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Sentencing policy reform in post-conflict Northern Ireland: charting a distinctive response to penal populism

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ABSTRACT

Northern Ireland's sentencing policy, while sharing commonalities with other Anglo-American jurisdictions, remains distinct due to its complex socio-political history and post-conflict legal framework. In response to evolving public expectations, the Department of Justice has recently undertaken a comprehensive review of sentencing policy, resulting in proposed reforms that reflect the unique challenges of a small jurisdiction with a legacy of sectarian violence. This article provides a socio-legal analysis of these reforms, critically evaluating their contextual drivers, practical implications, and potential long-term impacts. A central theme of this analysis is Northern Ireland's restrained approach to penal populism, which has set it apart from significant parts of the common law world, including the United States, Great Britain, and Australia, where punitive attitudes have led to escalating incarceration rates. Drawing on the concept of 'penal populism' developed by Bottoms and Pratt, this article explores how Northern Ireland has, to date, resisted the widespread adoption of punitive rhetoric in criminal justice policymaking. However, recent trends suggest a shifting landscape, including a rising prison population and an emerging 'tough on crime' public discourse. This article examines key proposals from the sentencing review, including the introduction of formal sentencing principles and purposes and the decision to reject a sentencing guidelines council in favour of enhanced judicial discretion through the Court of Appeal. It argues that these reforms reflect both caution and inadvertent radicalism as policymakers attempt to balance increasing demands for harsher sentencing with the enduring complexities of Northern Ireland's legal and political environment.

Keywords: penal populism; policy reform; post-conflict society; Northern Ireland; sentencing; rehabilitation.

INTRODUCTION

Northern Ireland's sentencing policy, while sharing similarities with its neighbouring jurisdictions, is marked by its distinctive socio-political history. In recent years, the Department of Justice (DOJ) has conducted a comprehensive review of adult sentencing

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policy, culminating in a series of recommendations for inclusion in an upcoming sentencing Bill.[1] These proposed reforms are deeply embedded within the polity's post-conflict legal and political framework, reflecting the challenges of balancing evolving public expectations, international obligations, the constraints of being a small jurisdiction and the legacy of sectarian violence. This article provides a socio-legal exploration of the most contentious reforms, examining their contextual underpinnings, practical implications, and potential impacts. It critically analyses the under-researched issue of sentencing policy within post-conflict Northern Ireland. The article provides valuable insights for scholars of Northern Ireland and comparative researchers examining sentencing reform across jurisdictions.

A key focus of this article is exploring how the complex post-conflict milieu has, to date, mitigated against penal populism becoming the dominant criminal justice narrative and policy driver in Northern Ireland, in contrast to many other Anglo-American jurisdictions. Writing in 1995, Bottoms devised the term 'populist punitiveness' 'to convey the notion of politicians tapping into and using for their purposes what they believe to be the public's generally punitive stance'.[2] The concept later became more commonly referred to in the literature as 'penal populism'. According to the influential work of Pratt:

> *Penal Populism* speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general. It feeds on expressions of anger, disenchantment and disillusionment with the *criminal justice* establishment. It holds this responsible for what seems to have been the insidious inversion of commonsensical priorities: protecting the well-being and security of law-abiding 'ordinary people', punishing those whose crimes jeopardize this.[3]

Such approaches have dominated criminal justice policy in the United States, Great Britain, Australia and elsewhere, leading to increasing rates of incarceration and prisons operating at more than full capacity.[4] Even in countries that have not fully embraced a populist punitive approach of high rates of incarceration, such as the Republic of Ireland, 'tough talk' on 'law and order' is common in the public and

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1 DOJ, *Sentencing Policy Review Consultation: Way Forward* (2021).

2 Anthony Bottoms, 'The philosophy and politics of punishment and sentencing' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995) 40.

3 John Pratt, *Penal Populism* (Routledge 2007) 12.

4 Julian V Roberts, Loretta J Stalans, David Indemaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press 2003).

political discourse, with politicians seeking to avoid being seen as out of touch and soft on crime.[5]

A common feature of penal populism is the challenge to judicial discretion in sentencing.[6] However, in post-conflict Northern Ireland, judges have retained more independence than many other common law jurisdictions. This can be attributed partly to the region's post-conflict legacy, where judicial independence has been crucial to maintaining fairness and legitimacy in a politically sensitive environment.[7] This article examines the tensions within the proposed sentencing reforms as they attempt to balance this respect for judicial autonomy with more populist concerns over perceived leniency and a lack of transparency.

Prison rates in Northern Ireland reflect its distinct approach to penal policy, setting it apart from the rest of the United Kingdom (UK). Post-conflict Northern Ireland consistently imprisons a smaller proportion of its population than the rest of the UK, with rates more comparable to the average for Western Europe. Since 2000, when comparable statistics were released, Northern Ireland has maintained the lowest percentage prison population in the UK.[8] Figures from 2024 show 140 prisoners per 100,000 in England and Wales, 150 per 100,000 in Scotland, and 99 per 100,000 in Northern Ireland.[9] However, Northern Ireland's prison population has been trending upwards of late. The average daily population rose by 11.4 per cent in 2023/2024 to 1877, with the male population increasing from 1607 to 1787 and the female population from 78 to 90.[10] During the same period, the average daily immediate custody population rose 10.1 per cent to 1176 – the highest since 2015/2016.[11] These figures provide essential context for the forthcoming penal reforms discussed in this article.

This article contends that, nearly 30 years after the Good Friday Agreement, Northern Ireland's growing societal normalisation has brought with it a more conventional punitive populism in public discourse and, to a lesser extent, in political and legal circles. It examines how this trend poses a challenge for DOJ policymakers, who must balance such pressures with professional caution and sensitivity

5 Liz Campbell, 'Criminal justice and penal populism in Ireland' (2008) 28(4) Legal Studies 559–579.

6 Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan 2014).

7 Kieran McEvoy and Alex Schwartz, 'Judges, conflict, and the past' (2015) 42(4) Journal of Law and Society 528–555.

8 Georgina Sturge, *UK Prison Population Statistics* (House of Commons Library 2024).

9 Northern Ireland Statistics and Research Agency (NISRA), *The Northern Ireland Prison Population 2023/24* (DOJ 2024).

10 Ibid.

11 Ibid.

to the region's unique post-conflict context. The article analyses key sentencing review proposals – such as introducing formal sentencing principles and rejecting a guidelines council in favour of enhancing the Court of Appeal's role – and concludes that these reforms reflect a mix of caution and inadvertent radicalism.

THE UNIQUE CONTEXT OF CRIMINAL JUSTICE POLICYMAKING IN POST-CONFLICT NORTHERN IRELAND

Northern Ireland, with a population of 1.9 million, was established in 1921 as a distinct UK legal jurisdiction as part of Ireland's partition.[12] Over the past century, it alternated between self-government and direct rule from London.[13] From the late 1960s to 1998, the region endured the Troubles, a prolonged ethnic-sectarian conflict that destabilised the area, causing over 3600 deaths and 50,000 injuries.[14] During this period, the justice system prioritised managing intercommunity violence over broader criminal justice policies for 'ordinary crime'.[15] The 1998 Good Friday Agreement marked a turning point, largely ending the conflict and creating a power-sharing government to foster cooperation between nationalist/republican and unionist/loyalist communities.[16] This framework continues to shape Northern Ireland's justice system, balancing security normalisation, post-conflict reconciliation, and persistent sectarian tensions.

Under the peace agreement, Northern Ireland's criminal justice agencies underwent significant reform to gain cross-community support.[17] The Royal Ulster Constabulary, active from 1921 until 2001, was replaced by the Police Service of Northern Ireland (PSNI), and the

12 Brice Dickson, *Law in Northern Ireland* 4th edn (Hart Publishing 2022); Marc Mulholland, *Northern Ireland: A Very Short Introduction* 2nd edn (Oxford University Press 2020); NISRA, Mid-Year Population Estimates Northern Ireland: 2023 (2023).

13 Mulholland (n 12 above).

14 David McKittrick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 2004); David McKittrick and David McVea *Making Sense of the Troubles: A History of the Northern Ireland Conflict* (Penguin Books 2012).

15 Aogán Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Willan 2006).

16 Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018).

17 Brice Dickson, 'Criminal justice reforms in Northern Ireland: the agents of change' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing 2015).

Public Prosecution Service (PPS) was established in 2005.[18] Reforms were also implemented within the prison service and the judiciary.[19] These changes were designed to enhance fairness and transparency and build legitimacy in a post-conflict society where trust in justice institutions had been deeply fractured. Whilst ultimately receiving broad support, these changes have been a source of political tension across the sectarian divide.[20] Nationalist parties have tended to push for increased institutional reform and oversight. Unionist parties have advocated greater deference to existing institutions, making them more sceptical of reforms.

The Northern Ireland Executive, a mandatory coalition, oversees justice policy. Most ministerial roles are distributed based on party representation, except the Justice Minister, who must secure cross-community support. Since 2010, the Justice Ministry has usually been led by members of the constitutionally neutral, liberal Alliance Party, except for one year under an independent (Unionist) Assembly member.[21] This arrangement gives the Alliance Party, with electoral support ranging from 5.2 per cent to 13.5 per cent since 2010, an outsized influence on criminal justice policy.[22] The party's liberal and social democratic ethos has been one of the restraints on a more punitive 'law and order' approach.[23] Furthermore, given the unlikelihood of most other political parties aligned with either nationalism or unionism holding the justice portfolio in the Executive, there appears to be reduced motivation for them to prioritise criminal justice issues. However, that is not to say that the other parties do not have views on criminal justice. It would be fair to say that a legacy of the conflict is that unionist parties are more likely to support tougher law-and-order approaches to crime, with nationalist parties more sceptical of

18 Ibid.
19 Ibid.
20 Ibid.
21 David Ford (Alliance Party) (2010–2016), Clare Sugden (Independent Unionist) (2016–2017), Naomi Long (Alliance Party) (2020–2022 and 2024–). Gaps indicate a period where there was no Minister in place.
22 John Tonge, Máire Braniff, Thomas Hennessy et al, *The Alliance Party of Northern Ireland: Beyond Unionism and Nationalism* (Oxford University Press 2023).
23 Ibid.

the state's coercive power and more likely to endorse alternatives to punitive measures.[24]

Since 2010, the Northern Ireland Assembly has introduced several reforms to the criminal justice system, typically receiving broad political support and backing from criminal justice professionals. Most legislation has focused on revising criminal procedures rather than creating new offences or overhauling sentencing laws.[25] These reforms have been mainly reactive, often inspired by legislation already passed in Westminster for England and Wales.[26] When the Assembly has pursued distinct criminal justice reforms, they have tended to originate from Private Members' Bills rather than the Executive. Notably, this includes being the only part of the UK to adopt the Nordic model approach to prostitution, which involves criminalising those who pay for sex.[27]

Legislation, though lacking an overarching statutory framework of sentencing principles, reveals several guiding themes – especially when viewed alongside successive Programmes of Government.[28] These emphasise managerialism – efficiency, performance, and cost-effectiveness – while recognising the harm crime causes to individuals and communities. There is a clear scepticism of punishment as a long-term solution, with greater emphasis on addressing root causes and promoting rehabilitative and restorative approaches, particularly for youth. Northern Ireland's youth justice system is notable for its statutory commitment to restorative justice, with youth conferencing

24 A useful contrast can be seen in the most recent Assembly manifestos, with the two larger unionist parties – the Democratic Unionist Party and Ulster Unionist Party – dedicating chapters setting out traditional law and order policies. In contrast within nationalism, Sinn Féin references criminal law reform at various points throughout its manifesto but does not include a dedicated section, whilst the SDLP focuses on promoting restorative justice and rehabilitation as more effective responses to crime: Democratic Unionist Party, *Our 5 Point Plan for Northern Ireland Real Action on the Issues that Matter to You* (2022) 44–48; Sinn Féin, *Time for Real Change* (2022); SDLP, *People First* (2022) 33; Ulster Unionist Party, *Build a Better Northern Ireland* (2022) 35–37.

25 All legislation passed by the Northern Ireland Assembly can be found at its website: Northern Ireland Assembly.

26 For example, the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 which was inspired by the Domestic Abuse Act 2021.

27 Graham Ellison, 'Criminalizing the payment for sex in Northern Ireland: sketching the contours of a moral panic' (2017) 57(1) British Journal of Criminology 194–214.

28 Northern Ireland Executive, *Programme for Government 2011–2015: Building a Better Future* (2011); Northern Ireland Executive, *Draft Programme for Government Framework 2016–2021* (2016); Northern Ireland Executive, *Programme for Government 2024–2027: Our Plan: Doing What Matters Most* (2025).

established under the Justice (Northern Ireland) Act 2002 as a key mechanism for addressing offending through dialogue and reparation. Elements of progressive punitivism also appear, such as proposals to expand hate crime laws.[29] Explicitly punitive rhetoric from the DOJ or its ministers is rare, typically reserved for emotive offences like child abuse or sexual violence.[30]

In attempting to discern the governing philosophy of criminal justice reform, it is essential to note that civil servants play a particularly influential role in the law reform process in Northern Ireland. Since establishing the Assembly in 1998, its political institutions' inherent instability has meant several periods of suspension, totalling approximately 10 years, have occurred.[31] During these periods, civil servants have continued to operate without oversight from local politicians, including, at times, with the authority granted by London to manage a technocratic government.[32]

That is not to say that civil servants operate in a policy vacuum. Northern Ireland's small size and close-knit professional networks create a unique dynamic in the UK when considering law reform in the justice system and other areas of policymaking. Unlike larger jurisdictions, where policymakers, legal professionals, and civil servants operate within broader, more anonymous structures, Northern Ireland's legal and political communities are relatively compact, with many key figures knowing each other personally or professionally. For example, Northern Ireland's small population fosters a close-knit judiciary, with just 15 judges in the Court of Appeal and High Court, compared to 118 in England and Wales.[33]

The relatively small size of the jurisdiction leads to a heightened concern about maintaining professional relationships and avoiding conflict when discussing or implementing reforms.[34] Judges, lawyers, politicians, and civil servants often work closely together over extended

29 DOJ, 'Written ministerial statement – update on hate crime legislation' (2024).

30 For a recent example see: DOJ, 'Justice Minister Naomi Long has commented following the conclusion of the Alexander McCartney case' (2024).

31 Colin Murray, 'Northern Ireland's post-Brexit governance crisis: what to do when the post-1998 centre cannot hold' (2024) 75(3) Northern Ireland Legal Quarterly 584–612.

32 Andrew McCormick, 'The UK Government approach to the Northern Ireland impasse is an affront to democracy' (*UK in a Changing Europe* 2 December 2022).

33 Conor McCormick and Brice Dickson, *The Court of Appeal in Northern Ireland* (Bristol University Press 2024).

34 Max Everest-Phillips and Marcus Henry, 'Public administration in small and very small states: how does smallness affect governance?' (2018) 3(2) International Journal of Civil Service Reform and Practice 1; Tiina Randma-Liiv, 'Small states and bureaucracy: challenges for public administration' (2002) 6(4) Trames Journal of the Humanities and Social Sciences 374–389.

periods, sometimes across multiple roles, which can create a reluctance to propose or support controversial changes that might strain professional ties. This interconnectedness fosters cautious, consensus-driven decision-making, balancing the need for reform with potential professional discord.[35] While this can encourage collaboration, it also leads to slower, incremental legal reform, as decision-makers are wary of alienating colleagues or disrupting established relationships.[36] However, the recent legal aid dispute between the legal profession and the DOJ demonstrates that tensions and open disagreement can still arise, particularly when long-standing frustrations reach a tipping point, challenging the norms of quiet consensus that usually shape legal policymaking in Northern Ireland.[37]

Northern Ireland's size also limits the presence of alternative sources of reform proposals typically available in larger jurisdictions. A striking example is that, with only two universities in the region containing only a handful of criminal law or justice scholars, significant policy areas are left with minimal academic critical exploration.[38] Another notable absence is that Northern Ireland currently lacks a law reform commission. From 2007 to 2015, Northern Ireland operated a law commission, which was disbanded due to budgetary constraints, with its responsibilities absorbed by the DOJ.[39] In contrast, statutory law commissions in England and Wales, Scotland and the Republic of Ireland have influenced legislative reforms, including sentencing policy.[40]

Traditional and new media both shape the political agenda, including on criminal justice. In Northern Ireland, crime reporting remains influenced by the conflict, with unresolved legacy cases and paramilitary activity drawing attention – and sometimes threatening journalists' safety.[41] Day-to-day coverage, however, centres on routine crime, often highlighting official reports or victim criticisms of justice

35 Ibid.
36 Ibid.
37 John Breslin, 'Justice Minister Naomi Long disappointed on eve of criminal barristers' four week "strike"' (*Irish News* 6 January 2025).
38 Queen's University Belfast and Ulster University.
39 Dickson (n 12 above) 78–80.
40 See for example: Law Commission, *The Sentencing Code* (Law Com No 382 2018); Law Reform Commission, *Report on Sentencing* (LRC 53–1996).
41 Flávia Gouveia and Jonathan McCambridge, '"I've had death threats and a device exploded in my street' *Belfast Telegraph* journalist tells MPs of paramilitary intimidation' *Belfast Telegraph* (Belfast 5 February 2025).

system failings, as in the wider UK and Ireland.[42] While concerns about sentencing leniency do surface, they generally lack the personalised attacks on judges found in some British tabloids.[43] Media consumption from Britain and Ireland also blends local concerns with broader law-and-order narratives.[44]

Even when locally driven, most criminal justice reforms in Northern Ireland rely on policy transfer from other jurisdictions, particularly England and Wales. Reforms are often adopted after having been in place elsewhere for some time, allowing DOJ officials to assess their perceived success before adapting or replicating the legislation to suit the local context.[45] Adapting legislation from jurisdictions like England and Wales requires care, given Northern Ireland's post-conflict context and the political sensitivity surrounding perceptions of fairness. To avoid politicisation, criminal justice reform tends to be consensus-driven, aiming to protect institutional independence and public confidence. Proposed sentencing reforms have emerged within this delicate landscape.

THE COMPLEX PATH TO REFORMING SENTENCING IN NORTHERN IRELAND

As with many policy reforms in Northern Ireland, due to the polity's complex and often unstable governance arrangements, the journey to a sentencing Bill has been anything but straightforward. In June 2016, the then Justice Minister, Clare Sugden, an independent unionist Assembly Member, announced a major review of sentencing policy, stating that:

> Concerns … have been expressed from time to time about sentencing in some individual cases. While such cases represent a very small part of the everyday work of the courts, they can have a significant impact on public perception and confidence in the justice system and the

42 For recent examples, see: Katie Andrews, 'Families affected by drugs tell government officials that dealers should get tougher sentences' (*UTV News* 27 March 2024); Alison Morris, 'The 42 females who have been killed in NI in the last eight years' *Belfast Telegraph* (Belfast 21 October 2024).

43 For a particularly striking example from England, see: Chris Pollard, 'WEAK BEAKS: Britain's softest judges exposed amid calls for courts to get tougher on criminals' *The Sun* (London 16 June 2019).

44 Ofcom, *News Consumption in the UK 2024 – Northern Ireland* (2024); Ofcom, *Media Nations Northern Ireland 2024* (2024).

45 Anne-Marie McAlinden and Clare Dwyer, '"Doing" criminal justice in Northern Ireland: "policy transfer", transitional justice and governing through the past' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing 2015).

> sentencing process. That is why I have decided that a comprehensive review of sentencing policy is needed.[46]

It seemed that the first and, to date, only non-Alliance Party politician to hold the Ministry would adopt a more traditional 'law and order' approach to policy. However, before the review could be formally established, political deadlock on other issues caused the government to collapse, and the Minister of Justice and her colleagues had to vacate their positions.[47]

A review team was established by the civil servants in the Department over a year after the initial announcement by the then Minister.[48] The review team included civil servants, a retired member of the judiciary, two academics based outside of Northern Ireland, representatives from Victim Support, probation and an offender welfare charity.[49] In 2019, a consultation paper based on the review's recommendations was published.[50] That a consultation on such a contentious subject as sentencing reform could proceed without direct political oversight underscores the singular nature of Northern Ireland's governance at the time.[51]

The Assembly resumed in early 2020, allowing a new Justice Minister, Naomi Long, from the liberal-orientated Alliance Party to oversee the final review.[52] In 2021, the DOJ published the 'Way Forward' document, a pivotal report outlining recommendations to overhaul sentencing policy.[53] However, by 2022, another political stalemate disrupted progress, delaying the proposed reforms until the Assembly's restoration in 2024.[54] The Executive has now committed to introducing a sentencing Bill by late 2025, almost 10 years after the review commenced, making it the first comprehensive sentencing reform since justice powers were devolved in 2010.[55]

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46 DOJ, 'Justice Minister announces sentencing review' (Press Release 9 June 2016).

47 Deirdre Heenan and Derek Birrell, 'Exploring responses to the collapse of devolution in Northern Ireland 2017–2020 through the lens of multi-level governance' (2022) 75(3) Parliamentary Affairs 596–615.

48 News Letter, 'Ex-minister "frustrated" by year long delay on sentencing review' (25 January 2018).

49 The list of core members can be found in appendix two of the following document: DOJ, *Sentencing Review Northern Ireland: A Public Consultation* (2019).

50 Ibid.

51 Heenan and Birrell (n 47 above).

52 DOJ (n 1 above).

53 Ibid.

54 Jayne McCormack, 'NI's Government has returned Stormont – what you need to know' (*BBC News* 3 February 2024).

55 DOJ, 'Justice Minister reflects on past year' (Press Release 3 February 2025).

The *Way Forward* document acknowledges the public perception that sentences are often viewed as 'too lenient' or 'soft on offenders'.[56] However, it explicitly challenges this attitude, asserting that there is 'little evidence that tougher sentencing helps to rehabilitate offenders or reduce further offending'.[57] This willingness to confront popular punitivism is a recurring theme throughout the papers on sentencing reforms.[58] A key component of the *Way Forward* proposals involves challenging populist punitiveness by promoting public education on sentencing practices and enhancing transparency.[59] This includes initiatives such as introducing the broadcasting of sentencing decisions in appropriate cases to improve understanding and trust in the justice system, as currently happens elsewhere in the UK.[60]

Despite its overarching scepticism of punitivism, the *Way Forward* document incorporates several reforms to address criticisms of leniency or inadequate sentencing. A number of these directly respond to local campaigns for change. In recent years, the media has played a crucial role in amplifying public campaigns advocating for justice system reform. Often led by either victims or relatives of victims or third-sector organisations with a particular interest in that area, these moral entrepreneurs have effectively gained widespread attention for their causes.[61] High-profile campaigns have called for tougher sentences for those who kill while driving, assault emergency workers, or harm vulnerable groups like the elderly.[62]

The proposal includes two new statutory aggravating factors: targeting vulnerable victims, particularly the elderly, and assaults on frontline workers.[63] It also recommends increasing maximum sentences for driving offences that cause death or serious injury and providing tariff guidance for judges in murder cases.[64] Additional reforms would widen the range of sentences eligible for appeal on grounds of undue

56 DOJ (n 1 above) para 29.
57 Ibid.
58 DOJ (n 49 above); DOJ (n 1 above).
59 Ibid.
60 DOJ (n 1 above) para 35.
61 Niall Deeney, '"He was left lying on the road" – NI man backs campaign after son killed by drink driver' (*BelfastLive* 26 January 2025); James McNaney, 'Victim of spiking says experience "spurred" her on to start campaign for introduction of new criminal offence' *Belfast Telegraph* (Belfast 5 August 2024); Christopher Woodhouse, '"Struggle for justice is not over": hundreds demand end to anti-women violence at Belfast rally' *Belfast Telegraph* (Belfast 25 November 2023).
62 *Belfast Telegraph*, 'Northern Ireland backs tougher laws for crimes against the elderly' (Belfast 29 June 2017); Rebecca Black, 'Call for stronger sentences for attacks on emergency service staff' *Belfast Telegraph* (Belfast 20 March 2023); Deeney (n 61 above).
63 DOJ (n 1 above) chs 8 and 9.
64 Ibid chs 4 and 10.

leniency.[65] Several of these proposals represent reworked, less punitive versions of reforms implemented in neighbouring jurisdictions.[66] The Department expressed concerns that these comparators impose overly rigid constraints on judicial discretion, especially regarding minimum sentencing.[67]

The remainder of this article focuses on two of the proposals that will have the most significant impact on sentencing practice: first, the establishment of Northern Ireland's first set of statutory principles and purposes of sentencing to provide more precise guidance for sentencers; and second, a reform of the process by which sentencing guidelines are developed within the jurisdiction.[68]

ESTABLISHING PRINCIPLES AND PURPOSES OF SENTENCING

Northern Ireland lacks formal principles and purposes to guide sentencing policy and procedure. While England and Wales legislate for these, and Scotland relies on its sentencing commission, Northern Ireland's recent sentencing review sought to fill this gap by proposing a statutory framework.[69] Initially, the proposals presented during the consultation phase were more ambitious, with a scope that suggested a deliberate rejection of punitiveness in sentencing.[70] However, the final recommendations adopted by the DOJ represent a more measured stance, reflecting an effort to balance a non-punitive emphasis with the need to respond to public understandings of the role of sentencing.[71] This section traces the development of these proposals, their implications for Northern Ireland's legal context, and the challenges of crafting principles suited to its unique socio-political landscape.

In proposing a set of principles and purposes for sentencing, the DOJ set out the following motivations:

- improved awareness, understanding and clarity in how sentencing decisions are reached including improving transparency and public confidence;

65 Ibid ch 5.
66 For example, in England and Wales, the maximum penalty for an assault on an emergency worker is two years.
67 This includes on tariffs for murder and the penalties for death or serious injury by driving offences.
68 DOJ (n 1 above).
69 Sentencing Act 2020, s 57(2); *Scottish Sentencing Council, Sentencing Guideline: Principles and Purposes of Sentencing* (2018); DOJ (n 1 above) ch 1.
70 DOJ (n 49 above) ch 1.
71 DOJ (n 1 above) ch 1.

- the provision of a definitive benchmark of the qualities that all sentences should incorporate and reflect;
- facilitating consistency in sentencing; and
- ensuring compliance with international obligations.[72]

Concerning the final point, no mention is made in the consultation or subsequent review documents of the international obligations that the Department has in mind. Given the broader context of Brexit and its destabilising effect in Northern Ireland, there perhaps was a decision to avoid explicitly referencing international obligations, especially those emanating from Europe.[73]

The obligations would undoubtedly include the European Convention on Human Rights (ECHR), which binds the actions of the Assembly, Executive, and criminal justice system agencies.[74] The text of the ECHR is likely to have a limited impact on the development of sentencing principles and purposes in Northern Ireland, as the ECHR primarily establishes broad human rights standards rather than specific sentencing frameworks.[75] While the ECHR requires that sentencing practices avoid inhuman or degrading treatment (article 3), uphold the right to liberty and security (article 5), and involve a fair and public hearing (article 6), it offers limited guidance on the specific aims and principles of sentencing.

Although not binding in Northern Ireland, the Council of Europe Guidelines and Recommendations on sentencing and sanctions provide a comprehensive framework for developing sentencing principles.[76] Key documents, such as the European Prison Rules and the Recommendation on Consistency in Sentencing, emphasise proportionality, transparency, and alternatives to imprisonment.[77] The guidelines advocate prioritising rehabilitation and reintegration of offenders into society, with imprisonment used only as a last resort, favouring alternative sanctions to minimise the social harms of incarceration.[78]

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72 Ibid para 1.

73 Murray (n 31 above).

74 Human Rights Act 1998, s 6; Northern Ireland Act 1998, s 6(2)(c).

75 Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Bloomsbury 2021).

76 Council of Europe, *Compendium of Conventions, Recommendations and Resolutions Relating to Prisons and Community Sanctions and Measures* (Council of Europe 2020).

77 Council of Europe, *Recommendation No R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing*; Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*.

78 Ibid.

While the DOJ's sentencing review did not reference the Council of Europe guidelines directly, it may have drawn on them. The consultation proposed four principles: proportionality, fairness, transparency, and the sparing use of punishment.[79] The first three received unanimous support, but the fourth was more contentious.[80] Though consistent with Council of Europe standards and the DOJ's ethos of resisting populist punitivism, the explicit rejection of a punitive approach was always likely to provoke debate.

The inclusion of both proportionality and the sparing use of punishment raises important questions about how these principles interact. Proportionality requires that sentences correspond to the seriousness of the offence and the offender's culpability, and it can justify either lenient or severe penalties depending on the context. By contrast, the principle of sparing use of punishment introduces a normative tilt toward restraint – implying that where multiple proportionate sentences are available, the least severe should be preferred. While this subtle distinction is not fully articulated in the consultation document, it aligns with a tradition of penal parsimony reflected in earlier policy texts, such as the 1990 Westminster White Paper *Crime, Justice and Protecting the Public*.[81] It is also embedded in Northern Ireland's legislative framework, which establishes a clear hierarchy of sentencing options – ranging from imprisonment to community orders, fines, and discharges – and stipulates that custody should be used only when the offence is serious enough to warrant it.[82]

Ultimately, aligning the principle of sparing punishment with proportionality requires careful legislative and judicial framing. If poorly articulated, it risks generating confusion about whether restraint is a general presumption or a directive tied to particular sentencing purposes. It also conflicts with other proposals within the review – such as increasing maximum sentences for certain offences – which reflect more punitive tendencies. Nonetheless, if clearly expressed, the principle could serve as a constructive counterweight to punitive drift – guiding sentencing towards moderation without compromising the fundamental requirement that penalties remain proportionate to the offence.

In the original consultation, the justification for the principle of using punishment sparingly is addressed in only two brief paragraphs, which includes an assertion that there is an 'increasing understanding that harsher punishment does not necessarily help to address offending

79 DOJ (n 49 above) ch 1.

80 DOJ (n 1 above) ch 1.

81 Home Office, *Crime, Justice and Protecting the Public* (White Paper, Cm 965 1990).

82 Criminal Justice (Northern Ireland) Order 2008, art 5.

behaviour' and further claims that 'this principle is supported by the findings of worldwide research, which indicates that it is not the severity of punishment that contributes to deterring offenders, rather it's the certainty of punishment'.[83] While a consultation document is not expected to meet the rigorous standards of academic discourse, the lack of a more detailed argument suggests perhaps an initial misplaced confidence that the proposal would not face challenge.

The consultation claims that using punishment sparingly reflects a societal shift in Northern Ireland toward a more rehabilitative approach.[84] However, this is questionable and contradicted by other parts of the review. The DOJ's *Way Forward* document itself notes that sentences are often viewed as too lenient, and it has supported reforms that introduce harsher penalties for certain offences.[85] Public surveys also suggest continued support for a punitive approach. In the most recent DOJ survey, the most endorsed sentencing rationale was public protection, followed by reparation, deterrence, and rehabilitation.[86] In earlier versions, 'punishment' topped the list when offered, and most respondents rejected the idea that prison should be reserved for dangerous offenders.[87] Confidence in sentencing also remains low, with 'tougher sentences' consistently cited as the most popular way to improve trust in the justice system.[88] While recent survey revisions omit such questions, this does not indicate a shift in public sentiment.[89] Although public opinion can appear punitive in the abstract, it tends to soften when people are presented with contextual information.[90] This undermines the reliability of existing survey data, suggesting that the DOJ lacked a solid evidential basis for its claim of a rehabilitative shift – rather than that such a shift is clearly refuted.

A proposal to enshrine a principle advocating the sparing use of punishment would be politically toxic in neighbouring jurisdictions like England and Wales, Scotland, or even the Republic of Ireland, despite the latter's lower incarceration rates. Such a principle would likely face media backlash and opposition portrayals of being 'soft on crime'. Its inclusion in Northern Ireland's consultation likely reflects the unique

83 DOJ (n 49 above) paras 1.16 and 1.17.

84 Ibid para 1.16.

85 Ibid.

86 M Beggs, *Cyber Crime, Modern Slavery and Sentencing: Findings from the 2021/22 Northern Ireland Safe Community Telephone Survey* (DOJ 2023).

87 K Ross and M Beggs, *Perceptions of Sentencing: Findings from the 2019/20 Northern Ireland Safe Community Survey* (DOJ 2022).

88 P Campbell, A Rice and K Ross, *Perceptions of Policing and Justice: Findings from the 2018/19 Northern Ireland Safe Community Survey* (DOJ 2020).

89 DOJ, Perceptions of Sentencing Questions (2024).

90 Kareen Gleb, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (Sentencing Advisory Council 2006).

political context at the time, as the consultation was developed during the Assembly's suspension, leaving civil servants to explore ideas that might not have withstood scrutiny in a more politically charged environment. This highlights a tension between evidence-based sentencing approaches and the political realities of policymaking, where public opinion and media often push for harsher measures.

In its review of consultation responses, the Department acknowledged 'some concern' about the sparing use of punishment principle.[91] Critics noted that the principle equated incarceration with punishment, overlooking other forms like fines or community penalties.[92]

Concerns were also raised about inadequate investment in rehabilitation programmes, which often leaves punishment as the only short-term option for protecting society.[93] The Department's response did not address these concerns and ultimately dropped the sparing use of punishment principle while retaining the other three.[94] Retaining the principle would likely have led to its removal during the legislation's passage, given expected opposition from more conservative Executive parties. However, that may have been a debate worth having, rather than pre-emptively avoiding.

The DOJ rejected the inclusion of mention of victims in the principles, citing concerns that it could elevate victims' interests above defendants' rights.[95] This reflects a broader assumption that victims uniformly support punitive measures – a view often invoked in penal populist rhetoric. However, Pemberton challenges this narrative, arguing for a more nuanced understanding of victims' needs that does not equate victim support with punitiveness.[96] Other reforms in Northern Ireland, such as the appointment of a Victims' Commissioner and the use of Victim Personal Statements, show efforts to strengthen victims' roles in the justice system.[97]

In addition to principles, the Northern Ireland review proposes sentencing purposes (or rationales) – punishment, public protection,

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91 DOJ (n 1 above) 5.

92 DOJ, *Summary of Responses: Sentencing Review Northern Ireland Consultation* (2021).

93 Ibid.

94 DOJ (n 1 above) 6.

95 Ibid 5–6.

96 Anthony Pemberton, 'Too readily dismissed? A victimological perspective on penal populism' in Hans Nelen and Jacques Claessen (eds), *Beyond the Death Penalty: Reflections on Punishment* (Intersentia 2022).

97 See the Commissioner's website for further information; Luke Moffett, 'Victim personal statements in managing victims' voices in sentencing in Northern Ireland: taking a more procedural justice approach' (2017) 68(4) Northern Ireland Legal Quarterly 555–575.

crime reduction (including deterrence), rehabilitation, and reparation – mirroring those in the Sentencing Code for England and Wales.[98] This list blends both retributive and consequentialist aims.[99] Punishment, as included here, is typically associated with retributive justice – imposing a proportionate response to moral wrongdoing. In contrast, rehabilitation, deterrence, and public protection reflect consequentialist reasoning, aiming to reduce future harm through behavioural change or risk management. Reparation, too, serves both functions – restoring victims and reaffirming norms. Without clear guidance on how to prioritise or balance these purposes in practice, sentencers are left to navigate potentially conflicting goals – such as imposing a punitive sentence that may hinder rehabilitation – on a case-by-case basis, raising questions about consistency and transparency.[100]

The final report from the DOJ acknowledges unease among some consultees about including punishment, particularly from those favouring a restorative approach and questioning the long-term effectiveness of punitive measures.[101] Despite these concerns, the Department appears to adopt a pragmatic stance, arguing that omitting punishment would prevent the purposes from gaining general acceptance, presumably from the public and politicians.[102]

A notable absence from the proposals for new legislation is any explicit reference to restorative justice. A practice commonly employed in post-conflict societies, restorative justice emphasises repairing the harm caused by criminal behaviour through processes that involve engagement between victims, offenders, and sometimes the wider community.[103] It seeks to foster accountability, reconciliation, and healing rather than focusing solely on punitive measures.[104] This approach has been integral in transitional justice efforts in South

98 Sentencing Act 2020, s 57(2).

99 Andrew von Hirsch, 'Proportionality in the philosophy of punishment' (1992) 16 Crime and Justice 55–98.

100 Andrew Ashworth and Elaine Player, 'Criminal Justice Act 2003: The sentencing provisions' (2005) 68(5) Modern Law Review 822–838.

101 DOJ (n 1 above) 6.

102 Ibid.

103 Kathleen Daly, 'What is restorative justice? Fresh answers to a vexed question' (2016) 11(1) Victims and Offenders 9–29; Gerry Johnstone, 'The agendas of the restorative justice movement' in Holly Miller (eds), *Restorative justice: From Theory to Practice* (Emerald Group 2008).

104 Daly (n 103 above); Johnstone (n 103 above).

Africa, Rwanda, and Colombia, providing mechanisms for rebuilding fractured communities and addressing historical injustices.[105]

In Northern Ireland, restorative initiatives emerged after the Good Friday Agreement as a response to the need for non-violent, community-backed alternatives to paramilitary policing and punishment within the two divided communities.[106] This approach was formally recognised in section 43 of the Justice and Security (Northern Ireland) Act 2007, which empowers the Minister of Justice to maintain a public register of accredited community-based restorative justice schemes. Nearly 30 years on from the conflict, these schemes have sought to offer locally rooted forms of accountability, facilitating dialogue and mediation between offenders, victims, and communities. While their ethos aligns with post-conflict reconciliation and social repair, such schemes remain small in scale, inconsistently applied, and insufficiently integrated into the wider criminal justice system – factors that continue to limit their transformative potential.

By contrast, restorative justice has achieved far greater institutional traction in the youth justice system. Following recommendations from the 2011 Youth Justice Review, Northern Ireland embedded restorative principles within statutory youth justice processes, including through youth conferencing.[107] This model brings together the young person, their family, victims (where appropriate), and justice professionals to agree on reparative actions and to address the underlying causes of offending.[108] The model has drawn international praise for its outcomes: high victim satisfaction rates, reduced rates of reoffending, and a more constructive engagement with young people

105 Isabella Bueno, Stephan Parmentier and Elmar Weitekamp, 'Exploring restorative justice in situations of political violence: the case of Colombia' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016); Jennifer Llewellyn and R Howse, 'Institutions for restorative justice: the South African truth and reconciliation commission' (1999) 49(3) University of Toronto Law Journal 355–388; Jonas Musengimana, 'Restorative justice and post-genocide reconciliation: ethical implications and community healing in Rwanda' (2024) 5 Journal of Ethics in Higher Education 241–261.

106 Anna Eriksson, 'Challenging cultures of violence through community restorative justice in Northern Ireland' in H Ventura Miller (ed), *Restorative Justice: From Theory to Practice* (Sociology of Crime, Law and Deviance, vol 11) (Emerald Group 2008); Kieran McEvoy and Harry Mika, 'Restorative justice and the critique of informalism in Northern Ireland' (2002) 42(3) British Journal of Criminology 534–562.

107 DOJ, *Equality and Law Reform: A Review of the Youth Justice System in Northern Ireland* (2011).

108 Brendan Marsh and Shadd Maruna. 'Desistance and restorative justice: learning from success stories of Northern Ireland's Youth Justice Agency.' (2016) 4(3) Restorative Justice 369–387.

in conflict with the law.[109] This stands as one of the more distinct and progressive elements of Northern Ireland's post-conflict justice landscape and contrasts sharply with more cautious approaches in adult sentencing policy.

While reparation is included in the proposed sentencing principles, it arguably does not adequately capture the broader scope of restorative justice. Reparation in criminal justice systems, including in the UK, typically focuses on material or symbolic restitution. In contrast, restorative justice encompasses a more comprehensive process to address harm, foster dialogue, and rebuild relationships.[110] Explicitly including referral to restorative justice, perhaps by further explaining the term reparation, would signal a more profound commitment to healing and reconciliation. However, doing so might have increased the risk that sceptics of restorative justice, particularly within the unionist parties, might have objected.

Ultimately, while the proposed framework claims to promote fairness and individualised sentencing, it exposes unresolved tensions – particularly between punitive and rehabilitative or restorative aims. The retreat from the more reformist tone of the consultation phase to a noticeably more cautious final report reflects a failure to coherently reconcile these competing rationales. The resulting ambiguity risks creating not flexibility, but incoherence, offering no clear guidance on how conflicting objectives should be prioritised. In practice, it delegates these unresolved tensions to the judiciary, empowering individual judges to determine – consciously or otherwise – whether to resist or reflect more populist penal tendencies. While this judicial discretion may offer some protection from political pressure, it also weakens the framework's ability to promote transparency, consistency, or public confidence. Rather than articulating a clear sentencing ethos, the final proposals reflect a compromise shaped more by institutional caution and political ambivalence than by principled direction.

THE PRODUCTION OF SENTENCING GUIDELINES IN NORTHERN IRELAND: A UNIQUE APPROACH

Having proposed reforms to the principles underpinning sentencing policy, the Northern Ireland review also addresses the mechanisms for implementing these principles through sentencing guidance development and the creation of a sentencing guidelines council. This is potentially the most controversial aspect of the proposed reforms.

109 Ibid.

110 Council of Europe, *Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters*.

Again, the post-conflict settlement has shaped the trajectory of policy and practice, leading to proposals for a unique sentencing guidance mechanism.

Traditionally, judges in Northern Ireland, as elsewhere, have exercised significant discretion in sentencing, tailoring penalties to the circumstances of each case by balancing aggravating and mitigating factors. However, reliance on judicial discretion has faced growing scrutiny in recent decades across the common law world. Criticism has emerged from both ends of the political spectrum, with the right advocating for sentencing guidelines to ensure tougher penalties. At the same time, the left views them as a means to address disparities, including racial or other biases, inconsistency, and a lack of proportionality.[111] Both perspectives underscore the broader debate over judicial discretion and the need for greater transparency and fairness in sentencing.

In response to these criticisms, many jurisdictions, including Northern Ireland, have adopted sentencing guidelines to enhance consistency and transparency.[112] The level of detail and prescriptiveness in these guidelines and the rules on judicial deviation vary across jurisdictions, reflecting differing legal traditions and institutional priorities.[113] At a high level of abstraction, we can say they tend to outline benchmarks for offences or offence categories, aiding judges in weighing aggravating and mitigating factors to determine appropriate sentences.

In some systems, including Northern Ireland's Crown Court guidelines, appellate courts establish sentencing guidance through rulings in specific cases.[114] They set benchmarks and provide interpretive guidance on statutory provisions and sentencing principles by leveraging their authority and expertise. However, this reactive approach – reliant on appropriate cases reaching the senior courts – can delay responses to emerging sentencing challenges and leave gaps, particularly for less frequently litigated offences. This issue is pronounced in smaller jurisdictions, such as Northern Ireland, where a limited appellate caseload constrains the development of sentencing precedents.

Transparency can also be problematic, as it is not always clear what evidence judges considered when framing the guidance. Additionally, variations in the detail and structure of judgments can lead to

111 Julian V Roberts, 'The evolution of sentencing guidelines in Minnesota and England and Wales' (2019) 48(1) Crime and Justice 187–253.

112 Arie Freiberg and Julian V Roberts, 'Sentencing commissions and guidelines: a case study in policy transfer' (2023) 33 Criminal Law Forum 87–129; Roberts (n 111 above).

113 Freiberg and Roberts (n 112 above).

114 Ibid.

inconsistencies. Ambiguity over which aspects of a ruling constitute binding guidance further complicates its application by lower courts, particularly when judgments do not explicitly state their intent or identify the relevant sections.

Increasingly, jurisdictions have established sentencing councils or commissions to develop and maintain guidelines – a trend dating back to Minnesota's first commission in 1978.[115] While structures vary, these bodies typically produce comprehensive, evidence-based frameworks supported by research, stakeholder consultation, and data analysis. Their processes are generally more transparent than judicial deliberations and involve a more diverse membership, including judges, legal professionals, academics, and public representatives, designed to promote more responsive and informed sentencing policy.

In England and Wales, policymakers moved toward a sentencing council model with the creation of the Sentencing Guidelines Council in 2003, shifting from reliance on appellate judgments.[116] In 2010, its functions were merged into the Sentencing Council, which no longer requires Court of Appeal approval for guidelines.[117] The 14-member Council includes eight judges and six non-judicial members, such as the Director of Public Prosecutions (DPP), senior police and probation officers, a defence barrister, and a legal academic.[118] Judicial appointments are made by the Lord Chief Justice with the Lord Chancellor's agreement; non-judicial members are appointed by the Lord Chancellor, also with the Lord Chief Justice's agreement, following open competition.[119]

Scotland and the Republic of Ireland have also adopted sentencing council models. The Scottish Sentencing Council, operational since 2015, drafts guidelines subject to High Court of Justiciary approval.[120] In the Republic of Ireland, the Sentencing Guidelines and Information Committee, established in 2020, drafts guidelines for approval or amendment by the Judicial Council's Board.[121]

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115 Ibid.

116 Julian V Roberts and Andrew Ashworth, 'The evolution of sentencing policy and practice in England and Wales, 2003–2015' (2016) 45(1) Crime and Justice 307–358.

117 The governing legislation is the Coroners and Justice Act 2009, pt 4 and sch 15. See Sentencing Council for England and Wales' website.

118 A current list of members is available: Sentencing Council members.

119 Coroners and Justice Act 2009, sch 15(1)(a).

120 The governing legislation is the Criminal Justice and Licensing (Scotland) Act 2010, pt 1. See Scottish Sentencing Council's website.

121 The governing legislation is the Judicial Council Act 201,9 ss 23–29 and ss 91–92. See Sentencing Guidelines and Information Committee webpages.

The choice between appellate courts and sentencing councils reflects a jurisdiction's legal culture and priorities. Appellate courts safeguard judicial independence and legal expertise but often lack the capacity to engage with broader policy and societal concerns. Sentencing councils offer a more structured and participatory model but must navigate tensions between independence and external pressures.[122] This is not a binary choice, as Northern Ireland's trajectory illustrates. Judicial oversight varies widely: in Scotland, the High Court of Justiciary retains final authority over guidelines, while in England and Wales, the council operates with greater independence.[123] Each model presents distinct trade-offs in delivering justice, transparency, and accountability.

Using sentencing councils instead of appellate courts to issue guidelines holds a complex position within penal populism.[124] Sentencing councils sometimes arise from political and public demands for greater accountability, responding to perceptions of leniency and/or judicial arbitrariness.[125] However, sentencing councils are also seen as a way to counterbalance such punitive tendencies by promoting evidence-based policymaking, diversifying the voices of those who input into sentencing guidelines and ensuring consistency rooted in objective principles.[126] The extent to which councils are successful in these aims differs across jurisdictions.[127]

Following the 2010 devolution of justice powers under the Hillsborough Agreement, it initially appeared that establishing a sentencing council would become a flagship justice policy for the Northern Ireland Executive.[128] Previously, policing and justice had remained under Westminster due to mistrust between communities. The Hillsborough Agreement marked a breakthrough, with cross-party consensus on devolving justice and identifying key priorities for the new DOJ – including a sentencing council to build public confidence.[129] Its inclusion signalled political support and suggested the potential for the Assembly to demonstrate its capacity to legislate on sensitive justice issues, reflecting the broader normalisation of local politics.

The newly formed DOJ launched a public consultation within months, though it remained noncommittal and presented alternative options. In his foreword, newly installed Justice Minister David Ford of the Alliance Party rejected penal populism, attributing

122 Freiberg and Roberts (n 112 above).
123 Ibid; Roberts and Ashworth (n 116 above).
124 Freiberg and Gelb (n 6 above).
125 Ibid; Freiberg and Roberts (n 112 above).
126 Freiberg and Gelb (n 6 above); Freiberg and Roberts (n 112 above).
127 Freiberg and Roberts (n 112 above); Roberts and Ashworth (n 116 above).
128 Hillsborough Castle Agreement (2010).
129 Ibid.

low public confidence in sentencing to media sensationalism and misunderstanding. He also stressed the need to protect judicial discretion.[130] The consultation outlined three reform options without expressing a preference.[131] The first proposed a statutory sentencing council, mirroring England and Wales; the second, a statutory advisory panel drafting guidelines for Court of Appeal approval; and the third, requiring no legislation, involved a judicially led Sentencing Group under the Lord Chief Justice. This last option built on proposals from a judicial working group established by the Lord Chief Justice a year earlier.[132]

The consultation received only 24 responses, many incomplete, and just one from a member of the public – indicating limited outreach or public interest.[133] Respondents included political parties, criminal justice bodies, government agencies, and third-sector organisations. Despite minimal public input, most favoured the more ambitious option of establishing a sentencing council, while the judiciary-led option attracted the least support.[134] Critics of the latter noted its narrow focus, lack of external input, limited independence, weaker impact on public confidence, and absence of any mechanism to improve public understanding of sentencing.[135]

Given the consultation results and the direction of policy in other parts of the UK at the time, a decision to create a sentencing council might have been an expected outcome. However, given the Minister's foreword to the consultation, it is not perhaps surprising that option three was chosen.[136] In doing so, the Minister stated that he was influenced by the Lord Chief Justice's well-timed initiative, which he described as 'unique to Northern Ireland'.[137] He also expressed concerns, reflected in the consultation responses, about whether establishing a new sentencing guidelines mechanism would represent good value for money.[138] This was during the era of the Conservative–Liberal Democrat austerity budgets, which impacted the

130 DOJ, *Consultation on a Sentencing Guidelines Mechanism* (2010).
131 Ibid.
132 Sentencing Work Group, *Monitoring and Developing Sentencing Guidance in Northern Ireland: A Report to the Lord Chief Justice from the Sentencing Working Group* (Lord Chief Justice's Office 2010).
133 DOJ, *Consultation on a Sentencing Guidelines Mechanism: Summary of Responses* (2011).
134 Ibid.
135 Ibid para 2.37.
136 Ibid 2–3.
137 Northern Ireland Assembly Plenary Debate 11 June 2012.
138 Ibid.

money available for the devolved administrations.[139] The Minister's arguments in favour of the more limited reforms closely mirrored the findings of the report of the judicial working group established by the Lord Chief Justice.[140]

The then Lord Chief Justice Declan Morgan articulated his opposition to a sentencing council model in a judgment in an appeal case where it was suggested that English Sentencing Guidelines could be used in Northern Ireland to guide sentencers:

> [The Sentencing Guidance model in England and Wales] reflects the fact that the jurisdiction is very large, that the opportunity for discussion between experienced judges about sentencing issues is consequently limited and that, although sentencing is often carried out by some of the most experienced criminal judges in the United Kingdom, there is also a long tradition of sentencing being carried out by Recorders and Deputy Judges who have had no or limited experience in the criminal law.
>
> In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but we have discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance.[141]

This passage reflects a deeply held judicial ethos that prizes local expertise, collegial discussion, and professional discretion over externally imposed frameworks. It also helps explain the judiciary's resistance to formalised sentencing structures – such as a council – on the grounds that they may be ill-suited to the scale and character of Northern Ireland's justice system. In a 2025 public lecture the current Lady Chief Justice echoed these points, stating 'for a more compact and much less populous jurisdiction such as ours which operates on a different footing my view is that a similar approach to England and Wales would be overly rigid and constricting'.[142]

With the DOJ deciding not to introduce a statutory-based council, the judiciary in Northern Ireland developed its distinctive approach to producing sentencing guidelines, reflecting the unique legal and

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139 Chris Gilligan, 'Austerity and consociational government in Northern Ireland' (2016) 24(1) Irish Studies Review 35–48.

140 LCJSG, *Report by the Lord Chief Justice's Sentencing Group* (Lord Chief Justice's Office 2012).

141 *The Queen v Thomas McVaughey and Martin Smyth* [2014] NICA 61.

142 Connor Beaton, 'Sentencing Council for Northern Ireland would have 'huge impact'' (*Irish Legal News* 29 May 2025).

political context. Currently, in Northern Ireland, the Judicial Studies Board (JSB) established by the then Lord Chief Justice in 1994 to oversee judicial training publishes sentencing guidelines supported in the task by the Lady Chief Justice's Sentencing Group (LCJSG) established in 2012.[143]

Both the JSB and LCJSG's membership are at the discretion of the Lady Chief Justice rather than the Government, with both organisations predominately made up of judiciary members. The JSB also includes one of Northern Ireland's three coroners and two senior law academics (one from each local university).[144] The LCJSG has several non-judicial members. Currently, it comprises, in addition to members of the judiciary, three court service civil servants, two law academics, and the Victim's Commissioner Designate for Northern Ireland.[145]

The LCJSG's stated functions include advising the Lady Chief Justice on Magistrates' Court sentencing guidelines, assessing appellate and Crown Court judgments for use as guidelines, liaising with the JSB on judicial training and guideline dissemination and assisting the Lady Chief Justice with her programmes of action in areas where there is a perceived gap in sentencing guidance.[146]

Comprehensive Magistrates' Guidance is developed by a judicial-only subcommittee of the LCJSG/JSB.[147] Whilst at the Crown Court level, the LCJSG reviews and recommends to the Lady Chief what it considers suitable Court of Appeal judgments as sentencing guidelines, which, if confirmed, are published on the JSB's website.[148] It is important to note that the group does not draft guidelines for the Crown Court but rather determines whether the Court of Appeal or Crown Court judgments qualify as guideline judgments.

The LCJSG's programme of actions primarily focuses on compiling relevant guideline judgments and Magistrates' Courts Guidance on specific matters (eg road traffic offences), occasionally supplemented by judicial training provided by the JSB.[149]

Given the *ad hoc* nature of the development of the sentencing guideline mechanisms in Northern Ireland and the lack of a statutory framework, the guidelines are not currently legally binding on a

143 LCJSG (n 140 above).

144 See current membership list.

145 See current membership list. The author of this paper is a former academic member of the Sentencing Group.

146 LCJSG (n 140 above).

147 See up-to-date version of the guidelines.

148 Ibid.

149 LCJSG, Report by the Lady Chief Justice's Sentencing Group 2017–2022 (Lady Chef Justice's Office 2024) annex D.

sentencing judge.[150] This differs from Northern Ireland's neighbouring jurisdictions where there is a statutory obligation on sentencers to either 'have regard' (Scotland and the Republic of Ireland) or 'follow' (England and Wales) relevant guidelines unless the court is satisfied that it would be either 'contrary to the interests of justice to do so' (England and Wales and the Republic of Ireland) or 'unless the court considers and states the reasons for departing from the guideline' (Scotland).[151]

The creation of the LCJSG in 2012 has been pivotal in deflecting calls for a sentencing guidance council in Northern Ireland. Despite this, the DOJ acknowledges that there has yet to be a review of the effectiveness of the sentencing guidelines arrangement since its establishment.[152] The Department stating that due to the ongoing consultation on sentencing and pressures on the criminal justice system caused by Covid, conducting the review is not a priority.[153] However, it is peculiar that in planning an overhaul of sentencing, the Department has not considered it essential to understand how effective the current system is at achieving its aims.

Nevertheless, support for a sentencing council model in Northern Ireland remains. In 2012, during an emotionally charged Assembly debate on the sentencing of those responsible for the terrorist murder of a police officer, an amendment to a motion advocating for the establishment of a sentencing guidelines council was proposed by the Social Democratic and Labour Party (SDLP) (one of the nationalist parties). Both nationalist parties, Sinn Féin and the SDLP, supported the amendment. The motion was defeated due to opposition from the unionist parties and the Alliance Party.[154] The debate involved the somewhat unusual position of the Irish nationalist parties advocating for what some termed the 'British' approach, with unionists objecting to it.

Rather than advocating for a council based on punitive populist reasoning, the nationalist parties argued that a council would create a fair, equitable, open, and transparent framework for sentencing reform, ultimately enhancing public confidence in the justice system. The reasons that unionist representatives opposed the amendment were not as clear but included from some that they feared a sentencing council would constrain the Assembly's ability to legislate to introduce harsher

150 DOJ (n 1 above) 18.

151 In England and Wales, see the Sentencing Act 2020, s 59; in Scotland, see Criminal Justice and Licensing (Scotland) Act 2010, s 6; in the Republic of Ireland, see Judicial Council Act 2019, s 92.

152 DOJ (n 1 above) para 68.

153 Ibid.

154 Northern Ireland Assembly Plenary Debate 11 June 2012.

sentences and that there was limited evidence of the effectiveness of such bodies. The Alliance Party, including the Minister of Justice, primarily cited concerns over the financial costs of establishing a council.[155] Notably, concerns about the council restricting judicial discretion were not key to the opposition's reasoning.

In 2018, Sinn Féin, an all-island party, played a pivotal opposition role in securing a political agreement with the then government to introduce a form of sentencing council in the Republic of Ireland – advocating for it as a means to address what it described as 'inadequate and inappropriate sentencing'.[156] In the recent 2024 election in the Republic of Ireland, Sinn Féin called for enhanced powers for the sentencing body along the lines of England and Wales.[157] This marked a more traditional 'law and order' stance than the party typically adopts in Northern Ireland. The contrast reflects differing political contexts: in the Republic, Sinn Féin has increasingly positioned itself as a party of government-in-waiting, responding to public concerns about crime and justice. In Northern Ireland, however, its legacy as a party historically sceptical of the state's coercive power, combined with the sensitivities of post-conflict policing and justice, has encouraged a more cautious and reform-oriented approach to criminal justice policy.

Given that the unionist parties in Northern Ireland tend to take a stricter law-and-order approach to crime than nationalist parties, one might have expected unionist parties to support a sentencing council based on more punitive populist arguments of reducing judicial discretion, especially given the existence of such institutions in the rest of the UK. Here, the nationalist/unionist divide on the subject needs to be viewed in the context of the legacy of the conflict, where it has generally been nationalist parties advocating for reforms to state institutions, including creating oversight bodies for criminal justice agencies, with unionist parties more likely to support the *status quo* and professional independence.[158] However, in May 2025, the justice spokesperson of the Ulster Unionist Party, Doug Beattie, announced his support for a Sentencing Council for Northern Ireland expressing concerns that sentencing in Northern Ireland was 'very lenient' with a 'lack of transparency [and] openness' arguing that a sentencing council could have 'a huge impact'.[159] At the time of writing it is unclear

155 Ibid.

156 Paul Hosford, 'Judges to get new sentencing guidelines after Sinn Féin deal with government' (*The Journal* 22 May 2018).

157 Sinn Féin, 'Fine Gael's deflection tactics cannot hide failings on sentencing – Pa Daly TD' 7 August 2024.

158 Mulcahy (n 15 above).

159 Beaton (n 142 above).

whether this will influence the views of the larger Democratic Unionist Party; in a recent Assembly debate on the issue, the party appeared non-committal.[160]

The ultimate views of the parties on a sentencing council may be influenced by recent developments in England and Wales, where a public dispute emerged between the Labour Government and the Sentencing Council over proposed guidelines that would have required courts to consider pre-sentence reports for defendants from specific backgrounds, such as ethnic minorities, when sentencing.[161] The row could deepen Alliance and possibly unionist concerns that a sentencing council might become a political lightning rod or undermine judicial autonomy.

The 2021 consultation informing the *Way Forward* document did not directly ask whether a sentencing council should replace existing guidance but focused on updating current mechanisms.[162] The DOJ addressed the council model only in response to unsolicited support during the consultation, citing high costs and limited economies of scale in a small jurisdiction, along with a lack of political consensus among Executive parties.[163] Further concerns centred on the role of criminal justice stakeholders, such as the PSNI and PPS. Unlike in England, Wales, and Scotland – where senior police and prosecution figures sit on sentencing councils – Northern Ireland's post-conflict context creates heightened sensitivity around maintaining professional boundaries.[164]

Despite rejecting a sentencing council, the *Way Forward* document does more than endorse the *status quo*. It seeks to balance public concern with a rejection of punitive populism and a drive for efficiency, resulting in a distinct policy approach. Notably, it proposes expanding the Court of Appeal's role in developing sentencing guidelines – powers usually reserved for sentencing councils – marking a unique shift within the common law world.[165]

The Department proposes that forthcoming legislation should empower the Court of Appeal to issue sentencing guidelines independently, without waiting for an appropriate criminal case to

160 Northern Ireland Assembly Plenary Debate 23 June 2025, Private Members' Business. Motion: Improving Sentencing Practices in Northern Ireland.

161 Lucy Fisher, Alistair Gray and Suzi Ring, 'Sentencing Council to suspend guidelines at centre of "two-tier" justice row in England and Wales' *Financial Times* (31 March 2025).

162 DOJ (n 49 above).

163 DOJ (n 1 above) 17.

164 See Sentencing Council in England and Wales membership; and Scottish Sentencing Council membership.

165 DOJ (n 1 above) 14–19.

come on appeal.[166] In addition to granting the court the authority to act on its initiative, the *Way Forward* document recommends allowing the Attorney General or the DPP to apply to the Court for a guidelines judgment.[167] According to the Department, these changes address the existing delays in producing guidelines for the Crown Court.[168]

While this reform may initially seem straightforward and uncontroversial, it raises several significant issues. If the Court of Appeal begins issuing dedicated, statutorily authorised guidance rather than providing a few paragraphs of *obiter dicta* within judgments, it effectively assumes a role closer to that of a sentencing guidance council than a traditional appellate court. This shift prompts several critical concerns, and while the *Way Forward* document seeks to address some, others remain unresolved.

A question raised by the reforms is whether this statutorily authorised guidance binds lower courts, and if so, to what extent. The *Way Forward* document recommends imposing a statutory duty on the judiciary to 'have regard' to sentencing guidelines or guideline judgments, requiring courts to provide reasons for any departure.[169] This change would align Northern Ireland's practice more closely with neighbouring jurisdictions.[170] This would mark an enhancement of the powers of the Court of Appeal in influencing sentencers.

Another question is what should be the format of Court of Appeal guidance. If the guidelines were to reflect the structure in England and Wales or even the current Magistrates' Guidelines in Northern Ireland, they would be in tabular form, a significant departure from the current brief *obiter* text in Court of Appeal judgments. The *Way Forward* document proposes that legislation guides the Court of Appeal regarding the content of guideline judgments, though it offers no specifics.[171] It is reasonable to assume that they may include a basic framework outlining mitigating and aggravating factors, along with thresholds for sentencing. This would improve consistency and the level of detail in the guidance but would again mark a significant expansion of the current powers of the Court of Appeal.

Sentencing councils can typically gather evidence from interested parties, such as victim advocacy groups, when drafting guidelines, which is a resource that courts lack.[172] The *Way Forward* document proposes allowing the Court of Appeal the discretion to receive

166 Ibid 14–15.
167 Ibid 15.
168 Ibid 14–15.
169 Ibid 18–19.
170 See earlier discussion on pages 237 and 238.
171 DOJ (n 1 above) 15.
172 Freiberg and Roberts (n 112 above).

representations, with the Attorney General or the DPP acting as gatekeepers – a novel approach not modelled on other jurisdictions.[173] Granting the Attorney General and DPP gatekeeping powers looks to be a safeguard, but it risks less favoured advocacy groups being excluded from making representations. The consultation informing the *Way Forward* document did not highlight the proposals' unique and potentially controversial aspects.[174]

Sentencing councils typically rely on empirical evidence to draft guidelines, conducting or commissioning primary research and using existing studies.[175] In contrast, courts generally base guidelines on evidence presented by litigants. The DOJ proposes empowering the Court of Appeal to consider 'relevant information' on sentencing, mentioning statistical data but offering little detail on what this would include.[176] The proposals stop short of granting the Court of Appeal authority to commission primary research, but the ability to independently collate existing research would significantly enhance its role. The Department notes that no similar provisions exist in neighbouring jurisdictions.[177]

The current model in Northern Ireland already raises concerns about the lack of diversity among those drafting sentencing guidelines – concerns likely to be amplified under the proposed reforms. The Court of Appeal comprises only four judges, including the Lady Chief Justice and three Lord Justices of Appeal, with the 11-member High Court bench also participating in appeal cases.[178] It remains unclear whether the latter would contribute to guideline development. In any case, such a small and senior judicial group lacks the demographic, professional, and experiential diversity found in sentencing councils elsewhere.

The document endorses continuing – and possibly expanding – the Lady Chief Justice's Sentencing Group (LCJSG), citing its alignment with priorities such as transparency, consistency, and public confidence.[179] However, the LCJSG's limited profile, remit, and resources cast doubt on its capacity to deliver on these aims, particularly in public engagement. The proposals appear to sideline its role in recommending Court of Appeal guidelines, while preserving its

173 DOJ (n 1 above) 15.
174 DOJ (n 49 above).
175 Freiberg and Roberts (n 112 above).
176 DOJ (n 1 above) 14–15.
177 Ibid 15.
178 See up-to-date list of the Northern Ireland judiciary; McCormick and Dickson (n 33 above).
179 DOJ (n 1 above) 16–18.

function in issuing Magistrates' Court guidance.[180] If implemented, the reforms would consolidate sentencing guideline development under exclusive judicial control.

In summary, the proposed reforms to sentencing guidelines in Northern Ireland build on an already distinctive process, aiming to enhance efficiency and consistency in decision-making without incurring significant costs. While stopping short of establishing a sentencing council, the reforms leave unresolved questions concerning the expanded role of the Court of Appeal, the transparency of guideline development, and the availability and forum for appeals. Given these uncertainties and a growing level of support for a sentencing council amongst lawmakers, it is perhaps unsurprising that, in June 2025, the Minister for Justice announced yet another consultation – this time on proposals for a dedicated sentencing review mechanism.[181] This consultation has the potential to bring judicial priorities into tension with those of most elected representatives, placing the DOJ in a difficult position.

CONCLUSIONS

At the heart of the proposed sentencing reforms for adults in post-conflict Northern Ireland are two interwoven tensions shaping the debate. The sentencing proposals seek to reconcile these tensions to achieve consensus on the forthcoming sentencing Bill.

The first tension lies in the competing rationales for sentencing, often framed as a conflict between punitive and rehabilitative or restorative approaches. This tension was starkly reflected in the trajectory of sentencing reform proposals for the creation of statutory sentencing principles and purposes. The DOJ initially proposed the principle of using punishment sparingly – aligned with a parsimony ethic and consistent with international guidance – but ultimately removed it following consultation. This retreat suggests a reluctance to provoke political opposition by appearing to favour one sentencing philosophy over another. Adopting the sentencing purposes set out in the English Sentencing Code, without critical adaptation or clarification, compounds this ambiguity by importing a framework already criticised for its conceptual confusion and lack of normative coherence.

While such inconsistencies between retributive and consequentialist aims are not unique to post-conflict settings, the drivers differ. In Northern Ireland, the legacy of conflict, the political sensitivities surrounding criminal justice reform, and the need for cross-community

180 Ibid 18.

181 Assembly Official Report: Monday 2 June 2025: Questions to the Justice Minister.

consensus contribute to a cautious and often ambiguous approach. It is regrettable that, as a post-conflict society, there has not been greater ambition to develop a distinct and coherent sentencing framework that reflects its particular context. A more explicit acknowledgment of Northern Ireland's internationally recognised leadership in restorative justice – both in community-led schemes and within the youth justice system – could have provided a firmer foundation for articulating a sentencing ethos shaped by reconciliation, repair, and reintegration. In the absence of such clarity, much will fall to the judiciary to navigate these competing principles and purposes when sentencing in individual cases.

The second tension centres on judicial independence versus greater accountability demands. While judicial discretion has traditionally been a cornerstone of Northern Ireland's legal system, within the public discourse, there have been criticisms that sentencing decisions can appear inconsistent or overly lenient. This has led to calls for more precise guidelines, increased oversight, and public scrutiny commonly associated with penal populism. However, many within the judiciary, legal profession and DOJ caution that excessive constraints on judicial discretion risk undermining fairness, proportionality, the ability to tailor sentences to individual cases and, ultimately, legitimacy in a divided society. The DOJ has sought to balance these competing visions in its proposals. Several of the proposed reforms, including the introduction of statutory guidance, statutory aggravators and the expansion of the use of the undue leniency procedure, are an attempt to recognise the calls for greater accountability. However, those favouring judicial discretion appear to have won their case on the most far-reaching suggestion in the rejection of calls for a sentencing council.

Judicial scepticism toward political interference in sentencing has played a role in shaping the reforms. Such scepticism is not unique to Northern Ireland; it is a common feature across the common law world. Ultimately, policies such as sentencing councils involve the judiciary relinquishing some discretion and accepting greater external oversight. In many common law jurisdictions, political demands for reform have overridden judicial resistance. In contrast, while acknowledging calls for greater guidance and harsher sentences in certain areas, Northern Ireland's sentencing proposals primarily seek to uphold judicial independence.

This outcome can be attributed to Northern Ireland's distinct post-conflict governance dynamics. Unlike elsewhere in the UK and Ireland, judicial and civil service leadership exerts a stronger influence, often compensating for political instability and legislative inertia. The small size of the jurisdiction further discourages reforms that could strain professional relationships between criminal justice professionals

and civil servants or impose high relative budgetary costs, such as establishing a sentencing commission.

Additionally, the political landscape plays a crucial role. The Justice Ministry is typically held by a party sceptical of populist reforms and orientated more towards managerialist concerns, such as the costs associated with establishing such a body. In contrast, despite their traditionally more punitive stance, unionist parties tend to be wary of institutional changes in the justice system, especially in the context of significant changes since the Good Friday Agreement that have tended to be viewed as a concession to nationalism. Conversely, nationalist parties, historically more sceptical of law-and-order politics, are often more open to institutional reforms to a system in which they were traditionally inherently distrustful. Until recently, the absence of political consensus has hindered progress toward establishing a new statutory body. However, this may be shifting, with the Ulster Unionist Party now expressing support for a sentencing council and the Democratic Unionist Party signalling a willingness to engage in discussions about whether to endorse such a proposal.

In aiming to adopt a consensus-driven approach to modernise the tools that guide sentencers, the reforms deliberately avoid the guideline council model adopted in neighbouring jurisdictions, instead favouring statutory guidance and an enhanced role for the Court of Appeal. This decision represents an act of accidental radicalism, as it significantly redefines the Court of Appeal's traditional role within the justice system, effectively positioning it as a quasi-sentencing council. Granting the Court of Appeal greater authority to take evidence and proactively issue guidelines significantly enhances its authority and is not based on experience elsewhere. The DOJ has not yet addressed the implications of such an innovative approach, and this will require further consideration during any subsequent consultation and when the sentencing Bill is introduced to the assembly.

To date, the experience in other parts of the UK has been that the introduction of sentencing principles and purposes and sentencing councils has accompanied an increasing trend towards punitivism in sentencing. Notably, in England and Wales, the Sentencing Council has often struggled to counteract political and public demands for harsher sentencing, contributing to rising prison populations. Although Northern Ireland has historically had a lower incarceration rate than the rest of the UK, its prison population is also increasing, reflecting trends in penal expansion. This raises questions about how any sentencing framework – judicially led or council-based – can insulate decision-making from broader penal populist trends. Time will tell whether Northern Ireland's decision to eschew the sentencing

council mechanism and implement its unique approach to sentencing guidelines will militate against penal populism.

Ultimately, these consensus reforms attempt to satisfy campaigners who have expressed longstanding concerns regarding transparency, consistency, and public confidence whilst avoiding embracing a full-throated penal populist approach to sentencing policy. This compromise position creates an overarching philosophical incoherency, but then politics is the art of the possible, especially in the context of the post-conflict governance structures of Northern Ireland. Such an incoherency in sentencing policy is not unique to Northern Ireland, but how it has manifested itself in the proposed package of reforms is. The durability of these reforms will depend on how effectively they bridge the gap between protecting expert-led sentencing and public perceptions of justice.