bild, 'The Use of Deferred Sentencing in England and Wales' (Sentencing Academy 2022) <https://barrowcadbury.org.uk/wp-content/uploads/2022/07/The-Use-of-Deferred-Sentencing-in-England-and-Wales.pdf>.

disposals, which are more cost-effective, can be as punitive as short sentences of immediate imprisonment.

8.6 Equality

Equality is at the heart of the work of the Council. There are matters concerning sentencing and ethnicity and gender that warrant scrutiny to ensure the justice system meets the (criminogenic) needs of all as much as possible to achieve its objectives. Such work includes ongoing vigilance against unwarranted disparities in sentencing (or their effects) that may impact the effectiveness of sentencing between groups.

8.7 The limitations of the current data

The main sources of data on sentencing in England and Wales are MoJ data (which publishes both routine statistical data and ad-hoc publications)[253] and the Sentencing Council which commissions research and publishes findings as required. Other providers of data include the Sentencing Academy, the Prison Reform Trust, the Institute for Criminal Policy Research, and other bespoke or one-off research studies. These studies provide information from which inferences can be drawn about the effectiveness of sentencing. However, such is the complexity of assessing the effectiveness of sentencing that challenges remain.

A key issue is that it is difficult to isolate the causal effects a sentence has on an offender, including in terms of the commonly cited metric of reoffending. While a court disposal may be important, a multitude of other factors will affect a person's propensity to reoffend. These factors include the nature and severity of the criminality; the person's age; and family and social circumstances. The degree to which any of these factors, or other difficult to quantify factors,[254] explain the apparent relationship between a court disposal and reoffending is a persistent challenge in assessing the effectiveness of a sentence.

In this report, we have noted examples of quantitative statistical analyses relevant to reoffending and sentencing. However, the official data available have a number of limitations and no database contains all variables that are of interest. Moreover, some variables are held but spread across different official datasets (see Section 5) and whether these datasets can be combined to enable greater insights is, at the time of writing, unknown.

8.8 The need for further evidence

Even linking existing datasets, if possible, will not address all the pivotal questions relevant to the complex task of assessing the effectiveness of sentencing. For example, perhaps the most significant deficit of the current evidence is that it fails to explain why, despite serious limitations, there are so many short sentences of immediate imprisonment. As noted above, we need to know more about the barriers to the use of other disposals. In this regard, research on the use of remand and failures to comply with other orders (such

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[253] For example, ad-hoc publications may provide further detail on other publications. See, 'Further Breakdowns of Reoffences by Type for Adult Offenders' (Ministry of Justice 2015) <https://www.gov.uk/government/statistics/further-breakdowns-of-reoffences-by-type-for-adult-offenders>.

[254] See Cyrus Tata, *Sentencing: A Social Process Re-Thinking Research and Policy* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-01060-7> accessed 29 April 2020.

as fines, community orders, and suspended sentence orders) would be two avenues of enquiry.

It is therefore inevitable that bespoke studies (using quantitative, qualitative, and mixed methods) focused on areas of key interest will be a necessary resource to provide the required granularity and insight. Such research can be diverse, but two further points are worth highlighting.

Firstly, value can be found in comparative research. There is already a significant body of scholarship that has focused on the complex task of making comparisons between different criminal justice systems in various jurisdictions.[255] However, there is little contemporary comparative research on the effectiveness of sentencing. Limited comparative research is unfortunate because, across various countries, key questions to be addressed include what sentence types are effective. Given that different jurisdictions grapple with similar challenges, comparative research can enable them to learn from each other. Indeed, reverting to the idea of the "natural experiment" noted in Section 5.1, different jurisdictions provide opportunities. For example, key questions have been raised around the suspended sentence order compared with a short custodial sentence and a community order. Scotland does not have a suspended sentence and comparative research might shed light on the effectiveness of the suspended sentence and barriers to use.

Secondly, several of the critical topics we have examined turn upon defendant perceptions and understandings of sentencing. It would therefore seem that there is ample merit in undertaking further research with offenders to uncover more about what works and why. We note that consideration of this is on the Council's agenda.

8.9 Final remarks

The effectiveness of sentencing is a complex issue. Indeed, 'what works' is perhaps the most challenging question facing criminal justice practitioners and scholars. It will often involve working with those in society with the most complex needs and the greatest socio-economic deprivation. Given this complexity and variability, it is unlikely there will ever be a single most effective disposal for all offenders at all times. Acknowledging this is not to suggest a nihilistic view toward the idea of an effective sentence. Indeed, 'nothing works' attitudes have been unproductive in the past and contributed to a punitive turn and swelling prison populations in various jurisdictions.

The evidence can tell us a great deal about the effectiveness of sentences. Certainly, the current evidence reveals that some disposals can be less effective in specific circumstances (such as those leading to short custodial sentences). This evidence may suggest avenues for future policy developments to consider. However, while we can

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[255] For example, David Nelken, 'Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators' (2019) 46 Journal of Law and Society S31; Renaud Colson and Stewart Field, 'Learning from Elsewhere: From Cross-Cultural Explanations to Transnational Prescriptions in Criminal Justice. An Introduction' (2019) 46 Journal of Law and Society S1; Dario Melossi, Máximo Sozzo and Richard Sparks, *Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (Bloomsbury Publishing 2011); Newburn, Tim and Sparks, Richard, *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control* (2004).

proceed based on good evidence, we should not "*over-promise clear answers to questions that are more complex than they appear*."[256]

Consequently, in assessing the effectiveness of sentencing it is necessary to have regard to a wide range of evidence across multiple disciplines: such as legal, medical, and criminological disciplines.[257] It is also important to have regard to research evidence at the macro, meso, and micro levels to provide as much insight as possible into these ongoing questions.[258] Indeed, the consequences of the pandemic poignantly reminded the field of the importance of population level correlates to criminal behaviour that might moderate individual level influences. The known reoffending rates for the period of April 2019 to March 2020 are markedly down from prior years. MoJ recognises the potential impact of the pandemic on the decrease, commenting that the follow-up period for tracking reoffending overlapped with the initial stages of the pandemic restrictions which "*could have had an effect on criminal behaviour*."[259]

To conclude, the evidence base is complex and requires careful scrutiny of its strengths and limitations. The evidence must also be periodically reviewed to keep abreast of developments such as those in the research on effectiveness, societal trends, and available disposals.[260] While we may never have a single right answer for sentencing in all cases that stands in perpetuity, we will over time be able to identify the better answers, rule out wrong answers, and enable guidelines that promote the most effective sentences possible.

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[256] Hough (n 130) 19; Fergus McNeill and others, 'Reexamining Evidence-Based Practice in Community Corrections: Beyond "A-Confined View" of What Works' (2012) 14 Justice Research and Policy 35.

[257] For example, this was all considered as part of the guideline for sentencing those with mental disorders. See 'Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments' (Sentencing Council of England and Wales 2020) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>.

[258] Farrall, Bottoms and Shapland (n 40).

[259] Ministry of Justice, Proven Reoffending Statistics: January to March 2020 (2022) <https://www.gov.uk/government/statistics/proven-reoffending-statistics-january-to-march-2020/proven-reoffending-statistics-january-to-march-2020>.

[260] This is part of the 'Strategic Objectives 2021-2026' (n 2) 2021–2026.

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Dr Melissa Hamilton is a Professor of Law & Criminal Justice at the University of Surrey School of Law. She recently was appointed as a Surrey AI Fellow with the Surrey Institute for People-Centred Artificial Intelligence. Hamilton is also a Fellow with the Royal Statistical Society, a member of the American Psychological Association, and an affiliate of the Association of Threat Assessment Professionals. Research interests include empirical analyses of the use of algorithmic risk assessment tools in criminal justice, policing, sentencing, corrections, and the perpetration and victimization of violent acts. Numerous publications appear in legal and scientific journals and books. Prior to taking up her academic posts, she worked as a police officer and a prisons officer in Florida, clerked for Judge Sam Johnson of the United States Court of Appeals for the Fifth Circuit, and practiced law as in-house counsel for multinational technology corporations. Hamilton holds a Juris Doctorate (JD) in Law and a PhD in Criminology from The University of Texas at Austin.

Dr Ian Belton is a Research Fellow in the Psychology Department at Middlesex University. His research focuses on the psychology of human decision-making, with a particular focus on empirical research into criminal sentencing judgments, as well as decision-making in other organisational contexts such as the corporate, defence and security sectors. He applies predominantly quantitative methods such as experiments and statistical modelling but has also used qualitative methods and believes in applying a pragmatic and flexible approach to data collection and analysis. His PhD thesis was an investigation of the role of personal mitigating factors in sentencing decisions and included analysis of evidence from sentencing data, interviews with judges, and experimental studies exploring public opinion on mitigation. He is currently working on a review of sentencing for offences involving indecent images of children for the Scottish Sentencing Council.

SERIOUS FRAUD OFFICE

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Steve Wade
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Steve.Wade@sentencingcouncil.gov.uk (by email only)

7 July 2022

Dear Steve,

Creating sentencing guidelines for the reduction of assisting offenders' sentences

I am writing on behalf of a number of law enforcement agencies responsible for investigating and/or prosecuting financial crime to ask you to consider new sentencing guidelines, which would encourage assisting offenders to cooperate with law enforcement in delivering justice to victims. This request meets the fourth criterion for sentencing guideline review, as set out on your website:[1] "issues relating to sentencing that the Council considers could be addressed by the development or revision of one or more guidelines".

As you know, this Government is committed to tackling economic crime, such as fraud. The 'Integrated Review' of our foreign and defence policy cited illicit finance as a high priority, putting it on a par with other national security threats such as hostile state activity. More recently, the Home Office's 'Beating Crime Plan' set out ambitious steps to reduce the incidence of fraud, recognising it as a major threat to citizens' safety and wellbeing.

Complex economic crimes often require a large amount of resource to investigate, and those investigations can take many years. The average investigation in the Serious Fraud Office, for example, is four years.[2] The volume of materials that must be interrogated and the forensic accountancy that must be undertaken can pose a challenge to even the most well-equipped law enforcement agencies.

[1] https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/our-criteria-for-developing-or-revising-guidelines/

[2] This is time taken to 'first resolution'—either a charge, the commencement of DPA negotiations, or termination of the investigation without charge.

The role of 'assisting offenders', i.e. those who were complicit in a crime and subsequently provide intelligence and/or evidence to a law enforcement agency investigating that crime, can change that. The most effective assisting offenders can provide paper trails of a crime that might otherwise remain hidden or prove difficult to identify, significantly reducing investigation times and increasing the likelihood of a successful case outcome. As noted in the judgement for *R v P; R v Blackburn* [2007] EWCA Crim 2290, "like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention".

Proposal

Participants in the National Economic Crime Centre[3] have recently considered the barriers to the effective use of assisting offenders in economic crime cases, and how those barriers can be overcome to enable the effective use of such offenders.

Anecdotally, the highest barrier to securing the assistance of an offender is the lack of certainty regarding their sentence reduction. Under sections 73 and 74 of the Serious Organised Crime and Policing Act 2005 (SOCPA), and under sections 74 and 388 of the Sentencing Act 2020, a reduced sentence can be awarded to an assisting offender (usually called a SOCPA Agreement). However, until the point of sentencing, an offender cannot be sure to what extent their sentence will be reduced, if it is reduced at all.

The sentence reduction for a guilty plea is set out in law and in guidelines (Reduction in Sentence for a Guilty Plea, issued by the Sentencing Council). It would be interesting to understand whether the number of guilty pleas increased following the production of these guidelines.

Without even the broadest of assurances, many would-be assisting offenders cannot see that the benefits of their assistance outweigh the risks. As the risks to economic offenders are generally less than those to, for example, members of organised crime gangs, it is possible to tip the scales so that the benefits are greater than the risks.

Creating sentencing guidelines would enable investigators to indicate at the earliest stage what level of reduction an offender can expect, if they provide assistance. Investigators may also be able to use the guidance to elicit further assistance—for example, by highlighting the difference in sentence reduction for those that provide intelligence only compared to those that provide evidence.

Impact

We expect the positive impact of greater assurances for assisting offenders to be high:

[3] The Serious Fraud Office, the National Crime Agency, the National Police Chiefs Council, the Crown Prosecution Service, HM Revenue & Customs and the Financial Conduct Authority.

- **Impact on law enforcement agency resource:** this change could see significant positive impacts on the length of investigations, the number of cases that law enforcement agencies take on, and the outcome of relevant cases.

- **Public confidence:** through the effective use of assisting offenders to secure wins in complex cases, we will see an increase in public confidence in the criminal justice system.

- **Fairness:** guidelines will make the application of SOCPA Agreements more clear, fair and consistent, going further than existing case law.

- **International impact:** this will also allow the UK to keep up with other jurisdictions which offer greater support to assisting offenders. The US allows payments to assisting offenders. While we do not propose making payments to assisting offenders, this does make the US a more attractive place to enter into such arrangements. In multi-jurisdictional cases, would-be assisting offenders may prefer to assist foreign law enforcement, reducing the UK's ability to police its own citizens and businesses. By taking steps to encourage offenders to provide intelligence and evidence in their own cases, the UK can better police crimes which took place within its jurisdiction.
- **Prison places:** by increasing the number of assisting offenders in economic crime cases, it can reasonably be expected that a greater number of offenders will have reduced custodial sentences,[4] therefore reducing the impact on prison places. The Sentencing Council may wish to consider the greater application of non-custodial sentences for assisting offenders in economic crime cases, which would further reduce the pressure on prison places.

Evidence base

While we will endeavour to provide you with sufficient evidence to research and possibly create guidelines, SOCPA Agreements are extremely sensitive, and there are limits to what details can be shared. Initially, you will be able to read the sentencing remarks for the following judgments:[5]

- *R v A* [2006] EWCA Crim 1803
- *R v P; R v Blackburn* [2007] EWCA Crim 2290
- *R v Z* [2007] EWCA Crim 1473
- *R v D* [2010] EWCA Crim 1485

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[4] Assisting offenders that provide intelligence only have, on average, had their sentences reduced by 33%, and those that also provide evidence have had theirs reduced by 66%. While, historically, we have seen low numbers of assisting offenders in economic crime cases, even a small increase, paired with these reductions, will see a reduction in total custodial time.

[5] In addition, the following judgements which precede SOCPA may be of interest: *R v Sinfield* [1981], *R v King* [1986], *R v Sivan* [1988], *R v Debbag and Izzet* [1990-1], *R v X* [1994], *R v Sehitoglu* [1988]

Over the past five years,[6] the Crown Prosecution Service has agreed a total of 56 SOCPA Agreements, of which 31 were under s.73 SOCPA (reduction in sentence).[7] We expect that by publishing sentencing guidelines—therefore giving greater assurances to potential assisting offenders—the number of SOCPA Agreements will increase.

Guidance

The guidance would need to apply to all offences to which, and in all circumstances in which ss.73 and 74 of SOCPA 2005 and ss.74 and 388 of the Sentencing Act 2020 apply.

In *R v P; R v Blackburn*, The President of the Queen's Bench Division, Sir Igor Judge, as he then was noted that "No hard and fast rules can be laid down for what, as in so many other aspects of the sentencing decision, is a fact specific decision." Despite this he went on to set out the factors that might be taken into account (indicating that it is possible to provide a set of guidelines) when agreeing a sentence reduction.

Sir Igor Judge noted that a mathematical approach should not be taken to reducing a sentence, as this is "liable to produce an inappropriate answer". However, he made these remarks in relation to a gruesome murder, where a long prison sentence is likely to be seen as the only suitable option for punishment. With this in mind, it may be that the sentencing guidelines only apply to a specific set of economic crimes, such as:

- Offences under the Fraud Act 2006,
- Principal money laundering offences in the Proceeds of Crime Act 2002,
- Failure to prevent offence tax evasion in the Criminal Finances Act 2017,
- Offences in the Bribery Act 2010,
- Market abuse offences in the Financial Services Act 2012,
- Insider dealing offence in the Criminal Justice Act 1993, and
- Other financial crime offences in the Financial Services and Markets Act 2000,
- In addition to the relevant common law offences.

This approach may, however, have unintended consequences.

Case law

Some case law exists already for SOCPA Agreements which relates to sentence reductions:

- In *R v P; R v Blackburn*, Sir Igor Judge (President QB) stated that "It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level will continue, as before, to be a reduction

[6] Between 1 May 2016 and 30 April 2021
[7] https://www.cps.gov.uk/socpa-information

of somewhere between one half and two thirds of that sentence." This case remains the leading case for the determination of sentence reduction.

- In *R v D*, Lord Judge LCJ noted that "the extent of any discount must be based on the value to the administration of justice of the performance by the defendant of his statutory agreement, and not on the simple fact that the agreement, so far as it goes, has been performed". Despite the starting point of 50%-66% in *R v P; R v Blackburn*, it was agreed that for an offender who provided intelligence only a reduction of 25% would be appropriate.

Despite this case law, the potential sentence reduction remains a key concern for would-be assisting offenders, and we continue to believe that crystallising the possible reductions in the form of sentencing guidelines would bring about more assisting offenders. In advance of *R v D*, the existing case law proposed a 50%-66% reduction for assisting offenders; *R v D* created new case law which lowered the bar for certain types of assistance. This does not create the level of certainty required to secure potential assisting offenders and realise the benefits set out above.

With this in mind, I would be grateful if you could consider including the creation of sentencing guidelines for assisting offenders in the Sentencing Council's 2022 work plan.

Kind regards,

Michelle Crotty

Michelle Crotty
Chief Capability Officer

Email: Michelle.Crotty@sfo.gov.uk

On behalf of:

Adrian Searle, Director, National Economic Crime Centre
Adrian Foster, Head of Proceeds of Crime Division, Crown Prosecution Service
Andrew Penhale, Head of Specialist Fraud Division, Crown Prosecution Service
Nik Adams Commander, City of London Police National Economic and Cyber Crime Coordinator
Mark Steward, Director of Enforcement and Market Oversight, The Financial Conduct Authority
Nick Sharpe, Deputy Director, Economic Crime, HM Revenue & Customs
Simon Grunwell, Deputy Director, Digital Support and Innovation, HM Revenue & Customs

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Annex A: Failure to ensure animal welfare guideline (as consulted on)

Animal Welfare Act 2006, s.9 (breach of duty of person responsible for animal to ensure welfare)

Effective from: XXXXXX

Triable only summarily
Maximum: Unlimited fine and/or 6 months
Offence range: Band A fine – 26 weeks' custody

Step 1 – Determining the offence category

The court should determine culpability and harm caused with reference **only** to the factors below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

Culpability demonstrated by one or more of the following

The court should weigh all the factors set out below in determining the offender's culpability. Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

A High Culpability	• Prolonged or deliberate ill treatment or neglect • Ill treatment or neglect in a commercial context • A leading role in illegal activity

B Medium culpability	• Cases that fall between categories A or C because:
	  ○ Factors are present in A and C which balance each other out, and/or,
	  ○ The offender's culpability falls between the factors as described in A and C

C Lower culpability	• Well-intentioned but incompetent care • Brief lapse in judgement • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to the commission of the offence

Harm demonstrated by one or more of the following

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Factors indicating greater harm	• Death or serious injury/harm to animal • High level of suffering caused
Factors indicating lesser harm	• All other cases

Step 2 – Starting point and category range

	High culpability	Medium culpability	Lower culpability
Greater harm	**Starting point** 18 weeks' custody	**Starting point** Medium level community order	**Starting point** Band C fine
	Category range 12-26 weeks' custody	**Category range** Low level community order – High level community order	**Category range** Band B fine – Low level community order
Lesser harm	**Starting point** High level community order	**Starting point** Low level community order	**Starting point** Band B fine
	Category range Low level community order – 12 weeks' custody	**Category range** Band C fine – Medium level community order	**Category range** Band A fine – Band C fine

The court should then consider further adjustment for any aggravating or mitigating factors. The following is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far.

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the owner/keeper of the animal: religion, race, disability, sexual orientation or transgender identity

Other aggravating factors

- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Significant number of animals involved
- Allowing person of insufficient experience or training to have care of animal(s)

- Ignores warning/professional advice/declines to obtain professional advice
- Offender in position of professional responsibility for animals
- Animal requires significant intervention to recover
- Animal being used in public service or as an assistance dog
- Distress caused to owner where not responsible for the offence

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity
- Mental disorder or learning disability, where not linked to the commission of the offence
- Sole or primary carer for dependent relatives
- Offender has been given an inappropriate level of trust or responsibility
- Voluntary surrender of animals to authorities
- Cooperation with the investigation
- Isolated incident

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Totality guideline.

Step 6 – Compensation and ancillary orders

In all cases, the court should consider whether to make compensation and/or other ancillary orders including deprivation of ownership and disqualification of ownership of animals. Where the offence has resulted in personal injury, loss or damage the court must give reasons if it decides not to order compensation (Sentencing Code, s.55).

- Ancillary orders – Magistrates' Court

Step 7 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 8 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

Annex B: Examples of cases of s.9 offending (failure to ensure animal welfare)

- A couple kept several pugs in a kennel that was too small and without proper heating or bedding. They were sentenced for this alongside the s.4 offence for animal cruelty and for unlicensed dog breeding.
- A horse trader who was charged for the neglect/ill treatment of 17 horses that, though not injured, were not being properly looked after, and were kept in such conditions that they would have suffered harm if this remained unchanged. He was also charged for s.4 and s.18 offences for causing suffering.
- Unlicensed breeding of dogs, with 30 puppies kept in cramped and dark crates (though there was no evidence of serious injury).
- A large horse farm, with 130 horses kept in an unsuitable/dirty environment. 14 horses had a serious parasitic infection that hadn't been treated. The offender was also sentenced for a number of other charges under s.4.
- An offender who kept his pet dog outside in an overgrown garden, with only a dilapidated wooden kennel for shelter. He was reported by his neighbours and charged for the s.9 offence.
- A poultry farm where ducks and chickens were kept in dark sheds and without the necessary dry litter. Four ducks were injured and had not been euthanised, and there were 32 duckling carcasses that had not been disposed of.
- An American Bully dog was locked in an office for four days while its owner was travelling. The dog was found walking in its own urine and faeces, and was desperate for food and water.
- A young couple had a cocker spaniel that was emaciated and flea ridden. Upon being telephoned by the RSPCA, the owners panicked and put their dog down the next day, falsely claiming it had cancer.
- Two bull terriers were kept in a yard littered with dog faeces and filled with other hazards. The dogs were not provided with clean water or enough food, and were found scavenging in bins by inspectors.

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Business Plan 2022/23: Mid-year update

The Sentencing Council's Business Plan includes a commitment to review the indicative timeline for preparation and publication of guidelines on a bi-annual basis and to publish updates as appropriate. While there are no major changes to the work plan, the timing of some projects has changed.

Due to a high volume of publications in Spring 2022, some of the planned start dates for consultations early in the period were postponed. This has had a consequential effect on the planned dates for publication of definitive guidelines/revisions and their coming into force:

- the consultation for revised Animal Cruelty guidelines was launched in May rather than April. It closed in August and we now expect to publish the definitive revision in April 2023. These are planned to come into force in July 2023.

- the consultation on new guidelines for the Underage Sale of Knives was launched in June rather than May. This, and the complexity of the issues raised in responses, has resulted in a revised expected publication date for the definitive guidelines of January 2023. These would come into force on 1 April 2023.

There are some further changes to the published timetable for 2022/23 as planned timescales have become clearer:

- the definitive revised guidelines for motoring offences are now expected to be published in April 2023 rather than March: because of the need to ensure sentencers are familiar with the extensive updates to these guidelines before they come into effect, this would mean they come into force in July 2023;
- subject to consultation responses, the revisions to the child cruelty guidelines which follow on from the increased maximum penalties introduced by the Police, Crime, Sentencing and Courts Act 2022, will be published and come into force alongside the annual miscellaneous amendments to guidelines (publication in March 2023, and in force in April 2023);
- the consultation dates for the revision to the Totality guideline are now confirmed as October 2022 to January 2023, having been slightly delayed by the period of National Mourning and extended to allow for the Christmas period. This means we expect publication of the definitive revisions in May 2023 rather than March.

The provisional timetable for other projects remains subject to change dependent on factors such as the available resources, unforeseen complexities, consequential delays from other projects and legislative changes. The revised indicative dates are included in the table below.

The Business Plan provided target dates for publication of research and evaluation findings. Some of these publications have been delayed due to resourcing issues. Due to the action by criminal barristers, the data collection in courts has been delayed until early 2023.

Sentencing Council Guideline Work Plan (at 1 November 2022)[1]

Guideline	Consultation period	Publish definitive guideline	Definitive guideline in force[2]
Sexual Offences (partial revision)	May 2021 – August 2021	May 2022	1 July 2022
Terrorism: revision of SC guideline	October 2021 – January 2022	July 2022	1 October 2022
Burglary: revision of SC guideline	June 2021 to September 2021	May 2022	1 July 2022
Perverting the course of justice etc	March 2022 to June 2022	March 2023	1 April 2023
Animal Cruelty	~~April~~ May 2022 to ~~June~~ August 2022	~~January~~ April 2023	1 ~~April~~ July 2023
Underage Sale of Knives	~~May~~ June 2022 to ~~July~~ August 2022	~~November~~ January 2023	1 ~~January~~ April 2023
Motoring offences	July 2022 to ~~October~~ September 2022	~~March~~ April 2023	1 ~~April~~ July 2023
Child Cruelty (partial revision)	August 2022 to October 2022	March 2023	~~TBC~~ 1 April 2023
Annual miscellaneous amendments[3]	September 2022 – November 2022	March 2023 – publication of response to consultation	Amendments will come into force annually on 1 April
Totality revision	~~Quarter 2 2022/23~~ October 2022 – January 2023	~~March~~ May 2023	1 ~~April~~ July 2023

Guideline	Consultation period	Publish definitive guideline	Definitive guideline in force[2]
Aggravated vehicle taking	Quarter 4 2022/23	TBC	TBC
Immigration offences	Quarter 4 2022/23	TBC	TBC

[1] The dates shown in this work plan are indicative.

[2] In most instances we aim to bring definitive guidelines into force quarterly, on 1 January, 1 April, 1 July and 1 October.