Punishment and Technology

Submission to the Independent Sentencing Review 2024-2025

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Introduction

> The review will examine the tough alternatives to custody, such as using technology to place criminals in a 'prison outside prison' and forcing offenders to do hard work in the community that gives back to society. (Sentencing Review, Press Release 2024)

Given the terrible state of England and Wales' prisons – persistent complaints of under-resourcing by governors, staff retention problems, recurrent criticisms by the Inspectorate, rising rates of violence and self-harm among prisoners, and above all the emergency early release of 5000 prisoners forced on the new Labour government in the summer – the announcement in October 2024 of a Sentencing Review to address the crisis was inevitable. The Review has understandably been welcomed by those bearing the brunt of this penal crisis.

Although the terrible state of the probation service – attested to by numerous reports from HM inspector of Probation in recent years – was not publicly mentioned as part of the Review's rationale I think it was of equal importance, but in a quite different way, as something to be finally dispensed with. This is evidenced, I think, by the Review's commitment to finding new technological solutions to penal problems without sufficient reference to the skilled human services and rehabilitative cultures that need to underpin their use.

It is primarily to the mooted connections between punishment and technology in the Review that I will respond in this submission. I am taking my cues on what is meant here by technology - specifically digital technology - from an article that Mr Gauke, the chair of the Review, wrote in the *New Statesman* at the time of his appointment:

> Specifically, does it [technology] provide an opportunity to punish offenders, protect society and rehabilitate people outside of prison in a much more effective way than previously possible? Electronic tagging, for example, is increasingly used, but we need to understand whether more could be done. The same can be said of drink and drug monitoring. We need to understand the potential for current and future technologies to keep offenders out of prison in the first place, or to release some prisoners safely at an earlier stage than is currently the case. There may well be lessons to be learned from other jurisdictions to ensure sentencing policy is properly able to exploit all these technologies (Gauke 2024: 27)

This is both a very open-ended view of digital technology's potential as a substantive form of control and an article of faith in it as a many-sided solution. It seems to be premised on the view that the relational approach formerly used by skilled and experienced probation officers and their third sector associates is not up to the challenge of supervising offenders in the community. Indeed, it may well not be: the probation service was severely weakened by the failed part-privatisation of it in 2014, and was not restored to its former (imperfect) glory by its reunification as a national state agency, albeit as part of the prison service, in 2021. These upheavals saw the departure of many experienced staff and left behind a serious retention problem with the newly trained staff who replaced them. There is currently a shortfall of 1600 staff in the probation service; it persistently, inevitably underperforms. Pockets of good practice based on the dedication of middle managers and their teams exist, but the strain on them is great and the system as a whole does not function reliably. Replacing an underperforming human/public service with more technological approaches may well – from the government's perspective - make sense in these circumstances, but in the interests of transparency I think it would help if the Review acknowledged and learned from an earlier attempt to make monitoring technology more normal and widespread as a form of offender management in the community.

It is mostly forgotten now that *Transforming Rehabilitation*, the strategic framework in which a previous incumbent of the Ministry of Justice pursued the privatisation of the probation service had a second, less publicized, part. This was the planned introduction of mass GPS tracking between 2014 and 2020, a supposedly world-beating innovation which the minister concerned wanted to prove was a better, more modern way of managing offenders than that of the

probation service, which was left with a more residual role. The plan failed utterly - not a single person was tracked by 2020 – but at considerable expense. Both the failure of privatisation and mass GPS tracking – and the high costs involved – were subsequently well documented by the National Audit Office. (GPS tracking was eventually introduced in a more measured and modest way, and the memory of the initial fiasco faded away). What both the part-privatisation of probation and the GPS fiasco had in common, despite much attendant rhetoric about increased public protection and concern for crime victims, was a complete absence of understanding of what social and administrative measures might actually enable crime prevention and reduced reoffending.

What is "prison outside prison"?

It is clear that the new Sentencing Review revives key themes in the Johnson government's 2020 White Paper, *A Smarter Approach to Sentencing.* Many of the concerns in the White Paper, not least its wanting an "expanded use of technology across the sentencing framework" and the proposed introduction of a highly restrictive, "house detention order" using EM have resurfaced in the new Review. Some of the White Paper's proposal for making EM slightly tougher – lengthening the daily maximum for hours in confinement , but the "house detention order" – in effect, an extended period of confinement on EM, with associated rehabilitative requirements - was not one of them.

This particular measure was first commended to policy makers in a not uninteresting report on sentencing from the Centre for Social Justice (2020), where it was called an Intensive Control and Rehabilitation Order (ICRO). Sentencers would be able to make such orders for three years, and in exceptional cases four years. The measure's deeper roots lie in academic reflection on "virtual prisons" and "community custody", and the use of a sentence akin to it in Canada.

In the context of the present Review the as yet unimplemented "house detention order"/ICRO could be easily repackaged as the "prison without prison" mentioned in the press release. (I have recently heard Ministry of Justice personnel refer to "community-based custody", another term which might fit the putative ICRO). Conflating "community" and "custody" contradicts the long-established wisdom of past penal reformers who have argued cogently, with evidence on their side that, that to maximise their rehabilitative and reintegrative potential, community alternatives to prison need not and should *not* in themselves be prison-like. I do not think that "prisons outside prisons" or "community-based custody" should be pursued in any form: this is a deeply unwelcome combination of punishment and technology. Prison has its place but

community alternatives, whilst always requiring controls of varying and tapering intensity, should not be designed to resemble or mirror it.

Electronic Monitoring

England and Wales was the first country in Europe to pilot electronic monitoring (EM) between 1989 and 1996, and the second to have a fully national scheme in 1999 (the first being Sweden, in 1996). Although "tracking movement" was the ideal of EM's early champions in both Britain and the US – from which both the idea and the practice originated - the available technology in the late 1980s, early 1990s only allowed for monitoring a person's presence in a designated place (usually their home). Unlike the majority of European countries, who embedded EM in their probation services and did not use it as a sentence in its own right, England and Wales chose to allow EM-curfews to be a stand-alone sentence (albeit with options for more integrated uses) and used a private companies contracted to central government (initially the Home Office, later the Ministry of Justice) to deliver the service. The reasoning behind this, at the time of the pilots, was a desire on the part of the then Conservative Government to make EM the centrepiece of their "punishment in the community" strategy. By offering the courts a new punitive means of keeping offenders in the community, the government was hoping both to undermine the social work base of the probation service and to reduce the rising prison population, which at the time (expressed as a daily number) was approximately 40,000.

There are some similarities between the situation then and the situation now, with a government turning towards technology as a punitive solution at the expense of supporting and improving the human capabilities of the probation service. The slow decline of the probation service into its present parlous state, despite determined efforts at modernisation and recovery led from within the service itself, began at that point. The difference between then and now is that the Conservative government in the 1990s did want to reduce the use of imprisonment while the present Labour government merely wants to slow its expansion.

Despite the difficulties entailed by the split between the probation service and the private companies, EM-curfews earned a niche place in the criminal justice process of England and Wales at the pretrial, sentencing and post-release stages. There is nothing morally wrong with seeking to regulate the locations and schedules of defendants/offenders as a mean of reducing reoffending in the community, although it is far preferable for this to be embedded in a rehabilitative programme aimed at effecting longer term attitudinal and behavioural change. All the initiatives were officially evaluated in greater or

lesser degree, more or less positively. Significantly, in 2005, a former Home Office researcher pointed out that while the official evaluations were indeed largely positive (in terms of reducing offending during the period of monitoring) the claims for EM made by politicians - by now New Labour – invariably outstripped what the research actually warranted. There were always "other factors" driving EM, of which a belief among ministers, and possibly civil servants, that it was better or more important than the probation service seems to have been one of them. The aformentioned GPS fiasco is a vivid example.

GPS tracking and alcohol monitoring have been useful additions to the suite of EM technologies, although there is no clear and decisive evidence that GPS tracking is more effective at reducing offending than RF, despite its greater controlling reach and versatility (real-time trail monitoring and exclusion zone monitoring) and, arguably, more "Orwellian" image. Its use as a post-release measure after pilot schemes had focused firstly on offenders convicted of acquisitive crime, and secondly on domestic violence, may be becoming standardised. The Review expresses interest in "the point at which offenders are released from prison, how long they are supervised in the community on licence, recall to prison, and how technology can support this." The current-post release schemes should generate ample evidence on this matter.

As with EM curfews, some offenders on GPS tracking speak well of the effect it has had on them. The strength of a person's motivation to reoffend, and their life circumstances, are more important indicators of the likelihood of re-offending than the "tech" itself. EM is not physically incapacitative – and nor should be it be – but the overuse of imprisonment as a response to breach makes its own contribution to rising prisoner numbers. It is not clear (in the public domain) if GPS tracking is a cost-effective measure within the penal system as a whole, but if the government's commitment to using technological solutions is more ideological/symbolic than pragmatic, this may be a lesser consideration than it may once have been.

Over the years a number of literature reviews and good practice guides, some drawing on international evidence, some distinctively British, have been conducted in respect of EM. There is no shortage of evidence about EM to guide politicians in respect of its benefits and limitations. Significantly, none of the reviews have ever suggested that the problem with EM is that it is not punitive enough, or recommended that it be made more punitive. This, of course, may be because the researchers had not been primed to think in these terms by those who commissioned the research, or were simply disinclined to do so, but it is sadly not difficult to imagine how EM might be made more punitive.

There are already suggestions, coming, as it happens from respected legal academics in respectable journals, that the frighteningly costly American prison

population could be much reduced by the mass use of ultra-punitive forms of location and biometric monitoring, monitored by the same kinds of artificial intelligence that are being developed for autonomous vehicles, and not excluding remote electro-shock responses for noncompliance. Outside the US, there would be many legal obstacles to implementing such horrific measures, but people who talk up the idea of making EM more punitive need to be careful what they wish for.

Artificial Intelligence

The open-endedness of Mr Gauke's view of technology will almost certainly make it receptive to the Prime Minister's recently announced "plan to make our country an AI superpower". The emphasis here is less on digital technology as a form of substantive control and more on ways of improving personal and organisational productivity, but the two may come to overlap. The government's *AI Opportunities for Action Plan* makes it clear that infusing AI into many aspects of British social life is becoming a political mission in its own right, requiring "ambition, purpose and focus". The Prime Minister confidently sees this as "a unique chance to boost growth, raise living standards, transform public services, create the companies of the future in Britain and deliver our Plan for Change". Although the Action Plan does not mention prisons or probation specifically it calls for "adoption of AI across our public services" because it will make them better, and there is no obvious reason why prisons or probation would be excluded from this. The Ministry of Justice has been exploring the potential of advanced digital technologies for use on the front line of probation services for some time and is readying itself for the public service transformation that the Prime Minister has in mind. An AI-based intelligent transcription tool is in development. An organizational and cultural shift in the Ministry from "digital by default" to "AI by default" is beginning, and there may even be a hope that by introducing these technologies into the probation service younger, tech savvy probation recruits may be more easily retained. By such means are organisations transformed, although trading on employees' love of "tech" presupposes a very different mindset, and skillset, than those which prevailed in the older probation service.

In October 2024, in enthusiastic anticipation of the widespread encroachment of AI into all aspects of European social life, including governance and public service, the Council of Europe issued a Recommendation on the **"**the ethical and organisational aspects of the use of artificial intelligence and related digital technologies by prison and probation services" (CM/Rec(2024)5). This is an important and timely document, written by the Council for Penological Affairs (PC-CP) a body with a long, illustrious history in the Council of Europe of

producing strong ethical recommendations on penal matters and drawing up rules for good practice in prison and probation services in its member states. It makes three initial points, namely that "AI and related digital technologies should be used legitimately and proportionately when and if they:

a) contribute to the rehabilitation and reintegration of offenders;
b) do not replace prison and probation staff but assist them in their everyday work;
c) help the criminal justice system, the execution of penal sanctions and measures and the reduction of recidivism"

While this approach to AI clearly does not preclude punishment or public protection, it does not foreground it in the way that the Sentencing Review does. In respect of "AI and related digital technologies" the tone of the Council of Europe's Recommendation is very different to that of the Sentencing Review, whose remit pays negligible attention to what desistance, rehabilitation and reintegration require. Tellingly, the appendix to the Council of Europe Recommendation concedes that a great deal of offender management in the community – work hitherto undertaken by trained probation officers - could already be automated using existing and emerging digital technologies (some of which may not be full AIs) but are resolutely against this, insisting that the human, personalised element in probation remain, and that digital tools do no more than assist this.

Whilst very optimistic about the benefits of "AI and related digital technologies" – unduly so, in my view - the PC-CP does not want personal supervision transformed into impersonal monitoring. They have made clear that the pursuit of AI for reasons of cost-effectiveness alone would be an insufficient reason for introducing it in prison or probation services – there has to be a sound penal or organisational reason for doing so. Whether, despite its membership of the Council of Europe, such reasoning will carry weight in England and Wales – when cost-effectiveness and increased productivity in public services is central to the new government vision of AI – remains to be seen I commend the PC-CPs approach on this matter.

Summary and Conclusion.

No features of the present penal crisis are the result of a failure of socially liberal penal attitudes and policies. They are the result of a relentless and sustained punitiveness subscribed to by both main political parties over several decades, which has filled the prisons and played its part in weakening the probation service. The present government are reaping what has been sown by previous

governments. I grant that there are no easy or quick policy or practice solutions. There is also no denying that crime is a serious problem. But it is hard to accept that yet more punitiveness is the answer to a problem largely caused by an excess of punitiveness in the first place. Sentence inflation must end. Contrary to what I see as the Review's neglect of, or indifference to, the probation service I think it would be worth re-investing in, and revitalising the human strengths for which it was once valued. It should be separated from the prison service and restored to its local community roots, as a former HM Inspector of Probation has recommended. Various forms of EM would have a place in this revitalised service, including new forms of drug monitoring. But rather than looking for new punitive technologies – "prison outside prison" - I suggest we stick with the existing monitoring technologies, and use them in a better, more integrated way - embedded in the probation service, not delivered outside it by a private company. AI may well have a place delivering efficiencies in the probation service, but it would be the wrong basis on which to attempt a wholesale transformation of the organisation. Desistance, rehabilitation and reintegration should be the watchwords of the new service, and technology should always be used to support not supplant their importance

There are several cautionary tales about the Ministry of Justice's past ambitions to move towards a more technologically-oriented vision of offender management in the community, always to the detriment of probation. The Review should be mindful of these.

I will end with a personal story. In 2012-14 I was a member of a Working Party on the future of EM in Scotland. In essence it was concerned with the pros and cons of introducing GPS tracking, and the Working Party did in fact end by recommending it. But there was a dissenter. The representative on the Working Party from Women's Aid had read the American research on the use of GPS tracking in the domestic violence field more assiduously than any other member. She accepted that it contained examples of good useful practice. She agreed that it may have benefits in Scotland. But then she added: "However, if the Scottish Government is willing to spend more money to support domestic violence services, GPS tracking of perpetrators would not be my first choice. I'd prefer another refuge and more staff". I think many managers and practitioners in England and Wales may respond to the aspirations of this Review in the same spirit.

References available on request.

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