



Home Office

# **Making Sentencing Clearer**

A consultation and report of a review by the Home Secretary,  
Lord Chancellor and Attorney General.

## **Contents:**

### **Foreword**

- 1. History**
- 2. Making Sentencing Clearer**
- 3. Indeterminate Sentences**
- 4. Determinate Sentences: Exceptions to Automatic Release**
- 5. Probation Powers**
- 6. Probation Resources**
- 7. Information for Sentencers**
- 8. Partial Regulatory Impact Assessment**
- 9. Consultation Responses**

## **Foreword**

**When we announced our plans to rebalance the Criminal Justice System in favour of the law-abiding majority we set out our intention to initiate a wider discussion on a range of sentencing and related issues. This consultation is part of that wider debate.**

**We have made significant progress over recent years in developing the legal framework that provides sentencers with a range of sentences that can be tailored to an individual offender. This document seeks views on how we can go further and make sentencing clearer for the public and those who come into contact with the criminal justice system, whether they are a victim, witness or defendant.**

**We are committed to ensuring that the public can have confidence in sentencing. We have already announced that we want judges to have more discretion so that they no longer have to reduce the sentence they impose by up to one third for an early guilty plea, regardless of the circumstances. The Sentencing Guidelines Council is currently considering whether in future judges should be able to reduce or remove the discount for an early guilty plea when the evidence against the defendant is overwhelming.**

**We want to rebuild the use of fines for low level offenders and to increase the use of robust community sentences as an alternative to short custodial sentences. The proposals in this document are also designed to ensure that the public are better protected from dangerous offenders and that resources are targeted at the offenders who pose the most significant risks. We would welcome your comments on how best to meet these objectives.**

**Home Secretary**

**Lord Chancellor**

**Attorney General**

## 1. HISTORY

### Sentencing History and Context

1.1 Some historical background is needed to put the proposals outlined in this consultation document in the context of the major changes to the sentencing and release framework in recent years.

1.2 The following provides a brief summary of the key changes to sentencing and outlines the current sentencing framework for England and Wales.

### **Crime, Justice and Protecting the Public (1990, White Paper) and the 1991 Criminal Justice Act Framework**

1.3 The 1990 White Paper set out that the role of the courts was to impose proportionate and consistent sentences. It provided a general framework for sentence decision-making for the first time. The basic principle was that the severity of the sentence imposed should reflect the seriousness of the offence committed.

1.4 Release provisions for offenders under the 1991 Act depended upon the length of sentence:

- **Under 12 months:** *automatic unconditional release (AUR)* – in prison to half way point; no licence; at risk for second half.
- **12 months to 4 years:** *automatic conditional release (ACR)* – in prison to half way point; on licence to three quarter point; at risk for final quarter.
- **More than 4 years:** *discretionary conditional release (DCR)* – in prison to half way point; release at any point between half way and two thirds when and only when the Parole Board consider the risk of release acceptable; on licence from the point of release to the three quarters point; at risk for final quarter.

1.5 *On licence* means that the offender is under the supervision of the probation service and will have to comply with various requirements, which may include living or working only where approved, attending offending behaviour programmes or being tagged. If the licence is breached the offender is liable to be recalled back into custody until the expiry of the licence. *At risk* means there are no positive obligations on the offender but if he commits a further offence the unexpired part of the sentence can be added to any new one.

### **“Justice for All” (2002 White Paper) and the Criminal Justice Act 2003**

1.6 John Halliday's sentencing review, “Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales” (July 2001) followed by the Government White Paper: “Justice for All” (July 2002) set out proposals for a wide ranging programme of reform for the criminal justice system.

This formed the basis of the new sentencing framework introduced by the Criminal Justice Act 2003. The Act introduces wide changes to sentencing principles and the sentencing powers of the courts.

### 1.7 The Criminal Justice Act 2003:

- **Purposes of sentencing:** for the first time the purposes and principles of sentencing have been put into statute. These are: to protect the public, punish the offender, reduce and deter crime and reform and rehabilitate the offender.
- **Statutory aggravating factors:** the seriousness of an offence (and thus the severity of the resulting sentence) should be increased if the offender demonstrates hostility based upon the victim's race, religion, sexual orientation or disability. For racial and religious aggravation this re-enacts previous legislation but the provision related to disability and sexual orientation is new.
- **Firearms:** a minimum sentence of 5 years for possession or distribution of prohibited weapons or ammunition, the maximum penalty is 10 years imprisonment.
- **Sentencing Guidelines Council:** established a new Sentencing Guidelines Council which is responsible for producing comprehensive guidelines for the full range of criminal offences to help remove uncertainty and disparity in sentencing and give representatives of the police, prisons, probation and victims a voice in sentencing for the first time.
- **Community sentences:** the Act replaced the various kinds of community sentences with a single community order with a range of requirements. The court can choose from the 12 different requirements, such as unpaid work and alcohol treatment, to make up a bespoke community order.
- **Suspended Sentence Orders:** replaced old suspended sentences. They are much more demanding than old suspended sentences and more widely available. An offender will have requirements to fulfil in the community, as in a community sentence. If an offender breaches the requirements the presumption will be that the suspended prison sentence is activated.
- **Public protection sentences:** Imprisonment for public protection (IPP) and the Extended sentence for public protection (EPP) for dangerous offenders. The IPP sentence provides for release to be at a date determined by the Parole Board. The Court will set a minimum term which will be served before the Parole Board considers whether it is safe to release the offender. After release, the offender remains on licence for at least 10 years. The EPP sentence will be for a specified period in the same way as for any other determinate sentence, though it must be for at least 12 months. The court must specify a custodial period and an extension period (during which the offender will remain on licence). From the halfway point of the custodial period the offender may be released if the Parole Board determines it is safe to do so, but release will not be automatic until the end of the custodial period. After release, the offender remains on licence for the unexpired term of the original sentence (if any) and for an extended period designated by the Court when imposing sentence.

- **Sentences over 12 months:** For those serving sentences over 12 months (apart from dangerous offenders) release is automatic at the half-way point but offenders remain on licence until the end of their sentence, thus serving it in full.
- **Murder provisions:** the Act introduced a statutory framework for setting tariffs for mandatory life sentences.
- **Custody plus:** The Act changes the structure of short prison sentences. The new custodial sentences of less than 12 months will consist of a short custodial period of between two weeks and three months followed by a licence period of at least 6 months. The court will be able to set requirements similar to those available under a community order for the licence period.

1.8 The murder provisions were implemented in December 2003. Most of the other provisions were implemented in April 2005 and apply to offences committed on or after that date. The CJS review document announced that the implementation of the custody plus sentence is being deferred to enable resources to be targeted at the more serious offenders.

### **What the Government is seeking to achieve in sentencing policy**

1.9 The Criminal Justice Act 2003 was designed to achieve a major shift in sentencing policy and has introduced substantial improvements to the sentencing framework.

1.10 It introduced a distinction between dangerous and non dangerous offenders as a basis of custodial sentencing so that a greater focus could be placed on those offenders presenting the most danger to the public. Those sentenced to unlimited sentences such as life sentences and IPP will only be released when they no longer pose a risk, which in some cases will be never. This contrasts with earlier legislation that distinguished between offenders according to their length of sentence but not the risk they posed to the public.

1.11 Those serving sentences of 12 months or more now remain on licence and subject to recall until the end of their sentence rather than the three quarter point.

1.12 The new community order provides a robust sentence for those offenders who can be dealt with in the community.

1.13 The aim in all this is to provide a sentencing framework in which the public has confidence and which puts public protection at its heart. The Government believes that prison should be targeted on serious and violent offenders. We are expanding prison places by an additional 8,000 over the medium term and 1,000 in the short term and will ensure these new places are focused on the serious, violent and seriously persistent offenders who ought to be in prison.

1.14 There are people in our prisons who should not be there:

- foreign nationals, who should be deported
- vulnerable women and young offenders, who need not be imprisoned
- those for whom mental health treatment would be more appropriate. The majority of non-violent offenders with low level disorders can be treated in the community without any risk to the public
- those on remand for less serious offences who can be tagged. We need to focus remand places on those with the highest risk of re-offending and speed up the court processes so those not yet convicted spend less time on remand

1.15 Sentencing has become tougher, with offenders more likely to get a prison sentence for almost any offence and that sentence is likely to be longer. In the last 10 years the custody rate for indictable offences in the Magistrates Court has more than doubled, increasing from 7% to around 15%, while the average sentence has remained around 3 months. In the Crown Court the custody rate has increased from 53% to 61% and sentence lengths have increased by some 6.6 months to reach an average of 27 months<sup>1</sup>. The Criminal Justice Act 2003 introduced a new framework designed to achieve a better balance by enabling us to focus our custodial resources on dangerous offenders by providing longer prison sentences for them while providing tough new community orders for those for whom prison is not the most effective response. So far the evidence is that the courts have made good use of the new sentences for dangerous offenders. The shorter sentences which were anticipated for non-dangerous offenders (as reflected in the guidelines about the new sentences issued by the Sentencing Guidelines Council) have not, however, materialised. Early evidence also suggests the new Suspended Sentence Order may be being used in cases where a community order would be appropriate. The Sentencing Guidelines Council will continue to be mindful of this distinction in the sentencing of different groups of offenders as it produces guidelines on individual offences. Following the significant increases in recent years we now want to see stability in sentence lengths and the custody rate whilst also protecting the public from the most dangerous offenders.

1.16 There are often better options than imprisonment for dealing with less serious non-violent offenders. More of these offenders should be dealt with through robust community sentences that ask a lot of them. Community orders are often more challenging than a short period in custody for less serious offenders. The community order, introduced by the Criminal Justice Act 2003, allows sentencers to attach requirements to the order to match the seriousness of the offence and the risks posed by and needs of the individual. 12 requirements are available to be used with the community order including unpaid work, a curfew backed by a tag, drug rehabilitation, programmes to tackle the offender's behaviour and supervision. The evidence so far is that the courts are not using community orders as fully as they might. The

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<sup>1</sup> Home Office statistics. For years, 1994 -2004, indictable offences only.

anticipated switch to these new community sentences from short terms of imprisonment that was envisaged has not happened but is a crucial part of the package of sentencing reform we wish to achieve.

1.17 Probation resources should be targeted at those that most need them – those who need intensive supervision because they are dangerous or because of their very high risk of re-offending.

1.18 Less serious offenders should be fined rather than given low-level community sentences. These are now much better enforced, hit offenders in the pocket and save taxpayer money. The use of fine has decreased significantly in the last 10 years (for indictable offences). Rebuilding the use of the fine will avoid probation being overloaded by low-level offenders serving community sentences. We are committed to achieving a shift back towards fines.

1.19 We must also do more to tackle prolific offenders, including drug users to try to prevent their re-offending. We are overhauling the priority and prolific offenders and drug intervention programmes to ensure that the highest crime causing drug-users are identified and targeted with more treatment and tougher conditions in the community, tougher enforcement and new follow-up assessments.

1.20 Bearing in mind the intention behind the Criminal Justice Act of rebalancing sentencing to ensure that it focused properly on the serious and dangerous offenders and allowed us to target resources on them we are also proposing to legislate to place a duty upon the Sentencing Guidelines Council to have regard to the achievement of that balance in drawing up guidelines.

### **What more needs to be done?**

1.21 Although the sentencing framework has been considerably improved by the Criminal Justice Act 2003, there is still more that we need to do to ensure that the system is clearer to the public and that we have the most effective policies in place to ensure the public is protected. The purpose of this paper is to consult on a range of measures in relation to the way that sentences are expressed and calculated, to consider further improvements to custodial sentences and to consider the best use of probation resources.

**Q1 What more could be done to promote the use of community sentences instead of short periods of custody for lower level offenders?**

## **2. MAKING SENTENCING CLEARER**

### **The current system**

2.1 Chapter one explains that the current sentencing system distinguishes between dangerous and non-dangerous offenders. Dangerous offenders can receive indeterminate (unlimited) sentences or extended sentences.

2.2 Offenders, who are not in the dangerous category serving a determinate sentence of 12 months or more serve their sentence in two halves, the first half in prison and the second half on licenced supervision in the community. The licence period is important; it fulfils a key purpose of sentencing – the reform and rehabilitation of offenders. The licence period reduces the risk to the public and reduces re-offending. The probation service supervises the offender and uses the time to work on the factors which underlie criminality. It also provides an opportunity for the effective resettlement of offenders (finding and maintaining employment and housing, and sustaining family ties), which is fundamental to reducing re-offending. If offenders remained in custody until the end of their sentence and were then released with no supervision and no opportunity to assess their risk in the community it could potentially be very dangerous in terms of public protection.

2.3 Courts are under an obligation when sentencing to explain how a sentence will be served, i.e. that it will be served in two parts, one in custody and one under supervision in the community.

2.4 The Criminal Justice Act 2003 introduced the release arrangements for determinate sentence prisoners described above. The new release arrangements are more transparent than the previous system, established by the Criminal Justice Act 1991, as offenders under that legislation were not under supervision for the whole of their sentence as they are now. The new system ensures offenders are supervised till the end of their sentence and that there are specific sentencing arrangements in place for dangerous sexual and violent offenders.

### **Proposal**

2.5 We need to make clear that fixed term determinate sentences comprise two parts and why that is important. Existing sentences could be re-packaged so they are referred to as an overall term of punishment made up of a custodial and a community period. So a four year sentence would be expressed as an overall term of punishment of four years with two years in custody and two years on licence in the community to reduce the risk to the public. Alternatively the sentence could be expressed simply as two years in custody followed by two years on licence in the community. Both options would make it clearer to the public what the sentence actually means and why it is structured in this way.

2.6 Proposals for the reform of indeterminate sentences in chapter three would also ensure that the public had a greater understanding of the sentence passed.

**Q2 Does the way sentences are explained by courts need to be changed so the public can understand them more easily?**

**Q3 Would it make sentences easier to understand if the length of determinate sentences was expressed as an overall term of punishment made up by two parts; a custodial period followed by period of supervision in the community or if the two parts are expressed as discrete elements?**

### 3. INDETERMINATE SENTENCES

3.1 The case of R v Sweeney (12 June 2006) raised important issues about how discretionary life sentences and other indeterminate or unlimited sentences are explained and constructed. Sweeney was sentenced to life imprisonment for offences of kidnap, and three offences of assault of a child under 13 by penetration. Such sentences comprise three elements: the minimum term that has to be served in prison as a punishment that is determined by the trial judge; a period in prison for public protection that is determined by the Parole Board and is based on the risks posed to the public should the offender be released; and finally a period on licence in the community that for life sentences will be for the rest of the offender's life. The system means that in practice offenders are likely to serve far longer in prison than the minimum term for punishment.

3.2 In determining the minimum term to be served for punishment the judge following section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 considers how long an offender receiving a determinate sentence for the same offence would serve in prison. The starting point is half of the length of the notional determinate sentence since a determinate sentence prisoner serves half of their sentence in the community. The judge also takes into account credit that would be given for a guilty plea and time spent in custody on remand that would count towards the notional determinate sentence to be served. In the Sweeney case, the judge concluded that the seriousness of the offence would warrant an 18 year determinate sentence. He then reduced this by a third to 12 years to reflect the early plea of guilty. He then halved the remainder. After deducting the time already served on remand this left a period of 5 years 108 days. He went on to say "It will only be after you have served that period that the Parole Board will be entitled to consider your release. It will only be when it is satisfied that you need no longer be imprisoned for the protection of the public that it will be able to direct your release....You and more importantly the family of J and the public should understand that an early release in your case is unlikely."

3.3 We have already announced that we want judges to have more discretion so that they no longer have to reduce the sentence they impose by up to one third for an early guilty plea, regardless of the circumstances. The Sentencing Guidelines Council is currently considering whether in future judges should be able to reduce or remove the discount for an early guilty plea when the evidence against the defendant is overwhelming.

3.4 But we also need to look at options for reforming other aspects of these sentences. Although few offenders sentenced to indeterminate sentences will be released at the expiry of their minimum term, the complexity of this system can leave the public with the belief that a very serious offender might be released far earlier than is likely to be the case. There are five options for reform:

3.5 **Option One** - Clearly, part of the concern about these sentences relates to the way the sentence is expressed. One option is, therefore, to

make the headline sentence clearer. One possibility might be to borrow the American phraseology and to talk of a sentence of, for example, six years to life, arguably making it clearer what the totality of the sentence might be. A description of the sentence along these lines, coupled with an indication from the judge of the average time served in similar cases might make the effect of the sentence clearer. This would allow for a more realistic view of the actual likely length of time in custody, but there would still be a lack of clarity.

**3.6 Option Two** - The second option would be for the judge to make a recommendation to the Parole Board on the minimum period to be served for public protection in addition to the minimum term for punishment. The judge would need to base this on clear criteria relating to the offence and the offender. The recommendation would allow for changes in risk levels whilst the offender was in custody, and the more sophisticated risk assessment available to the Parole Board in assessing the offender over a period of time. However, it would be a strong pointer to the Parole Board.

**3.7 Option Three** - The third option is a variant on the second. The trial judge would announce a life sentence and then there would be an adjournment for a further assessment of risk. The case would then come back to court for a decision on the period of punishment plus an initial recommendation for the period to be served in custody for public protection. This would allow for a more detailed risk assessment to be undertaken.

**3.8 Option Four** - A more radical option would be to allow the judge to sentence imposing additional years on the minimum term on account of the dangerousness of the offender. Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 currently does not allow judges to do this. Section 82A could be amended to change the way that the tariff is determined where, for example, a public protection test is met. This could allow the judge to add the years that he felt were necessary to reflect public confidence issues where an offender is dangerous. However, this approach could confuse punishment issues determined by the judge with public protection issues that are the responsibility of the Parole Board. There would be difficulty in the judge having the information to base an assessment of the public protection risks posed by the individual and how these are likely to change over time. But there would be greater clarity around how much the offender would actually serve as a minimum.

**3.9 Option Five** - A final option would be to amend section 82A to disapply the requirement to take into account the duty to release determinate prisoners at the half way point where an exceptionally high seriousness test is met. For consistency with the determination of the minimum term for mandatory life sentences, the exceptionally high seriousness test in paragraph 4 of Schedule 21 to the CJA 03 could be used as a starting point, ie:

- two or more relevant offences where each involves a substantial degree of premeditation or planning, abduction, or sexual or sadistic conduct

- a child victim, involving the abduction of the child or sexual or sadistic motivation
- a relevant offence committed for the purpose of advancing a political, religious or ideological cause
- a previous conviction for a relevant offence

3.10 The effect of this would be that where the offence meets the exceptionally serious test the sentencing judge determining the tariff would not halve the notional determinate tariff. Alternatively, the judge could be given a discretion as to how much of the notional determinate sentence should be served in custody. In the Sweeney example, the 12 years remaining after the one third guilty plea reduction would not be reduced to 6. Therefore, the time spent on remand would be deducted from 12 years, if the judge determined the whole period should be spent in custody, leaving 11 years and 108 days, rather than 5 years and 108 days.

3.11 One problem with this option is that it would not allow consideration during sentence of any changes to the risk posed by the offender, as a result for example of the treatment of a mental illness. It may be necessary to consider an appropriate mechanism for dealing with such cases. The option would also result in very different periods of punishment where the offender received an indeterminate rather than a determinate sentence for the same offence.

- Q4 Would it be helpful if the judge was able to express an indeterminate sentence in a way which made the sentence clearer to the public?**
- Q5 Is there merit in the judge giving a recommendation or order for the minimum period to be served for public protection?**
- Q6 Would a judge have sufficient information to be able to reach this decision?**
- Q7 Should the judge be able to disapply the requirement to take into account the duty to release determinate prisoners at the half way point where an exceptionally high seriousness test is met? Would this result in too great a variation in punishment between indeterminate and determinate sentences?**

#### **4. DETERMINATE SENTENCES: EXCEPTIONS TO AUTOMATIC RELEASE**

4.1 The Government's report on rebalancing the criminal justice system in favour of the law abiding majority raised a possible issue of concern in regard to a small number of offenders whose offences were not serious enough for them to be given indeterminate sentences but who nevertheless should not be released at the halfway point in their sentence because of serious concerns about the risks they pose.

4.2 The potential source of concern is a prisoner who has been sentenced to a standard determinate sentence but who is subsequently assessed whilst in prison as posing a serious risk to the public. The focus would be on the prisoner's likely behaviour on return to the community; it would not be about compliance or otherwise with the prison regime and would not be a disciplinary measure. In such a case, it might be in the public interest for the prisoner's automatic release at the half way point to be reviewed.

4.3 This would be a major step to take and, whilst the Parole Board would be competent and the appropriate body to assess if the prisoner were safe to be released in terms of risk posed to the public, there might be advantage in building in an additional safeguard against potential abuse in order to restrict use of the procedure to those cases where there was substantial evidence or risk, and to sustain public confidence. One option would be for all offenders serving a determinate sentence who are assessed as a serious risk to the public to be referred to a High Court judge for preliminary consideration as to whether it is arguable that the offender should be detained beyond the half-way point on the basis of risk. If the judge considered that there was a *prima facie* case for continued detention, the matter would be referred for full hearing by the Parole Board. Otherwise, the offender would be released automatically in the usual way.

4.4 If such a procedure were to be established, it could apply solely to those convicted of a scheduled offence but not sentenced to a public protection sentence, or it could apply to a wider group, perhaps where there is a scheduled offence in the past record.

4.5 There is also the question of who should be able to refer a case for consideration for continued detention. The offender manager is one obvious person, but it is also for consideration whether the police should also be able to refer a case to the High Court if, for example, they receive new intelligence about the prisoner that suggests he might pose a considerable risk on release.

4.6 If the Parole Board decided not to release the offender, he would be kept in custody until the expiry of his sentence (or earlier if the Board subsequently considered him safe to release at an annual review).

4.7 There is no suggestion that the overall term of the sentence would be extended as to do so would seem contrary to the principles of natural justice and article 7 of the European Convention on Human Rights.

**Q8 Do you think there should be power for the prison or other authorities to refer a sentence for reconsideration of automatic release if an offender gives serious cause for concern during the custodial part of his sentence and, if so, who should have the power to refer? If so, should this reference be to a High Court judge, or do you have another idea?**

## **5. PROBATION POWERS**

### **Giving offender managers the power to deal with breach of a community order**

5.1 At present, offenders who fail without reasonable excuse to comply with their community order become subject to breach action. The offender manager, or in law the “responsible officer”, must either issue a warning or start court proceedings for breach. No more than one warning may be issued per year: on the second unacceptable failure to comply the offender must be returned to court. “Responsible officers” at present may be officers of local probation boards, electronic monitoring contractors and officers in charge of attendance centres.

5.2 Once before the court, the case for breach must be proved to the criminal standard. If the offender denies the breach, adjournments for case preparation and pre-trial review are often required. If proved, the court must take one of a specified list of actions. It may make the requirements of the order more onerous or it may revoke the order and resentence for the original offence. Where there is wilful and persistent failure to comply it may revoke and resentence to imprisonment even where the original offence was not imprisonable or, where it did carry custody, it may imprison the offender even if the offence was not serious enough to warrant such a sentence. Under the Criminal Justice Act 2003 the court may not, as it could under the previous legislation, do nothing or simply impose a fine.

5.3 The Government believes that it may be possible for offender managers to deal with some instances of breach by varying the offender’s sentence without having to go back to court. This would save court time and should have the potential to speed up the breach process. The powers to vary the sentence would be within an envelope set by the sentencing court. The court imposing a community order would set out the maximum required for the offender to discharge the requirements imposed in the order, as well as a corresponding minimum. In between those limits it would be open to the offender manager to adjust the sentence according to the behaviour of the offender.

### **Analysis**

5.4 The manner in which such administrative powers would work would require careful consideration, but the Government believes that they could be added to the present structure. The power for the offender manager to issue a warning could remain, as could the requirement to take action in the event of any unacceptable failure to comply and the power to refer the case back to court in the case of serious breach. The courts’ powers for dealing with breach could remain unchanged.

5.5 Issues for discussion surround the way in which courts would sentence offenders under the new arrangements and the exercise of their new powers by offender managers.

## **Court sentencing powers**

5.6 The sentencing court would set both a minimum and maximum range of punishment to be undertaken by the offender to discharge the requirements imposed in the community order. The maximum would set the limit of the offender manager's discretion in adjusting the sentence. These limits would represent a sentencing "envelope" within which administrative action would be possible.

5.7 This 'envelope' could apply across a range of different requirements which are regularly included in community orders including:

- Number of hours of unpaid work required
- Length (number of hours per night) and duration (number of months) of night-time curfew requirements
- Frequency (number of times per week) and duration (number of months) of drug-testing conditions

5.8 How the size of the envelope is calculated would be for consideration. One option is for it to bear some fixed relationship with the maximum in each case, perhaps 20% or 50% variation between the maximum and minimum. This would be set by legislation. For example for 20%, a community order with an unpaid work requirement of a maximum of 100 hours would have an envelope of 20 hours; leading to a range of 80-100 hours to be completed depending on the offender's behaviour. For 50% there would be an envelope of 50 hours; leading to a range of 50-100 hours.

5.9 A scheme such as this would represent a change in sentencing practice as courts currently impose the sentence that a completely compliant offender would serve, i.e. the bottom of the range. If in future courts were to impose the top of the range a further option would be for them to calculate this in relation to the minimum, i.e. the sentence that they would currently impose. For example, a current community order with an 80 hour unpaid work requirement might be enhanced by 20% to give a maximum of 96 hours. The range would then be 80-96 hours. For 50% the range would then be 80-120 hours. This would seem the simpler and preferable option for the courts.

## **Community order requirements**

5.10 Using the example of unpaid work makes the setting of a sentencing envelope by the court a relatively simple matter. But it becomes more complex where other requirements are concerned. For example, under the Criminal Justice Act 2003, a supervision requirement must last the whole length of the order, so a range would not be possible without legislative change. Requirements such as curfew have both overall length and hours per day when they apply. It would be for consideration whether the range would apply to one or the other, or both. Where an order had multiple requirements the court would need to know whether to set ranges for all of them.

## **Establishing whether there has been a breach**

5.11 Before the offender manager could take action under the new arrangements, he would need to establish that a breach had taken place. This would need an open process to avoid any suggestion of discrimination.

5.12 There are also issues as to procedure in order to meet ECHR obligations. The offender would need to be given notice of the alleged breach, the chance to see or hear any evidence relied on in determining whether a breach had occurred, and the right to reply to any representations made against him.

## **Offender manager breach action**

5.13 The action taken by an offender manager once it has been established there has been a breach would need defining. Although the limits would be pre-determined by the court, offender managers would need clear guidelines on how to exercise their powers within them. The expectation would be that the more serious the breach the nearer the top of the sentence range the offender would have to serve, but there would inevitably be a certain amount of discretion. It would be essential to try to maintain consistency of approach across the country.

## **A new role for the offender manager**

5.14 However circumscribed, this scheme would represent the introduction of a new, quasi-judicial function for offender managers. This raises issues about training and also the likely effect on the relationship between the offender manager and the offender. It would be important to ensure that reluctance to jeopardise that relationship did not have the perverse effect of fewer failures to comply being judged “unacceptable”.

**Q9 Do you agree that the Government should pursue a scheme giving offender managers the power to vary the punishment served by an offender depending on his or her behaviour, without going back to the court?**

**Q10 Do you agree with the possible arrangements outlined for such a scheme? If not, what alternative structure would you recommend?**

## **6. PROBATION RESOURCES**

### **Reducing burdens on probation so they can focus on the serious and prolific**

6.1 The Government's report on rebalancing the criminal justice system in favour of the law abiding majority referred to the need to improve probation performance and described a number of factors which were relevant to this aspiration, including the following:

“First, we want to make sure that probation services are not swamped with less serious offenders, and with huge burdens of report-writing. We know that more and more minor offenders are getting community sentences (including people who might have been fined in the past). And courts are also demanding more and more reports from probation before they sentence. We need probation to be able to concentrate on the people who really need intensive supervision, either because they are dangerous or because of their very high risk of reoffending. We will work with the Lord Chief Justice and with sentencers to find ways of ensuring that probation resources are targeted on those who most need them, that more minor offenders are fined rather than given low-level community sentences, and that courts do not make excessive demands for reports.”

6.2 Between 1993 and 2003, the number of offenders given a community sentence under probation service supervision increased by almost 50%, from around 100,000 to around 146,000, and this upward trend has continued.

### **Court reports**

6.3 The provision of reports to the court by probation to inform the sentencing process is a long-standing practice which is currently regulated by section 156 of the Criminal Justice Act 2003. It provides that the court must normally obtain a pre-sentence report when considering a community sentence, but need not do so if it is of the opinion that it is unnecessary in the circumstances of the case. Certain requirements can only be imposed as part of a community order or suspended sentence order if a report has been provided.

6.4 The Probation Service has recently developed a system of fast delivery and standard delivery reports, which differentiates between those which can be produced quickly and those where a longer period is required to collect the necessary information. Many fast delivery reports are produced orally at the court on the day, thus saving resources. Probation is committed to providing an increasing proportion of reports to the court as fast delivery or oral reports. However, it remains the position that the burden on probation staff from completing these reports is significant and continuing to increase.

## **Community orders**

6.5 The Criminal Justice Act 2003 provided a new generic community sentence, known as the community order. Courts are able to tailor these orders to the seriousness of the offence and the needs of the offender. They can select from a menu of twelve requirements to do so. The Sentencing Guidelines Council produced a guideline in December 2004, which set out principles for the way in which courts should make use of the new sentences in the 2003 Act, including the community order. It established three levels of seriousness: low, medium and high. It went on to give examples of the number and duration/intensity of particular requirements which might be appropriate for orders at each of these levels. The National Probation Service has prepared guidance for court report writers to ensure that the reports they produce are consistent with this framework.

## **Proposals**

6.6 There are a number of options which could ensure better targeting of probation resources. These range from changes to the legislative framework such as to remove the community order from the sentencing options available to the courts for particular kinds of offences to informal efforts to influence the context in which sentencing decisions are taken to encourage self-imposed restraint on the part of sentencers. We would be interested to hear your views on the options set out below:

### **Agreement with the courts to limit requests for reports and use of community penalties for low level offenders**

6.7 The National Offender Management Service could agree with the courts that where the court's initial view is that the case is no more serious than to justify a low seriousness range community order, probation would undertake an initial screening to assess likelihood of reconviction and risk of harm. Where the outcome is low on both counts, no formal report would be produced and the expectation would be that the court would impose a fine. A variant on this, should the court remain convinced that a community order is necessary, would be that the court imposes a curfew requirement supported by electronic monitoring. This would not require probation involvement as the electronic monitoring contractors would supervise the sentence.

### **Change in relative distribution of types of reports**

6.8 Another approach to reduce demands for court reports would be to encourage a shift in the balance of types of reports, so that a higher proportion are oral reports and fast delivery reports compared to standard delivery.

## **Voluntary support to offenders receiving fines instead of community orders**

6.9 There is some reason to believe that there is a group of low level offenders currently receiving community orders because they have welfare needs which could be addressed by a range of agencies. One way of supporting the use of the fine for these offenders would be to make available support and advice. This could be provided by private or voluntary sector providers.

## **Legislation to make community orders unavailable as a penalty for certain non-imprisonable offences**

6.10 It would be possible to legislate to remove the option of the community order from the sentencing menu available to the courts for some offences. Removing the community order sentencing option could apply to a range of minor, non-imprisonable offences for which a fine is normally judged to be the most suitable response.

6.11 Under the Criminal Justice Act 2003 all offences, whether imprisonable or not, qualify for a community order provided the individual offence is serious enough to warrant such a sentence. This represents a change from the previous position, when some community disposals were available for all offences and some for imprisonable offences only (in both cases, only provided the particular offence in question was serious enough to warrant a community order). For example, the community punishment order (unpaid work) was available only for imprisonable offences, whereas the curfew order was available for any offence.

6.12 Removing the community order option could be effected in a number of ways, as follows. Either of these options would require primary legislation.

### **(a) Remove the community order option for all non-imprisonable offences**

6.13 This would be legislatively relatively simple to achieve, but would deny the community order to the courts for the more serious examples of offending within this category of offences, including where persistence has made the offending more serious (Section 143 of the Criminal Justice Act 2003 requires a court to regard previous convictions as aggravating factors, if this is reasonable in view of their nature and relevance and how long ago they took place).

### **(b) Apply the community order option only to those non-imprisonable offences subject to a particular maximum penalty**

6.14 This might apply the option of a community order only to those non-imprisonable offences where the maximum penalty is a level 5, or a level 4 or 5, fine. It would ensure that if probation resources were deployed, they would

be more likely to be directed to the most serious offending within the non-imprisonable offence category.

- Q11 Do you consider that any of the above options should be pursued?**
- Q12 Do you consider that it would be appropriate for NOMS to seek to enter into agreements with the courts regarding their requests for reports and use of community orders? If this is acceptable, would a screening process involving the court's assessment of low seriousness and assessment as low risk of reconviction and low risk of harm be the best method for deciding which cases should not have full reports and should not normally receive a community order? Do you have any alternative suggestions?**
- Q13 Do you think it is likely to make sentencers more willing to impose fines in suitable cases if additional support (provided by organisations other than the Probation Service) can be made available to offenders?**
- Q14 If legislation to make the community order unavailable as a penalty for certain offences is introduced, which option do you favour for specifying the offences to which it should apply? Do you consider that a community order should be unavailable for all non-imprisonable offences? Alternatively, should it remain available for non-imprisonable offences attracting a maximum fine of level 5? Or should it also remain available for offences with a maximum fine of level 4?**

## **7. INFORMATION FOR SENTENCERS**

7.1 Statistics show that there is considerable variation between different geographical areas in the proportion of defendants who are remanded in custody even when the profile of offences is quite similar. Similar variations in the use of custody as a sentence have been highlighted by information supplied to courts by the Sentencing Guidelines Council.

7.2 We want to build on the information that is already available to courts and to ensure that it is as accurate, useful and timely as possible. In order to make the cost of remand and sentencing decisions more transparent to courts, to enable them to focus correctional resources on the highest risk offenders, we will seek to improve the quality and range of information available.

**Q15 Should information be published on the unit costs of remand and sentencing disposals? Should information be published on what the costs of sentencing and remand decisions are at national, regional, area or court level?**

**Q16 Would you like to see comparative information for each region or area covering various sources including demographics, crime patterns and reconviction rates?**

## **8. PARTIAL REGULATORY IMPACT ASSESSMENT**

### **Title**

8.1 The title of the consultation is “Making Sentencing Clearer – A consultation and report of a review by the Home Secretary, Lord Chancellor and Attorney General”.

### **Purpose and effect**

8.2 To consult on a number of options to revise the procedures for expressing and calculating some indeterminate and determinate sentences; to propose new powers for probation officers; to better target probation resources and to provide better information to sentencers on sentencing, remand decisions and their costs.

### **Benefits**

8.3 Benefits include, better public understanding and confidence in the sentencing of criminal offences; better arrangements for ensuring the public are protected from some dangerous offenders; better targeting of probation resources and the provision of better information to sentencers leading to more effective and consistent sentencing decisions.

### **Costs**

8.4 The costs of these proposals will depend on the options implemented. In basic terms the main costs will come from the need for additional prison places. Early estimates suggest that the proposal to end the requirement that sentencers, when setting an earliest release date, should automatically halve the term could result in an additional 60 prison places by 2011-12; the proposal to retain some determinate sentenced prisoners beyond the half way point in their sentence could require an estimated 50 prison places by 2011-12.

8.5 Proposal to legislate to remove a community order as an option for some low level offences will mean a reduction between 2,800 and 3,400 community orders annually.

### **Other assessments**

8.6 A draft Race Equality Impact Assessment (REIA) confirms, in line with the criminal justice system generally, that proportionately more offenders from minority ethnic communities receive sentences which could be affected by the proposals in this consultation, Although the numbers likely to be affected by the proposals is proportionately small a full REIA is, being carried out and will be informed by this consultation process.

### **Monitoring and evaluation**

8.7 Should there be legislation the effect of the proposals will be monitored.

**Contact points**

8.8 The following official can answer questions about the proposals or the Partial Regulatory Impact Assessment:

Neil Stevenson, National Offender Management Service, Home Office  
2<sup>nd</sup> Floor, Fry Building, 2 Marsham Street, London, SW1P 4DF  
Email: [NeilJ.Stevenson@homeoffice.gsi.gov.uk](mailto:NeilJ.Stevenson@homeoffice.gsi.gov.uk)  
Telephone: 020 7035 1767

## 9. CONSULTATION RESPONSES

9.1 The Government would welcome your views on the questions posed in this document. Please send written comments to:

Neil Stevenson  
National Offender Management Service  
Home Office  
2<sup>nd</sup> Floor, Fry Building  
2 Marsham Street  
LONDON SW1P 4DF

Or by email to:

[sentencingconsultation@homeoffice.gsi.gov.uk](mailto:sentencingconsultation@homeoffice.gsi.gov.uk)

9.2 Comments should be received by **9<sup>th</sup> January 2007**. You should also contact this address if you require a copy of this consultation paper in any other format, e.g. braille, large font, audio.

9.3 A summary of the responses received will be published within 3 months of the closing date and will be made available on the Home Office website ([www.homeoffice.gov.uk](http://www.homeoffice.gov.uk))

### **Responses: Confidentiality & Disclaimer**

9.4 The information you send us may be passed to colleagues within the Home Office, the Government or related agencies. Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

9.5 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

9.6 Please ensure that your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

9.7 The Department will process your personal data in accordance with the DPA – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

9.8 This consultation follows the Cabinet Office Code of Practice on Consultation - the criteria for which are set below.

***The six consultation criteria***

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

(Note: For this consultation Ministers have agreed to a consultation period of 8 weeks in order to allow for the introduction of legislation, if required.)

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full code of practice is available at:

[www.cabinet-office.gov.uk/regulation/Consultation](http://www.cabinet-office.gov.uk/regulation/Consultation)

**Consultation Coordinator**

**If you have any complaints or comments specifically about the consultation process only, you should contact the Home Office consultation co-ordinator Christopher Brain by email at: [christopher.brain2@homeoffice.gsi.gov.uk](mailto:christopher.brain2@homeoffice.gsi.gov.uk)**

**Alternatively, you may wish to write to:**

Christopher Brain  
Consultation Co-ordinator  
Performance and Delivery Unit  
Home Office  
3<sup>rd</sup> Floor Seacole  
2 Marsham Street  
London  
SW1P 4DF