

# **MAKING PUNISHMENTS WORK**

REPORT OF A REVIEW OF THE  
SENTENCING FRAMEWORK FOR ENGLAND AND WALES

July 2001



# CONTENTS

<b>Introduction</b>	i	<b>Appendix 1</b>	
<b>Executive Summary</b>	ii	The Review	70
<b>Chapter 1</b>		<b>Appendix 2</b>	
The case for change	1	Sentencing behaviour and its impact on services	79
<b>Chapter 2</b>		<b>Appendix 3</b>	
The principles of sentencing	12	Offenders' careers	92
<b>Chapter 3</b>		<b>Appendix 4</b>	
Prison sentences of less than 12 months	22	Overseas models of sentencing	99
<b>Chapter 4</b>		<b>Appendix 5</b>	
Prison sentences of 12 months and over	27	Public and practitioner views on sentencing	108
<b>Chapter 5</b>		<b>Appendix 6</b>	
Intermediate sanctions	34	The impact of sentencing on crime	126
<b>Chapter 6</b>		<b>Appendix 7</b>	
Non-custodial sanctions	38	Cost-benefit modelling	133
<b>Chapter 7</b>		<b>Appendix 8</b>	
Sentence management	45	The competing "philosophies"	163
<b>Chapter 8</b>		<b>Acknowledgments</b>	165
The shape of the framework – legislation and guidelines	52		
<b>Chapter 9</b>			
Costs and benefits	58		
<b>Chapter 10</b>			
Implementation – making it happen	65		



# INTRODUCTION

## Home Secretary

This report contains the conclusions and recommendations of the review of the sentencing framework in England and Wales that you announced on 16 May last year.

The review, as you asked, has involved large numbers of people, outside as well as inside Government. Details of those who have contributed are in Appendix 1 and the Acknowledgements that follow the Appendices. This report would not have been possible without the many and varied contributions that have been made. The review team is extremely grateful for the help and support that has been so freely and generously given. Responsibility for the content of the report rests with the review team itself.

The review was born out of a belief that the present sentencing framework suffers from serious deficiencies that reduce its contributions to crime reduction and public confidence. The report finds that belief to be well founded, although the framework also has strengths on which to build. The case for improvement is strong; but following a period of incessant change, many practitioners fear that further reform may not be for the better. They need and deserve a framework that is not only better and easier to understand, but also one that works and will last.

Some of the present deficiencies cry out for reform. The shorter prison sentences are peculiarly ill-suited for their purposes. The lack of any clear message about the effect of persistent offending on severity of sentence is a major shortcoming. The absence of reality in the second half of prison sentences is a serious weakness. Courts could also be more usefully involved in the consequences of their decisions. There also continue to be unexploited opportunities in non-custodial sentences, including reparation for victims.

The report sets out a framework that – on the evidence – should increase the contribution of sentencing to crime reduction and public confidence. The proposals rest on judgements about the ethical, operational, political and managerial dimensions of sentencing. They build on promising developments that are already visible – in the courts, in the prison and probation services, and in the developing links between those services and

the police – but will require a great deal more of all concerned.

Whether the proposed framework will achieve the desired results, what it will cost, and its effect on the prison population, will depend on how it is used, and how services and offenders respond. The review rejects a “nothing works” view of the impact of sentencing. Sentenced offenders do desist from crime, some relatively quickly. The impact of “what works” in reducing re-offending, however, especially in relation to the more persistent offenders, has yet to be fully evaluated. Expectations will need to be kept under review, as evidence accumulates.

There is no “right” sentencing framework, suitable for all places in all circumstances at all times. The report advocates one that appears to suit present and foreseeable circumstances in England and Wales. Putting it into place would require a great deal of hard work and planning, and significant additional investment. The report identifies factors critical for success, especially the need to have the required infrastructure in place first. The questions to be asked now about the proposals are not only “Do they make sense?” and “Could they get better results?” but also “Is there sufficient confidence in better outcomes to justify the necessary investment?” and if so “How can they be made to work to best effect?”

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# EXECUTIVE SUMMARY

This Review has been about whether the sentencing framework for England and Wales can be changed so as to improve outcomes, especially by reducing crime, at justifiable expense. Having examined the purposes and principles of sentencing, the review has looked at the types of sentence that should be available to the courts, with the aim of designing more flexible sentences, that work effectively and smoothly whether the offender is in prison or in the community. It has also examined ways in which sentences are enforced; the systems that govern release from prison; and the role of the courts in decision making while the sentence is in force. Judicial discretion in sentencing, and the judicial guidelines governing its use, have been examined, as well as the framework of statute law. The costs and benefits of the recommendations have been estimated, including different ways in which the proposed new framework could be used. Factors critical for successful implementation have been identified.

## The case for change

**0.2** An overview of the present framework reveals limitations and problems. The most compelling of these are the unclear and unpredictable approach to persistent offenders, who commit a disproportionate amount of crime, and the inability of short prison sentences (those of less than 12 months) to make any meaningful intervention in the criminal careers of many of those who receive them. The gradual erosion of the approach set out in the Criminal Justice Act 1991, with its emphasis on linking punishment to the seriousness of the offences under sentence, and the resulting muddle, complexity, and lack of clear purpose or philosophy, are further grounds for reform.

**0.3** The overview also suggests there are new opportunities to improve outcomes, which the present framework is not well fitted to exploit. The most important of these are the recent advances made towards defining and putting into practice “what works” in reducing reoffending through work with offenders under sentence, and the prison and probation services’ developing ability to work in more integrated ways to that end. There is also growing awareness of the contributions that reparation and “restorative justice” schemes can make. The framework could do more to exploit these developing opportunities, within a clearer

sense of common purpose. If it could do so in ways that were more transparent, accessible and accountable, it could gain in public confidence.

**0.4** Sentencing serves the purposes of crime reduction and reparation as well as punishment. It is important to establish how much sentencing can be expected to contribute to crime reduction. The available evidence suggests that greater support for reform and rehabilitation, within the appropriate “punitive envelope” of the sentence, to reduce risks of reoffending, offers the best prospects for improved outcomes. Even here reduction, rather than immediate elimination, of recidivism is the realistic target. These conclusions support the need for wider crime reduction strategies, outside sentencing, aimed at preventing offending in the first place, and increasing the likelihood that those who do commit crime will be caught and brought to justice speedily.

**0.5** Sentencing, and the framework within which it operates, need to earn and merit public confidence, but this is a complex relationship, and not one in which sentencers can simply be “driven before the wind” of apparent public mood, regardless of the principles that need to govern sentencing. More can and should be done to improve public understanding of sentencing, and sentencers’ understanding of public opinion. The review’s assessment of public views on how sentencing should operate (Appendix 5) has informed its recommendations for a new framework, especially those on persistent offenders, and the importance of supporting and strengthening work aimed at leading sentenced offenders away from lives of crime.

### *Recommendations*

- 1. A new framework should do more to support crime reduction and reparation, while meeting the needs of punishment. In support of crime reduction, the framework should in particular do more to target persistent offenders and support the work of the prison and probation services to reduce re-offending.**
- 2. The Home Office should consider the scope for further research into ways of increasing current knowledge about the contributions of sentencing to crime reduction through deterrence and incapacitation.**

## Principled sentencing

**0.6** Several existing principles of sentencing should be retained, including the principle that severity of sentence should be “proportionate” to the seriousness of the criminal conduct in question, and that imprisonment should be reserved for the cases in which no other sentence would be severe enough. The proportionality principle should be redefined, however, to take clearer and more predictable account of previous convictions. Simply requiring them to be “taken into account” is not enough. There should be a new presumption that severity of sentence will increase as a result of recent and relevant previous convictions that show a continuing course of criminal conduct. This would mark the increased denunciation of an offender who persistently failed to respond to previous sentences, while also increasing the opportunities for more effective efforts at reform and rehabilitation. Additional deterrent and incapacitative impacts on crime are uncertain, but possible.

**0.7** Guidelines will be needed to help sentencers match sentence severity with the seriousness of offences at different levels, and to show the ranges within which sentence severity may vary in relation to presence or absence of previous convictions. Otherwise the effect of this new presumption on sentencing practice would be unpredictable and disproportionately severe sentences could result.

**0.8** Sentencing decisions should be structured so that if a prison sentence of 12 months or more was not necessary to meet the needs of punishment, sentencers should consider whether a non-custodial sentence would meet the assessed needs for crime reduction, punishment and reparation. The large number of offenders who might or might not receive a relatively short prison sentence should be assessed by reference to the risk of their reoffending; the seriousness of the harm likely to result if they do reoffend; and the measures most likely to reduce those risks. That assessment would enable the sentencer to decide whether a non-custodial sentence could be imposed (even where seriousness justified a custodial sentence) and whether it could be designed in ways which met all the relevant needs, or if a short prison sentence was unavoidable.

**0.9** Consistency in sentencing should be a continuing goal, but measured by consistency of approach rather than artificial uniformity of outcomes, recognising that disparate outcomes in superficially similar cases are frequently justifiable and necessary. The transparency of the framework,

and general understanding about how it is supposed to work can, and should be, improved. Sentencers should be provided with accessible information about the efficacy of sentencing, as well as its costs, and should make themselves generally aware of it.

### *Recommendations*

3. **The existing “just deserts” philosophy should be modified by incorporating a new presumption that severity of sentence should increase when an offender has sufficiently recent and relevant previous convictions.**
4. **The principles governing severity of sentence should be as follows:**
  - **severity of punishment should reflect the seriousness of the offence (or offences as a whole) and the offender’s relevant criminal history;**
  - **the seriousness of the offence should reflect its degree of harmfulness, or risked harmfulness, and the offender’s culpability in committing the offence;**
  - **in considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.**
5. **Imprisonment should be used when no other sentence would be adequate to meet the seriousness of the offence (or offences), having taken account of the offender’s criminal history.**
6. **Courts should be free to choose from the full range of non-custodial sentences, while being required to match the punitive weight of such a sentence with the seriousness of the offence (or offences), having taken account of the offender’s criminal history.**
7. **Courts should have clear discretion to pass a non-custodial sentence of sufficient severity, even when a short prison sentence could have been justified – bearing in mind their ability to re-sentence in the event of repeated breach of conditions.**
8. **The so-called “totality principle”, which requires courts to look at all the offences before the court as a whole, and increase sentence severity accordingly without adding the total suitable for each individual offence cumulatively, should remain.**
9. **New sentencing guidelines should set out “entry points” for considering severity of sentence, alongside graded definitions of seriousness of offences, and indicate the range of effects that previous convictions should have on sentence severity.**

## EXECUTIVE SUMMARY

### *Recommendations (cont)*

10. The proposed new guidelines should look for consistency of approach, rather than uniform outcomes, and recognise justifiable disparity, for example in cases where the offender has young dependant children.
11. Section 95 of the Criminal Justice Act 1991 should be amended to require the Secretary of State to disseminate information about the effectiveness of sentencing, as well as its costs (including the contributions of sentencing to crime reduction and public confidence); and about consistency of approach between different areas. In addition, practitioners should be required to make themselves aware of the information provided.
12. Unless only a prison sentence of 12 months or more would meet the needs for punishment, sentencers should consider the scope for a community sentence to meet the needs of punishment, crime reduction and reparation.
13. Reasons for sentencing decisions, including grounds for any mitigation, should be given and recorded for subsequent retrieval if needed, preferably electronically.
14. The Home Office should consider ways of increasing public knowledge about how sentencing is intended to work and how it is working in practice.

minimum) of 6 months and whatever would take the sentence as whole to less than 12 months. Such a sentence would be potentially more punitive in its effect on offenders who breached their conditions than any existing prison sentence of under 12 months. For those small numbers of offenders for whom post custody supervision is not needed, a sentence of plain custody, of up to 3 months, would be available. All short term prison sentences would mean what they said in terms of time served.

### *Recommendations*

15. Prison sentences of less than 12 months need to be substantially reformed to make them more effective in reducing crime and protecting the public.
16. All such sentences should normally consist of a period in prison (maximum 3 months) and a period of compulsory supervision in the community, subject to conditions and requirements whose breach may lead to return to prison.
17. The period of supervision should be a minimum of 6 months, and a maximum of whatever would take the sentence as a whole to less than 12 months.
18. In cases where the court identified no need for a supervisory period it should be able to order a period in custody, without post release supervision, of up to 3 months.

### Prison sentences of less than 12 months

**0.10** One of the most serious deficiencies in the present framework is the lack of utility in prison sentences of less than 12 months. Only half of such sentences are served, less with Home Detention Curfew, and the second half is subject to no conditions whatsoever. The Prison Service has little opportunity to work on the factors which underlie the criminality because the time served in custody is so limited – and yet these sentences are used for large numbers of persistent offenders who are very likely to reoffend. There is a need to provide a structured framework for work with the large number of offenders who persist in criminality at a level of seriousness that does not require longer prison sentences.

**0.11** This need could be met by requiring those who serve short prison sentences to undertake programmes under supervision after release, under conditions, which – if breached – could result in swift return to custody. Under such a sentence, the initial period in custody could be any period between 2 weeks and 3 months, and the period of supervision could be any period between (a

### Prison sentences of 12 months or more

**0.12** Half of an existing prison sentence of 12 months or more has to be served in custody, at which point the prisoner is released on licence (except for earlier releases under Home Detention Curfew). If the sentence is over 4 years, release has to be authorised by the Parole Board and can be delayed until the two thirds point. All prisoners released from these sentences are subject to conditions which last until three quarters of the sentence has passed – at which point the offender is free of conditions, although the outstanding part of the sentence can be re-activated on conviction of a further offence. Special provisions apply to violent and sexual offenders, for whom supervision can be extended. Making the supervisory period of the sentence run to its expiry, would make these sentences more ‘real’ and increase the opportunities for crime reduction, through work with offenders in the second half. Proper planning for a prisoner’s re-entry into the community, under conditions geared to “seamlessly” completing work begun in prison to reduce re-offending and managing risks to the public, would bring further benefits.

## EXECUTIVE SUMMARY

**0.13** To achieve these goals, all sentences of 12 months or more should be served in full, half in custody and half in the community, the second half being subject to conditions whose breach could result in recall to prison. Before an offender is released, the prison and probation services should design a ‘package’ of measures to be required of the offender after release. The conditions would be geared to public protection, rehabilitation and resettlement. The adequacy of the ‘package’ would be subject to review in a criminal court before release. Supervision and conditions would extend until the end of the sentence. Fixed release at the halfway point would facilitate proper planning for re-entry into the community. Discretionary release would be reserved for ‘dangerous’ offenders (convicted of specified violent or sexual offences) who had high risks of reoffending and the potential to cause serious harm. For these offenders there would be a special sentence, under which release during the whole of the second half would be at the discretion of the Parole Board. In addition, the court would have power to order an extended period of supervision, of maximum 10 years for sexual offences and 5 for violent offences. Instead of the existing discretionary early release scheme (Home Detention Curfew), where appropriate it would be possible to feature curfews and electronic monitoring in post-release conditions.

### *Recommendations*

- 19. Prison sentences of 12 months or more should continue to be served partly in prison and partly in the community, but conditions of release, and supervision, should continue to the end of the sentence, with liability to recall to prison if conditions are breached. For most offenders, release would be at the half-way point of the sentence.**
- 20. Before the release of a prisoner, the content of the second half of the sentence should be subject to court review, on the basis of proposals prepared jointly by the prison and probation service, in consultation with other potential contributors in the statutory, independent, and voluntary sectors.**
- 21. Discretionary release should be reserved for violent and sexual offenders who may need to be detained for longer to avoid risks of serious harm to the public.**
- 22. Violent or sexual offenders who present a risk of serious harm to the public should be eligible for a new sentence, the effect of which would be to make their release during the second half of the sentence dependent on a decision by the Parole Board. Courts would have power to extend the supervisory part of the sentence.**

## Intermediate sanctions

**0.14** The review examined the scope for two possible new sentences: “intermittent custody”, which would allow the offender to spend part of a custodial sentence out of prison, and “suspended sentence plus”, which would in effect combine a suspended sentence of imprisonment with a community sentence, so that the suspended prison sentence could be activated if the offender failed to comply with the conditions of the non-custodial sentence.

**0.15** The Prison Service, with its existing establishments, would not be able to manage a sentence of intermittent custody (which could cover weekend imprisonment or imprisonment for parts of the day and night), other than through the release on temporary licence schemes, which it already operates. Those schemes play a useful part in resettlement, but would not be suitable as an alternative to a new sentence incorporating temporary release from the outset. While intermittent custody has some attractions as a way of avoiding some of the negative aspects of imprisonment (such as loss of job or home), its possible costs and benefits are uncertain and difficult to estimate. Public confidence in such a sanction needs more testing than the review has been able to provide. Neither has the review been able to draw any firm conclusions from experience of intermittent custody in other jurisdictions. Some of the effects of intermittent custody could be achieved through intermittent containment in the community – by using attendance and residence requirements and curfews with electronic monitoring to impose a kind of “house arrest”. In the longer term, “community prisons” would provide additional opportunities for an “intermittent custodial” sanction. Before any new sentence could be recommended with confidence, the Prison Service needs to consider as part of a review of its estate the scope for building “community prisons” that would lend themselves to that sort of sanction – if necessary on a pilot basis. In parallel, a review of the “intermediate estate” of hostels, probation and attendance centres, could produce plans for optimising use of such facilities, strengthening the possibilities for “containment in the community” within a non-custodial sentence.

**0.16** In looking at suspended sentences, the review has found no grounds for removing the current restrictions on their use. When an offence and previous convictions mean that a prison sentence has to be passed, suspending it entirely, conditional only on avoiding conviction for another offence, should continue to be possible only in exceptional

## EXECUTIVE SUMMARY

circumstances. For imprisonable offences, when a non-custodial sentence is passed, there would be benefit in making clear to offenders the “conditional” nature of the sentence, in the sense that, if the community sentence breaks down through non-compliance, a custodial sentence may be passed instead. To achieve this, the sentencing court should be able to indicate a presumptive starting point for a custodial sentence if one has to be passed. This would not bind any re-sentencing court, which would in any event have to take account of any compliance with the non-custodial sentence; but it would be a clear signal of the possible consequences of non-compliance.

### *Recommendations*

23. The Home Office should establish a review of the existing “intermediate estate” for accommodating and managing offenders in the community, with the aim of developing a strategic plan for its future use, staffing, management and development. The review should embrace all types of accommodation, whether owned by the prison or probation services, or the independent and voluntary sectors, and whether used for prisoners on temporary release; prisoners on conditional release; offenders serving community sentences; or ex-offenders receiving support voluntarily.
24. The Prison Service should consider what types of local prison would best meet the needs of short-term prisoners sentenced under the new framework, and the scope for accommodating in such prisons offenders who might in future be sentenced to a form of intermittent custody.
25. Courts should have power, when passing a community sentence for an imprisonable offence, to indicate the length of a prison sentence that would be an appropriate starting point for re-sentencing, should breach of the community sentence make that unavoidable. Any such indication should be recorded in ways that guaranteed its retrieval in the event of re-sentencing.
26. The “conditional” nature of a non-custodial sentence for an imprisonable offence should be emphasised in the design of a new framework.

## Non-custodial sentences

**0.17** The proliferation of community penalties over the past 10 years, each containing its own detailed provisions as to content and enforcement, has both complicated the statute book and increased the risks of inconsistent sentencing. In spite of the growth of community penalties, they are still not viewed as being sufficiently punitive. This is partly to do with the lack of clarity in relation to their stated aims. There is very little guidance, for example, on what punitive value should be ascribed to the various orders. In addition, the threshold splitting financial and non-financial community penalties may have created the impression that financial penalties should be reserved for the least serious offences.

**0.18** In order to match a non-custodial sentence to the assessed risks of reoffending, and the measures most likely to reduce those risks, courts should have the power to impose a single, non-custodial penalty made up of specified elements, including: programmes to tackle offending behaviour, treatment for substance abuse or mental illness; compulsory work; curfew and exclusion orders; electronic monitoring; and reparation to victims and communities. Supervision would be used to manage and enforce the sentence, and support resettlement. In deciding on the elements of the sentence, the court would be required to consider the aims of punishment, reparation and prevention of re-offending. The ‘punitive weight’ of the chosen ingredients should be no greater than would be commensurate with the seriousness of the offences under sentence, subject to any increased severity required for previous convictions. Under the new framework, financial penalties would be available at all levels of seriousness, both in isolation and in combination with the non-custodial penalties, above. In addition, a new interim review order, strengthening the existing power to defer sentences would be available, for cases in which a court found reasons for allowing time for an offender to meet commitments voluntarily, before being sentenced.

### *Recommendations*

27. Existing community sentences should be replaced by a new generic community punishment order, whose punitive weight would be proportionate to the current offence and any additional severity for previous convictions. The sentence would consist of ingredients best suited to meeting the needs of crime reduction, and exploiting opportunities for reparation, within the appropriately punitive “envelope”.

## EXECUTIVE SUMMARY

### *Recommendations (cont)*

28. The purposes, and applications, of the various non-custodial penalties, should be made clear, either in legislation or guidelines.
29. Under the new community punishment order, courts would be able to order an offender to undertake an accredited programme, subject to local availability and the assessed suitability of the offender for such a programme.
30. Sentencers would be able to specify the type of compulsory work an offender should undertake in the community, based on advice from the probation service. Crime & Disorder reduction partnerships would be used to advise on what types of work would respond to local needs and wishes. The probation service should consider ways in which religious and other groups could be involved more directly in work with offenders aimed at reducing re-offending.
31. Financial penalties would be available at all levels of seriousness, both in isolation and in combination with the ingredients making up the community punishment order. The 'serious enough' test to justify a non-financial community sentence would be dropped.
32. A new interim review order should be created, enabling deferral of sentences to be strengthened with proper safeguards.

**0.20** Under the new framework, all non-custodial sentences would be enforced by the court, which could, if the terms of the sentence were breached, replace the community sentence by a custodial sentence. In cases where there was a high risk of re-offending and swift action was required, the probation service should make more use of their power to apply for an arrest warrant which could lead to remand in custody, pending a full court hearing. All custodial sentences would be enforced administratively on breach of requirements, subject to a right of appeal to a court. To ease difficulties in calculating time to be served under prison sentences, the court would be informed – to the nearest day – how much time the offender had spent in custody on remand, but time spent in police custody would no longer count. The court would order the Prison service to discount the remand period when implementing the sentence, but the sentence actually passed would not be discounted.

**0.21** In order to enable courts to have a more active role in determining what is needed, not just at the point of sentence but during its course, and with better information about the outcomes of their decisions, the courts would develop and provide a 'sentence review' capacity. This new function would deal with breaches of community sentences, hear appeals against recall to prison, authorise pre-release plans, and review progress during community sentences or the community part of custodial sentences. Visible involvement of the court for the duration of the sentence would exert additional leverage over the sentenced offender, especially at the crucial stage of release from prison, but also during periods in the community, whether after release from prison, or under a community sentence. Offenders would realise that when they were under sentence in the community, whether they stayed there or faced return to prison would depend on their own good behaviour and compliance. This would also be transparent to the public. Services with an interest in the behaviour of offenders under sentence in the community – the probation and police services, and providers of electronic monitoring services – should be under explicit obligations to co-operate in the prevention of re-offending and protection of the public through work with offenders under sentence. The Parole Board would continue to operate in respect of life sentences, and the new special sentence for 'dangerous' offenders, leaving review hearings to deal with community and custodial sentences.

### Sentence Management

**0.19** Sentence management issues – such as sentence calculation and enforcement – have been the source of many difficulties. Enforcement mechanisms, in particular, are complicated and not transparent. Procedures for enforcing sentences, and penalties for breach of conditions vary greatly. There is also a sharp division of roles between sentencers who confine themselves to the immediate offences and the sentencing decision, and the prison and probation services who implement the sentences passed. Unless sentencers request progress reports, there is no procedure through which sentencers can receive feed-back from the outcomes and implications of their decisions, or take account of an offender's progress or otherwise, during the sentence – other than for drug treatment and testing orders.

## EXECUTIVE SUMMARY

### *Recommendations*

33. PSRs should be based on a thorough analysis of risks of reoffending and needs for measures to reduce those risks. They should be of uniformly high quality and enable courts to be accurately informed of all the possibilities available to them.
34. The court, having been informed to the nearest day, how much time the offender had spent on remand, would order the prison service to discount that period when implementing a prison sentence. The court would also take any remand time into account when judging the punitive weight of a non-custodial sentence.
35. In cases of breach, all non-custodial sentences should be enforced by return to court (as provided for under section 53 of the Criminal Justice & Court Services Act) but re-sentencing an offender to custody would, under the new framework, result in a period of post-release supervision.
36. Where a swift response to the failure of a non-custodial sentence was needed, the probation service should be encouraged to use the existing power to apply for an arrest warrant. A court hearing could lead to remand in custody, pending a full hearing.
37. Breach of conditions imposed on release from prison should be enforceable administratively through recall to prison, subject to a review hearing by a court.
38. If the breach occurred during the community part of prison sentences of under 12 months, re-release would be possible after recall only if there were 4 months or more of the sentence left to serve. Re-release from sentences of 12 months or more would be possible, subject to a review hearing 12 months after the date of recall (or appeal against recall). That review hearing would also determine the date of any future hearings.
39. There should be a new statutory duty on the probation service, the police service and providers of electronic monitoring to co-operate in the supervision of offenders under sentence in the community, especially those judged to have a high risk of reoffending.
40. Courts should develop and provide a new 'sentence review' capacity which would deal with breaches of community sentences, hear appeals against recall to prison, authorise pre-release plans for offenders on release from custody and review progress during community sentences and the community part of custodial sentences.

### **The shape of the framework: legislation and guidelines**

**0.22** In the present framework the 'going rate' of punishment in relation to offence seriousness, within the maxima laid down in statute has, for the most part, been left to judicial discretion – within such guidelines as the Court of Appeal has decided to provide through judgements in individual cases or groups of cases. The line between what should be in statute and what should be in guidelines is not a clear one, and Parliament has recently specified mandatory minimum sentences for some repeat offenders. How much to include in a future sentencing Act; how much to leave to judicial discretion; how to govern the use of that discretion through guidelines; and how to produce such guidelines are all questions to be answered through any new sentencing framework.

**0.23** For a new framework, an Act of Parliament should set out the general principles, specify the newly designed sentences, provide for review hearings, prescribe enforcement procedures and require guidelines to be drawn up. The Act should take the form of a Penal Code, which would be kept continuously available in up to date form. New guidelines for the use of judicial discretion will be an essential part of the new framework, in order to avoid unpredictable consequences, for example in the sentencing of persistent offenders. Such guidelines would be set out in a separate, published Code, that would apply to all criminal courts. The guidelines would specify graded levels of seriousness of offence, presumptive "entry points" of sentence severity in relation to each level of seriousness, how severity of sentence should increase in relation to numbers and types of previous conviction, and other possible grounds for mitigation and aggravation. Responsibility for producing, monitoring, revising and accounting for the guidelines should be placed on an independent judicial body, in the form of either the Court of Appeal (Criminal Division) sitting in new capacity, or a new judicial body set up for the purpose, which would be required to consult on the draft guidelines and to respond to comments made by Parliament, the Government and others. The Sentencing Advisory Panel should have a new remit to enable it to advise on all aspects of the guidelines, and produce drafts.

## EXECUTIVE SUMMARY

### *Recommendations*

41. Codified guidelines should be produced for application by all criminal courts, taking account of existing guidelines and the need for their further development and modification in the light of changes resulting from this report. Such guidelines should be permanently available to all in their up-to-date form.
42. New independent machinery should be established for this purpose, either using the Court of Appeal (Criminal Division) in a new capacity, or establishing a new body for the purpose. In either case, the remit of the Sentencing Advisory Panel should be widened to enable it to provide more general advice on sentencing issues, including draft guidelines.
43. The body responsible for the guidelines should also be responsible for monitoring their application, keeping them up to date and otherwise revising them as necessary. It should also have regard to the need to promote consistency and public confidence, and the need for information bearing on the costs and effectiveness of sentences.
44. Guidelines should be published in draft for public debate, and the responsible body should be required to consider comments made by Parliament, the Government and others, and to publish an explanation of its final conclusions.
45. Parliament should consider ways of establishing a statutory Penal Code incorporating the relevant statute law on sentencing, including the way sentences operate, as well as the powers of the courts; and the Government should instigate the necessary discussions for this purpose.
46. Once suitable guidelines were in place, and had a chance to operate, it would be sensible to review whether mandatory minimum sentences for particular offences in statute would still be needed.

### **Costs and benefits**

**0.24** Experience of this and other jurisdictions suggests that there is no necessary, or even likely connection, between the shape and content of a legal framework, and levels of punishment imposed within it. The effect of the framework proposed in this report on public expenditure, the size of the prison population, and the workload of the courts and probation services, will depend very much on how it is used. If no other changes take place, and

depending on the effect of increased severity of sentence for persistent offenders, the proposed reforms (once established) could require additional annual public expenditure of between £440m and £540m; the prison population could increase by between 3000 and 6000; and the probation service would be working at any one time with 80,000 more offenders. But these are not the necessary, or only possible consequences of the proposed framework.

**0.25** If the new framework was accompanied by other changes affecting severity of punishments – whether deliberately or accidentally – the range of possible effects would widen. On one possible assumption about how increased severity of sentence would operate, a 10% variation in the average length of sentences of 12 months or more would either reduce costs by £122m or increase them by £136m. On these assumptions, the prison population would either reduce by 800 places, or increase by nearly 7000. Costs and the size of the prison population are less sensitive to changes in the proportions of offenders receiving custodial and non-custodial sentences, but if these fluctuated by plus or minus 10%, annual costs would reduce by £25m or increase by £30m, and the need for extra prison places could reduce by 800 or increase by 700. These ranges illustrate the importance of deciding, well before any new framework is implemented, its intended or expected consequences for expenditure, the prison population, and the workloads of services. Decisions on the necessary sentencing guidelines will be an important part of this process. A dialogue between those responsible for interpreting the new framework and putting it into effect (the judiciary and magistracy) and those responsible for meeting the demands they will create (principally the Prison and Probation services, and therefore the Government) will be needed to provide a basis for spending, recruitment and other infrastructure plans in advance of implementation.

**0.26** Analysis of the possible benefits of the proposed changes shows that they should enable better results to be obtained in terms of crime reduction, principally through new ways of working with offenders under sentence, and that these should be worth more than the necessary additional expenditure. This judgement is highly sensitive, however, to current assumptions about the crime reduction effects of work with offenders, which have yet to be fully proven. It also cannot take into account the extent to which better results could be achieved within the existing framework. On reasonable assumptions, the value of additional

## EXECUTIVE SUMMARY

crime reduction benefits that could accrue would exceed those achieved under the existing framework by between £170m and £200m per annum, although this would to some extent be offset by improvements that are achievable within the present framework. These estimates take no account of possible earlier desistance from crime as a result of more intensive targeting of persistent offenders, by the police as well as the prison and probation services. Nor do they attempt to evaluate any benefits in terms of increased public confidence. Any benefits of those kinds would be additional. Further work on the technical aspects of cost-benefit analysis in this area would be useful.

### *Recommendations*

47. The Government, consulting sentencers, should use analysis of costs and benefits to make choices about how it expects the new framework to be used.
48. The proposed new sentencing guidelines should not assume that existing norms for sentence length would be equally punitive in the new framework, or that the existing custody rate would be equally appropriate.
49. The Home Office should consider whether any more light can be thrown on the extent to which prison sentences already increase in length as a result of previous convictions and by how much.
50. The Home Office should set up workshops for experts in cost-benefit analysis in this sort of area, with the aim of developing existing techniques further, and informing future spending decisions.

## Implementation

**0.27** Several conditions must be met for successful implementation. These include:

- a shared understanding of, and commitment to the new framework amongst all those involved in its implementation, and a wider public;
- an adequate infrastructure of systems and processes to enable the new arrangements to work as intended;
- adequate resources, especially programmes for offenders, to meet the needs of staff and services;
- legislation and guidelines that are clear and intelligible to all concerned.

Firm foundations will be needed to build a framework that will last. Benefits would not materialise if the framework proved short-lived, and the necessary transitional costs would be wasted.

**0.28** A challenging timetable will be necessary, but one that allows sufficient time for all the necessary work to be completed. A target date should be set as soon as all the necessary tasks have been identified, but should be contingent on the necessary resources being available in time. A project team will need to work closely with all interested parties in creating a comprehensive implementation plan, subject to direction from a high level steering group and full consultation with all concerned.

### *Recommendations*

51. The Home Office should set up a central unit, responsible for constructing, through consultation, a suitable implementation plan, and of carrying it through with all the interested parties, under the direction of a Steering Group.
52. The Government should consider the time and resources needed for successful implementation of a project of this scale, including the scope for “pilot” or “development” projects and a development fund.
53. The Government should commit itself to changes that are intended to last long enough to deliver the estimated benefits.
54. The Government should discuss with sentencers the way in which the framework is likely to be used, in order to inform its estimates of demands on services.
55. The framework should not be implemented until the necessary infrastructure and resources are available to all services, including offender assessment systems, and prisoner release planning systems.

# Chapter 1

## THE CASE FOR CHANGE

### Introduction

How well is sentencing working in England and Wales today? How could the framework within which it operates be changed to enable it to work better – to achieve better outcomes at justifiable cost? The review has tried to answer those questions, consulting widely, and weighing up the evidence. It has tried to take account of the many dimensions of sentencing: the ethical and philosophical; the practical and operational; the managerial and political. The onus is on those who propose change to show that it would be worthwhile. That is especially so after a decade that has seen more change in this field than any other in living memory. Many contributors to the review have expressed frustration over apparently incessant and disconnected changes, and pessimism about the likelihood that further change will be beneficial. The necessary search for improvements in the framework within which they work will need to take that perspective into account.

**1.2** This chapter looks at the case for change:

- firstly by outlining what sentencing is for and what it is supposed to achieve;
- by identifying apparent weaknesses in the present framework, including difficulties it has in exploiting new opportunities;
- and finally by assessing how much can be expected of sentencing and in what areas better outcomes are most likely to be achievable.

### What sentencing is for

**1.3** At its roots, sentencing contributes to good order in society. It does so by visibly upholding society's norms and standards; dealing appropriately with those who breach them; and enabling the public to have confidence in its outcomes. The public, as a result, can legitimately be expected to uphold and observe the law, and not to take it into their own hands. To achieve this, there must be confidence in the justice of the outcomes, as well as in their effectiveness. Achieving a satisfactory level of public confidence is therefore an important goal of sentencing, and the framework for sentencing needs to support that goal.

**1.4** The review has found widespread agreement that sentencing serves three other more specific purposes, those of:

- punishment
- crime reduction and
- reparation.

**1.5** Opinions differ as to whether punishment is a goal in its own right or is, rather, a means of achieving the other two goals. Crime reduction includes:

- deterrence (specific deterrence of those actually sentenced, and general deterrence of others put off from offending for fear of the sentencing consequences);
- incapacitation (being excluded from society through imprisonment for a period during which offending in the community is therefore not possible);
- reform and rehabilitation (measures to change the way offenders think and behave, and to enable them to develop in ways that reduce risks of re-offending).

Punishment – meaning the loss of liberty, property or other rights and freedoms – is necessary in order to achieve any of the three aspects of crime reduction, as well as reparation. Perhaps above all, the goal is to achieve punishments that work as well as they can, in terms of crime reduction and the satisfaction of victims and communities. Equally important is the goal of achieving punishments that are just, and are seen to be just.

**1.6** The rest of this chapter does two things:

- it looks at the apparent limitations of the present sentencing framework, and
- it then assesses how much can realistically be expected of any sentencing framework – especially in reducing crime.

### The present framework: limitations and opportunities

**1.7** An overview of the present framework suggests that there are two sets of reasons why improvements are desirable. The first is to do with inherent limitations in the present framework. The second is more to do with new or emerging opportunities that the present framework is not well equipped to exploit.

(i) Limitations of the present framework

*A narrow sense of purpose*

**1.8** The present statutory framework requires those who pass sentence to concentrate primarily on the offence or offences committed by the offender and the level of punishment “commensurate” with the seriousness of those offences. Although the Act originally requiring this was amended fairly soon after its implementation, to enable sentencers to take account of the offender’s previous convictions and any “failure to respond to previous sentences”, the importance of offenders getting their “just deserts”, and of “the punishment fitting the crime” remains a key feature of the statutory framework.

**1.9** There is nothing wrong with this in itself, but it provides a less than complete guide to the selection of the most suitable sentence in an individual case. Sentencers are not encouraged to consider crime reduction or reparation. Nor are they provided in statute with any guidance on the measurement of seriousness, or the matching, “commensurate” severity of sentence. These questions are left to non-statutory guidelines, through decisions in individual cases by the Court of Appeal (Criminal Division), and the Magistrates’ Courts Sentencing Guidelines, drawn up and disseminated at the instigation of the Magistrates’ Association.

**1.10** Sentencers have told the review that they are not inhibited from taking a wide view of a case, and using their individual discretion to take account of different circumstances. If that is so, any gap between the theory of the legal framework approved by Parliament, and what happens in practice, is worrying. It may lead to inconsistency, and is not good for public confidence. The needs of crime reduction and reparation could certainly feature more prominently in the framework, in ways that would encourage a consistent approach, more explicitly geared to what is most likely to reduce crime in the individual case, and (where possible) make amends to a victim, or the local community.

*A muddled approach to persistent offenders*

**1.11** The ability of sentencers to “take account” of previous convictions and any “failure to respond” to previous sentences, appears to have unpredictable consequences, which differ between magistrates’ courts and the Crown Court. This is in spite of a doctrine, drawn from guideline judgements of the Court of Appeal (Criminal Division), known as

“progressive loss of mitigation”. In crude terms, this means that a reduction in severity of sentence that may be made on account of an offender’s “clean” record, should be progressively lost as the number of previous convictions increases.

**1.12** The information in Appendix 3 shows that

- there is a strong correlation between number of previous convictions and the likelihood of receiving a short prison sentence;
- persistent offenders do not appear to receive significantly longer prison sentences (in a sample of male offenders aged over 18 and sentenced in 1998, the average sentence for burglary for an offender with 10 or more previous convictions was only 4 months more, at 19.1 months, than for an offender with 1 conviction);
- persistent offenders with 10 or more previous convictions still had a one in four chance of receiving a community sentence.

The general picture has been confirmed in discussion with those who pass sentence in magistrates’ courts. If an offender has “failed” on a previous sentence, be it custodial or not, the court, in increasing desperation, may “try something different”. Frustration is compounded by the visible inability of short prison sentences to tackle the causes of a persistent criminal career (see the immediately following section). As a result, persistent offenders whose offences are not so serious as to land them in the Crown Court, find themselves “bouncing around” between a variety of custodial and community sentences, without any clear rationale, continuity, or predictability.

**1.13** The position in the Crown Court seems to be rather different. For some time, the higher courts have set their faces against “sentencing on record”. The doctrine of “progressive loss of mitigation” reflects this, because it implies that the desirable sentence in a case can become less severe on account of a good record, or one that is not too awful, but should not become more severe on account of a bad one. This would explain the limited difference between average sentence lengths for offenders of greatly differing records – although more information is needed to assess the extent to which previous convictions might influence sentence severity.

**1.14** Persistent offenders commit a disproportionate number of crimes and account for a disproportionate number of sentencing occasions (see Appendix 3). The framework is not as clear as it needs to be in relation to persistent offenders.

## Chapter 1

### THE CASE FOR CHANGE

The statute law leaves a great deal to discretion, to a degree that is bound to result in inconsistency of approach, and may help to explain some of the wide variations in practice between petty sessional areas, as shown in Appendix 2. The doctrine of “progressive loss of mitigation” raises an important question of policy: what effect should a bad criminal record have on the severity of sentence following a further conviction?

**1.15** The present situation is unsatisfactory because it is not as clear as it might be and has unpredictable results, both of which are likely to weaken the impact sentencing can have on re-offending by the relatively small proportion of offenders who commit a disproportionate amount of crime.

#### *The inadequacy of short prison sentences*

**1.16** Prison sentences of less than 12 months literally mean half what they say. Half the period of the sentence is served in prison, and release is automatic at the half-way point (or earlier if released under the Home Detention Curfew scheme). No conditions apply during the second half of the sentence, which to all intents and purposes is meaningless and ineffective.

**1.17** For offenders who need only a short period in prison to persuade them to desist from crime, this may not be a problem. But most of those who receive short prison sentences of less than 12 months are not in that category. A sample of male prisoners receiving short prison sentences in mid 1998 showed:

- 54% had been to prison under sentence before;
- 56% had five or more previous convictions;

A sample of male prisoners receiving short prison sentences in early 2000 showed:

- 40% admitted to having problems over drug misuse before entering prison;
- 53% were unemployed.

**1.18** This picture may be similar to any sample of offenders. The point is that the shorter prison sentences are ill-equipped to do anything to tackle the factors underlying criminal behaviour, by comparison with any other sentence. Furthermore, there is a strong likelihood of those sentences being used for very persistent offenders whose offences are judged serious enough to deserve imprisonment, but not so serious as to justify a longer prison term. The increased use of those sentences has also borne down much more heavily on women, than on men

(see Appendix 2).

**1.19** The Prison Service is increasing the availability of programmes aimed at preventing re-offending. This expansion is unlikely to reach short sentence prisoners, however, who do not stay long enough in prison to make completion of programmes feasible. Appendix 6 shows the higher reconviction rates for offenders who have served short prison sentences. Looking at who receives these sentences, what can be done in prison, and the absence of any formal intervention after release, the relatively poor outcomes are patently predictable. The weakness of the short prison sentence as a means of reducing crime, for the majority of those who receive it, has come through very strongly during the review. Also, the lack of “honesty” in what these sentences mean is bad for public confidence.

#### *The weakness of longer prison sentences*

**1.20** Longer sentences (those of 12 months and over) are closer to meaning what they say, but have important limitations. Half the sentence is served in prison. If the sentence is of four years or more the period in prison may be extended to two thirds of the sentence, if parole is refused. For sentences from 12 months up to 4 years, release is automatic at the half-way point, or earlier if released under the Home Detention Curfew scheme, but is subject to conditions laid down by the Prison Service. Release at the discretion of the Parole Board is also subject to conditions. In both cases the conditions normally only bite up to the three quarter point of the original sentence.

**1.21** For example, a prisoner sentenced to 2 years, refused release on Home Detention Curfew, will be released automatically, subject to conditions, after one year, and the conditions will run for 6 months. The last quarter of these longer sentences (over 12 months) only has to be served if the offender commits a further offence before it has been completed and the court decides to activate the period outstanding from the date of the new offence.

**1.22** The last quarter of the sentence lacks any obvious purpose. Although the prison and probation services have for many years committed themselves to sentence planning that has the aim of managing the resettlement of prisoners in the community “seamlessly”, and special steps are being made to protect the public from further offending by the more predictably dangerous released prisoners, for the great majority of released

## Chapter 1

### THE CASE FOR CHANGE

prisoners the impact of the sentence on their behaviour after release is questionable. A current joint inspection by the Prison and Probation Inspectorates has highlighted the current weakness of efforts to manage prisoners' "re-entry" to the community successfully. This review heard of prisoners who could not understand why the probation service had anything to do with them after their release, and who felt that having completed their term in prison they had finished their sentence. There is a great deal of scope to make the second half of these prison sentences more "real", following up "seamlessly" work done in prison to prevent re-offending, maintaining a close watch on progress, and protecting the public from further offending.

**1.23** Any changes must take account of the need to provide adequate sentences and release arrangements for the most dangerous offenders – those who commit violent and sexual offences and are assessed as having high risks of re-offending.

#### *Lack of confidence in community sentences*

**1.24** Although the range of community sentences is wider than ever, and their intensity can be greater than before, they are still not seen by many to be sufficiently punitive or protective of communities. The present framework – as originally set up – sought to establish them as punishments in their own right, for cases that were "serious enough" but not "so serious" as to require imprisonment, and not as alternatives to imprisonment. Little guidance exists on how to measure the relative severity of the various non-custodial orders. Also, the Criminal Justice and Court Services Act 2000 has now provided that, if a community sentence breaks down as a result of non-compliance by the offender, a prison sentence should normally be substituted (section 53 of the Act, which has not yet been brought into force).

**1.25** Although the stated purpose in the present framework is to arrive at a punishment representing "just deserts", whether in prison or in the community, courts are required to consider crime reduction purposes before passing some community sentences, but not others (see and compare sections 42 and 51 of the Powers of the Criminal Courts (Sentencing) Act 2000 with sections 37, 46 and 52).

**1.26** Apart from financial penalties, reparation is notable by its absence from the array of orders available for the sentencing of adults, although a reparation order now exists for young offenders, and compulsory work can be used to make reparation to the community.

**1.27** There is a case for clarifying the purposes of the various community orders, and how they should be used, so that the recent proliferation of orders are made more understandable to the community, sentencers and offenders – taking account of the purposes of crime reduction, reparation and punishment.

#### *Muddled and weak enforcement systems*

**1.28** Current arrangements for the enforcement of sentences are inconsistent and unclear. There is a patchwork of 'enforcement' activity – with no consistent principles underlying the current legislation, structures and practices. For instance there are several different mechanisms for determining how to respond to a breach of licence or community sentence, ranging from court based decisions for community sentences to Secretary of State decision with a requirement to consult the Parole Board for parole and most licences. Recent changes such as creation of 'pure' executive recall to prison, for breach of Home Detention Curfew, and transfer from the courts to the Secretary of State of the responsibility for revoking licences for prisoners released automatically have further complicated the picture. The available penalties for breach also vary and can include suspension of licence for a variable period, revocation of licence and recall to custody, and return to prison for all or part of the period between the date of any new offence and the original sentence expiry date.

**1.29** The present framework does not encourage "continuous review" of the offender's progress while under sentence, or action in response to good or bad progress. Only in the relatively new Drug Treatment and Testing Order is there a beginning of a new approach, in which the offender is "put to the test", and the court is given oversight over successful implementation of the order.

**1.30** A more continuous "follow through" of all sentences offers prospective benefits in terms of public confidence and crime reduction.

#### *Unnecessary rigidities*

**1.31** The Criminal Justice Act 1991 created three "tiers" of seriousness of offence, against which severity of sentence was to be matched. Financial penalties were earmarked for the least serious offences; community sentences for offences that were "serious enough" to deserve "punishment in the community"; and prison sentences for offences that were "so serious" that no other sentence would be adequate.

## Chapter 1

### THE CASE FOR CHANGE

**1.32** Any framework must have a clearly expressed threshold governing the use of imprisonment. The value of splitting financial and non-financial community penalties is less clear. Doing so may have unintentionally created an impression that fines should be reserved for the least serious offences (which is not the case – large fines can be and are passed in serious cases in the Crown Court). Certainly, fines have failed to recover their previous share of sentences, although the high levels of unemployment used to explain their decline no longer exist. In parallel, community sentences have increased in number and intensity, alongside the increased use of imprisonment (see Appendix 2). There is at least a possibility that fines are not being used to the extent they could be. Abolition of the unit fines system that was supposed to encourage their use, along with lack of confidence in the enforcement of fines may have contributed to this.

**1.33** But it might also help if the apparent rigidity of the present framework were removed. The restriction of sentencing options for the less serious offences can often present the court with an unsatisfactory choice to make between a financial penalty – which may seem unaffordable, especially with a string of debts for previous offences – and a discharge – which may be seen to give the wrong message.

#### *The muddled legacy*

**1.34** The Criminal Justice Act 1991 was interpreted by the courts in ways that had not been predicted or expected. In fact, the ‘just deserts’ approach failed to take root, because deterrence was soon reinstated as an aim of sentencing. This was compounded by the Act’s failure to deal satisfactorily with the relevance of previous convictions, which resulted in early amendment to allow previous convictions, and “failure to respond to previous sentences” to be “taken into account”. The inconsistent (and therefore) unpredictable effects of these changes has already been noted.

**1.35** Later, Parliament provided that in some circumstances, a community sentence could be passed instead of a fine, even when the offences were not “serious enough” to justify such a sentence (see section 59 of the Powers of the Criminal Courts (Sentencing) Act 2000). Most recently, the Criminal Justice and Court Services Act raised further questions about the original philosophy by creating a presumption that a prison sentence will be substituted for a community sentence that has broken down through non-compliance.

**1.36** An attempt in the early 1990s to construct a new framework for sentencing failed, rapidly, to achieve its purpose. Substantial further erosion has taken place since, yet no new vision has been put in place of the original. The result is a muddle, which is not good for consistency, public understanding, or a sense of common purpose amongst the various agencies involved in sentencing. Practitioners complain bitterly about the consequent complexities and inconsistencies, which they feel are a drag on efficiency as well as effectiveness. It is only because of their ingenuity and application that the results are not worse.

#### *Lack of transparency*

**1.37** If anyone asked how sentencing was supposed to work they would have to be pointed in the direction of a massive volume of statutes, most of which amend each other, and an equally large volume of case law, conveniently set out in the three volume encyclopaedia edited by Dr David Thomas (Encyclopaedia of Current Sentencing Practice, published by Sweet and Maxwell). On top of this, the enquirer would be directed to the Magistrates’ Courts Sentencing Guidelines.

**1.38** Nevertheless the framework is still relatively inaccessible. It is thanks to the initiative of the Court of Appeal (Criminal Division) and the Magistrates’ Association that sentencing guidelines have been taken as far as they have. The guidelines have more effect on what happens to offenders than the statutory framework, so they are very important. The Sentencing Advisory Panel now exists to help the Court of Appeal develop its guidelines further.

**1.39** Notwithstanding the progress made or in prospect, there must be ways of making the framework more accessible, to practitioners as well as to Parliament and interested members of the public.

**1.40** Decisions in individual cases also need to be clearly understood. Progress has been made in this area, too, but the legal framework could do more to set out the requirement for decisions to be explained, and to ensure that sentences mean what they say.

**1.41** An interested enquirer who understood how sentencing was supposed to work might also ask whether it was working as it should. A lot of information is published by the Government, which accounts for its own policies in this area. In the area of judicial policy, accountability is less clear and any possible clarification would be worthwhile.

*Inconsistency*

**1.42** The wide disparities in sentencing between petty sessional areas in different geographical areas are hard to explain or justify (see Appendix 2), and the Magistrates' Association has taken welcome steps to encourage greater consistency. The Crown Court, aided by the Judicial Studies Board and the Court of Appeal's guidelines, has also done a good deal of work aimed at achieving consistent levels of punishment. Apparent variations at that level are less wide than in magistrates' courts.

**1.43** Interpreting the available data is difficult, because there is so little information about variations in the seriousness of the offences under sentence. A precise comparison between offence seriousness and sentence severity is therefore elusive. Research suggests people agree more readily on comparative seriousness than on appropriate levels of severity for any given level of seriousness. Absence of clear, comprehensive guidelines on offence seriousness and appropriate severity leaves a good deal to discretion. Also, the courts' willingness to allow local prevalence of offending to influence severity of sentence has encouraged local variation. Whether courts who cite local prevalence as a reason for severe sentences have studied local crime rates by comparison with other areas, or the effects of their sentences on local crime patterns, is unclear. Comparatively low local incidence of a crime does not appear to have been cited as a justification for a more lenient approach to sentencing.

**1.44** Consistency needs to be addressed in any new framework, and any changes should if possible make it easier to understand and explain sentencing decisions in relation to justifiable reasons for disparity.

(ii) New opportunities

*"What works"*

**1.45** The existing framework was originally born out of a period when many felt that sentencing made little if any difference to re-offending, or crime rates generally. That period, often characterised as "nothing works", was a reaction against indeterminate and potentially disproportionate punishments resulting from an over-optimistic view of sentencing as "treatment". It was understandable, in that context, to focus on the narrow question of "appropriate punishment" (or "just deserts"). It is now clear that focussing sentencing exclusively on punishment does not necessarily limit its severity. Equally, it does not

encourage attention to "what works" in crime reduction.

**1.46** The purpose of this brief historical reference is to introduce the significant new work of the prison and probation services in England and Wales, which is not a revival of an old "treatment" model, but rather a more rigorous analysis of "What works" in preventing re-offending through work with offenders under sentence – to change their attitudes and behaviour; treat their substance abuse; improve their skills etc. How best to support this important development through the sentencing framework is an important theme of this review.

**1.47** The Prison and Probation services are about to embark on a new period of more integrated national leadership and management. This is likely to accelerate the work that has now been going on for some years in both services to improve their performance in preventing re-offending. Both services have developed national strategies to implement "What works" for this purpose, and to achieve national targets. The following features of their endeavours are important for the sentencing framework:

- the development of a new system (known as OASys) to measure the risks of an offender re-offending, and the likely resulting harm; to assess the needs for work likely to reduce those risks; and to identify a suitable programme of work;
- the development of a wide range of programmes of proven value in reducing re-offending, and the formal accreditation of such programmes.

**1.48** OASys, which is not yet fully operational, includes an "actuarial" risk assessment, based on past offending and related predictions, and a more "clinical" assessment of risk based on known features of the offender's personality and behaviour. It enables case workers to identify the programmes most likely to "work" for the offender in question. Such programmes can include:

- developing the offender's thinking and understanding, so as to change attitudes and likelihood of offending;
- removing drug or alcohol addiction or dependency;
- improving literacy and numeracy levels, or other aspects of education;
- improving job related skills.

**1.49** "What works" strategies and programmes have been based on research evidence, most of which comes from other countries. Evidence is still

## Chapter 1

### THE CASE FOR CHANGE

being accumulated in England and Wales, and it is too soon to draw firm conclusions about the impact of these developments on re-offending. A reasonable estimate at this stage is that, if the programmes are developed and applied as intended, to the maximum extent possible, reconviction rates might be reduced by 5-15 percentage points (i.e. from the present level of 56% within two years, to (perhaps) 40%). In the face of historically unchanging levels of re-offending, that would be a remarkable success.

**1.50** “What works” is not an uncritical revival of past optimism about “treatment”. Instead of “nothing works”, it says that “some things can work for some people, provided the right programmes are selected and implemented properly”. The question for this review is whether the sentencing framework could do more to help these developments and maximise their success. The prospects for improvement, although not yet proven, are great enough to justify making sure that the framework gives as much help as it can.

#### *Youth justice reforms*

**1.51** The youth justice system has been substantially reformed in the past few years. The courts now have a wider range of powers for young offenders, many of them with strikingly new features, such as the action plan order, referral order, and reparation order. There is growing interest in the role restorative justice can play in work with young offenders. Also, much closer working is being developed between the different agencies that work in this field. One question for this review, therefore, is whether there are ways in which the framework for sentencing of older offenders could benefit from what is happening with the younger ones. The themes of joint working and reparation (including restorative justice) are particularly relevant.

**1.52** Although the Crime & Disorder Act 1998 made it the aim of the youth justice system to “prevent offending by children and young persons”, the general principles of the existing framework continue to apply to the sentencing of young offenders – for example the principles governing the use of custody. Although the review has concentrated on the powers available for sentencing offenders aged over 18, its proposals for general principles need to be appropriate for the sentencing of all offenders.

#### *Criminal Justice and Court Services Act 2000*

**1.53** As noted above, this Act has in effect re-defined the nature of community sentences, by creating a presumption (not yet implemented) that courts will substitute a custodial sentence when a community sentence has broken down through the non-compliance of the offender.

**1.54** Many jurisdictions in the rest of Europe make their community sentences “conditional” on good behaviour in this way, and several actually describe them as “conditional prison sentences”, so that the unenforced prison sentence “hangs over” the offender until the community penalty has been fully discharged.

**1.55** This development in England and Wales does not just add to the lack of clarity in the present framework (as noted above): it also provides an opportunity to re-define the relationship between the different sentences, and how they should be used.

#### **Improved outcomes**

**1.56** If there is scope for improvement, how much can any changes be expected to achieve? This section assesses the evidence bearing on what can reasonably be expected of sentencing – especially as a contribution to crime reduction. The first point to make is that there is no necessary, or even predictable, connection between the content of a framework and its impacts. Similar frameworks can and do produce different outcomes in different jurisdictions. What sentences are passed, in what numbers and with what severity of punishment; and what work is done by prison and probation services, with what results, are far more influential on costs and outcomes than the broad framework of law and guidelines within which they operate.

**1.57** Governments and Legislatures can and do change frameworks with the aim of securing specific changes in sentencing behaviour. Their intended changes do not always materialise. The last attempt in England and Wales, for example, in 1991 had results unintended by its originators. The “just desert” approach was intended to limit the use of imprisonment and promote the use of “punishment in the community”. A combination of judicial interpretation, revision and supplementary legislation, and a judicial response to perceived public concerns about levels of punishment, produced different results. Looking at other jurisdictions, whether changes in frameworks have

## Chapter 1

### THE CASE FOR CHANGE

their intended results seems to depend on whether there is a sufficiently widely shared understanding and acceptance of aims and objectives, especially between legislatures and Governments on the one hand and sentencers on the other, but also in the wider public. Other key factors may include the workability of the reforms, including human and financial resources, necessary systems and infrastructure, including IT and communications.

**1.58** That said, it is important to assess what contribution any changes might make towards improved outcomes, against the goals of sentencing identified earlier in this chapter. Those goals embraced punishment, crime reduction (through deterrence, incapacitation and reform and rehabilitation) and reparation, along with an underlying goal of sustaining public confidence. These are now addressed, starting with public confidence.

#### (i) Public confidence

**1.59** Surveys – including a new one commissioned as part of this review – show that levels of public confidence in the adequacy of punishment are low (see Appendix 5). They also suggest, however, that awareness amongst the public about the levels of punishment actually imposed is also low; and that the public are as interested in crime reduction as in punishment. Thus, as Appendix 5 shows:

- the public is badly under-informed about sentencing severity, and believes it to be more lenient than it is;
- when faced with sentencing options, the public seem ready to pass sentences broadly in line with existing practice.

**1.60** There is also some evidence that fear of crime may promote desires for more punitive sentencing. Successful efforts to reduce crime and the fear of crime could reduce concern about levels of punishment. In any event, levels of punishment must be subject to some limits, based on principles of justice. Such limits are discussed in the next chapter, and one role of sentencers is to judge where those limits are in relation to what the public are reasonably entitled to expect. It would be a bad use of public money to invest in extra punishment on the basis of inadequate information about what the public really think (bearing in mind the wide differences of opinion likely to exist at any time); or on the basis of public opinion that was itself relying on inaccurate information or assumptions; or on fears that might or might not be justified. Extra

punishment to satisfy a badly informed public is unlikely to provide good value for money. The most recent surveys do not suggest that the increased use of punishment over the past few years has altered the widespread view that sentencing tends to be too lenient. What seems to be needed is:

- better, and more accessible information for the public about how sentencing is supposed to work, in this respect, and how it is working in practice;
- better information for sentencers about what the public think, and on what information the various opinions are based;
- better information about the costs of the punitive element of sentences if, and when, they can be disaggregated from the crime reduction elements.

**1.61** The available information does not suggest that the framework should be changed in order to produce different levels of punishment, in order to increase public confidence, as an end in itself. Different punishment levels may result from other justifiable changes aimed at reducing crime – which may themselves also promote public confidence. If so, that would be welcome and add value.

#### (ii) Deterrence

**1.62** Deterrence needs to be considered in two forms: the general effect on the population at large; and the specific effect on sentenced offenders. The review has found no evidence to show what levels of punishment produce what levels of general deterrence. Along with likelihood of detention and conviction, the availability of punishment clearly contributes to general deterrence, which undoubtedly exists (see Appendix 6), but there seems to be no link between marginal changes in punishment levels and changes in crime rates. The evidence shows the importance of certainty of punishment, so that deterrent effects are unlikely to be achieved if the prospects of avoiding detection and conviction are high. It is the prospect of getting caught that has deterrence value, rather than alterations to the “going rate” for severity of sentences. The lack of correlation between punishment levels and crime levels is in line with the current literature which analyses these trends in other jurisdictions. Punishment levels may have more to do with tradition, culture, and prevailing mood – including levels of fear and concern about crime – than about the shape and content of the legal framework.

## Chapter 1

### THE CASE FOR CHANGE

**1.63** The deterrent effect of sentencing on sentenced offenders is equally hard to pin down. The available evidence strongly suggests that deterrence works differently for different people – much better for those who desist rapidly from offending than for those who persist in the face of repeated punishment. For large numbers of offenders any sentence may be enough to result in a “life style choice” to desist from further crime. There appears to be no statistical correlation between types of sentence and likelihood of desistance, according to Home Office analysis of the Offenders’ Index. What happens to an offender during sentence, or happens in parallel or afterwards for extraneous reasons, may have as much to do with desistance as the type of sentence passed. Known differences in levels of likely punishment for different types of offences may, however, influence persistent offenders’ choice of crime. There is evidence, for example, that some offenders will consciously choose to avoid the risk of long prison sentences by not carrying weapons. Reconviction rates for longer prison sentences are lower than for shorter ones. This is partly explained by differences in criminal history, and may also be partly explained by longer supervision after release. The longer period in which to tackle underlying causes of criminal behaviour may also be a factor, as may ageing in itself.

**1.64** Deterrence is more likely to work for the general population, and for the large group of offenders who have short criminal careers – perhaps because they have more to lose if they persist. In that respect the successes of sentencing – those who never commit crime or desist quickly – are unseen, unmeasured and therefore unsung. Performance tends to be measured in relation to the effects of sentences on those most resistant to change who take up a disproportionate amount of the resources spent on sentencing. A truer measure would take account of those who never appear (perhaps after a caution) or do not keep coming back for more.

**1.65** The evidence suggests that any new sentencing framework should make no new assumptions about deterrence. To change the framework in order to achieve a specific deterrent effect would not be justified. Nor, contrary to widespread belief, is there any evidence to support making deterrence a specific purpose of sentencing in individual cases: the general and specific deterrent effects of sentencing can be assumed from the “going rate” of sentence severity in relation to offence seriousness. If changes to the

framework that are justifiable on their own merits (for example in relation to persistent offenders) contributed to general or specific deterrence, that would represent additional value for any necessary investment, even if the additional deterrence could not be demonstrated. Aside from any change to the framework, it would be helpful if more information were available about the general and specific deterrent effects of sentencing.

#### (iii) Incapacitation

**1.66** Excluding offenders from society, by imprisoning them, prevents their committing crimes in the community while they are in prison. It is safe to assume that if there were no prisons there would be a lot more crime. Again, a precise measure of the effect of imprisonment is elusive, not least because deterrence as well as incapacitation is involved. Estimates can be made, and have been made, of the marginal crime reduction effect of increasing the numbers in prison, simply as a consequence of avoiding the estimated number of crimes the extra prisoners would have committed had they been at liberty. The most recent Home Office estimates (see appendix 6) suggest that the prison population would need to increase by around 15%, for a reduction in crime of 1%. If efforts were targeted at particular groups of offenders, for instance those with drug problems who commit more offences per year, per offender, a 1% reduction in crime would require a smaller (7%) increase in the prison population. These estimates take no account of the dynamics of crime outside prison: for example the “recruitment” which goes on to support criminal networks trading in stolen goods or illegal drugs, or to sustain less formal groups indulging in criminal lifestyles.

**1.67** Some Home Office modelling suggests that any crime reduction effect of incapacitation is likely to be temporary. Increasing the proportion of offenders sent to prison or increasing the sentence length will cause a small and almost immediate reduction in crime levels. However, as time passes new recruits to crime join the offender population and a proportion of those released from prison re-offend. Gradually the crime rate will return to its previous level and the prison population will settle down at the higher level, but there will be more offenders in the system, consuming more resources. An alternative hypothesis is that imprisonment would take time out of the criminal career and incapacitation would reduce overall crime. Further work is needed to improve our understanding of these matters. Such work will need to take into account wider questions about possible but

## Chapter 1

### THE CASE FOR CHANGE

unprovable deterrent effects of increased imprisonment, and whether better work in prison could reduce risks of re-offending on release. It also fails to measure any negative aspects of imprisonment on crime. Beliefs that imprisoned offenders learn through association with other criminals, acquire or consolidate anti-social and criminal attitudes and habits, and become further alienated from a law-abiding lifestyle, are widely held, but difficult to establish through objective analysis. Evidence certainly exists to show that imprisonment creates additional challenges when prisoners are released – for example through loss of job or accommodation, or reduced prospects of obtaining either or both. These are inevitable consequences of imprisonment and are part of the case for ensuring that imprisonment is used only when no other sentence would be adequate.

**1.68** Looked at in isolation, the available evidence does not suggest a case for changing the framework in any particular direction for the sole purpose of increasing an “incapacitation” effect. If changes were justifiable on other grounds and had a crime reduction effect through incapacitation, they would add value – whether temporarily or not. The value would be greater if the changes bore particularly on the more persistent offenders.

#### (iv) Reform and rehabilitation

**1.69** Finally, when looking at crime reduction, it is necessary to look at costs and outcomes of efforts to reform and rehabilitate sentenced offenders, and the scope for improving on the present framework for that purpose. Here, the position is a bit clearer, and more positive. The “What works” developments, and the implementation of the associated policies are described earlier in this chapter (paragraphs 1.45-1.50) and in Appendix 6. Although the evidence to support them is as yet incomplete there is a strong enough case to justify looking for a framework that would be more supportive of the attempts being made to reduce re-offending. Only if the framework is as supportive as it can be will it be possible to tell whether the opportunities to reduce re-offending have been exploited as fully as they might be. The weaknesses of the framework in this respect have already been described. This is perhaps the most obvious way in which the impact of the existing framework on crime reduction could be improved.

#### (v) Reparation

**1.70** The analysis has so far concentrated on the costs of punishment and the benefits, in terms of public confidence and reduction of crime. It is important not to overlook other factors bearing on

public and victim satisfaction. Some of these are to do with the principles of justice that are discussed in the next chapter. Others, to be noted here, are to do with the extent to which the framework might increase public and victim satisfaction, at reasonable cost, by investing more in reparation and “restorative justice”. The review has found widespread interest in the contribution which “restorative justice” might make to sentencing, and has examined the evidence bearing on it (see Appendix 6). Policy and practice in this field is not yet sufficiently developed in England and Wales to justify very specific new elements in the basic framework for sentencing, but the framework should be flexible enough to accommodate future developments of proven value.

### Conclusions

**1.71** This chapter has explored the case for changing the existing framework, and draws the following conclusions. First, the framework needs to address more directly than at present the purposes of crime reduction and reparation, as well as punishment.

**1.72** Several deficiencies in the present framework need to be remedied, especially:

- the weakness of prison sentences of less than 12 months;
- the limitations of longer prison sentences;
- the uncertain and unpredictable treatment of persistent offenders.

**1.73** The framework can, and should do more to support recent and foreseeable developments in work with convicted offenders to reduce their re-offending through “What works”.

**1.74** Any changes should seek to reduce present complexity and increase transparency.

**1.75** Sentencing makes important contributions to crime reduction and public confidence, and the available evidence suggests that:

- confidence could be improved through changes which improved public awareness of sentencing practice and improved sentencers’ awareness of public opinion and the knowledge on which it is based;
- changing present levels of punishment as an end in itself, or exclusively to enhance deterrent or incapacitative effects on crime would not be justified;
- improvement in the present state of knowledge about deterrence and incapacitation is desirable;

## Chapter 1

### THE CASE FOR CHANGE

- outcomes are most likely to be improved by targeting resources on the offenders most likely to re-offend and commit offences serious enough to cause concern to local communities;
- if targeting persistent offenders reduced crime through additional deterrence, incapacitation or both that would be a bonus;
- changes in the framework aimed at promoting effective work with offenders during their sentences are most likely to improve outcomes;
- there is scope for greater attention to reparation.

**1.76** In principle, the case for reform is strong. The final analysis will turn on the estimated costs and benefits of proposed changes (explored in chapter 9) and levels of confidence in the assumed outcomes.

#### *Recommendations*

- **A new framework should do more to support crime reduction and reparation, while meeting the needs of punishment. In support of crime reduction, the framework should in particular do more to target persistent offenders and support the work of the prison and probation services to reduce re-offending.**
- **The Home Office should consider the scope for further research into ways of increasing current knowledge about the contributions of sentencing to crime reduction through deterrence and incapacitation.**

## Chapter 2

# THE PRINCIPLES OF SENTENCING

### Introduction

The purposes of sentencing need to be governed by principles whose application results in sentences which are just, and “fit” the circumstances of individual cases. This chapter addresses what those principles should be and how they might work in practice. If crime reduction were to be an overriding goal, punishments would be limited solely by an assessment of whether the offender was likely to re-offend. In a large number of cases that would produce indefensibly severe punishments in relation to what the offender had actually done. Principles have to be established to determine the relative amounts of punishment that can be justified in particular cases, and they need to be capable of being applied equally across all cases.

**2.2** This chapter addresses the principles governing the use of punishment and suggests how one case should be differentiated from another in terms of the severity of sentence to be imposed. It does not address the absolute level of punishment to be meted out through the penal system. The same, or similar, principles can and do result in very different overall levels of punishment in different jurisdictions. Chapter 8 outlines how guidelines might be used to influence levels of punishment. Chapter 9 shows what effects different punishment levels might have on costs, the prison population and service workloads.

**2.3** The courts in England and Wales have gone a long way to establish principles of sentencing, which to some extent have already been incorporated in law and practice. The principle that severity of punishment should not exceed a level “commensurate” with the seriousness of the offence or offences for which the offender is to be sentenced is well established and widely supported. So is the principle that prison sentences should be reserved for cases that are so serious that no other level of punishment would be adequate. Those principles provide a sound basis for developing a new framework. Chapter 1 identified two areas, however, in which there is scope for improving on the way in which the severity of sentences is matched with the seriousness of cases. First, the effect of previous convictions must be clarified; and, second, fines should not appear to be reserved for the least serious cases for which other non-custodial penalties are prohibited.

**2.4** Principles of sentencing can be expressed in a variety of ways, and in themselves are uncontroversial. Most are to do with the overriding principles of justice and fairness. These require sentencing to be:

- proportionate
- consistent
- free from improper discrimination
- compliant with human rights
- transparent.

More practical principles are to do with:

- efficiency (smooth running – sound systems that work well with minimum delay)
- effectiveness (getting desired results)
- economy (avoidance of waste)

In other words – value for money and workability. Sentencing needs not only to be right in principle, but workable, efficient and effective in practice. Also, any new framework must comply in all respects with the Human Rights Act, and the proposals in this report have been tested against that criterion.

**2.5** This chapter examines how the limits on punishment might be defined according to those principles, before going on to illustrate what a structure for decision-making might look like.

### Defining the limits on punishment

#### (i) Proportionate sentencing

**2.6** The principle of proportionate punishments (“just deserts”) needs to be sustained. No-one favours disproportionate punishment. The question is: proportionate to what? Requiring the severity of a sentence to be proportionate in relation to what an offender has done makes sense and is justifiable. The main alternative would be to link severity to assessed risks of re-offending and consequent harm, but that would be imprecise and haphazard in its effects, and would result inevitably in some unjust outcomes. Risk assessment systems can usefully inform judgements about work to be done with offenders under sentence, and whether a non-custodial sentence would be adequate. When it comes to judging appropriate severity of sentence, however, seriousness of the criminal conduct is a more reliable guide. Only for the most serious offenders who pose a risk of serious harm to the

## Chapter 1

### THE CASE FOR CHANGE

public should risk be a basis for judgements requiring loss of liberty that would not have been justified by the seriousness of past conduct. Chapter 4 suggests how risk should play a part in the sentencing of dangerous offenders. The rest of this chapter is confined to the general run of offenders, excluding those who would be eligible for the special sentence described in that chapter.

**2.7** If sentence severity should be commensurate with the seriousness of criminal conduct, how should “seriousness of criminal conduct” be defined? Most people – it would appear (see Appendix 5) – expect antecedent criminal conduct to be relevant as well as the most recent offences, and expect persistent criminality to result in more severe sentences than would otherwise have been passed. Chapter 1 argued that the existing framework badly needs to be clarified on this point. Clarification needs to be based on a clear presumption that sentence severity should increase as a consequence of sufficiently recent and relevant previous convictions. The justification for this modified principle is two-fold. A continuing course of criminal conduct in the face of repeated attempts by the State to try to correct it, calls for increasing denunciation and retribution, notwithstanding that earlier crimes have already been punished. In addition, persistent criminality justifies the more intensive efforts to reform and rehabilitate which become possible within a more intrusive and punitive sentence. As it happens, because previous convictions are a strong indicator of risks of re-offending, this presumption would also, coincidentally, take such risks into account. For all these reasons, the new presumption would serve to target resources on the offenders who commit a disproportionate amount of crime and are most likely to re-offend. The new presumption must be governed by the proportionality principle, to avoid excessively severe, and therefore unjust punishments. To do this, clear guidelines demonstrating the “gearing” between offence seriousness, seriousness of record, and bands of acceptable sentences, will be needed, building on the guidelines already established or under development.

**2.8** Severity of sentence should be governed, therefore, by the following principles:

- the severity of the punishment should reflect the seriousness of the offence and the offender’s criminal history;
- the seriousness of the offence should reflect its degree of harmfulness or risked harmfulness, and the offender’s culpability in committing the offence;

- in considering the offender’s criminal history, the severity of the sentence should increase to reflect previous convictions, taking account of how recent and relevant they were.

Sentencing guidelines would govern the extent to which severity of sentence could increase, in relation to what sort of previous convictions. The more recent, frequent and serious they were, the greater the effect. All crimes would be potentially “relevant”, but relevance would be a factor, to guard against disproportionate effects. The most relevant would be offences showing a continuing course of criminal conduct, even when the types of offence committed were various (as they commonly are).

**2.9** The so-called “totality principle”, allowing several current offences to be treated as a whole for sentencing purposes, would be preserved and set out in guidelines. This should mean that, when several offences are sentenced together, the combined effect should be more severe than would have been justified by the most serious offence, but not so severe as to be outside the range for that offence, after taking account of any added severity for previous convictions. Although some have seen this as a “discount for bulk offending”, a cumulative approach would be impractical, and any attempt to “gear” severity of sentence to numbers or types of current offence would be vulnerable to the accident of what happened to appear on the charge sheet. More contested cases could result. The added severity would guard against offenders manipulating hearings for different offences in order to secure a combined sentence.

**2.10** Chapter 1 also highlighted the case for removing the present distinction between community sentences (for which the offences must be “serious enough”) and fines (which appear to be designated for the least serious crimes). This distinction should be removed, to make clear that financial penalties (including compensation orders – which, as now, should have priority over fines) can be used freely, alone or in association with other non-custodial sentences, when imprisonment is not necessary. Under the provisions of the (draft) Proceeds of Crime Bill confiscation orders will also be available for all offences. Fines can be as punitive in their effect as other non-custodial sentences, and when punishment is the goal should play their full part whenever possible. Custody should continue to be used only when no other sentence would be adequate in relation to the seriousness of the offence or offences, taking into account any continuing course of criminal conduct.

## Chapter 2

### THE PRINCIPLES OF SENTENCING

**2.11** Subject to the necessary guidelines (see below) these principles would guard against sentences disproportionate to the seriousness of the latest offending, taking account of the previous history. They would make a clear distinction between custodial and non-custodial sentences, while increasing flexibility in the use of the latter. They would justify targeting the more intrusive and intensive sentences on the offenders whose records showed they were most resistant to change and most in need of work to prevent re-offending. Such sentences would provide greater opportunities for work aimed at tackling the causes of the criminal behaviour, and removing or ameliorating them. There is less evidence to suppose that increased severity would have a greater deterrent effect, on recipients of the sentence or others who might (or might not) notice the effects of applying this principle. A possible deterrent effect, cannot be ruled out in the face of the incomplete knowledge on this subject. Greater severity of sentence for persistent offenders would also increase the “incapacitation” effect on crime, for a period.

#### (ii) Increased severity for persistent offenders

##### *Options*

**2.12** By how much should severity of sentence increase, in relation to what sort of previous convictions, and how should this be laid down? Offenders’ careers typically include a broad range of offences (see Appendix 3). Property crime (theft and burglary) tends to predominate in the longer careers, even of those who commit violent and sexual offences. The link between drug misuse and criminality is now well established. Special sentences for persistent offenders have been abolished, mainly on the justifiable grounds that the maximum sentences now available are high enough to embrace sentences of sufficient severity for even the most persistent offender. The review has found no grounds for reinventing them. Within the maximum available, by how much should a sentence increase when the offender has the worst possible criminal record, and how are the worst records to be distinguished from the least bad?

**2.13** A new statutory presumption that sentence severity should increase, as a consequence of previous convictions, would be insufficient on its own to secure a consistent, predictable and transparent approach. The review has considered three ways of buttressing a new presumption:

- a simple “totting up”, points, system, such as exists for motoring offences;

- mandatory minimum sentences;
- a more graduated approach to “totting up”, with outer limits to guard against sentences disproportionately severe in relation to the crimes involved.

**2.14** A simple “totting up” system, with automatic consequences, such as works for motoring offences, is not readily transportable to the generality of crime. The system seems to work for many motorists for two main reasons. First, roadside cameras have substantially increased the likelihood of being caught; and second, a large proportion of motorists are very keen to avoid disqualification from driving. The population whose behaviour is influenced by “totting up” for motoring offences is very different from the relatively small population of persistent criminals whose conduct is frequently unrestrained by the actual, or perceived likelihood of being caught and punished, or the likely severity of the sentence. That said, if persistent criminals perceived a greater likelihood of being caught, and greater certainty of punishment, they might behave differently.

**2.15** There would be practical difficulties in adopting a simple, accumulating, points system for the generality of crime. Offences would have to be graded, according to seriousness, and allocated a suitable number of points. Seriousness scales of that sort are desirable and feasible in any event. The problem arises as points accumulate for a persistent offender so that – eventually – a relatively minor offence can trigger a massively severe sentence. “Totting up” works for the relevant group of motoring offences because they are often absolute offences and the ultimate sanction of disqualification from driving is clearly justifiable by the accumulated course of conduct i.e. the offender has shown unfitness to drive. What sentence is needed on conviction of a not very serious theft, of low value, following spasmodic offending of varying seriousness and nature over a long period is harder to say and needs more sophisticated decision making aids than simple arithmetical accumulation. A cumulative approach would lead to disproportionate outcomes. As a general principle, the increased severity in sentence must retain a defensible relationship with the offences under sentence, within the maximum available for the offence. A more refined approach to “totting up” than would be possible with a points system is needed.

**2.16** Some mandatory minimum sentences for repeated offending already exist (sections 109, 110 and 111 of the Powers of the Criminal Courts

## Chapter 2

### THE PRINCIPLES OF SENTENCING

(Sentencing) Act 2000). They require sentencers to pass a sentence at least as severe as that laid down in the statute, for repetition of the same types of offence (so far, sexual, violent and drug offences, along with burglary, have been dealt with in this way). Mandatory minimum sentences are also laid down for specified offences in the Federal, and several States' jurisdictions in the USA. Many contributors to the review have argued against these sentences, on the grounds that they are inherently likely to result in some disproportionately severe sentences for the latest offence. There are also more fundamental questions about how much detail should be set out in primary legislation; how much should be left to judicial discretion; and how that discretion should be governed and accounted for. Since early in the last century, Parliament has given the Court of Appeal responsibility for achieving consistency in sentencing, through its function of hearing appeals against sentence. In practice, the "tariff", or "going rate", of punishment, in relation to offences of different seriousness, has been made a responsibility of the Court. Parliament, of course, remains sovereign. As a matter of policy, a decision must be made whether to go further down the road of specifying in statute what severity of sentence should be consequent on what sort of criminal record; or to pursue an alternative. A new approach to sentencing guidelines seems to offer the better prospects. A general case for these is made in Chapter 8. In relation to persistent offenders, they could incorporate a more refined approach to "totting up" as follows.

#### *The preferred approach*

**2.17** A court takes into account how recent the previous convictions are, how serious they appear to have been (judged by the sentences passed) and whether there is any evidence that the offender has made serious and genuine efforts to reform. The mixed nature of most persistent offenders' criminality means that less weight should be given to whether previous and current offences are in the same category: it should not matter if the latest offence is theft and the previous record included a mixture of burglary, theft, violence, drug offences, and driving while disqualified. The key point is whether the previous offences justify a more severe view, and more intensive efforts within a punishment of greater severity to prevent re-offending. The relevance of previous convictions to whether there is a continuing course of criminal conduct should be taken into account. Completely disparate and remote previous convictions should be given less weight. Information systems at present

are unlikely to be able to tell the court much about the seriousness of the previous offences, but the offence category and sentence passed will be good indicators. In future, a short record of the sentence passed and reasons for it should be kept and filed electronically so that it becomes part of the "dossier" on an offender, and available at any ensuing appearance.

**2.18** The amount and rate at which a criminal record should (presumptively) increase sentence severity, and subject to what limits, will need to be spelt out in guidelines. Those guidelines should set out presumptive "entry points" for sentences, in relation to offences graded according to described levels of seriousness. Seriousness levels would be defined within, as well as between, categories of offence (so as to distinguish, for example, between defined seriousness levels of different offences of burglary or robbery, and show where they overlapped). The "entry points" would be artificial, in that they would assume, as a basis for structured decision making, no prior adjustment for aggravating or mitigating factors. They would make no allowance, for example, for a guilty plea, which would be dealt with separately in the guidelines, along with other aggravating and mitigating factors not covered in definitions of seriousness.

**2.19** The guidelines would then specify the way in which previous convictions should impact on the "entry point". Absence of previous convictions (or a small number that were old or irrelevant) would reduce severity of sentence below the "entry point". Relatively few previous convictions, showing a sufficiently recent disposition to criminality of about the same level of seriousness as the current offence, would justify adopting the "entry point". Larger numbers of previous convictions, of the same or greater apparent seriousness as the current offence, would increase severity of sentence progressively, within a range to be specified.

**2.20** To avoid disproportionate outcomes, either too lenient or too severe, the guidelines would indicate the permissible range for a given level of seriousness. The following examples are illustrative only. Where the "entry point", for example, was a prison sentence of 18 months, a first offender might receive a non-custodial sentence, but for an offender sentenced on a large number of sufficiently recent occasions for offences of about the same level of seriousness, the sentence might be three years. In a particular category of offence, such as domestic burglary (for which the maximum sentence is a 14 year prison sentence), the "entry point" for the highest level of seriousness would be

relatively high – perhaps five years – and the worst sort of criminal record could take it into the upper reaches of the permissible sentence. Such cases would be relatively rare. In 1999 for example, in the Crown Court, out of 8,596 people (over 18) sentenced to immediate custody for burglary in a dwelling there were only three sentences (of 12 years) anywhere near the maximum (of 14 years). For receiving stolen goods (maximum sentence of 14 years), there was only one sentence of 7 years near the maximum. The key points are that the seriousness of the current offences would determine the permissible range; the range around the “entry point” can be quite wide – of the order of, say, plus or minus 100%; and the effects of previous convictions would always be subject to outer limits resulting from the seriousness of the current offences. The guidelines would be indicative and leave some room for discretion. The giving of reasons for sentence would explain on the record how the guidelines had been interpreted and applied in a particular case. The “entry point”, adjusted for previous convictions, would be the basis for considering any other aggravating or mitigating factors,

(iii) Consistency and freedom from improper discrimination

**2.21** Consistency can be recognised through like cases resulting in like outcomes. The variety of circumstance in criminal cases, however, makes this an incomplete definition, and one which can result in undesirable priority being given to apparently uniform outcomes, regardless of circumstances. A better approach is to seek consistent application of explicit principles and standards, recognising that these may result in justifiably disparate outcomes. The goal is consistency of approach not uniformity of outcomes. This makes consistency difficult to monitor, but not impossible.

**2.22** The desirable effect can be illustrated in relation to the sentencing of women, on which the review has received a good deal of evidence, including the Report of the committee chaired by Professor Lady Wedderburn “Justice for Women”. The principle of equal treatment demands that there should be no preferential treatment as between men and women who commit crimes. That said, as the Court of Appeal (Criminal Division) has already recognised (in the case of Haleth, and a judgement by Watkins LJ in 1982), it should be legitimate to take into account when sentencing, the effect of different sentences on the welfare of children dependent on the offender – not to the exclusion of other factors, but as part of the

picture. The sentencing outcomes will depend on the circumstances of the case as a whole. Public protection or the needs of retribution may mean that a prison sentence is unavoidable. In other cases where imprisonment could have been justified, but a non-custodial sentence would be suitable and adequate, it might be passed instead on the grounds of the harm to dependent children that would otherwise result. The principle should be applied equally to men and women, although the likely effect is that more women than men would benefit. A consistent application of the principle, therefore, will not result in uniform outcomes – but like cases would be treated alike. The Court of Appeal (Criminal Division) has set out the circumstances which may legitimately mitigate the severity of a sentence. In the interests of justice not only being done, but being seen to be done, it would be helpful if these principles were published in a more accessible form, as part of a comprehensive code of guidelines governing the use of discretion. The same grounds for mitigation may not be acceptable from the same offender indefinitely. Record-keeping should be adequate to reveal persistent claims on the same grounds whenever an offender appears on conviction of a further offence.

**2.23** In cases involving offenders from different parts of the community, and especially those from ethnic minorities, cultural, religious and ethnic diversity must be respected, but the general principle applying to levels of punishment should be one of equal treatment, regardless of cultural, religious or ethnic background. Section 95 of the Criminal Justice Act 1991 requires the Home Secretary to disseminate information to criminal justice practitioners, to help them fulfil their duties to avoid improper discrimination. There is no duty to take that information into account, and the Race Relations (Amendment) Act 2000 does not apply to those who pass sentence. Little has been said to the review about the usefulness of the s.95 provisions, but concern has been expressed that the statistical information published is perhaps not sufficient to be sure that individual decisions are free from improper discrimination. That said discrimination needs to be tackled across the criminal justice system as a whole, as sentencing outcomes will be necessarily influenced by the types of offenders brought before the courts. Monitoring outcomes is the key to achieving non-discrimination, and this should involve the systematic collection of data between all criminal justice agencies and appropriate research. In addition, it should be part of all practitioners’ responsibilities to make themselves aware of the information provided by the Home Secretary.

## Chapter 2

### THE PRINCIPLES OF SENTENCING

**2.24** Consistency needs to be monitored. Section 95 of the Criminal Justice Act 1991 also requires the Home Secretary to disseminate information bearing on costs. This can include information about apparent disparity of sentencing outcomes in different geographical areas. Such data can usefully prompt questions in local areas about practice there in relation to others. A danger here is that apparent uniformity of outcome could become the goal, but that would be avoided if the data were used to explore possible unwarranted disparities. The areas at the outlying extremes – whether of apparent severity or lenience – might find they had reason to move towards the norm. The Magistrates’ Association has made efforts to move in this direction by circulating relevant statistics, which is to be welcomed. Although the need may be less great in the Crown Court, there is no reason in principle why the same sort of monitoring should not be attempted. The present duties on the Home Secretary to provide information should be widened to embrace information bearing on consistency.

#### (iv) Transparency

**2.25** In common with the rest of criminal justice, sentencing needs not only to be fair but to be seen to be fair. This means that reasons must be given for decisions, in language that will be understood by everyone involved and ideally retained in a form which enables them to be retrieved for later reference, preferably electronically. It also means that the framework itself should be accessible to everyone. To achieve this, the relevant law and associated guidelines should be continuously available to everyone in their up to date forms. It should not be necessary to go to a large number of sources to understand the framework. This will mean designing a new way of legislating in this area, and proposals for this are made in chapter 8.

**2.26** In addition, more information should be available to the public about how sentencing is supposed to work and how it is working in practice, including local sentencing patterns. A short descriptive guide with the latest key data could be made available on the Internet, and as a leaflet. Popular misconceptions should be addressed directly with the aim of increasing public knowledge. The Lord Chancellor’s Department have taken a step in this direction by developing a ‘Just Ask’ educational website which will explain the basic elements of the legal system, including the workings of the criminal justice system. More structured ways of accounting for the various responsibilities for sentencing would help, and again these are pursued in chapter 8. There are many

other ways, apart from common information sources, targeted information, and improved explanations of sentencing decisions, of creating a culture of transparency with the aim of increasing the public’s level of understanding. A number of ideas have been put to the review, including incorporating sentencing and the criminal justice system into the citizenship curriculum at school; allowing the media (which is the main conduit of information to the general public) to have direct access to judgements via the Internet; more court open days; and allocating responsibility for promulgating understanding of a new sentencing framework to a part of the criminal justice system.

#### (v) Efficiency and effectiveness

**2.27** It is important that any sentencing framework should be ‘workable’, and the administrative tasks and procedures which it gives rise to should be simplified in order to minimise any burdens. Some of these tasks, notably sentence calculation and arrangements for issuing and breaching licences, involve a significant degree of complexity, and therefore significant scope for error. There have been numerous judicial challenges which seek to define fair administrative procedures that impinge on liberty (cf. The Allen Court of Appeal judgement), others have challenged the basis of executive decision making and sentence calculation. The Joint Criminal Justice Inspectorates published last year the report “Information Needs within the Criminal Justice System”, which highlighted the links between efficient administration and just and effective outcomes, outlined a range of areas in which administrative failures had created problems. The proposals which follow, for taking account of remand time, limiting discretionary release to cases in which it is most important, streamlining enforcement systems, and providing a single new sentence for “dangerous offenders” all take account of this goal.

**2.28** To achieve efficiency, full and long-term costs of comparative sentences must be taken into account. The importance of practitioners being aware of costs is already recognised in the framework through section 95 of the Criminal Justice Act 1991, and section 80 of the Crime and Disorder Act. As section 80 recognises, outcomes are as important as costs. It would be helpful if practitioners were aware of both, and if the present responsibility of the Home Secretary to disseminate information about costs to practitioners were extended – at least for those who pass and implement sentences – to include information about outcomes. Evaluative information should be published on the effectiveness of programmes in reducing re-offending.

## Chapter 2

### THE PRINCIPLES OF SENTENCING

**2.29** There should also be an obligation on those who pass sentence to make themselves aware of such information – not in the sense of calling for estimates of cost or to forecast outcomes in particular cases, but to inform their judgement of a proportionate response to the needs of the case. A framework of the sort advocated in this report creates risks that every possible condition and requirement will be thrown into community sentences and the community element of prison sentences. What is required is a more discriminating (in the best sense) approach, which targets the most intensive work where it is needed most, in the interests of protecting the public, and avoids “condition creep” that would be disproportionate in relation to crime reduction as well as punishment. Awareness of costs and outcomes should be an aid to proportionate sentencing.

#### Principled decision making

**2.30** Under the foregoing proposals sentencers would ask themselves, consulting the guidelines:

- what is the acceptable range of sentence severity for this case, bearing in mind the seriousness of the current offence or offences, and any increase or reduction to be made on account of presence or absence of previous convictions;
- within that range, taking account of any other relevant factors that could justify increasing or reducing severity, what sentence would most closely serve the purposes of crime reduction and reparation in this case?

The following paragraphs and diagram illustrate how this might work in practice. Some of what is described may correspond with existing best practice. If so that would be a good thing: bringing law, guidelines and practice closer together is a desirable goal of any reform programme. Also, the best reform programmes go with the grain of existing or prospective best practice.

**2.31** Sentencers would first examine evidence bearing on:

- the seriousness of the current offence or offences (this should embrace the acts committed, the harm caused or risked, and the culpability of the offender in relation to those);
- the relevance of previous convictions (this would embrace their number, how recent and frequent they were, and the extent to which they demonstrated a continuing course of criminal conduct on the one hand, or serious attempts to “get out of crime” on the other);

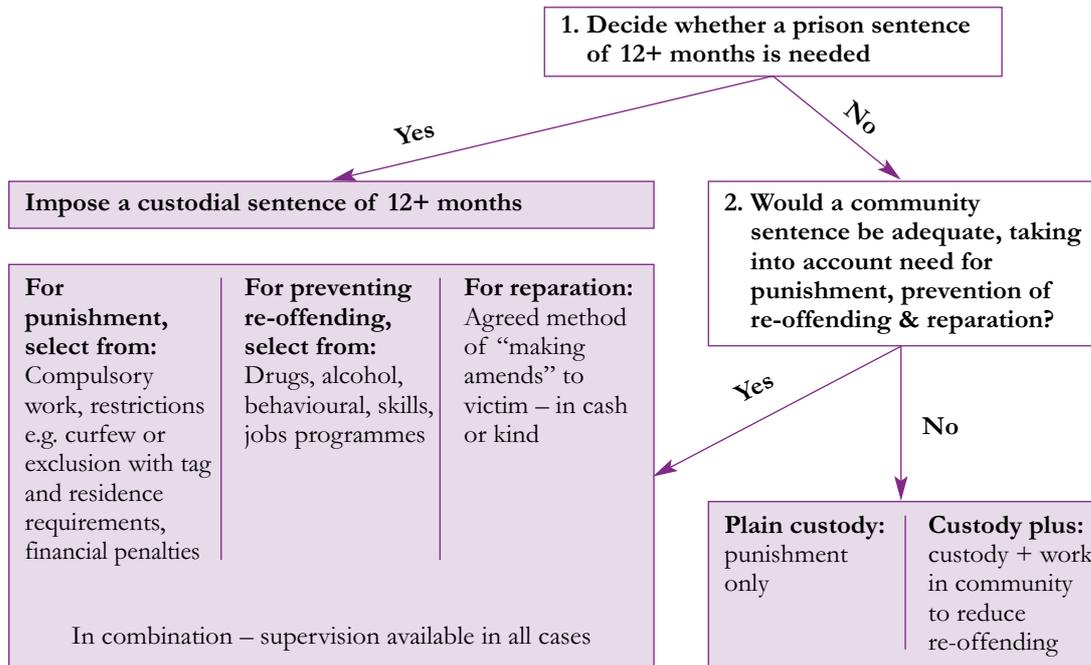
- the assessed likelihood of re-offending and measures most likely to reduce that risk.

**2.32** New guidelines would help sentencers to establish the appropriate relationship between seriousness of offence, previous convictions and severity of sentence, and to take account of any other aggravating or mitigating circumstances. All guidelines would be available in a published Code, with which all courts would comply (see Chapter 8). Claims of mitigation by an offender should be subject to challenge by the prosecution, and courts would have discretion not to accept the same claims indefinitely, regardless of persistent offending. Pre-sentence reports would contain assessments of risk of re-offending, likely levels of resulting harm, and the measures most likely to reduce them. Victim statements, once available, would be considered as part of the judgement of seriousness.

**2.33** “Starting points” for assessing the limit of sentence severity, in relation to different levels of seriousness, would be set out in the proposed guidelines (see paragraphs 2.17 to 2.20). The actual sentence to be passed would depend on whether the net balance of aggravating and mitigating factors found in the case required the sentence to be more or less severe than the “starting point”. Relevant previous convictions would be an aggravating factor, and their absence or paucity grounds for mitigation.

**2.34** Having reviewed this evidence, the court would go through the options as illustrated in the diagram. First, the court would decide whether only a prison sentence of 12 months or more would be sufficient to mark the seriousness of the case, including the effect of any previous convictions. If so, a sentence of a length commensurate with the seriousness, consistent with the guidelines, would be passed. In passing it, and drawing on the assessment of risks and needs, the sentencer would draw to the attention of the prison and probation services the priorities for work to reduce the risk of re-offending (e.g. the importance of efforts to reduce drug or alcohol misuse). The court would also highlight for offenders the importance of their co-operating with such work, so that – on release from prison – any success on their part in addressing their offending behaviour could be taken into account and reduce the intensity (and punitiveness) of the second half of the sentence (details of the proposed new structure of prison sentences of 12 months and over are in chapter 4). Also, at this stage, the court would identify any offenders who were eligible for the proposed special prison

Chapter 2  
**THE PRINCIPLES OF SENTENCING**



sentence available for “dangerous” offenders (see chapter 4).

**2.35** If a prison sentence of 12 months or more was not judged necessary, the court would then consider whether a community sentence would meet the needs of punishment bearing in mind the needs for crime reduction (including public protection) and reparation. An important factor at this point would be the assessed risks of re-offending. In cases of lowest risk, the primary need might be for a suitable, straightforward punishment. The preferred options in this case would be those of a visibly punitive nature, albeit that they may also serve other purposes. These are principally:

- restrictions on liberty, through curfew and electronic monitoring;
- compulsory work;
- financial penalties (compensation or fine, with priority as now to the former, and confiscation).

If a combination of these penalties would suffice, it would be ordered. Only if the maximum loss of liberty and property fell short of the minimum punishment required would a short prison sentence be passed. New short prison sentences are described in chapter 3. In this sort of case, the appropriate prison sentence would be “simple

custody”, on the grounds that no follow-up action to reduce risks of re-offending would be necessary, other than voluntary help, for example to obtain housing and employment. Imprisonment in such cases, where only straightforward punishment is needed, is likely to be comparatively uncommon, judging by the sort of offenders who are most likely to receive a short prison sentence now. They commonly have significant numbers of previous convictions, and many of the features in their lives that are known to be associated with persistent criminality. They would therefore be more likely to qualify for “custody plus”.

**2.36** When considering a possible community sentence, if the court finds that the assessment of risks of re-offending, and consequent harm require work to tackle the offending behaviour at its roots, it would look for appropriate programmes, matching the assessed needs. In such cases, the “menu” for a community sentence will be larger. The first decision would be a choice of the programmes needed to tackle the offending behaviour, and an assessment of how punitive compliance with such programmes would be. If the “punitive weight” of complying with the necessary programmes was inadequate, it would be increased by adding any of the more exclusively punitive components described in the previous paragraph,

## Chapter 2

### THE PRINCIPLES OF SENTENCING

unless there were good reasons to the contrary (for example an offender who was incapable of doing compulsory work). Only if the punitive weight remained inadequate would a prison sentence be passed, and in this sort of case, the prison sentence would be “custody plus” i.e. a set period in custody for punitive purposes followed by a programme under supervision in the community aimed at tackling the offending behaviour. For more detail on this sentence see chapter 3. “Custody plus” would be the sentence of choice for offenders with high risks of re-offending, whose offences and previous convictions were so serious as to leave no adequate alternative, but not so serious as to require a longer prison sentence. There would be a presumption that sentences of less than 12 months contained a “plus” element unless the court was satisfied that it was unnecessary in the interests of crime reduction to order one. The content of the “plus” element would be specified when passing sentence. The goals of the “plus” element would be crime reduction, public protection, and where possible reparation. The needs of punishment would be met by the period in prison, and loss of liberty imposed by compliance with the “plus” programme.

**2.37** In every case where a prison sentence of 12 months or more was not passed, the court would consider the possible scope for reparation. The “punitive weight” of any agreed reparation would be taken into account, along with any ordered compensation. When the court wanted to give an offender an opportunity to demonstrate a commitment to reparation, or compliance with the law, it would be able to make an interim order specifying the undertakings given by the offender, and the period to be allowed for meeting them (see chapter 6 for a description of this order). Sentence would then be passed on the basis of a report from the probation service on the offender meeting the undertakings, and account would be taken of any grounds for mitigating the sentence that would otherwise have been passed.

#### Conclusion

**2.38** A framework based on the principles outlined in this chapter would set outer limits of punishment that could be justified in a case, but leave discretion to choose the sentence most appropriate to the circumstances viewed as a whole, bearing in mind the needs of punishment, crime reduction and reparation. Flexibility might be thought to be at the

cost of some consistency, but no such adverse consequence should result, provided that the principles governing discretion were comprehensive, transparent and accessible; proper monitoring systems were in place; and the results transparently available to all. The overriding principle should be one of consistency of approach, rather than uniformity of outcome.

**2.39** Appendix 8 describes how the “philosophy” underlying this approach is to be compared with others. It would require those who pass sentences and those who implement them to work more closely together in assessing risks of re-offending, deciding on work to reduce those risks, and managing and enforcing the sentences passed. In most cases, the sentence would be viewed as an appropriate punitive “envelope” within which the goals of crime reduction and reparation would be pursued. Thus, if a sentence started in the community, all concerned would know that the offender could be re-sentenced to imprisonment if he failed to comply with the requirements of the community sentence. Equally, a prison sentence would remain meaningful, and capable of being enforced by return to prison in the event of non-compliance, throughout its duration. Where an offender was at any given time during the sentence, and what was required of him, would depend on his (or her) own response to the requirements of the sentence. The focus of all concerned would be on the work aimed at reducing re-offending, and whether it was working.

**2.40** This chapter has set out a general approach to sentencing which would respond to the deficiencies in the present framework that were identified in chapter 1 and have a better prospect of securing desirable results, within principles that are just, fair and transparent, with a prospect of delivering better value for money. A new framework – it will be apparent – will need new types of sentence, and new guidelines for their use. The framework described will also require new ways of enforcing and “managing” the implementation of sentences, in ways which bear down quickly and effectively on non-compliance with requirements made of offenders under sentence in the community, and respond more positively to offenders who show willingness and ability to mend their ways. The following chapters describe how that might be achieved, at what cost, and with what results.

*Recommendations*

- The existing “just deserts” philosophy should be modified by incorporating a new presumption that severity of sentence should increase when an offender has sufficiently recent and relevant previous convictions.
- The principles governing severity of sentence should be as follows:
  - severity of punishment should reflect the seriousness of the offence (or offences as a whole) and the offender’s criminal history;
  - the seriousness of the offence should reflect its degree of harmfulness, or risked harmfulness, and the offender’s culpability in committing the offence;
  - in considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.
- Imprisonment should be used when no other sentence would be adequate to meet the seriousness of the offence (or offences), having taken account of the offender’s criminal history.
- Courts should be free to choose from the full range of non-custodial sentences, while being required to match the punitive weight of such a sentence with the seriousness of the offence (or offences), having taken account of the offender’s criminal history.
- Courts should have clear discretion to pass a non-custodial sentence of sufficient severity, even when a short prison sentence could have been justified – bearing in mind their ability to re-sentence in the event of repeated breach of conditions.
- The so-called “totality principle”, which requires courts to look at all the current offences before the court as a whole, and increase sentence severity accordingly without adding the total suitable for each offence cumulatively, should remain.
- New sentencing guidelines should set out “entry points” for considering severity of sentence, alongside graded definitions of seriousness of offences, and indicate the range of effects that previous convictions should have on sentence severity.

*Recommendations (cont)*

- The proposed new guidelines should look for consistency of approach, rather than uniform outcomes, and recognise justifiable disparity, for example in cases where the offender has young dependant children.
- Section 95 of the Criminal Justice Act 1991 should be extended to require the Secretary of State to disseminate information about the effectiveness of sentencing, as well as its costs (including the contributions of sentencing to crime reduction and public confidence); and about consistency of approach between different areas. In addition, practitioners should be required to make themselves aware of the information provided.
- Unless only a prison sentence of 12 months or more would meet the needs for punishment, sentencers should consider the scope for a community sentence to meet the needs of punishment, crime reduction and reparation.
- Reasons for sentencing decisions, including grounds for any mitigation, should be given and recorded for subsequent retrieval if needed, preferably electronically.
- The Home Office should consider ways of increasing public knowledge about how sentencing is intended to work and how it is working in practice.