

## Chapter 3

# PRISON SENTENCES OF LESS THAN 12 MONTHS

### Introduction: the present situation

One of the most important deficiencies in the present framework is the lack of utility in short prison sentences – those of less than 12 months. Only half of such sentences are served. Release is automatic and the second half is subject to no conditions whatsoever. With Home Detention Curfew, for many the period in custody is shorter than it would otherwise have been. The sentence is nevertheless used for large numbers of persistent offenders, with multiple problems and high risks of re-offending, whose offences (and record) are serious enough to justify a custodial sentence, but not so serious that longer prison sentences would be justified. A more effective recipe for failure could hardly be conceived.

3.2 The Prison Service has little if any opportunity to work on the factors that underlie the criminality in these cases. Predominantly, the sentences serve the needs of punishment. The time available for anything else is usually extremely limited and the Prison Service has to concentrate on accommodation and containment, within basic prison regimes. As currently constructed, the second half of the sentence is too short to make meaningful programmes after release worthwhile. Some enterprising “Pathfinder” projects, run with the probation service and voluntary organisations, are showing what can be done with prisoners serving short sentences, as part of the development of “What works” in work with offenders to reduce re-offending. The pathfinder project run at Lewes prison in conjunction with CRI (Crime Reduction Initiatives) and the one at Low Newton prison run in conjunction with Durham Probation Service, are good examples of these, amongst others. For prisoners who are willing to co-operate with programmes after release, these show promise of good results. A more supportive sentencing framework, however, requiring more to be done with more offenders, would enable this pioneering work to achieve results on a wider scale.

3.3 The punitive effect of short prison sentences may contribute to general deterrence, and deter some offenders who have not gone far down a criminal career. Persistent offenders, however, are clearly not deterred by the prospects of this sort of punishment – whether because they take no account of being caught, assume they will not be convicted, or simply do not care or think about the

consequences of what they do. For large numbers of offenders who receive these sentences, they are markedly ineffective. Reconviction rates within 2 years of release – at 60% of those released – are higher for these sentences than for other prison sentences. Appendix 3 shows a strong correlation between numbers of previous convictions and the likelihood of receiving a short prison sentence. The sentences are therefore being used in cases for which they are particularly ill-designed and equipped.

3.4 Risks of re-offending among short-term prisoners are broadly similar to those on probation or combination orders. The figures for community service orders are lower. For persistent offenders of this type, whether they receive another community sentence or (very often) another short prison sentence will turn on the court’s view of the seriousness of the latest offence – or a desire to try something different. The short prison sentence is likely to do little, if anything, to protect the communities to which the prisoners will very shortly return, beyond the briefest respite; and little if anything to help or influence those offenders to change their lifestyles and observe the law.

3.5 Short prison sentences have in recent years come to play an increasing part in penal policy, largely because of choices made by sentencers – mainly magistrates. Appendix 2 provides details. Between 1989 and 1999, sentences of less than 12 months for indictable offences and adults above 18, increased from 27000 to 45000 – an increase of 67%. The bulk of the increase was in the shortest of these sentences. Those of under 3 months increased by 176%; those of 3 months and less than 6 months by 89%. Appendix 2 shows the disproportionate increase for female offenders. It also shows that the proportion of prison receptions accounted for by sentences of less than 6 months is correspondingly very high, at 60% of total receptions in 1999. It is not clear why this marked shift has occurred, at a time when non-custodial sentences have themselves become more punitive. One reason may be a feeling that repeated offending following non-custodial sentences leaves no alternative.

3.6 The review has found widespread dissatisfaction with this state of affairs. Sentencers are frustrated at having to pass sentences they know

have such limited effect. The prison service looks in vain for guidance on how to make the best of these sentences. The probation service feels, and is, powerless until the offender re-offends. Other participants, for example in the employment service, who are involved in the resettlement of these prisoners, wonder about their purpose. The results are the worst aspect of the so-called “revolving door”. The mischief lies not in the revolving door itself, but in the lack of any material impact on either side of it.

3.7 Some argue that many of those now receiving these sentences could equally well be dealt with through a community sentence. From recent trends, as shown in Appendix 2, it does look as if many offenders of this type were dealt with in that way, until the mid 1990s. Even taking things as they now are, in terms of punishment levels, the continued strengthening of community sentences, including the availability of curfews with electronic monitoring, drug treatment and testing orders, and stricter use of sanctions (including imprisonment) following breach of conditions, could justify greater use of community sentences than at present. Some other measures proposed in this report, including in the medium term the possible development of an “intermediate estate” to house offenders in the community (see chapter 5), could contribute to such a shift. Meanwhile however, short prison sentences will continue to be appropriate for many offenders. The question is: what form should such sentences take?

3.8 The main need is to provide a structured framework for work with the large number of offenders who persist in criminality, but not at a level of seriousness requiring longer prison sentences. This need could be met by requiring those who serve short prison sentences also to undertake programmes under supervision in the second part of their sentence, after release from the custodial part, under conditions, which – if breached – could lead to return to custody. Those programmes would be of the same sort as those that are being developed by the prison and probation services for offenders generally – whether under prison or community sentences. They would include

- “treatment”, for drug or alcohol abuse, mental health problems etc;
- “cognitive” programmes, aimed at changing offenders’ attitudes and consequently their behaviour;
- “skills” training, aimed at increasing the offender’s ability to be self-supporting, and

gainfully employed, including basic skills like numeracy and literacy;

- “resettlement”, including help with accommodation and employment;
- “relationships”.

Unless efforts of this sort are made, for many offenders receiving these sentences the chances of re-offending and returning to prison are all too high. The focus of the post-release programme would be on reform, resettlement, and public protection, including tough enforcement. Protective measures like curfews and electronic monitoring should also be available, but compulsory work would only be used on a small scale as part of a training programme, or as a means of making reparation to victims or the community. The increased involvement of voluntary organisations, and volunteers (for example as mentors), in partnership with the prison and probation services, will be essential in much of the work to prevent re-offending and support resettlement.

### A new short term prison sentence

3.9 Various ways of re-defining short prison sentences, so as to add compulsory programmes in the community to a period in custody can be conceived. Sentences of less than 12 months could be structured as they are now – with half served in prison, but the second half made subject to conditions. In many cases, however, the supervisory period would be too short to enable an impact to be made on re-offending. In order to gain that impact, sentence lengths could increase unjustifiably. Also, a simple change of that sort would greatly increase the severity of the existing sentences, not just through the new conditions and programmes, but also through the liability to serve the whole term in prison if conditions are breached – which cannot happen now.

3.10 An alternative approach would be to make prison sentences of less than 12 months consist of more variable constituent parts. To achieve an impact on the risk of a persistent offender re-offending at least six months is needed. If the minimum supervisory period were six months, the least severe short prison sentence would consist of a minimum period in custody (say, 2 weeks) and six months under sentence in the community. Potentially (for example if recalled to prison soon after release for breach of conditions) such a sentence would be much more severe than all prison sentences of 6 months or less now (which can amount to no more than 3 months in custody, and frequently less).

3.11 In order to “translate” the existing sentences into sentences that would have real meaning, and remain broadly equivalent in terms of severity, a novel approach is needed. The following paragraphs describe such an approach, before considering alternatives.

(i) “Custody Plus”

3.12 Under “custody plus” the period of custody could be any period between 2 weeks and 3 months (the equivalent of an existing 6 month sentence), and the period of supervision could be any period between a minimum of 6 months and whatever period would take the sentence as a whole to less than 12 months. The sentence would be expressed in terms of its total length and its constituent parts. A nine month sentence, for example, could be expressed as 1+8, 2+7, or 3+6. The next sentence in the sentencing hierarchy, above “custody plus”, would be a 12-month prison sentence, of which six months would have to be served before release under conditions (see the following chapter).

3.13 As a result, these prison sentences would mean what they said, instead of half of what they say. Prisoners under supervision would be liable to recall to prison administratively, on breach of conditions, with a right of appeal. In the event of recall, re-release would be possible only for those with 4 months or more left to serve at the recall point, and on the authority of a review hearing. Liability to recall to prison on breach of conditions would make this potentially a sentence almost as severe as one of 12 months under the new framework (see Chapter 4). The most severe short prison sentence, therefore would be 3 months in prison and nearly 9 months under supervision. The least severe short prison sentence, under ‘Custody plus’, would be one of 2 weeks in prison and 6 months under supervision. Sentence severity would therefore be “seamless” in its gradations, notwithstanding the limit on the initial period in custody. Distinctions between co-defendants deserving different sentences could be made, for example, by varying the custodial or supervisory periods, or both.

3.14 The content of the supervisory period would be determined at sentence, on the basis of advice in the pre-sentence report. If work with the offender revealed a need for modification of the programme, this should be possible through a review hearing, provided that the punitive weight of the sentence remained proportionate.

3.15 The custodial period would not only be part of the punishment but would also provide an

opportunity to work with the offender on the content and implementation of the post release plan. If possible, work would begin during the custodial part of the sentence to tackle the offending behaviour, as is already being done in the Pathfinder projects referred to at the start of this chapter. Treatment for drug or alcohol abuse, for example, could start in prison. Partnerships with the voluntary sector, as well as statutory services, have a lot to offer in this area. A dedicated part of the prison estate for this purpose (and perhaps for resettlement of longer term prisoners) could be useful, and help to reduce the risk that overcrowding would disrupt the work with offenders because of the need to transfer them elsewhere to release cell space. This could be considered as part of the review of the “intermediate estate” recommended in chapter 5.

(ii) 3 v. 6 months in custody

3.16 “Custody plus”, as described above, would prevent an immediate custodial period of more than 3 and less than 6 months (real time) from being ordered in court on sentencing. The rationale for this lies in the additional severity of the “conditional release” period of the sentence, which is “convertible” to imprisonment and could be for as long as 11½ months. Nevertheless, the review has found serious concern about the possibility of losing a court’s power to specify custodial periods of more than 3 and less than 6 months in custody as part of the new sentence. This must be taken seriously. If “custody plus” with a 3 month initial limit lacked the confidence of sentencers in the Crown Court, some have indicated that they might resort to 12 month sentences when shorter ones would have been sufficient.

3.17 In 1999, of those aged 18 or over sentenced to custody at the Crown Court, 12% (5,171) received a sentence of over 6 months and under 12 and would therefore have served over 3 and less than 6 months in custody unless they were released early under Home Detention Curfew. Of these about three quarters were given 9 months. In 75% of the cases resulting in more than 3 and less than 6 months of actual imprisonment, the custodial period is therefore 4½ months, or less for offenders released early under Home Detention Curfew. In most cases, therefore, the difference between an immediate custodial period of 3 months in “custody plus”, and current terms of imprisonment, would be a month and a half or less – arguably at least equivalent to the minimum 6 months’ conditional release under “custody plus”, with liability to imprisonment on administrative recall following

breach of conditions. In addition, the differences between the under 6 month, and over 6 less than 12 month populations, are not so marked as to justify a 6 month maximum for “custody plus”. Comparing the (provisional) figures for prison receptions of sentenced prisoners in 2000 – of which the 6 month or less population is five times larger than the over 6 and under 12 – the only real differences are a fall in motoring offences, from 24% to 8% of the longer sentence lengths, and a rise from 6% to 15% in the proportion of burglary offences. The proportion of offenders with a drugs problem falls from 42% to 33%, in the longer sentences, and the proportion of those working full or part-time rises from 28% to 40%.

3.18 If the maximum initial prison term was 3 months, the “loss” of graded severity of sentence would therefore be more apparent than real. An alternative option would be to fix the maximum period in custody under the new sentence at any period less than 6 months. The constituent parts of sentences under 12 months could therefore be any custodial period less than 6 months, and a “conditional” release period of 6 months or more. It would probably be desirable to limit magistrates’ courts to 3 months (the equivalent of their six month jurisdiction at present), and restrict the discretion to go higher to the Crown Court. Apart from the objections of principle already described, this option would add to complexity, and to costs (see Chapter 9 and Appendix 7). Whether any value would result is hard to say. From the point of view of managing the offender population, there would be some loss of value, in being unable to distinguish a population subject to a different regime from others receiving longer prison sentences. Focussing work on short-term prisoners, with a view to protecting the public on their release and reducing risks of re-offending is more likely to be successful if the distinction between them and the longer-term population is not blurred. The adverse effects on the offender of anything up to 6, rather than 3, months in custody can of course be quite significant in terms of potential loss of employment, loss of accommodation and break up of family ties.

3.19 This section has argued that it would be wrong to parade the 3 month limit as a weakening of the existing framework. Taking the proposals as a whole, they amount to a considerable strengthening. A proper debate, and a full understanding of the implications, will be essential on this point. The case for “custody plus” will need to be made persuasively if misgivings about it are to be overcome.

### ‘Plain custody’

3.20 If “custody plus” is to be the new structure for prison sentences of less than 12 months, with a 3 month or 6 month maximum period in custody, the question arises whether all offenders receiving such sentences should receive the “plus” element, or whether courts should have discretion to dispense with it. The review has identified two arguments for allowing such a discretion, and facilitating a sentence of ‘plain custody’ with no post-release conditions or supervision.

3.21 The first argument for allowing courts to dispense with the “plus” element is that not all offenders will need it, and that to require it would divert resources from offenders who do. The thinking underlying this approach is that some offenders commit offences that are so serious that imprisonment is essential, but do not present the factors normally associated with persistent offending. They have stable, secure backgrounds; are first offenders; and appear to have “learned their lessons” as a result of being caught and punished. Although average reconviction rates are high, substantial numbers do not re-offend, and there is everything to be said for targeting resources on offenders with high risks of re-offending (who typically have already shown themselves to be persistent offenders).

3.22 The few cases in which it would obviously be sensible to dispense with the “plus” element are, for example, cases of contempt of court, or involving foreign nationals who would return to their home country on release. Some offenders commit serious offences – for example involving breach of trust – but present low risks of re-offending. 14% of offenders sentenced to 6 months or less, in a sample taken during the review, had no previous convictions; 50% of males had been in their own, or rented accommodation; and 28% were in full or part-time employment (55% were unemployed).

3.23 A second argument for allowing courts to dispense with the “plus” element is that some offenders would not comply with it, so that the attempt would be “not worthwhile”. Some offenders – a small proportion – are seen to be so recalcitrant and unresponsive that there is simply “no point” in trying to work with them in the community. There is no doubt that work with offenders frequently has to be done with long odds against success. If that was a case for giving up, however, there would be no point in any attempts to work with prisoners after release. Dispensing with the “plus” element in the least promising cases

would be a policy of despair and would undermine the purpose of the sentence.

3.24 The balance of the arguments, in principle, lies in allowing courts discretion to dispense with the “plus” element – but not on the grounds of forecast non-compliance with the ‘plus’ element. There should be a high level of expectation that offenders receiving short prison sentences will need supervision after release. In addition to the needs identified before sentence, some of the negative aspects of imprisonment, such as loss of job, loss of accommodation, loss of family or other support, may need to be tackled through resettlement programmes. Short-term prisoners, for example, are likely to feature in the 90% of prisoners who leave prison without a job and the one third of prisoners who lose their job on being sent to prison. They may also be among the three fifths of prisoners with very poor literacy skills, and the two thirds with very poor levels of numeracy. All of these factors are known to be associated with criminality. In the interests of protecting the public, therefore, there should be a presumption that short prison sentences will normally include a period of supervision unless the court finds reasons, which it should state, for not doing so. The safeguard for the public would be the power of administrative recall to prison in the event of non-compliance after release.

3.25 The “plain custody” version of the new short prison sentence would be subject to the same maximum custodial period on “custody plus” i.e. 3 or 6 months. The sentence would be expressed in terms of the period to be served – so that the sentence would mean what it said. Special provision would be needed to preserve the power of prison governors to add days in custody for breaches of prison discipline, which would otherwise be lost as a consequence of losing the “unconditional release” period of the existing sentences. The review has identified two ways of doing this. One would be to allow part of the sentence to be remitted for good behaviour. That would be inconsistent with the rest of the proposed framework, in which “earned remission” plays no part. A better alternative would be to provide that “plain custody” always included an additional number of days that would not be enforced except when justified by breaches of discipline.

3.26 It will be necessary to consider how the new sentencing structure should apply in relation to the maximum sentences for offences, and the jurisdiction of the magistrates’ courts. In principle, if the new sentences have a maximum initial term of 3 months’ imprisonment, they should be

available for all offences having a maximum penalty, at present, of 6 months’ imprisonment or more. For offences carrying a maximum penalty of 3 months’ imprisonment, a restriction to plain custody might be the best option, but other possibilities should be explored. As to jurisdiction, in principle it seems right that magistrates’ courts should be able to pass the new sentences, up to the three month maximum initial term of imprisonment, even though at their most severe such sentences are potentially more punitive in their impact than the present limit of 6 months’ imprisonment. In principle, it could be argued that magistrates’ courts should also be able to pass the new sentences consecutively, so that the custodial period could be up to six months and the supervisory period up to 12 months. This should be considered further, however, alongside the recommendations of Lord Justice Auld’s review of criminal courts.

#### *Recommendations*

- **Prison sentences of less than 12 months need to be substantially reformed to make them more effective in reducing crime and protecting the public.**
- **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.**
- **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.**
- **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.**

## Chapter 4

# PRISON SENTENCES OF 12 MONTHS OR MORE

### Introduction: the present situation

Half of an existing prison sentence of twelve months or more at present has to be served in prison, unless the prisoner is released, at the discretion of the prison governor, under the Home Detention Curfew scheme. If the sentence is of four years or more the prisoner's release depends on a decision by the Parole Board, until two thirds of the sentence have passed, at which point the prisoner must be released. All prisoners released from these sentences are subject to conditions which last until three quarters of the sentence have passed. At that point the offender is free of conditions. If convicted of a further offence committed after release, and before expiry of the sentence, the offender may have the outstanding part of the sentence, from the date of the offence to the expiry of the original sentence, activated by the court sentencing for the new offence. The origins of these sentences are to be found in the report of the review of parole, chaired by Lord Carlisle whose report was published in 1988 (Cm 532). As a summary of the relevant issues, the Report remains highly informative and illuminating.

4.2 Lord Carlisle's review was constrained by the then existing framework for sentencing. His committee was asked to re-design arrangements for parole – and did so – but not the sentences within which parole operates (see, for example, paragraph 235 of the Report). The Criminal Justice Act 1991, broadly speaking, implemented the Carlisle committee's recommendations as they stood. A wholly new structure would have been introduced by the Crime (Sentences) Act 1997 (sections 10 to 27), but those provisions were repealed, not having been implemented, by the Crime and Disorder Act 1998.

4.3 The ideas underpinning the Carlisle Committee's recommendations were that prison sentences should be served partly in prison and partly in the community; and that parole (discretionary release) should be reserved for the most serious offenders (i.e. those serving sentences of four years or more). The complications resulting from release being either automatic at "half time", or at the discretion of the Parole Board from the half way to the two thirds point; and from the last quarter being "free" but "activatable" on conviction of a further offence, probably result from the lack of a more fundamental review of sentencing as a

whole. Such a review – as the current one has found – would have needed to address the design of the prison sentence from first principles, with the aim of arriving at something less complex and more effective.

4.4 The changes that would have been made by the 1997 Act, had they been implemented, were driven by different ideas: "truth in sentencing" (so that time served in prison would have been closer to the time specified in the sentence); and "earned remission" (so that prisoners could have been released early, at discretion, on grounds of good behaviour).

4.5 Special provisions apply to violent and sexual offenders. The supervision of offenders convicted of sexual or violent offences may be extended where the court decides that a longer period of supervision is necessary to prevent further offending and secure rehabilitation (section 85, Powers of Criminal Courts (Sentencing) Act 2000). Supervision may be extended for up to ten years in the case of a sexual offence, and five in the case of a violent offence (provided that the offender receives a prison sentence of four years or more). Violent and sexual offences are defined for this purpose in section 161 of the Act.

4.6 Other provisions enable courts to impose custody when they would not otherwise have been justified in doing so, or to impose a longer sentence than would otherwise have been justified, when they identify a need to protect the public from serious harm from an offender convicted of a violent or sexual offence (sections 79 and 80 of the Powers of Criminal Courts (Sentencing) Act 2000). Where the maximum sentence for an offence is life imprisonment, courts also have the discretion to pass that sentence and should do so (according to guidance from the Court of Appeal (Criminal Division)) when the offence and associated risks are serious enough.

4.7 Taking the present framework as it is, there is no obvious reason why the last quarter of a prison sentence should have an effect on the offender only if he/she commits a further offence during it. An alternative presumption – that the sentence should run its full course so that supervising services can act if necessary right up to its expiry – is likely to create more confidence and increase the effectiveness of work to reduce re-offending. As

things stand now, some sentencers have said they find it difficult to read out to offenders in open court, as they are supposed to do, the precise effect of the prison sentence they have passed, because doing so undermines so much – for all listeners – the effect of their decision.

**4.8** Making the supervisory period of the existing sentence run to its expiry would make these prison sentences more “real”, and increase the opportunities for crime reduction through work with the offender and use of restrictions on liberty. It would also be more punitive, because of the extended conditions and requirements, and liability to recall to prison for breach of them. Keeping an equal division between time in custody and time in the community is a reasonable starting presumption. There is no reason why someone who receives a longer sentence should be liable on that ground alone to spend more of it in prison than someone serving a shorter sentence. An equal division also provides a sound footing for work to prevent re-offending after release. Including the supervisory period as part of the prison sentence enables offenders who breach conditions to be returned swiftly to prison. The sentence is genuinely, therefore, and in its entirety, one of imprisonment – served partly in prison and partly in the community – the requirements for the community element being determined by the offender’s behaviour.

**4.9** Supervision following prison also needs strengthening. Making supervision run for the whole of the second half of all sentences would at least double its length in all cases. Content, however, is even more important than length. A prisoner’s “re-entry” to the community is a crucial moment, in terms of protecting the public and guarding against re-offending. Policies have long been in place which recognise this and call for work by the prison and probation services to plan an offender’s sentence, including the post release period. But the idea of a prison sentence that is served partly in prison and partly in the community, combining work inside prison and in the community “seamlessly” to reduce re-offending, has not taken root. Probation staff tell of offenders who on release from prison do not understand why they have to report to the probation service at all, and who feel that they have “done their time” and should be left alone. A recent joint inspection by the Prison and Probation Inspectorates is likely to show that even where there is an obligation on the probation service to provide supervision after release (all sentences of 12 months or more), resettlement cases are viewed as the “poor relations” compared with community sentences and

very little pre-release planning is being undertaken.

**4.10** The introduction of Home Detention Curfew (HDC) has rapidly increased the availability of curfews with electronic monitoring, as part of a “package” of controls on release but its capacity to support resettlement objectives is under-exploited. A great deal can be done to make release planning, and management of prisoners’ return to the community, more effective, buttressing curfews, and electronic monitoring where necessary, with programmes to meet identifiable needs.

**4.11** Reconviction rates increase with the length of period after release (see Appendix 6). Risks of “relapse” have been identified in offenders who appear to have done well in treatment; and the probation service is developing “booster” programmes to reinforce the impact of earlier ones. Longer periods under enforceable conditions after release will enable the impact on offending behaviour to be sustained in this sort of way, to bring re-offending down.

**4.12** The present framework is not conducive to maximising performance in this important respect of resettling prisoners in the community. Changes could increase the likelihood of prisoners returning to the community with appropriate conditions, geared to completing work begun in prison to reduce re-offending, and to managing any risks to the public. The prison and probation services are showing how this can be done in relation to the most serious and dangerous offenders.

**4.13** This chapter looks first at sentences of 12 months or more, as they apply to the majority of offenders, and secondly at the sentences available for the more dangerous offenders from whom the public needs special protection.

### **A new custodial sentence of 12 months or more**

**4.14** It continues to make sense that prison sentences should be served partly in prison and partly in the community, so that resettlement and behaviour after release can be steered and monitored under conditions whose breach may necessitate return to prison. But to make prison sentences more meaningful and effective, they should be served in full. The first half should always be in prison. Whether any part of the second half need be in prison should depend on the offender’s compliance with conditions imposed on release. Those conditions should be based on up to date assessments of risks, and of needs for continuing work to prevent re-offending and

protect the public. Legitimacy and transparency would be served by the courts having more say in the content of the second half of the sentence. A review by the court before release, to determine – on advice from the prison and probation services – the content of the second half of the sentence would stimulate better pre-release planning and exert more transparent leverage over the offender's future behaviour (see chapter 7).

4.15 When sentencing an offender to a prison term of twelve months or more, under this new approach, a court would:

- indicate to the prison service, from the assessment of risks and needs in the pre-sentence report, the type of work needing to be done to reduce the risk of re-offending, and
- explain to the offender that the weight of the conditions to be applied during the second half of the sentence will depend on how well he/she co-operates with the prison service's work, and that those conditions could be onerous in the event of non-compliance or poor progress.

These steps would make visible to the offender, the public, and the prison and probation services, what the court expected of the sentence, in terms of efforts to prevent re-offending. This should stimulate and energise the process, and provide a basis for review, before release into the community.

4.16 Before such an offender was released, the prison and probation services would together design a "package" of measures to be required of the offender after release, depending on their up to date assessment of the risk of re-offending and the need for further work to reduce it and protect the public. The same range of options as those for a community sentence would be available: curfew, exclusion and electronic monitoring; residence requirement; attendance at treatment or other programmes aimed at changing criminal behaviour or improving job related skills; supervision to monitor and enforce the programme and provide other support aimed at preventing offending. The conditions would be geared to crime reduction and public protection as well as resettlement and rehabilitation. Compulsory work could only be used on a relatively small scale for the purposes of training or reparation. The Prison and Probation Services would consult other statutory voluntary and independent agencies in the design and delivery of suitable programmes, and involve them where possible and desirable. Other standard conditions, listed below, would apply as they do now.

#### STANDARD CONDITIONS

While under supervision you must:

- i. keep in touch with your supervising officer in accordance with any reasonable hours that you may from time to time be given;
- ii. if required, receive visits from your supervising officer at your home at reasonable hours and for reasonable periods;
- iii. live where reasonably approved by your supervising officer and notify him or her in advance of any proposed change of address;
- iv. undertake only such employment as your supervising officer reasonably approves and notify him or her in advance of any proposed change in employment or occupation;
- v. not travel outside the United Kingdom without obtaining the prior permission of your supervising officer (which will be given in exceptional circumstances only);
- vi. be of good behaviour, not commit any offence and not take any action which would jeopardise the objectives of your supervision, namely to protect the public, prevent you from re-offending and secure your successful reintegration into the community.

4.17 The probation service would put proposals, developed jointly with the Prison Service, to a review hearing of the appropriate court (see chapter 7 on review hearings). The court would decide whether to endorse them or commission advice on further options. Once satisfied, the court would explain the effects of the programme to the offender, the importance of compliance with the requirements, and the likelihood of return to prison for non-compliance. If necessary, the court could order a further review hearing, to review progress, at a fixed interval after release. The intensity of the "package" could vary during the remainder of the sentence, if the offender's behaviour justified modification of it. Good progress by the offender should enable the probation service to apply for a review hearing for the purpose of lifting sanctions no longer needed. Low levels of compliance should result in applications for tougher sanctions, unless the failures were so serious as to justify immediate recall to prison. If recalled the offender would be entitled to a review hearing 12 months from the date of recall to determine suitability for re-release. That review hearing would also set the date of any

future hearings. In the longer periods of supervision the more intensive programmes would be completed well before the end of the sentence. Where continuous risk and needs assessment showed that further work was necessary, however, “booster” programmes would be provided, if necessary with the authority of the court through a review hearing.

**4.18** Under this approach sentences would “mean what they say” and – more importantly – the second half of the sentence would be much more effective, through its extra length, greater attention to post-release conditions, and extended likelihood of recall to prison if conditions are breached. The changes proposed would increase the punitive weight of the sentence, which raises questions about sentence length. These are discussed in chapter 9.

#### Discretionary release?

**4.19** Home Detention Curfew (HDC) and parole currently provide for release at discretion, rather than at points fixed by the court. The argument for HDC is that it enables curfew with electronic monitoring to facilitate re-settlement of those prisoners judged “safe enough” to release before the normal time has been served. For sentences of less than 12 months, HDC provides a form of controlled release that would not otherwise be available at all. The case for the existing parole system is that it enables prisoners serving the longest sentences to be kept in prison for longer than others, if their continued detention is necessary to protect the public. The rationale for this is that those serving the longest sentences present the greatest risk to the public and should therefore be liable to spend a longer proportion of their sentences in prison. What sort of discretionary release systems, if any, should there be in a new framework?

**4.20** The main case for discretion to release prisoners “early” is that a prospect of early release can provide prisoners with an incentive to co-operate with programmes in prison aimed at reducing risks of re-offending. To the extent that any increased co-operation enables them to make better progress than would have resulted otherwise, risk of their re-offending could be reduced. Another possible argument, for discretion to release early in order to aid prison discipline, is not strong when viewed as a whole: good behaviour in prison, induced by a desire for early release, is unlikely to be a reliable guide to behaviour after release. For disciplinary purposes, it is better to use other means of creating incentives within prison regimes, and to retain existing powers to add days to the prison

sentence for misbehaviour. “Earned early release” may be helpful in prison management, but if not accompanied by strict risk assessment, can increase crime. To combine the two approaches would be confusing and potentially frustrating, for example to a prisoner who behaved well but was still assessed as high risk so could not be released. The case for discretion to release prisoners “late” is that the risk of their re-offending can be delayed. It is interesting to note, from an analysis of prisoners discharged from sentences of 4 years or more (but less than life) in 2000, that a large proportion – around 40% were released on or around the halfway point.

**4.21** Before examining the arguments for “early” or “late” release, it is necessary to look at the different ways in which discretionary release systems can be constructed. The review has examined three possibilities:

- discretion to keep some prisoners in prison for longer than others who are released automatically;
- discretion to release people earlier than the automatic release date (like HDC);
- discretion to release people during a period which “straddles” symmetrically the normal release date (such as exists in the Detention and Training Order for young offenders).

Any of these would be possible. If the first applied to all prisoners it would result in more prisoners being kept in custody for longer than at present (all other things being equal); and the second would result in some being released earlier; the net results of the third would depend largely on how discretion was exercised, and especially on how much caution was exercised over risks of re-offending. For modelling purposes, the review has adopted the last of these, as one that is well suited to the purpose of determining release in relation to risks of re-offending, without any presumption as to whether prisoners as a whole should stay in longer or come out earlier. Three scenarios have been evaluated: a “severe” approach, resulting in average prison terms of more than half the sentence; a “lenient” approach, resulting in average terms of less than half; and a “neutral” approach, in which early and late releases cancel each other out (see Appendix 7). But whilst this was a useful model to adopt for the modelling and costings work, it also showed how difficult it is to construct suitable ‘windows’ around the half way point. Any workable system will inevitably include possible anomalies where, for instance, someone getting a longer sentence could be let out earlier than someone receiving a shorter sentence.

4.22 Points to bear in mind when deciding whether and in what circumstances to allow for discretionary release include the following.

- Any discretionary release system is likely to detract from the finality of the court's sentencing decision, and create uncertainty about the punitive outcome of the sentence. This could be bad for victim and public confidence.
- All risk assessment includes "false positives" as well as "false negatives" – so some who would not have offended will be held unnecessarily, while some released will offend, creating additional victims and undermining public confidence. Extra care to avoid either of these risks will only increase the other.
- A requirement for a prisoner simply to "complete the programme" in prison would not be enough. The risk assessment would be vital. A prisoner who did all asked of him/her, but was refused release on grounds of risk assessment, is likely to be very unhappy and potentially disruptive.
- If completion of programmes was a pre-requisite for release, it could be argued that programmes would need to be equally available to all prisoners, in order to be fair. Although that would be a good thing in itself, it could prove difficult to achieve in practice.
- Discretionary release systems consume a lot of time, effort, energy and resource, focussing on deciding the "right" release date. Yet, the "added value" of marginal changes in release dates, in terms of the effect on an offender's criminal career, is likely to be extremely small, and in the case of shorter sentences where the range of possibilities will be small, any effect would border on the negligible.
- The content of the post-release programme, including the conditions and requirements to be made of the offender and the seamless continuation after release of work to prevent offending and protect the public, is likely to be much more important than the precise date of release. Requiring resources to be devoted to "getting the release date right", within limited budgets, is likely to divert energy and resource from the much more important tasks of seamless pre and post release sentence planning.
- The net effect of a "neutral" release system, like the Detention and Training Order for young offenders, will depend on how discretion is used. If decision-makers were cautious, the net effect would be to increase the average time spent in custody; if they were more prepared to take risks, average time in custody would reduce. In both cases, however, a proportion of those released

(who would be greater in number in the second instance than in the first) would offend when they might have been in custody.

- Discretionary release systems have implications for public confidence, through the inevitable loss of transparency over the time to be served in custody.

4.23 The contributions of variable release systems of this sort to crime reduction and public confidence are therefore highly dubious. Their administrative costs are inescapable; and the long term effect on the need for prison places is hard to estimate. Looking at all the various factors, the balance lies in limiting discretionary release systems to those offenders who pose the most significant threat to the public, and whose continued detention beyond "the norm" can therefore be justified. For the bulk of prisoners, fixed release points are better able to meet the needs of punishment and crime reduction. Focussing on fixed release points, for most offenders, is necessary and helpful for effective management of a prisoner's return to the community, under suitable restrictions and conditions. Fixed release will avoid some of the costs of discretionary release systems whose effects on offending are likely to be small – and not entirely positive. Fixed release will also make it easier to concentrate on the more important task of managing resettlement in ways that sustain the sentence in the community and protect the public, and enable the prison and probation services to continue in the community work begun in prison. By comparison with what exists now, prisoners would have the additional incentive to co-operate in prison with programmes to prevent re-offending, in order to minimise the conditions and programmes likely to be imposed after release. Other incentives can be used as part of prison regimes and privileges.

4.24 With fixed release dates, the effects of HDC would in effect be "rolled forward" into the second part of the prison sentence. Apart from the relatively small numbers receiving short periods of imprisonment without supervision on release, the effects of HDC would be achievable within the redesigned custodial sentences, which would focus more directly on pre-release planning and programmes (including curfews with tagging) to protect the public and prevent re-offending as they re-enter the community. The loss of early release through HDC would create additional costs and increase the prison population, in the absence of any offsetting changes. This is taken into account in Chapter 9 and Appendix 7.

**'Dangerous' offenders**

4.25 Existing powers to deal with dangerous offenders were described in paragraphs 4.5 and 4.6. "Dangerous" for the purposes of this review applies to an offender assessed as having a high risk of committing a further offence that would cause serious harm to the public. Powers to deal with those whose risk to others arises from a severe personality disorder have been considered in a separate review, "Managing dangerous people with severe personality disorder: taking forward the Government's proposals". The Government's proposals were published in the White Paper "Reforming the Mental Health Act" in December 2000. Although these proposals include arrangements for those currently before the courts – for example, improved access to risk assessment and a range of disposals – it is clear they will not cover all of those who are "dangerous" as defined in this paragraph and will not, therefore, sweep away the need for powers of the sort described in paragraph 4.5 and 4.6.

4.26 A "special" type of sentence is therefore needed in a new framework, for offenders for whom the application of compulsory powers under the Mental Health Legislation is not appropriate and for those who do not receive a life sentence. Where a life sentence is available it should always be considered. In some cases its use would not be appropriate, for example when the current offence, the risks of re-offending, and the risks of resulting harm are not so serious as to justify using a life time penalty; but when the risk of serious harm is clearly established, a life sentence may be appropriate, even when the required period in custody, for retribution, is relatively short.

4.27 When a life sentence was not available, or was inappropriate, a new determinate prison sentence would be based on the following characteristics:

- An offender would be eligible for the "special" sentence on conviction of specified violent or sexual offences, and any other criteria needed to establish a threshold.
- Whether to use the sentence in cases where the offender was eligible would depend on the risks of re-offending and the likely seriousness of any resulting harm, as shown through the pre-sentence report and any other available information (e.g. a psychiatrist's or psychologist's report). Only when there were high risks of re-offending and serious harm would the sentence be used. Harm could be defined, as now in s.161(4) of the Powers of Criminal Courts

(Sentencing) Act 2000, in terms of death or serious personal injury (whether physical or psychological).

- When used, the length of the prison sentence would be the same as if the offender had not qualified for the "special" sentence, but its effect would be different. Instead of being released to serve the second half of the sentence under conditions in the community, the offender would be released only at the discretion of the Parole Board, throughout the second half of the sentence. Conditions on release would be set by the Board, which would have the same range of options as would be available in the case of release from "ordinary" prison sentences of more than 12 months.
- In addition, the sentencing court would have power to order an extended period of supervision after release, up to a maximum of 10 years from the normal sentence expiry date or the maximum for the offence, whichever is the lesser. At present, the maximum period of extended supervision is 10 years for sexual, and 5 years for violent offences. Whether to keep that distinction, or adopt a single period of 10 years for both types of offence should be considered as part of the decisions to be reached following the current review of the Sex Offenders Act. Supervision would be extended in any case where there was a strong likelihood that the offender would not be released during the second half of the prison term. Any review decisions during extended supervision would be by the Parole Board (see also chapter 7).

This sentence would replace sections 79, 80 and 85 of the Powers of the Criminal Courts (Sentencing) Act 2000.

4.28 An alternative approach would be to transfer all release decisions from the Parole Board to the courts, as part of the review hearings advocated for other sentences. While that has the appeal of simplicity, it overlooks the special importance of decisions in these cases, and the need for time and expertise in weighing up risks and options, while keeping the needs of the public in mind. Although courts could sit with expert assessors, a busy court schedule is less than ideal for these cases, and it would be better to see how other types of review hearing develop before adding further to courts' tasks. The Parole Board is well suited to these responsibilities, alongside its present responsibilities for life sentence prisoners.

What threshold?

4.29 It will be important to set a threshold for this sentence to ensure that it is reserved for dangerous offenders, and not used inappropriately. Dangerousness must mean high levels of risk, and of resulting harm. The most obvious starting point for determining eligibility for the sentence is the approach adopted by the Criminal Justice and Court Services Act 2000 (section 68). That approach would need further development to establish qualifying offences for the “special” sentence, and (most probably) qualifying prison terms.

4.30 A current review of Part 1 of the Sex Offenders Act 1997 is likely to produce a list of all sex offences considered to carry sufficient risk to justify registration as a sex offender. Sex offences are also under more general review. Depending on these reviews, it might prove sensible to provide that all offenders committing sex offences who are required to register should be eligible for the “special” sentence. No firm recommendation would be sensible at this stage, but the possibility should be examined once the reviews are complete.

4.31 For violent offences, the list of offences in Schedule 4 of the Criminal Justice and Court Services Act could be a useful starting point, although it would need further refinement. In its present form it only includes offences when they have been committed against children under 18. Whether a “list” approach would be sufficient for violent offences would have to be considered further. A more general provision, like section 161(3) of the Powers of Criminal Courts (Sentencing) Act 2000 for violent offences, might be necessary.

4.32 Whatever the definition of the “threshold” offences, there would also need to be a “threshold” sentence. The present “parole” threshold of four years is one possibility, but seems too high for this purpose – at least in relation to sexual offences. Four years is the threshold at present for extended supervision in the case of violent offences. Section 68 of the Criminal Justice and Court Services Act 2000 adopts sentences of 12 months or more as the threshold for violent and sexual offenders subject to its provisions for risk management in the community.

4.33 This is an area where risk of re-offending and likely seriousness of resulting harm will be as important as the seriousness of the current offence. That said, the proposed new sentence is potentially very onerous and punitive, especially if used to its maximum extent. Much turns on how much

discretion should be left to the courts: the lower the threshold, the greater the discretion. The thresholds for violent and sexual offences need not be the same. Sex offenders as a group may pose higher risks of re-offending, which could justify a lower threshold for them.

4.34 Under the proposals in this report, the sentence to be passed will be more severe than it would otherwise have been, if there are sufficiently recent and relevant previous convictions. A possible approach would be to provide that the “special” sentence would be available when:

- The sentence for the current offence(s) was 12 months or more, and
- the offender had been convicted previously of a qualifying offence and had been sentenced to 12 months’ imprisonment or more for that offence.

4.35 More thought needs to be given to the options than has been possible in this review. A new sentence of the sort proposed, however, offers the prospect of a clearer, more transparent way of dealing with the offenders in question. It would clear away the recent ‘undergrowth’ of provisions in this area, notwithstanding the inevitable detail of the qualifying conditions – which could themselves be simplified as part of the process.

#### *Recommendations*

- **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.**
- **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 statutory, independent, and voluntary sectors.**
- **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.**
- **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.**

## Chapter 5

# INTERMEDIATE SANCTIONS

### Introduction

The changes advocated in the previous two chapters would result in the following range of prison sentences:

- under 12 months: sentences would be served in proportions laid down by the court, of up to three months in custody, and in most cases from six months to whatever period would take the total to 12, under specified restrictions in the community, breach of which could result in return to custody;
- 12 months and over: half of the sentence would be served in prison and half in the community, under restrictions authorised by a court, breach of which could result in return to custody;
- dangerous offenders: half of the sentence would be served in custody, release during the second half would depend on the discretion of the Parole Board, and sentencing courts would be able to extend supervision after release for up to 10 years or the maximum for the offence.

5.2 These changes offer the prospect of many benefits, including:

- much more meaningful, and longer, impacts on offenders during the second half of the sentence;
- wholly new impacts on offenders on release from short prison sentences;
- a simpler, cleaner structure, better able to differentiate between the risks and needs posed by different groups of offenders;
- a more transparent set of powers, easier to understand;
- fewer administrative complications, wasted effort, and errors, in calculating time to be served.

Under the proposals in Chapter 2, these benefits should bear down particularly on persistent offenders.

5.3 Two further possibilities have been examined: the scope for “intermittent custody”, which would allow the offender to spend part of the sentence out of prison, for example in order to stay in work; and “suspended sentence plus”, which would combine a suspended sentence of imprisonment with (in effect) a community sentence.

### “Intermittent custody”

5.4 “Partial” or “intermittent” custody has long been advocated by some, as a way of avoiding some of the negative aspects of imprisonment, such as loss of job or home, or damage to family or other relationships. Such a sentence could meet the needs of cases in which spending some time in prison is necessary to mark the seriousness of the criminality, but in which “full time” imprisonment is not judged necessary. “Intermittence” could cover “weekend” imprisonment, or imprisonment for parts of the day or night. The Prison Service already uses Release on Temporary Licence (ROTL) in support of resettlement, before permanent release, primarily for prisoners towards the end of their sentence. In 1999, for example, 256, 179 ROTLs were granted, of which 70,726 were for resettlement purposes such as securing accommodation or employment, undertaking community service, or renewing family ties.

5.5 Release on temporary licence would not be a suitable means of achieving a sentence of “intermittent custody”. Release decisions are for the Prison Service, and if Prison Service staff were deliberately to alter the punitive effect of a sentence by granting intermittent release throughout the custodial part of the sentence, the legitimacy of the court order and the sentence passed would be undermined. “Intermittence” would more appropriately be ordered by the court itself.

5.6 The Prison Service has told the review that, with the existing prison estate and prison population, it would not be able to accommodate a new sentence of intermittent custody. Prisoners under such a sentence would need to be held in local prisons, which are under the greatest pressures. Holding prison cell space vacant for days, or parts of days at a time, in such prisons would be difficult, disruptive and potentially wasteful. “Full-time” prisoners might have to be dispersed, and their regimes disrupted, even more often than at present, in order to ensure cell space was available for prisoners returning from release.

5.7 Much would depend on whether intermittent custody was used for offenders already receiving prison sentences, or for those who now receive non-custodial sentences. Pressure on prison places would increase only if the new sentence drew more offenders into prison – which it might.

## Chapter 5

### INTERMEDIATE SANCTIONS

5.8 The review has taken account of work underpinning the Government's Reply to the Third Report from the Home Affairs Committee Session 1997-98, HC486 – Alternatives to Prison Sentences (Cm 4174). The Committee had recognised both the potential advantages of "weekend prison", in enabling offenders to keep or seek employment, and a number of difficult practical issues to be resolved concerning its implementation. It recommended a feasibility study by the Home Office to see if weekend prison could be made possible without significant extra costs. The Government, in its Response, concluded that from the operational perspective it would be difficult to manage the logistics of such an arrangement, and expressed concerns about possible "net widening". The Government concluded that weekend prison would not be a viable and useful option at that time.

5.9 Limitations in the existing prison estate are a real problem. A new sentence would require a review to establish what sort of prison accommodation and regimes would best suit a "floating" population. The sort of "community prisons" advocated in the Report on Prison Disturbances in April 1990<sup>1</sup> could lend themselves to this sort of sentence. They could also have advantages for the new short prison sentences advocated in this report.

5.10 The possible costs and benefits of intermittent custody are difficult to estimate, and any estimates would in any event be highly speculative. Leaving prison places unoccupied might at first sight appear wasteful, but if they would otherwise have been occupied, at possibly greater expense, that would not be the case. Whether offenders released intermittently would offend during release periods is difficult to say. Equally, it is difficult to say whether longer term re-offending rates would be affected. The effect on public confidence is also hard to judge – a serious offence committed by a released prisoner would cause concern, but that is true of any serious offence committed by an offender under sentence, and reflects general concern over the most serious and persistent offenders, for whom a sentence of intermittent custody would not be appropriate. Much would depend on how it was used.

5.11 The review has been unable to draw firm conclusions from the experience in other jurisdictions of intermittent custody. Short periods in jail are used in the USA, for example as sanctions for breach of conditions in the community. Use of

"weekend imprisonment" in some European countries appears to have faded out.

5.12 The effects of intermittent imprisonment can be achieved in other ways. An offender receiving a community sentence can be required to reside at a named address, including a probation or prison hostel; to attend a designated centre at designated times; to stay at home under curfew, electronically monitored, for designated periods; and to refrain from entering designated areas at any time. This can amount to intermittent "containment in the community".

5.13 An "intermediate sanction", involving serious loss of liberty, but some continuing freedom, can help to deal with offenders in transition – whether from a less restrictive community sentence which needs to be "beefed up", or from imprisonment to a relatively restrictive (but supportive) programme of resettlement. Much can be done without creating new types of sentence. If the goal is to maximise loss of liberty, for punitive or protective reasons, while avoiding some of the negative consequences of imprisonment like loss of home or job, intermittent "containment in the community" could be the better course. Conditions of community sentences, and of the second half of prison sentences, could be used in the new framework to achieve "intermediate sanctions" for those who need them – whether because of the risks they pose in terms of further offending and resulting harm, their needs in terms of supervision and support, or both. An infrastructure of accommodation would be needed, suitable for prisoners after transfer from the prison to the community part of a prison sentence and for offenders serving non-custodial sentences.

5.14 The review has not been able to look closely at the estate that is already available to support, and contain offenders in this "intermediate" state. Probation centres, approved hostels and attendance centres (renamed senior custody centres) are likely to comprise a substantial resource. Maximising the benefits of its use, within the sentencing framework, calls for deeper analysis and review than has so far been possible. Such a review could contribute to the current efforts to integrate more closely the work of the prison and probation services and could be used to explore the possibilities for bringing together the probation service's three 'residential' facilities (above). The outcome of the review would be a clear national

<sup>1</sup> Prison Disturbances April 1990 – Report of an Inquiry by the Rt Hon Lord Justice Woolf (Parts I and II) and His Honour Judge Stephen Tumin (Part II), February 1991, Cm 1456

policy about how such an “intermediate estate” was to be used and developed, in consultation with sentencers, and taking account of their interests. The review would embrace the various uses to which the estate can be put including:

- accommodation
- “treatment” (drug and alcohol misuse, mental health)
- “containment” (with electronically monitored curfew)
- supervision (monitoring and support)
- purposeful activity (including programmes to influence behaviour, improve skills and job prospects)
- scope for using the estate as part of the response to breach of conditions while under sentence in the community (whether under a community sentence or after release from prison).

It would consider how the estate should be organised and run, bearing in mind its potential for those under community sentences, and for prisoners (before or after release), and the opportunities it could provide for joint staffing and management by the prison and probation services. It would need to have an eye on the legal basis for housing different ‘types’ of offender together (for instance those on ‘license’ and those who are accommodated voluntarily). The scope for using ROTL in conjunction with an “intermediate estate” would also be considered, covering prisoners at any stage of their sentence, and not just near the end. Any new developments could be piloted and evaluated.

5.15 This review has found continued support for the idea of “intermittent custody”. Difficulties for the Prison Service would need to be overcome before a new sentence could be recommended with confidence. Acceptability of the idea to a wider public would also need to be tested further, and it would need to be clear whether “intermittent custody” would be used for offenders already going to prison, or for those who do not. Long term planning of the prison estate should establish what sort of local prisons would best meet the needs of short sentence prisoners, some of whom might serve their sentences “intermittently” if a court so ordered. Out of this, the scope for an “intermittent prison sentence”, incorporating a court order for intermittent release for specified purposes (such as work or treatment) should be re-examined. A new “intermediate estate” for offenders under sentence in the community, whether on release from prison or under a community sentence, would not depend on any new sentence being available, and should be

pursued regardless as a means of supporting the new framework and integrated work with offenders. A time frame of not more than 12 months should be set for the proposed review of the “intermediate estate”, and its use and management.

### Suspended sentence “plus”

5.16 A prison sentence may currently be suspended only in exceptional circumstances (section 118 of the Powers of Criminal Courts (Sentencing) Act 2000). Some have argued that this restriction should be removed. The review has not found strong grounds for doing so. If an offence, and previous convictions, mean that a prison sentence has to be passed, because no other sentence would be adequate, a decision not to impose it in practice, so that – provided no further offence is committed while the sentence is in force – the offender entirely escapes punishment, does need to be reserved for exceptional circumstances. Otherwise, the force of a custodial sentence will be lost, possibly along with the importance of reserving it for cases where no other sentence will do. If a court is as confident as it can be that the offender has a low risk of re-offending, but needs a tough punishment because of the seriousness of the offence, it can use its judgement to find the right balance. The fact that imprisonment will in a new framework underpin community sentences should make a significant difference to the perceived “toughness” of the “toughest” community penalties – and the shorter prison sentences will be much more punitive in their effect than what exists now.

5.17 The review has looked at the possibility of creating a new sentence of suspended imprisonment combined with (in effect) a community sentence. In many jurisdictions, notably on the mainland of Europe, community sentences have developed as “conditional” prison sentences. In effect, the prison sentence is suspended, and provided that the community sentence is observed, is never invoked.

5.18 The framework in England and Wales has already taken a substantial step down that route. Section 53 of the Criminal Justice and Court Services Act 2000, when implemented, will require courts, when an offender breaches the conditions of a community sentence, to substitute a prison sentence, taking account of any compliance with the community sentence, unless there are good grounds for not doing so. The new framework advocated in this report would retain that power. One additional power is worth considering. When

passing a non-custodial sentence for an imprisonable offence, the court should be entitled to indicate the length of the prison sentence that, in the opinion of the court, should be the starting point for any re-sentencing following breach of the community sentence. This indication would not be binding on any re-sentencing court but would be a clear warning to the offender about the implications of non-compliance. In this respect as in many others, record keeping and communication systems would need to be up to the task of ensuring that the indication was brought to the attention of the re-sentencing court. The court which heard the case and passed sentence is in the best position to indicate what the starting point for any re-sentencing should be. A clear warning at that time, with the authority of the court, should help to concentrate the offender's mind on the importance of complying with the community sentence, and the severe risks of not doing so. In the event of re-sentencing for breach, the re-sentencing court would consider the starting point recommended by the original sentencing court, and make an allowance for any compliance with the non-custodial sentence.

5.19 Wider recognition that, for imprisonable offences, non-custodial sentences are, in effect, "conditional" prison sentences should enhance their credibility and effectiveness. A new framework could make this even clearer, through the way it was expressed. A visible sanction of imprisonment for breach of conditions, if absolutely necessary, backed up by closer monitoring and tougher enforcement, could justify increased use of non-custodial sentences. A feature of the new framework is the flexibility afforded to sentencers to use their judgement in passing the most fitting sentence, with confidence that if risks materialise, other shots remain in their locker. The Drug Treatment and Testing Order has broken the ground for this: those who succeed on it do well; those who fail may receive substantial prison sentences (if justified by their original offences). The point is that the most severe sanction possible can be withheld, when the circumstances justify it, to be used if necessary later. Judgement and discretion in each case are essential, based on close assessment of risks and the need for public protection. This approach has more to be said for it than any wider use of suspended prison sentences or the creation of a new form of suspended prison sentence in combination with community sentences.

#### *Recommendations*

- **The Home Office should establish a review of the existing "intermediate estate" for accommodating and managing offenders in the community with high risks of re-offending, 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.**
- **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 in future might be sentenced to a form of intermittent custody.**
- **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.**
- **The "conditional" nature of a non-custodial sentence for an imprisonable offence should be emphasised in the design of a new**

## Chapter 6

# NON-CUSTODIAL POWERS

### Introduction: The present situation

Over the past 10 years, there has been a proliferation of new community sentences. Each new sentence contains particular twists and inflexibilities as to content and enforcement. For adults, sentencers now have:

- Curfew orders;
- Probation orders;
- Community service orders;
- Combination orders;
- Drug treatment and testing orders;
- Attendance centre orders (for offenders under 21).

In addition the Criminal Justice and Court Services Act 2000 has introduced (but not yet brought into force):

- Exclusion orders and
- Drug abstinence orders.

It has also renamed probation orders to community rehabilitation orders, community service orders to community punishment orders and combination orders to community punishment and rehabilitation orders.

6.2 This recent growth in new types of orders is not helpful to understanding sentencing. The present law regarding conditions in community sentences is complex and should be simplified and made more understandable to the community, sentencers and offenders. Many of these new orders merely give a new statutory framework to a course of action which could be taken under existing legislation, and the statute book ends up being complicated with further orders which often replicate the virtues and defects of existing orders. Such proliferation also increases the risk of inconsistency. New ideas and developments in the supervision of offenders should, where possible, be incorporated into existing sentences without resorting to the regular introduction of entirely new ones.

6.3 Although the range of community sentences is wider than ever, and their intensity can be greater than before, they are still viewed by many as being insufficiently 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. They were not established, as is common in mainland Europe, as alternatives to imprisonment. Although custody as a consequence of resentencing for breach is available under the current system, the Criminal Justice and Court Services Act 2000 has imposed a new regime for enforcement of community sentences by providing for a prison sentence to be substituted if a community sentence fails through non-compliance. This together with the greater intensity of community sentences (as evidenced by the greater number of additional requirements being attached to orders – see appendix 2) has redefined the nature of community sentences, making them more akin to ‘conditional sentences’. These developments add to the lack of clarity in the present framework, in relation to the aims of community sentences, but also provide an opportunity to re-define the relationship between the different sentences, and how they should be used.

6.4 Little guidance exists on the punitive value to be ascribed to the various non-custodial orders – although the punitive weight is required to be “commensurate” with the seriousness of the offence(s) (section 35 (3) (b) of the Powers of Criminal Courts (Sentencing) Act 2000). Though the stated purpose in the present framework is to arrive at “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. For example, sections 42 and 51 of the Powers of the Criminal Courts (Sentencing) Act clearly state that probation orders and combination orders can be considered desirable in the interests of:

- (a) securing the rehabilitation of the offender;
- or
- (b) protecting the public from harm from him or preventing the commission by him of further offences.”

And yet, sections 37, 46 and 52 of the same Act, say nothing about purposes in the description of curfew orders, community service orders and drug treatment and testing orders. Reparation is notable by its absence from the array of orders available for the sentencing of adults, although concepts of reparation and training have crept into juvenile community disposals. There is a need to clarify the purposes of the various community orders and how they should be used – in relation to the stated aims of crime reduction, reparation and punishment.

6.5 Finally, the value of the threshold splitting financial and non-financial community penalties has become less clear. The “serious enough” threshold may have unintentionally created an impression that fines should be reserved for the least serious cases, which is not the case. As far as statute law is concerned, fines can be imposed with any other punishment and large fines are passed in serious cases in the Crown Court. Fines, have failed to recover their previous share of sentences and there is a possibility that they are not being used to the extent that they could be – though the lack of confidence in the enforcement of fines is likely to have contributed to this. Nevertheless, there is a strong current of opinion viewing the framework as unduly constraining in relation to less serious offences. This is particularly so in magistrates courts, where the current restriction of sentencing options for less serious offences, presents the courts with an unsatisfactory choice to make between a financial penalty – which may seem unaffordable, particularly if the offender already has a string of debts for previous offences – and a discharge, which can seem to give the wrong message – of condonement rather than punishment. There is a case for a more flexible sentencing framework at the lower end of the seriousness spectrum; in which it would be possible for sentencers to respond more easily to the circumstances of offenders with limited

financial means, by routinely imposing a community penalty rather than a fine or where a history of failure to pay fines would justify using non-financial penalties of appropriate severity. This has been recognised in section 59 of the Powers of Criminal Courts (Sentencing) Act 2000, in respect of curfew orders and community service orders only.

### A new community punishment order

#### (i) Description

6.6 The court would have the power to impose a single, non-custodial penalty with specified ingredients. A community punishment order would essentially be made up of the elements drawn from:

- compulsory programmes, aimed at changing offending behaviour, including treatment for substance abuse, and improving skills;
- compulsory work;
- restrictions and requirements, including curfew, exclusion, electronic monitoring;
- reparation;
- supervision – to manage and enforce the sentence and support resettlement.

In thinking about the content of an order, the sentencer should have clearly in mind from the outset, the amount of punishment that would be proportionate, taking account of the current offences and any additional severity for previous convictions. The “punitive weight” should determine how much can and should be done to reduce the risks of re-offending and make reparation. The scope for an additional financial penalty should also be kept in mind.

6.7 Against that background, the sentencer would choose from a ‘menu’ of options. The following table illustrates what those options would be (building on existing provisions), how they would be used, and what their primary and secondary purpose (punishment, crime reduction, reparation) would be.

TYPE	CONTENT	PURPOSES
<b>Supervision</b>	<ul style="list-style-type: none"> <li>• Ensuring compliance with the sentence;</li> <li>• Monitoring offender's response: updating risks &amp; needs assessment, initiating action when necessary, including breach/review hearings;</li> <li>• One to One advice on criminogenic issues: employment, relationships, housing, money management.</li> </ul>	<p><b>Main</b> Crime reduction – through sentence enforcement and provision of support.</p> <p><b>Subsidiary</b> Punishment – loss of liberty through attendance at meetings and compliance.</p> <p>Reparation – where that is an element in the sentence (see below).</p>
<b>Compulsory programmes</b>	<ul style="list-style-type: none"> <li>• Behavioural: aimed at influencing thinking, attitudes and thereby behaviour;</li> <li>• Educational/training: aimed at improving skills, job prospects etc;</li> <li>• “Treatment”: tackling drug or alcohol misuse, mental health problems etc;</li> <li>• Requirement to abstain from drugs, or have treatment for drug misuse, and comply with testing and review procedures.</li> </ul>	<p><b>Main</b> Crime reduction – by matching programmes to needs.</p> <p><b>Subsidiary</b> Punishment – loss of liberty through attendance and compliance.</p>
<b>Compulsory work</b>	<ul style="list-style-type: none"> <li>• Undertaking a set number of hours of work in the community, within a set period.</li> </ul>	<p><b>Main</b> Punishment – loss of liberty through enforced work.</p> <p><b>Subsidiary</b> Reparation – where work is designed to “make amends” to the community.</p> <p>Crime Reduction – where training is combined with the work.</p>
<b>Reparation</b>	<ul style="list-style-type: none"> <li>• An agreed method (by offender and victim) of ‘making amends’ to the victim, or the local community – in cash, kind or through work.</li> </ul>	<p><b>Main</b> Reparation.</p> <p><b>Subsidiary</b> Punishment – loss of cash or payment in kind.</p>
<b>Additional restrictions or requirements</b>	<ul style="list-style-type: none"> <li>• Curfew (with ‘tag’ where appropriate);</li> <li>• Exclusion (with ‘tag’ where appropriate);</li> <li>• Requirement to live at stated address (including hostel);</li> <li>• Other restrictions on movement: avoidance of named persons; confiscation of passport etc;</li> <li>• Disqualification from driving;</li> <li>• Depriving offender of property used for purposes of crime.</li> </ul>	<p><b>Main</b> Crime reduction – through restricted opportunities.</p> <p>OR</p> <p>Punishment – through loss of liberty.</p>

## Chapter 6

### NON-CUSTODIAL POWERS

6.8 The focus of the sentence would be on what, and how much, offenders were being required to do, and for what purposes. The “punitive weight” of the chosen ingredients would be relatively easy to measure in some cases – such as compulsory work and curfew with tag – but more difficult in areas such as compulsory programmes. In those areas, sentencers would need to be aware of the content and requirements of the various accredited programmes. The local probation service would provide the courts with a guide to the programmes

that they offered and the loss of liberty involved. As far as possible the court would indicate when sentencing the extent of the loss of liberty to be incurred, through the chosen ‘mix’ of requirements, and would be required to justify it in relation to the seriousness of the offences and any relevant previous convictions. An outline ‘tariff’ for the ingredients making up the new community punishment order, is illustrated below. (It is not intended to be prescriptive in illustrating possible combinations).

#### Bottom tier

- appropriate financial penalty
  - appropriate reparation
  - supervision directed towards practical but non-intensive efforts to prevent re-offending
- } Alone or in combination

#### Middle tier

- higher financial penalty
  - more substantial reparation
  - compulsory work
  - programmes of moderate intensity to prevent reoffending
  - disqualification from driving
- } Alone or in combination

#### Top tier

- hefty financial penalty
  - substantial reparation activity
  - enforced work (for a longer number of hrs)
  - intensive programmes to prevent reoffending, with enforced attendance at designated centres
  - residence requirements
  - curfew/exclusion (with tag where appropriate)
- } Alone or in combination

The largest combinations at the highest levels would be the most severe and should accommodate quite high levels of seriousness and properly managed risk. The current maximum of 240 hours for compulsory work could be increased, though should not fall below the minimum of 40 hours. The “punitive weight” of the package would be measured by: loss of liberty, or property where financial penalties were involved (see paragraph 6.15); loss of liberty through curfew and requirements for residence or attendance at programmes as measured by number of hours per day x number of days; scale of any exclusion and its duration; and the intensity of compulsory work as measured by hours per week x number of weeks.

6.9 Supervision would become mainly the means of managing the sentence content, ensuring compliance and monitoring outcomes, while providing additional support aimed at reducing risks of re-offending – especially in relation to finding employment or accommodation. Appointments for supervisory purposes would continue to be enforceable by instigating breach proceedings for missed appointments, but the punitive, crime reductive and reparative requirements of the other options would be the core of the sentence, and their implementation the target. Where electronic monitoring was a part of the sentence, probation and electronic monitoring suppliers would be under a general requirement to co-operate in monitoring the compliance of offenders with the actions required of them through the sentence, and to seek remedial action from the court where necessary.

(ii) Supplementary requirements

6.10 Courts would only be able to sentence an offender to undertake a compulsory or accredited programme where the probation service had indicated that the programme was available and the offender was suitable for it. This is similar to the approach taken now with attendance centre orders which can only be made in parts of the country that are served by an attendance centre, and with the DTTO which can only be made on the recommendation of the probation service. The process would also be made more specifically dependent on OASys results. The probation service would advise the court where the OASys assessment had clearly indicated that a programme was appropriate (and the programme was available locally). By providing individual risk and needs profiles, OASys creates new opportunities for courts, on advice from the probation service, to specify in more detail what should happen to the offender (see appendix 6). Initially, the courts are

likely to rely heavily on PSRs to provide them with sufficient information about the new choices available to them, and an offender’s suitability for specific elements or combinations of elements. Courts should have opportunities, however, to discuss with the probation service the programmes needed for offenders they sentence and the matching of availability with need.

6.11 When including compulsory work in a community sentence, the sentencer could indicate – in addition to the number of hours per week required – what type of work placement the offender should undertake, based on advice from the probation service and the need to work around an offender’s job or training. An unemployed offender, for example, could be required to complete a large number of hours over a relatively short period, whereas an employed offender would need longer to do the same number of hours. The Crime & Disorder reduction partnerships (set up under the Crime & Disorder Act 1998) could be used to advise on what types of work would respond to local needs, and to gauge feelings about restitution or reparation to the community. It may also be possible, judging from evidence provided to the review, to involve local religious communities more in work with offenders under sentence. Muslim groups, in particular, have expressed interests in working constructively with probation services to reduce re-offending by members of their faith. The possibilities should be explored by the probation service with those concerned, within the framework advocated by this report.

6.12 Some conditions are so significant in terms of the way in which they affect offenders’ lives and restrict their liberty, that there would continue to be an obligation on the court to specify their precise requirements, rather than leaving them to the discretion of the probation service. These include:

- A requirement as to residence;
- A requirement to be subject to electronic monitoring ;
- A requirement to refrain from certain activities, such as going to particular places;
- A requirement to undergo treatment for a mental condition;
- A requirement to undergo treatment for alcohol and drug dependency;
- A drug treatment and testing requirement.

In addition, the last three conditions would require the consent of the offender as they involve medical treatment – though this would not apply to any other aspect of the new order.

## (iii) Reasons

6.13 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 and to give reasons for its decision, including its justification for the punitive weight of the sentence in relation to the seriousness of the offender's conduct. OASys will provide enhanced information about the offender to the court and to the writer of a pre-sentence report, and will assist in making the judgement as to the balance required. It will be important that the re-structured order provides more flexibility than the current series of orders, though this should not be at the cost of indiscriminate addition of conditions and requirements. A requirement to produce reasons would help to focus minds on the circumstances of a particular case, avoiding this 'condition creep'.

## (iv) Variance

6.14 The probation service would be able to apply to the court to vary the provisions of an order, in response to good progress or the offender's changing needs and circumstances – providing the "punitive weight" of the sentence was not increased. By building on section 53 of the Criminal Justice and Court Services Act 2000, the court would be able to change the terms of the order in response to breach.

**Financial penalties and discharges**

6.15 Under the new framework, financial penalties (fines and compensation orders) would be available at all levels of seriousness, both in isolation and in combination with the non-custodial penalties described above. The "serious enough" test to justify a non-financial community sentence would be dropped. When financial penalties were used in combination with other non-custodial penalties, the "punitive weight" would be combined. It should continue to be possible to combine a financial penalty with a custodial sentence providing the overall punitive burden was not disproportionate.

6.16 Substantial fines in quite serious cases might be enough to meet the needs of punishment, but history of failure to pay fines would justify using non-financial penalties of appropriate severity. It would be possible to impose a non-custodial penalty in cases of fine default or in those cases where a fine would simply add to the burden of debt to little effect. An offender who received a non-custodial penalty instead of a fine would be liable to imprisonment for breach. It will be important, therefore, to use this power in a way which does not expose 'poorer' offenders to a greater risk of

imprisonment. It should be possible to create degrees of 'punitive' equivalence between the loss of liberty involved in a community penalty and the deprivation of resource involved in a fine. The proposed sentencing guidelines could include illustrations of "equivalence" between financial and non-financial penalties.

6.17 Current efforts to improve enforcement of fines (such as fixing a date for review of payments at the time of sentence, attachment of earnings, deductions from benefit, requirement to appear before an enforcement panel, fines clinics and the use of bailiffs in seizing goods) must succeed in order to support this approach.

6.18 Confiscation orders will continue to be available as a financial penalty – but under the new provisions of the (draft) Proceeds of Crime Bill. These, when enacted, will make confiscation orders available for all offences and for all cases (although cases will have to have been committed to the Crown Court for a confiscation order to be made). They will continue to be available in combination with other penalties, with no limit on the sum to be confiscated.

6.19 Absolute and conditional discharges would be retained separately, as now. The evidence shows that they are an effective disposal, attracting better than predicted reconviction rates. For example, 44% of offenders were reconvicted of a standard list offence within 2 years of a conditional discharge in 1995, which was 2% lower than the predicted rate.

**An interim review order**

6.20 Although it is currently possible for a court to defer passing sentence on an offender for a period not exceeding six months, the review has found grounds for further clarification and strengthening of this disposal, with proper safeguards built in. In particular, sentencers have said that they would like to be able to ask for additional undertakings, and the probation service have said that they would welcome a more active role in deferred sentences. Others have said that it would be helpful to bring more consistency into the use of deferrals, though with the warning that they should be used for quite clear purposes. One of these purposes, should be to enable the offender (where it was appropriate) to tap into reparation or restorative justice schemes, where they exist, at the pre-sentence stage.

6.21 Under the new framework, the court should be able to make an interim review order, for a fixed period of no more than 6 months, during which the offender would be able to meet specified voluntary commitments, such as:

## Chapter 6

### NON-CUSTODIAL POWERS

- Reparation;
- Voluntary attendance at drug/alcohol treatment programmes;
- Participation in restorative justice schemes.

The court would be able to ask for additional undertakings during the period of deferment, such as a requirement for the offender to live at a certain address. In order to introduce proper safeguards, it would be possible for offenders under the interim review order to be brought back to court prematurely and sentenced, on the basis of evidence that undertakings made as part of the order were not being met. On the basis of a report from the probation service at the end of the period, a final sentence would be passed. The activities carried out and the progress shown would act as a mitigating factor in any subsequent sentence passed. It would fall to the new 'review hearing' function (see chapter 7) to assess an offender's progress on completion of a 'review order', to determine whether the undertakings on which the sentence had been deferred had been met (on the basis of the probation service's report), and to pass the appropriate sentence on the basis of this assessment. These changes would clarify, and strengthen, the existing powers to defer sentence, and should increase consistency in the use of this power.

#### *Recommendations*

- 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 an appropriately punitive "envelope".
- The purposes and application of the various non-custodial penalties, should be made clear, either in legislation or guidelines.
- 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.
- 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.
- 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.
- A new interim review order should be created, enabling deferral of sentences to be strengthened with proper safeguards.

## Chapter 7

# SENTENCE MANAGEMENT

### Introduction: the current situation

This chapter deals with what has been broadly termed 'sentence management' – in other words all the issues that touch on the implementation of sentences: sentence calculation, sentence enforcement and the ability of courts, with the Prison and Probation Services, to 'review' progress during sentences.

7.2 The present framework has caused great difficulties in relation to sentence calculation (the means of translating the sentence of the court into a period of custody), in particular the counting of remand time. The basic principles – namely that time spent on remand or in police custody reduces any sentence of imprisonment, but must not be counted more than once – are now fairly clear. But the application of these principles has been, and can still be, ambiguous as a result of the successive tranches of legislation and judgements by the courts which overlay the basic statutory provision in Section 67 of the Criminal Justice Act 1967. An attempt to devise a workable system whereby remand time is taken into account by the courts was embodied in section 9 of the Crime (Sentences) Act 1997 (now section 87 of the Powers of Criminal Courts (Sentencing) Act 2000) – but the provision was never brought into force because of the difficulties of calculating police detention and court custody time. Other sentence calculation difficulties have arisen from section 40 of the Criminal Justice Act 1991, which provides an "activation power" enabling the court to order released prisoners to be returned to prison if they commit a new offence before their sentence expiry date. The courts sometimes order a return for a period in excess of that allowed by section 40. Any changes to the framework must therefore try to ease sentence calculation issues in order to avoid any new uncertainties. It must also preserve powers to maintain discipline in prison.

7.3 Within the Criminal Justice Act 1991, as repeatedly amended, there are several different mechanisms for determining how to respond to a breach of licence or community sentence. These include:

- Court based decisions (for community sentences, young offender notices of supervision, licenses for sentences of under 4 years in relation to pre-1999 index offences, the "activation power"

introduced by section 40 of the Criminal Justice Act 1991 for offences committed before the sentence expiry date);

- Secretary of State decisions, without reference to any other body (for HDC);
- Secretary of State decisions, with a requirement to consult the Parole Board and a right of subsequent representation against the decision to the Board (for parole and most licences).

The available penalties for breach vary similarly:

- Fines – only possible in the courts and to be removed as an option in respect of breach of community sentences by section 53 of the Criminal Justice and Court Services Act 2000 (not yet implemented);
- 'Suspension' of licence for a variable period (only possible in the courts);
- Revocation of licence and recall to custody until a point short of licence expiry (HDC);
- Revocation of licence and recall to custody until licence expiry (most licences);
- Return to prison for all or part of the period between the date of any new offence and the original sentence expiry date (only possible in the courts where a licensee is convicted of a new offence; can be combined with recall).

7.4 These arrangements create an unnecessarily complicated patchwork of 'enforcement' activity, with no consistent principles underlying the current legislation, structures and practices – and worse, real risks of inequity of treatment of a similar act of non-compliance depending on the type of licence and the procedures which apply. In terms of transparency, the system is also inadequate. It is essential that any new sentencing framework address these issues. The purposes and principles underpinning the new framework must apply as much to the enforcement of sentences as to the initial sentencing decision and must be translated in workable mechanisms.

7.5 There is currently a sharp division of roles between sentencers who confine themselves to the immediate offences, and surrounding circumstances, and the prison and probation services who implement the sentences passed. There is no requirement to work collectively in managing the sentence as a whole, or to take account of the offender's progress during sentence. Sentencers as a

rule receive little or no “feedback” from their decisions. There is little flexibility during a community sentence and during the licence period of custodial sentences of 12 months or over, to reward an offender who is doing well by ‘lifting’ some of the penal measures in the sentence, or (during a licence period) to ‘toughen’ the sanctions where things are not going so well. Sentencers can, and sometimes do, order progress reports and the review has heard that where this happens, it improves the likelihood of successful completion of community orders. The Drug Treatment and Testing Order (introduced as part of the Crime & Disorder Act in 1998) involves the court throughout the term of the order through regular review hearings. These enable sentencers to consider the offender’s progress and to determine whether changes are needed to the requirements and provisions of the order. An 18-month evaluation of DTTOs carried out last year showed that the review process was welcomed by staff and offenders as making a positive contribution to the treatment process. A system which, like the DTTO, engages sentencers in the post-sentencing process and encourages them to focus more on the outcomes and implications of their sentences could help improve results, in terms of crime reduction and public confidence.

### The Use of Pre-Sentence Reports (PSRs)

**7.6** The changes recommended by the Review will have the effect of reinforcing the importance of rigorous pre-sentence reports, and will rely heavily on the newly emerging risk and needs assessments made available through PSRs. In circumstances where offenders are likely to receive a community sentence or custody plus, the PSR will be important as it will give the probation service the opportunity to design a proposed community sentence containing the elements most likely to reduce re-offending and protect the public. There should be a requirement to consider a PSR before passing any custodial or community sentence, unless the court decides that it is unnecessary to do so. Reports would not be needed in cases where the sentence was fixed by law, or where the court was prepared to order a discharge, or a fine in isolation.

**7.7** The key ingredients of a report would be the assessment of risks of re-offending and the measures needed to reduce such risks. The use of OASys, which is likely to become compulsory for PSRs once it is available, will help greatly in this regard. By assessing risk of reconviction, needs linked to offending and risk of serious harm, it will enable better targeting of specific elements in the

sentence. It should not be a primary purpose of a report to advise the court on the seriousness of the offence or offences for which the offender is to be sentenced. Report writers need to have reliable information, however, about those offences to enable them to gauge the severity of sentence likely to be required. This must come from the Crown Prosecution Service (CPS), along with details of previous convictions, and any ‘victim statement’ (made under the emerging proposals for such statements to be taken). Given, the increasing importance of PSRs under the new framework, the timely and accurate provision of such information from the CPS will be even more important. Work is already underway to improve performance and to consider the need for a joint performance measure between the CPS and the probation service in this area. It will be crucial, however, that the probation service has from the CPS information about the current offence(s) and previous convictions – as the absence of such information will subvert reliable risk and needs assessments, as well as judgements of seriousness and severity.

**7.8** When a PSR concludes that a community sentence is viable it should go as far as possible in specifying a recommended ‘package’ of measures, geared towards meeting the assessed risks and needs while reaching the indicated level of severity. Time constraints may mean that a precise specification of programmes designed to address the underlying causes of the offender’s criminality cannot be given. In those cases, the court would be asked to give a general indication of the type of programmes to be considered, and authorise their implementation, subject to any necessary ‘review hearings’ to settle the detail, or to vary them later. Although there are some elements of non-custodial sentences, such as residence or treatment requirements, for which the court would have to specify the precise details.

**7.9** It has been suggested that the police should be consulted more routinely in the production of PSRs, as they may have relevant information not available to others. PSRs need to reflect proven evidence, rather than intelligence, and it is doubtful whether routine consultation with the police over every PSR would be practicable. Police input to risk assessment by the probation service can be achieved in other ways, by sharing information and working together in the supervision of offenders serving their sentence in the community (see paragraph 7.25). The review is not able to recommend routine consultation with the police over PSRs, but the CPS should ensure – in relevant ‘high risk’ cases – that essential information known to the police should be

available via the papers supplied to the probation service.

7.10 There will be a tension between PSRs of quality, based on thorough analysis of risks and needs and the need for speedy justice. It will be important for the court to reach a decision on all the possibilities to be made available by the proposed new sentencing framework, and PSRs – subject to the use of discretion where necessary – will be vital in this respect. Specific Sentence Reports (SSRs) have been introduced to speed up the process. A streamlined version of OASys – if that is possible – would help to support these.

### Sentence calculation

7.11 In order to resolve some of the current difficulties around sentence calculation, several changes are proposed under the new framework.

#### (i) Calculation of remand time

7.12 Section 87 of the Powers of Criminal Courts (Sentencing) Act 2000 (originally section 9 of the Crime Sentences Act) would be more or less adopted for the purposes of counting remand time for custodial sentences. But time spent in police custody would not, as provided for in that Act, count against sentence. The reasons for this are to do with both reasons of principle and practicality. There is a qualitative difference between time spent on remand and time spent in police custody. The former is preventative and is imposed by the courts, whereas the latter is an unavoidable feature of the investigation of crime. It seems reasonable to distinguish between detention for very different purposes. There are also administrative difficulties in establishing whether, and how much, time was spent in police custody – which, in any event, is very short. Difficulties with the counting of court custody time would be reduced by giving the courts discretion as to how much remand time should count. In principle, however, the starting point for the calculation of remand time would be court ordered remands. The new procedure would be as follows:

- The court would be informed (by the prison service), to the nearest day, how much time the offender had spent on remand;
- The court would order the Prison Service to discount that period when implementing the sentence;
- The sentence actually passed would not be discounted.

7.13 One of the effects of these provisions might be that the time spent in custody on remand might be equal to or above the ‘up to’ 3 months that would be served on as sentence of custody plus. If this were the case, then the sentencer should consider a community sentence of adequate severity. However, if the time spent on remand were under 3 months, then the prison service would simply deduct the time from the custodial period of custody plus.

7.14 There would need to be an additional provision to require the court, when judging the punitive weight of a non-custodial sentence, to take time spent on remand into account.

#### (ii) Added days

7.15 It is important that, under any new framework, prison governors’ ability to make use of additional days should be preserved as a disciplinary tool. Whilst under the proposed changes, additional days can be preserved for sentences of 12 months and over and for custody plus, because the prison sentence extends to embrace the supervisory period, the absence of any such period in plain custody loses the “cover” for added days. The review considered making custody plus subject to a period of remission which could be forfeited in the event of the prisoner committing offences against prison discipline. However, this would not sit easily with the rest of the framework. Instead, there would be provision for sentences of plain custody to be subject to a statutory number of additional days, which could be remitted unless they needed to be enforced as a result of disciplinary offences.

### Sentence enforcement

7.16 Again, to try and ease the present complexities around enforcement procedures, there should be a single set of administrative recall mechanisms for breach of custodial sentences and it should be clear when, in addition to administrative recall, the courts’ power to order a return to custody would be available.

#### (i) Non-custodial sentences

7.17 The new National Standards for the supervision of offenders in the community (which came into force in April 2000) provide that offenders will be issued with a maximum of one warning for an unacceptable failure to comply with a community sentence in any 12 month period, rather than two as before. Section 53 of the Criminal Justice and Court Services Act 2000 (not yet brought into effect) put this warning on a statutory basis and created new arrangements for

## Chapter 7

### SENTENCE MANAGEMENT

dealing with a breach of a community sentence, where that breach is referred back to the court. Under the Act, where the court concludes that the community sentence is unsustainable, it must pass such custodial sentence as it thinks appropriate for the original offence or, where custody was not available for the original offence, imprisonment not exceeding 3 months. In most cases, therefore, there is unlikely to be any post-release supervision.

7.18 The new framework would adopt the existing statutory position but the result in most cases, where the court decided that the community sentence was unsustainable and re-sentenced to a prison sentence, would be a sentence of custody plus or a longer sentence of over 12 months, both of which would include post-release supervision. So although the existing community sentence would be expunged, a new period of supervision would follow the period in custody. In such cases (where custody was imposed for breach of a non-custodial sentence), the custodial period is unlikely to be very long, and probably in most cases no more than would be possible under custody plus.

7.19 In cases where the probation service concluded that the community sentence was no longer sustainable and there was a sufficiently high risk of re-offending, it should be possible, by building on existing powers and efforts to improve enforcement performance, to arrive at an accelerated decision making process. The probation service should be encouraged to make more use of the existing power to apply for an arrest warrant, rather than the usual procedure by summons. A court hearing after arrest, could lead to remand in custody, before resolving the matter later through a full hearing. The aim would be to look for resolution at an early court hearing.

7.20 Currently, if an offence is committed during a community sentence, the new offence has to be dealt with in its own right – whether or not the new offence constitutes a breach of the existing sentence. This can lead to confusion about what should happen to an outstanding community order, while a new sentence is served. There would be two possible options for dealing with an offence committed by an offender subject to an extant community sentence, under the new framework:

- The court sentencing for the second offence should decide, in addition to imposing a sentence for that offence, what to do with the extant order. This would enable courts to pass a sentence for the ‘old’ and ‘new’ offence and then decide whether they should be implemented consecutively or concurrently;

Or

- There would be a new power to enable the court to pass a sentence for more than one offence at once. This would enable the sentencer to pass one sentence for the ‘new’ offence, which absorbed an additional amount in substitution for the original community sentence.

Although the second of these options raises some practical questions – for instance a possible need to be able to identify for appeal purposes a separate sentence for each offence – the model deserves further consideration.

#### (ii) Custodial sentences

7.21 The community element of all custodial sentences would be enforced administratively on breach of requirements by, as now, the prison service on advice from the probation service. All such recalls would be subject to a right of appeal to a court.

7.22 Where recall was from a sentence of custody plus, re-release would only be possible – except where on appeal the court decided that the decision to recall was not justified – if there was still 4 months or more of the sentence left to serve. Otherwise the remaining time before sentence expiry would not be long enough to enable productive activity to be undertaken in the community. Suitability and conditions for re-release would be determined by a review hearing.

7.23 For the longer sentences of over 12 months, there would be an automatic right to a review hearing within 12 months of the date of recall, or the date of any appeal against recall. The review hearing would decide whether the offender was fit for re-release and, should the hearing decide against release, would also determine the date of any future hearings. All such re-releases would be subject to the same sort of review hearing and options for conditions as the original release. These provisions would replace current circumstances where breach beyond sentence expiry date (SED) can occur, in particular:

- A Young Offender Notice of Supervision (section 65 of the Criminal Justice Act 1991) which requires all under 22 year olds released from a term of imprisonment in a YOI to be subject to a minimum of three months supervision – which can exceed SED where the sentence is short;
- Section 40A of the 1991 Act which applies to those who are released from a section 40

sentence (i.e. a sentence imposed for conviction of a new offence during the currency of the original offence), for which the term of imprisonment is less than 12 months, and which provides for a fixed period of 3 months supervision, which can run beyond SED.

7.24 Under the new framework, the “activation power” available under section 40 of the Criminal Justice Act 1991 for commission of a new offence before sentence expiry date would be abolished. As the post-release period of supervision would run until the end of all custodial sentences, administrative recall on ‘breach’ would be available right up until the end of sentence. The court when sentencing for the new offence would decide whether it should run consecutively or concurrently to the period of recall for breach of the ‘old’ sentence.

(iii) Effective supervision

7.25 There should be greater co-operation between the police, the probation services and providers of electronic monitoring in supervising offenders under sentence in the community. In the same way as section 67 of the Criminal Justice and Court Services Act 2000 places a duty on the police and probation areas to produce a risk management strategy for “relevant sexual or violent offenders”, the police have much to contribute in risk assessment and supervision of offenders who have a high risk of re-offending and of committing a wider range of offences. There should, therefore, be a new statutory duty for the probation and police services to co-operate in developing risk management strategies for offenders under sentence judged to be at high risk of re-offending. In practice, this could include anything from information sharing, to the probation service consulting the police on the development of risk management strategies for offenders serving their sentence in the community. In some cases, the police may need to be consulted when pre-release packages are put together. The manner and extent of the recommended co-operation will depend on local circumstances. In some places, co-operation is likely to build on existing local systems.

**Review hearings**

(i) Functions

7.26 In order to encourage courts to have a more active role in determining what is needed, not just at the point of sentence but also during its course, and with better information about the outcomes of their decisions, the courts would develop and provide a ‘sentence review’ capacity covering the

following activities:

- Dealing with breaches of community sentences;
- Hearing appeals against recall to prison;
- Pre-release planning (authorising the content of the community ‘package’ for sentences of 12 months and over);
- Reviewing progress during community sentences or the community part of custodial sentences (and deciding whether to vary the intensity of the sentence).

(ii) Tier/Jurisdiction

7.27 There would be flexibility in determining which function should be attributed to which court jurisdiction. Although it would be desirable for the original sentencer to ‘review’ the case wherever possible, such a requirement would be difficult for magistrates to meet, and in other cases could lead to unacceptable delay. The level of review need not, therefore, always correspond with the level of court that passed the sentence. Cases would be allocated to a level suitable for the issues arising and the complexity and needs of the particular case. In practice this might mean that undisputed cases could be dealt with by magistrates and more complicated and serious cases by district judges or the Crown Court. Those serving in a ‘review hearing’ capacity would need to develop an improved awareness of sentencing matters, though the role could be filled by any circuit judge, district judge or panel of lay magistrates. Training will be important in all cases, with a particular requirement for magistratres to have completed a course of training to MNTI (magistrates’ new training initiative) standards before sitting. The impact on court time will need to be properly resourced (see chapter 9).

Chapter 7  
SENTENCE MANAGEMENT

Pre-release planning	Appeals against recall to prison
<ul style="list-style-type: none"> <li>• Hearings largely by TV link, with potential for physical appearance at the request of the prisoner or court (though these would only be a small % of cases).</li> <li>• Legal aid would not normally be available. Any legal representation would be at the prisoner's own expense. The normal procedure would be to make representations in advance.</li> <li>• The TV link hearings would be informal, with the normal probation court liaison officer present if needed.</li> <li>• As pre-release planning would mostly involve sentences of 12 months and over, at the higher end of the seriousness scale, cases would be likely to fall to district judges, with some allocation to the crown court.</li> </ul>	<ul style="list-style-type: none"> <li>• Hearings would be largely by TV link, but with a right to appear in person, in cases of serious dispute.</li> <li>• The Court would not have the power to vary length of the recall but only to overturn the decision to recall.</li> <li>• TV link hearings would mostly be dealt with at district judge level.</li> <li>• Where the recall was authorised, the prisoner would be eligible for further review hearings, in the pre-release planning function (see opposite).</li> <li>• A proportion of these appeal cases would be likely to involve serious disputes. In these cases, there would be a full (adversarial) hearing, with prosecutor present and appearance in Court by the person who had evidence of the breach (e.g. probation officer, police...). Legal representation and legal aid would be available.</li> </ul>
Breach of community sentences	Reviewing progress
<ul style="list-style-type: none"> <li>• Review hearings would deal with these as legislated for in the Criminal Justice &amp; Court Services Act 2000: a court would be able to impose a sentence of imprisonment, if in its view the offender was unlikely to comply with the requirements of the community sentence during the remaining period.</li> <li>• These cases would all be dealt with by a full hearing, with a right to apply for legal aid. Breaches would usually be 'prosecuted' by the probation officer, unless proceedings were adversarial requiring the presence of a prosecutor.</li> </ul>	<ul style="list-style-type: none"> <li>• For <i>community sentences</i>, the process would mainly be paper-based – as the only option would be to reduce the intensity of the sentence. It would only be possible to increase the intensity of the sentence in response to breach (see opposite function).</li> <li>• For the <i>community part of the custodial sentence</i>, it would be possible to both increase and decrease the intensity of the sentence. The option of increasing the intensity of the sentence would be when there was a need to divert the offender onto something more punitive/intense when problems appeared, without necessarily recalling.</li> <li>• Most of these cases would be paper-based, but those requiring an increase in intensity might require an appearance in person before the court. Drug treatment and testing requirements which require an offender to attend periodic review hearings in person, would also be an exception.</li> <li>• Any legal representation would be at the offender's own expense, and only the presence of the probation officer would be necessary.</li> </ul>

## (iii) Procedure

7.28 Paper-based hearings or hearings using live television link would be appropriate in most cases. Full hearings, with representation and eligibility for legal aid, would only be necessary when new restrictions on liberty were an issue, such as when re-sentencing on failure of a community sentence, when dealing with appeals against recall to prison in cases where there was a serious dispute or when reviewing progress on drug treatment and testing requirements. For the pre-release planning function, the prison and probation services would have worked up a release package in advance, involving the police where particularly high risk offenders are concerned, to which the review court would give its authority. Reviewing the package should require some visible engagement in the process on the part of the offender, and most of these 'hearings' should be conducted by TV link. The table opposite, illustrates how the procedures for 'review hearings' might work, according to the different functions.

## Parole Board

7.29 The Parole Board would continue to operate as it does now in respect of life sentences, and in respect of the new special sentence for 'dangerous' offenders in the same way as it does now for determinate sentence prisoners (see chapter 4). Review hearings would act in the capacity described above for community sentences, custody plus and longer prison sentences.

*Recommendations*

- **PSRs should be based on a thorough analysis of risks of re-offending 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.**
- **The court, having been informed by the Prison Service to the nearest day, how much time the offender had spent on remand, would order the prison service to discount that period when implementing sentence. The court would also take any remand time into account when judging the punitive weight of a non-custodial sentence.**
- **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.**

*Recommendations (cont)*

- **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.**
- **Breach of conditions imposed on release from prison should be enforceable administratively, through recall to prison, subject to a review hearing by a court.**
- **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.**
- **There would 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 re-offending.**
- **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**

## Chapter 8

# THE SHAPE OF THE FRAMEWORK – LEGISLATION AND GUIDELINES

### Introduction: the present situation

This Report has already noted that sentencing outcomes depend less on the content of the legal framework than on the way it is used. Judicial discretion, and its governance, are therefore crucial in determining sentences passed. In the present framework, except where there are mandatory sentences, judicial guidelines are likely to have more effect on what happens to offenders than anything laid down in Acts of Parliament. The “going rate” of punishment in relation to offence seriousness, within the maxima laid down in statute, has for many years been left to judicial discretion, within such guidelines as the Court of Appeal (Criminal Division) chooses to deliver through judgements in individual cases, or groups of cases. More recently, the Magistrates’ Association has instigated the production of Sentencing Guidelines for the Magistrates’ Courts. The Court of Appeal (Criminal Division) has recently been given the support of the Sentencing Advisory Panel, to provide information and advice on suitable guidelines for different categories of offence (see sections 80 and 81 of the Crime and Disorder Act 1998). As well as the “going rate”, or “tariff”, for sentence severity, guidelines also describe the various factors which may make the penalty more or less severe (aggravating and mitigating factors). Guidelines not only play a large part in determining what happens to offenders: they also in large measure determine the impact of sentencing on the services responsible for carrying them out – principally the prison and probation services – and therefore the impact on public expenditure. Sentencing policy is – in effect – currently shared between the judiciary and Parliament, and there is no institutional machinery through which to establish communications between the judicial arm of sentencing policy and the Executive charged with implementing sentencing decisions.

**8.2** The line between what should be in guidelines and what should be in statute law is not a clear one. Parliament has recently tended to specify things previously left to guidelines, for example when it wants to specify things that it believes should make penalties more severe. Examples of this trend include repeated commission of specified offences, for which Parliament has laid down mandatory minimum sentences, subject to exceptions, now contained in sections 109, 110, and 111 of the

Powers of Criminal Courts (Sentencing) Act 2000; offending on bail; and offending with a racial motive. Key general principles, like the effect of previous convictions, and how large numbers of offences on the same charge sheet should be dealt with, continue to be left to guidelines.

**8.3** How much to include in a future Act; how much to leave to judicial discretion; how to govern the use of that discretion through guidelines; and how to govern the production of such guidelines are important questions for any future reform of sentencing. The role and content of guidelines; rules governing their ownership and accountability; and procedures for their production and review all need to be considered. It seems reasonable to start from a presumption that some discretion must be left to those who take the decisions, within the general framework laid down by Parliament. So many variables are involved in individual cases that no law or guidelines can ever prescribe for them all. If no judgement were needed, there would be no need for judges. Equally clearly, however, to achieve consistency and transparency, discretion must be subject to guidelines covering general principles and their application to individual cases.

**8.4** The present arrangements derive from Parliament’s decision, early last century, to place responsibility on the Court of Appeal for hearing appeals against sentence, primarily for the purpose of evening out inconsistencies. For the past twenty years or so the Court has been developing “guideline judgements” in individual cases, through which it sets out general principles to be observed by courts when sentencing. A sort of “common law” of sentencing has developed, as demonstrated by the three volumes of case law contained in the Encyclopaedia of Current Sentencing Practice edited by Dr David Thomas. In parallel, the Magistrates’ Association has instigated the development of Sentencing Guidelines for the Magistrates Courts. These take a different form, setting out “entry points” for sentences in different offence categories, and reasons for increasing or reducing sentence severity. Adherence to these guidelines is voluntary. Two areas have decided not to adopt them, and others have adopted them with modifications. If guidelines were grounded in law, there would be a firmer basis for compliance and consistency. Parliament seems to have been content to observe those developments, while retaining the

right (which it has) to supplement or (in effect) override them through legislation, for example in the ways described in paragraph 8.2 above. A clearer understanding of how far a statutory framework should go, and what should be left to guidelines – subject to the confidence Parliament has in those guidelines and their effect – would be helpful.

8.5 Parliament must decide how far it wants to go in specifying what should happen in sentencing decisions. Reasons why Parliament may have felt it necessary to specify its will beyond doubt in legislation could be to do with the present complexity of the guidelines; their incompleteness; lack of clarity (for example in relation to previous convictions) and the absence of clear information about what is actually happening in areas of public concern. If there were to be clearer understandings about

- what the guidelines require, and why;
- what effect they are having in practice;
- how they might be modified in relation to changing needs;

the respective roles of judiciary and Parliament could be more clearly delineated and understood, and public confidence enhanced. More open and public debate about the guidelines could support this.

8.6 Present and foreseeable issues arising from the existing guidelines, and methods of producing them, include the following:

- If the changes recommended in this report are implemented new guidelines will be essential. These will need to show how previous convictions should increase severity of sentence (see chapter 2). For that purpose it will be necessary to ensure that guidelines include a comprehensive grading of offences by seriousness (including gradations of seriousness within the same offence category, and how these overlap with other categories). Those gradations will need to be linked to presumptive “entry points” for consideration of sentence, and the guidelines will need to spell out – in broad or more detailed terms – the effect of different types of previous record on those entry points. Once guidelines for this purpose are available it would be sensible to look again at the need for mandatory minimum sentences based on previous convictions.
- New guidelines are also needed for other purposes, for example to take account of the increased punitive weight of the longer prison sentences, and to guide courts on the use of non-custodial penalties, and the shorter prison sentences.

- The way discretion is used in a new framework will crucially affect the demands made on the prison and probation services, and associated costs. A clear statement of the relevant guidelines will be essential, before any changes are implemented, in order to inform plans for the necessary services and expenditure. A dialogue between those responsible for guidelines, and those responsible for services, will be necessary for this purpose.
- The guideline judgements of the Court of Appeal (Criminal Division) are capable of further development, for example to fill existing gaps; distinguish between different levels of seriousness within the same category of offence; and show how seriousness levels within various offences overlap with each other.
- The present guidelines are not easy for the general public to access. This is also true of the statutory framework. Both could be made available in more accessible forms.
- Having two separate sets of guidelines for the two sentencing tiers, done in two different ways, is less than ideal. There is a risk that the Court of Appeal (Criminal Division) guidelines depend too heavily on the type of cases that come to it – which are inevitably the more serious Crown Court cases, and a small proportion of the total. A look at guidelines against the totality of offences and offenders coming before criminal courts, thus integrating the Guidelines for the Magistrates’ Courts with the Court of Appeal guidelines, would be beneficial.
- It is undesirable that Magistrates’ Courts should be free to ignore the guidelines developed for them.
- If court structures were changed following the review of criminal courts by Lord Justice Auld, for example to produce a single courts system, perhaps with a new intermediate tier, the case for a single set of guidelines applying to all criminal courts would be even stronger.

8.7 The new framework proposed in this report will need to be supported by a clear code of sentencing guidelines, to be observed by all criminal courts. Implementing the framework provides an opportunity to establish guidelines that reflect all the business coming before the courts. Such guidelines would not be over-rigid. Their purpose would be to guide the use of discretion. The framework advocated in this report depends on wise use of discretion, which increases the importance of sound and comprehensive guidelines. Although it would be worth looking at the ways in which guidelines have been constructed in other

jurisdictions, it will be important to arrive at a method which builds on the present position, including the now well established principle of seeking consistency through a system of appeals. The goal should be structured and principled decision making, not adherence to pre-determined outcomes, and within a framework based on deliberation and consultation, accessible to all, and capable of being modified in the light of experience.

### A structured framework – accessible to all

**8.8** The foregoing analysis means that there should be a clearly understood and coherent “interlocking” between the statutory provisions made by Parliament, and the guidelines laid down for the courts. The statute would set out the general principles advocated in chapter 2, including the following:

- the severity of the sentence should reflect the seriousness of the relevant offences, and the offender’s criminal history;
- the seriousness of the offence should reflect the harm caused, threatened or risked, and the offender’s degree of culpability in committing the offence;
- the severity of the sentence should increase as a consequence of sufficiently recent and relevant previous convictions;
- a prison sentence should be imposed only when no other sentence would be adequate to reflect the need for punishment;
- non-custodial sentences (including financial penalties) should be used, when they are adequately punitive, in ways designed to reduce the risk of re-offending and protect the public.

The statute would also:

- specify the newly designed sentences, custodial and non-custodial;
- provide for review hearings;
- prescribe enforcement procedures;
- require information to be taken into account, including in pre-sentence reports;
- state when reasons for decisions have to be given.

**8.9** The statute would require guidelines to be drawn up that would include:

- descriptions of graded seriousness levels, covering all the main offences;
- presumptive “entry points” of sentence severity in relation to each level (including circumstances justifying a community sentence);

- how credit for absence of previous convictions, and escalating sentence severity for increasing numbers and types of previous conviction should operate, and subject to what limits (taking account of existing mandatory minima);
- how multiple offences on the same charge sheet should be dealt with;
- other grounds for aggravation and mitigation.

The statute would specify responsibility for producing, monitoring and revising the guidelines.

**8.10** The codified guidelines should be continuously available to all, in up to date form. Ideally, the statutory provisions should be similarly available in a continuously up to date Penal Code. At present, legislation “accumulates” through amendment to past enactments. Much sentencing law was consolidated in the Powers of the Courts (Sentencing) Act 2000. That Act does not include, however, the way prison sentences operate, and already it has been substantially amended by the Criminal Justice and Court Services Act 2000. As a result, to discover, for example, how non-custodial sentences should be enforced, it will be necessary to locate section 53 of the later Act (when it is implemented) and transport the amendments it makes to a Schedule of the earlier one. Neither Act on its own can enable anyone to understand the position. Information systems may increasingly enable these complexities to be overcome. The need for these would be avoided, however, if there were to be a continuously up to date Penal Code, such as exists in many comparable countries (see Appendix 6). This would improve general accessibility and transparency, and should reduce complexity and inefficiency. To achieve this, Parliament would need to establish ways of ensuring that small amendments to the Code did not open the whole Code up for debate. This ought to be possible – for example by enabling parts of the Code to be reviewed and amended independently and reproduced as amended in the full Code. This would be part of a more modern approach by Parliament to legislation of this sort. The present method does a disservice to practitioners and the public alike.

### Ownership of and responsibility for producing guidelines

**8.11** The Government of the day accounts for the current state of the law, as expressed through Acts of Parliament governing sentencing. For the production of new guidelines, new machinery will be needed. Simply leaving guidelines to decisions on cases after implementation would not provide an adequate or reliable basis for policy or planning. Nor would it meet the other needs identified in this

chapter for transparency and accountability. Various possibilities can be considered for new machinery. A key first question is whether production of guidelines should continue to be a responsibility discharged independently of Parliament. Given the impacts of guidelines on liberty, and on public expenditure, a case can be made for Parliamentary input to this aspect of sentencing policy. There is no obvious case, however, for abandoning the policy of sharing responsibility for sentencing policy with a body independent of Parliament. Indeed the expertise required suggests that an independent body would be needed in any event. The question remains whether there should be some form of Parliamentary control: should Parliament, for example, have a right of veto over the guidelines?

**8.12** If Parliament had a veto over the guidelines it would in effect have complete control. Failure of Parliament and the independent body to agree could result in endless “ping-pong” as different versions of guidelines were batted to and fro, leading potentially to catastrophic loss of confidence. The better course, while building on the independent role already given by Parliament to the Court of Appeal, supported by the Sentencing Advisory Panel, would be to construct a new relationship between Parliament, the Executive, and an independent judicial body. This could be done in ways which opened the subject up to more general debate, so that the body independently responsible for guidelines was fully informed of all shades of opinion in Parliament and elsewhere, as well as all the available evidence. The body responsible for the guidelines could be required to publish them in draft, and to consider and reply to comments made on them by Parliament (for example in debate, or through the Home Affairs Select Committee), the Government, and others. Three possible options are described below, each based on the proposition that responsibility for guidelines should take account of the interests of Government and Parliament while remaining independent of both.

(i) Option A

**8.13** Guidelines would be drawn up by the Court of Appeal (Criminal Division) sitting a special new capacity. The Lord Chief Justice would chair the panel, which would take evidence and advice from any well informed source. The Attorney General could speak from experience of referring cases where he had concluded sentences were unduly lenient; the Sentencing Advisory Panel could bring information and evidence to bear; and professional and other organisations, including the magistracy,

District and Circuit Judges, Government Departments, the Prison, Probation and police services, academics and others could submit evidence based on their own experience and information. The Court would prepare draft guidelines for consultation, and having considered any responses (including any Parliamentary debate or discussion of them), would promulgate a final version under the authority conferred on it by statute. As part of its evidence the Government would be able to inform the Court about the impact of its proposals on the prison and probation services and expenditure on them.

**8.14** This option probably goes most closely with the grain of recent developments. It would provide for continuing ownership by the Court of Appeal (Criminal Division). The Court would need a small “resource” of its own to manage the work, commission evidence etc, but the most obvious resource for producing draft guidelines would be the Sentencing Advisory Panel, with a wider remit enabling it to provide direct and continuous support to the Court in the development of its thinking, and the translation of its conclusions into codified guidelines. At the very least, the Panel’s responsibilities would need to be widened beyond its present role of providing advice on guidelines for a “particular category of offence”. It would need to be able to advise on general issues, including the effect of previous convictions and multiple offences on sentence severity, and other principles of general application, including aggravation and mitigation. If the Panel were subject to direction by the Court, however, it would lose its independent role, which would be undesirable.

(ii) Option B

**8.15** The responsible body could be independent of the Court of Appeal, but under strong judicial leadership. For example, it might be chaired by the Lord Chief Justice. Members could be appointed by the Lord Chancellor, after consultation with the Home Secretary, and could include required numbers of judges from the Court of Appeal (Criminal Division), the Circuit Bench, District Judges (Magistrates Courts) and lay magistrates, as well as professionals and academics. The balance could be such as to give a preponderance to sentencers. Alternatively, it could be composed exclusively of sentencers. A choice would turn on whether to incorporate in the body some of the expertise not likely to be directly available to sentencers, such as would be brought by members with a prison, probation, research, statistical or

other analytical background. This body would work more like a non-departmental public body than a court, but with the same result: codified guidelines applying to all courts. The Sentencing Advisory Panel could either continue, with a revised remit to advise the new body (which in that case would consist of sentencers only), or – in effect – be subsumed into it.

**8.16** Such a body would be more broadly based than the Court of Appeal – even if its membership were confined to sentencers. It might be better able to reflect the full range of criminal offences and offenders. Inevitably however, it would constitute a “third party” between the courts and Parliament. The risk of conflict between it and the courts should be small if it consisted entirely of sentencers, or if judicial representation in a wider body was sufficiently strong. If the Court of Appeal (Criminal Division) came across cases which showed up inadequacies in the guidelines, it should not be inhibited from deciding such cases on their merits, and referring the issues to the body responsible for guidelines.

(iii) Option C

**8.17** An independent body could be appointed in a similar way, but without reserving its leadership to the judiciary, and having a more even mix of members, between those with sentencing responsibilities and those with more general qualifications. This would be more risky, in terms of potential conflict with the Court of Appeal and courts generally, and would amount to a much more deliberate decision to establish a “third party” in the dynamics of sentencing policy. In this model the Sentencing Advisory Panel would have to be subsumed into the new body.

**8.18** The important goal is to arrive at a method that fits present and foreseeable circumstances; will work; and is likely to secure the desired outcome. Independent Sentencing Commissions have been developed in the USA, with varying results (see Appendix 4). The background there is very different. Commonly, there is no tradition of seeking to establish consistency through decisions on appeals. There is therefore no parallel to the development of guidelines through an appeal system, as has happened in England and Wales. Also, Sentencing Commissions have been very much bound up with the move to more determinate and predictable sentencing frameworks, less prone to wide variations of approach, and less likely to be undermined by discretionary release systems. Some of the products of these Commissions – notably the Federal version – have been criticised for over-

complexity and rigidity, and inadequate consultation with judges. Commonly, the work of Commissions is subject to endorsement by the relevant Legislature. Strains can therefore develop between the work of Commissions and the views and decisions of Legislatures, for example when Legislatures enact mandatory minimum sentences that then override the guidelines. There are some interesting lessons to be learned from the experience of the Federal and several State jurisdictions in the USA. For example, those Commissions that have been ably led by the judiciary and have included substantial representation from the criminal justice system, have proved that it is possible to construct a deliberative dialogue with the Legislature about what guidelines are desirable, taking account of their likely impact, including costs; and that it is possible to construct guidelines that address the less serious as well as the most serious crimes, and non-custodial as well as custodial penalties. Many guidelines also offer useful experience of trying to relate offence seriousness to seriousness of previous record. Some of the sentencing “grids” in the USA are more prescriptive than others, but a “grid” system is not the only way of providing guidance on the effect previous convictions should have on severity of sentence. There is no simple transportable “model” for guidelines that would lend themselves to the prevailing circumstances in England and Wales and be likely to secure the desirable outcomes.

**8.19** Options A and B seem more likely to be workable and less likely to have adverse outcomes. They could blend more easily with the role of the Sentencing Advisory Panel, while widening its remit. A more radical change, just as the Panel is getting under way, is not desirable so early in its life. The most pragmatic options seem to be those that would consist either of the Court of Appeal (Criminal Division) sitting in a special capacity and hearing evidence (Option A); or of a newly constituted body composed entirely of sentencers (the narrower version of Option B). In either case, there would be an obligation to hear evidence, and to consider advice from the Sentencing Advisory Panel, which would in effect become an independent resource for the necessary work and would be able to prepare draft guidelines. A dialogue between the relevant body and the Panel, on the basis of the evidence available to each, and public debate of the options, could arrive at the desired end product while embedding the work in the “judicial arm” of the constitution. It would be undesirable to create a separate resource, potentially

in “competition” with the Advisory Panel.

8.20 Legislation would give the body responsible for guidelines and the Panel their new responsibilities and duties. For the guidelines body, these would include:

- drawing up and publishing sentencing guidelines for all courts;
- consulting on draft guidelines;
- monitoring the effect of the guidelines;
- amending them as necessary;
- explaining the guidelines in public;
- making recommendations for sentencing law reform, based on experience of the guidelines.

It would also continue the existing duty (in section 80(3) of the Crime and Disorder Act) to have regard to the need to promote consistency in sentencing and public confidence in the criminal justice system and to take into account the costs and effectiveness of different sentences in reducing re-offending. Several benefits would result:

- the guidelines would be more comprehensive than ever before;
- they would be clear to all – practitioners and public, and provide an improved basis for judicial studies and magisterial training, as well as decision making;
- they would have the benefit of open discussion;
- they would be reviewable in relation to changing needs;
- a responsible body would be able to explain and account for them, including whether they were working as intended.

### The need for a structured dialogue

8.21 The idea of structured sentencing guidelines produced through new machinery is not new and has been much debated. The reforms proposed in this report create a need for clear guidance, available to all, before the reforms are implemented. Sentencers need to know what effect the changes should have on previous practice. The Government needs to know how sentencers plan to behave, so that it can plan the delivery of the necessary services. There ought to be a structured dialogue between the body responsible for guidelines and the Government about what they are likely to contain and what their effects on services are likely to be. This can be done without prejudicing the independence of the guidelines body.

8.22 The ideas and options in this chapter will need to be discussed further with the senior judiciary, the Sentencing Advisory Panel, and more

widely. Pending such discussions, it would be premature for this review to offer a final view on the choice between the options. In principle, option B appears to have the balance of advantage, because of the breadth of sentencing experience that it would bring to bear on the guidelines. Whether it should look to an independent Panel, or – in effect – subsume the Panel is a difficult choice about which the existing Panel must be consulted.

#### *Recommendations*

- **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.**
- **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 general advice on sentencing issues, including draft guidelines.**
- **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.**
- **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.**
- **Parliament should consider ways of establishing a permanently up-to-date 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.**
- **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.**

# Chapter 9

## COSTS AND BENEFITS

### Introduction

The new framework proposed by the report is designed to get the best possible results from any given level of resources. Actual costs and benefits, and the impacts on the prison population and service workloads, will depend on how the new framework is used. The review has therefore estimated costs and benefits in two ways:

- first, the costs and benefits of the proposed changes have been estimated on the basis that no other changes occur;
- then, estimates of costs and benefits have been made on the basis of several “What if?” scenarios in which other changes do occur, whether intentionally or not.

A full account of the methods used, and the results, is in Appendix 7. This chapter highlights the main points and draws conclusions. It deals first with costs, and then with cost-benefit.

**9.2** All the estimates assume that the new framework has been in place long enough for the changes to take effect and have arrived at a “steady state”. Transitional costs will also need to be taken into account. The illustrative “What if?” scenarios are intended to inform the policy choices that will need to be made in the light of this report, and to show the implications of those choices for the size of the prison population, the workloads of the prison and probation services, and related costs.

**9.3** Clearly the impact of any changes on the size of the prison population is important from several points of view, including the need to plan ahead in order to accommodate the likely impact. Some contributors to the review have argued that any new framework should be judged according to its effect on the size of the prison population, which they argue is already large enough (or too large). The proposals from the review, all other things being equal, would increase the prison population, but that is not their only possible, or necessary effect. Decisions to be made about sentence severity, including the effect of persistent offending, could affect average lengths of prison sentences, and the proportions of custodial and non-custodial sentences. The “What if?” analysis shows the varied effects of different decisions, yet to be made.

**9.4** The size of any prison population is a product of:

- the number of people committing crimes in society;
- the seriousness of those crimes, as viewed by Parliament in framing the relevant laws, and sentencers within the powers and guidelines available to them;
- the proportion of offenders that are caught, prosecuted and convicted;
- the frequency with which they are caught and convicted when they persist;
- the severity of punishments judged suitable by Parliament and sentencers for given levels of seriousness and persistence.

In different jurisdictions, or the same jurisdiction over time, fluctuations in the prison population may have as much (or more) to do with changed views about the seriousness of crime and appropriate levels of severity, as with actual numbers and types of offenders sentenced. The review has not attempted to say what general level of severity of punishment would be appropriate. This is matter for political judgement, taking account of all the available evidence bearing on all the goals of sentencing, and the public funds available after allowing for other priorities. In terms of those priorities, for the purpose of reducing crime, it will be very important to take into account any success of current policies aimed at increasing the likelihood of detecting offenders and bringing them to justice. Success in that area would independently increase the prison population, and is more likely to increase the deterrent effects of law enforcement (including sentencing) than a general increase in levels of punishment.

**9.5** In appraising the costs and benefits of sentencing, ideally, it would be helpful to distinguish the costs of punishment from the costs of crime reduction and reparation, so as to link costs with the outcomes of the three purposes of sentencing, and identify any separable “price of punishment”. That may or may not prove possible through further development of the work so far on the cost-benefit of sentencing. The cost-benefit work presented here is at an early stage of development and will benefit from wider exposure and debate as it is taken further. Meanwhile, in implementing a new framework, the expected impact on the prison population will have to be forecast, on the basis of choices made of the sort illustrated in the “What if?” scenarios.

### Costs: the “steady state” scenario

9.6 All other things being equal, the proposals in this report would require additional public expenditure. The provisional estimates from modelling the preferred sentences (in Table 4, Appendix 7), with varying assumptions about the effect of increased severity for persistent offenders, suggest:

- increased costs in the range of £464m and £540m;
- increases in the prison population of between 3000 and 6000; and
- an increase in probation workload of over 80000 offenders.

The main drivers of additional costs (in the absence of any measures to offset them) are:

- additional conditions, requirements and programmes for prisoners after release, for longer periods;
- extended liability of released prisoners to be recalled to prison for breach of those conditions and requirements;
- the new presumption of increased sentence severity for persistent offenders;
- the new sentence for dangerous offenders;
- more work with offenders in prison to reduce risks of re-offending;
- extra prison places as a result of fixed release points in place of discretionary release before the half-way point in the sentence;
- new court based review hearings.

9.7 Cost estimates have been built in three parts, on the assumption of having reached a “steady state” while all other things remain equal. The three parts are:

- the costs of the re-designed prison sentences;
- the costs of increased severity for persistent offenders; and
- the costs of review hearings.

(i) The new prison sentences

9.8 Four main changes have been modelled:

- the new short (under 12 months) sentences;
- the new longer (12 months and over) sentences (including the new sentence for dangerous offenders which is illustrated as an additional cost within the modelling for the longer sentences);
- fixed release dates, with no early release (HDC), but discretionary release for dangerous offenders.

Those sentences are described in chapters 3 and 4. Some of the options considered in those chapters have been subject to separate analysis in the modelling. These are:

- two variants of the shorter prison sentences – the preferred version with a maximum of three months in custody, and the alternative with a maximum of 6 months;
- three different ways in which a discretionary release system might operate in the longer sentences, in addition to the preferred fixed release system.

9.9 The resulting estimates of costs of the new prison sentences are shown in Tables 1 and 2 of Appendix 7. Both Tables assume that all those who currently receive prison sentences of under 12 months will continue to do so. (Alternative assumptions, that a substantial proportion of those who currently receive under 12 month sentences will in future receive sentences of 12 months; and that some currently receiving short prison sentences receive community sentences, are included in the “What if?” scenarios).

9.10 Important points from this part of the analysis, which estimates the costs of the new prison sentences, are that:

- a six month maximum for custody in the shorter sentences would cost an estimated £23 million extra per annum, and require 720 more prison places (nearly twice as many) by comparison with the preferred maximum of three months;
- the only discretionary release system costing less than the preferred fixed date system is the one which assumes prisoners would on average be released after serving less than half of their sentences in prison;
- the primary reason for increased net expenditure on the new prison sentences would be the increased input to work with offenders in prison and after release to reduce risks of re-offending.

9.11 The cost estimates for the new prison sentences provide no grounds for abandoning the preferred options of a three months maximum period in custody for the shorter sentences, and fixed release dates for the longer ones (except for dangerous offenders). The estimates for the additional costs of increased severity of sentence for persistent offenders therefore adopt those proposals as the “preferred model” (which is Model 4 in Table 1, Appendix 7). The estimated net additional annual cost of this model, before adding the impact of increased severity for persistence, is

£366 million. 750 additional prison places would be needed and the probation service would need to manage over 80000 more offenders.

(ii) Increased severity for persistent offenders  
**9.12** The report advocates (in chapter 2) a new presumption that recent and relevant previous convictions should increase the severity of the sentence that would otherwise have been justified by the current offence or offences. Modelling the effect of this suffers from the difficulty of not being sure about the extent to which sentencers do or do not already increase sentence severity on grounds of previous convictions. Many sentencers say they already do so, but it has not been possible to establish the extent or effects of current practice. From the analysis in Appendices 2 and 3 it seems certain that the very large increase in short prison sentences is in large measure a consequence of increased severity for persistence. There is much less evidence, however, to suggest that the length of prison sentences increases significantly as a result of previous convictions. The average figures available show that average sentence lengths do not greatly increase with numbers of previous convictions. This may be a result of a disproportionate number of relatively short prison sentences passed on offenders who have large numbers of previous convictions but have committed offences relatively low in the seriousness scale. If there were a higher likelihood of these shorter sentences than of the longer ones, appearing in the group of offenders with large numbers of previous convictions (which is possible), this would hold the average sentence length for persistent offenders down. More detailed analysis of the distribution of sentence lengths, in relation to previous convictions and seriousness of current offences would be necessary to throw more light on what is happening already, and the Home Office should examine the scope for this. The greater the extent to which previous convictions already increase sentence length, the less effect the new presumption of increased severity would have.

**9.13** The analysis has assumed that the new presumption of increased severity for previous convictions would not increase the existing likelihood of receiving a short prison sentence, because the custody rate already seems to take a good deal of account of previous convictions. (An increase in the custody rate has been modelled, however, as part of the “What if?” analysis – see paragraphs 9.20 and 9.21 below). For the length of prison sentences of 12 months or more, four options of increased severity have been evaluated. Two of them (options 1 and 2) assume only

increases in sentence length. The other two assume increases, but also decreases for those with no or few convictions. These are included because of the possibility that the new presumption could increase the credit given for absence of previous convictions, as well as the severity for persistence. The options including greater credit for a good record seem less likely to be relevant, given that existing guidelines already favour reduced severity for offenders with no or very few previous convictions. The impacts of the four options on the costs of the “preferred model” are estimated in Table 4 of Appendix 7. The more likely options (those including no additional credit for a good record) would bring the annual additional costs of the preferred model for new prison sentences to between £440 million and £540 million. Those options would require between 3000 and 6000 additional prison places.

**9.14** These results highlight the importance of establishing as accurately as possible what effect the proposed new presumption of increased severity should have, all other things being equal, on sentence lengths and costs; and of considering ways in which increased targeting of persistent offenders might be offset, for example through options for sentence lengths and the custody rate that are considered as part of the “What if?” analysis.

(iii) Review hearings

**9.15** The additional annual costs of review hearings are provisionally estimated at around £28 million, using the assumptions described in Appendix 7.

### Costs: the “What if?” scenarios

**9.16** All the foregoing estimates, although based on several and various assumptions, assume no separate changes as a consequence of the new framework. Separate changes could happen, however, either accidentally, or as deliberate acts of policy. Should targeting of extra resources on the more persistent offenders, for example, be accompanied by any change of approach to offenders presenting low risks of re-offending, so as to affect the custody rate? And should average sentence lengths be adjusted to take account of the extra punitive weight of the new prison sentences compared with those that exist now? The following results show that, on various scenarios and adopting one assumption about the impact of increased severity for persistent offenders, the costs of the framework and its impact on the prison population would vary widely. For example, depending on

whether average length of prison sentences increased or decreased by 10%, in combination with an increase or decrease of 10% in the custody rate, and substantial diversions from under 12 month to 12 month sentences:

- the need for additional expenditure could range between about £300m and £650m, and
- the impact on the prison population could vary between a reduction of about 1500 and an increase of almost 10000.

Table 15 in Appendix 7 shows the detail of these combined effects.

9.17 Four scenarios are evaluated in Appendix 7 (paragraphs 60 to 78):

- changes in the average length of prison sentences for terms of 12 months or more;
- changes in the custody rate (the proportions of offenders who receive custodial and non-custodial sentences);
- diversion from prison sentences of under 12 months to 12 months or more;
- later release dates in prison sentences of 12 months or more.

All of these adopt the preferred model for the framework (Model 4), and one of the options for increased severity for persistence (option 1), as the baseline against which to model changes. Other permutations, of course, are possible and can be modelled.

(i) Changes in sentence length

9.18 There is no obvious reason why the length of prison sentences for terms of 12 months or more should increase as a consequence of the new framework. The proposed new sentences would be more severe than a current sentence of equivalent length, because they include conditions that “bite” right up to the end of the sentence, instead of up to the three-quarter point as now. This will make the last quarter of the sentence more “real” than before. Work to reduce risks of reoffending may continue to the end of the sentence. Restrictions on liberty will result from compliance with conditions, and breach of conditions will facilitate swift recall to prison. Although some prisoners serving four years or more will be released earlier, unless they have been classified as dangerous, that would not justify a deliberate shift in sentence length (which could in any event increase as a consequence of recent and relevant previous convictions). The new sentences as a whole would therefore be, both actually and

potentially, significantly more punitive than their current equivalents. The size of the increased punitiveness is hard to quantify, but could be estimated at, say, around 10%. The courts will need to consider whether existing guidelines on sentence severity need to be adjusted accordingly. This will need to be done through the proposed new guidelines for the new framework. The consequences for demands on the prison service are significant, as the following summary of the analysis shows.

9.19 To illustrate the possible effects, Table 8 in Appendix 7 shows the results of a 10% reduction in the length of sentences of 12 months or more. This would reduce annual costs by an estimated £122m. Instead of requiring 3000 extra prison places, this scenario indicates a possible reduction of 800 places – a difference of 3800 prison places. The Appendix also shows the results of a 10% increase, although there is no reason to expect or seek this. Table 9 shows that this would increase annual costs by £136m. The need for additional prison places would go up from 3000 to nearly 7000. The extreme sensitivity of the prison population to apparently small fluctuations in sentence length is obvious. Plus or minus 10% in average lengths of sentences of 12 months or more can make a difference of over 7600 prison places.

(ii) The custody rate

9.20 The proportionate use of custody has increased substantially in the past few years; yet numbers and intensity of non-custodial penalties have also increased over the same period, while numbers and types of offenders sentenced have not changed significantly (see Appendix 2). The new framework should result in a more flexible approach, taking more account of risks of re-offending. For imprisonable offences, when a short prison sentence could be justified immediately but is not judged necessary, a prison sentence will still be available if the non-custodial penalty breaks down through repeated non-compliance. In parallel with changes to the framework, other changes are going on that could increase confidence in the effectiveness of non-custodial penalties – for example the increasing availability of the Drug Treatment and Testing Order, the associated drug treatment services, and curfews with electronic tagging.

9.21 The present custody rate, as history shows, is not the only or necessary one. This report argues that the most intensive and punitive sentences should be reserved for the most serious and persistent offenders. In implementing the proposed

## Chapter 9

### COSTS AND BENEFITS

framework it is possible to assume no change in the custody rate, an increase, or a decrease. Paragraphs 9.12 and 9.13 have explained why the changes proposed in this report may not justify a further increase in the custody rate beyond what has already occurred. There is a case for targeting short prison sentences on those offenders who are most resistant to change, and whose offences (taking account of previous convictions) justify a custodial sentence. A great deal will depend on how sentencers (especially magistrates and district judges) choose, or are led, to use the new short sentences, bearing in mind the scope to use non-custodial sentences. Greater use of non-custodial sentences is one possibility. Table 10 in Appendix 7 shows that a 10% increase in non-custodial sentences, in place of custody, would reduce annual costs by £ 25m, and require 2200 additional prison places instead of 3000 (a reduction of 800 places). A 10% increase would add to annual costs by £30m and require 3700 additional prison places (700 more than the basic Model). Plus or minus 10% in the custody rate can therefore make a difference of 1500 prison places.

(iii) Diversion from short to long prison sentences

9.22 Under the proposals in chapter 3, prison sentences of less than 12 months would have a maximum initial term in custody of either 3 or 6 months. If the maximum were 3 months (as has been assumed for modelling purposes in the preferred Model 4), some offenders currently receiving prison sentences of more than 6 and less than 12 months might instead receive one of 12 months. This could happen if judges felt that the most severe of the new under 12 months sentences was inadequate for an offender they would currently sentence to more than 6 and less than 12 months (although in practice those receiving such sentences could serve only between 3 and 6 months in custody, minus any early release time, and without the post release conditions applying to the new sentences).

9.23 Table 12 in Appendix 7 shows what the additional annual costs would be if 15 % of those currently receiving sentences of 3 or more but less than 6 months received 12 month sentences, and if 50% of those currently receiving 6 or more but less than 12 months similarly received the longer sentence. These diversions would add about £65 million a year to costs, and require 4800 additional prison places, by comparison with the 3000 required in the basic model (i.e. 1800 extra prison places as a result of this “upward” diversion in sentencing). This underlines the importance of winning any

argument about the adequacy of the new sentences of less than 12 months, if they are to have a maximum initial custodial term of 3 months, rather than 6. The costs of adopting a six month maximum, and the impact on the prison population, would be significantly less than this “upward” diversion if it occurred (see Table 2 and paragraph 9.10 above).

(iv) Later release date

9.24 In order to test the sensitivity of the estimates to changes in the proportion of the longer (12 months and over) prison sentences that has to be served in prison, the model has been used to calculate the effect of a fixed release date at two thirds, instead of half the length of the sentence. Table 13 in the Appendix shows that this would nearly double the estimated costs of the basic model, adding nearly £370 million a year to costs, and pointing to a need for 15000 extra prison places. This scenario again underlines the sensitivity of costs and the prison population to changes in the length of time spent in custody.

#### Cost-benefit: the “steady state” scenario

9.25 Estimates of cost-benefit are constrained by the available data and methodologies. Further development of these would facilitate deeper and broader analysis. The benefits of the proposed new framework have been estimated solely in terms of its possible impact on crime, through the incapacitation effect of imprisonment and work with offenders to reduce re-offending. Values have been put on those benefits, so as to compare them with costs. No assumptions have been made about possible deterrent effects, or any effects of “partial incapacitation” in the community. Other benefits, such as increased public confidence, have not been estimated, through absence of sufficiently robust data. The work on estimating cost-benefit is at an early stage of development and will benefit from wider exposure and review. The limitations of the work so far mean that great care is necessary when interpreting the results, so as to avoid misleading conclusions. For example, the modelling techniques used tend to produce artificially favourable results for prison sentences with larger proportions in custody than in the community, and these should be ignored for the reasons explained in Appendix 7. Also, the model is static, not dynamic. It has no built in “law of diminishing returns” for work to reduce re-offending, or the longer term effects of incapacitation (on which see paragraphs 1.66 to 1.68 in Chapter 1).

9.26 Tables 6 and 7 in Appendix 7 show the results. Table 6 shows differing results for models with discretionary release systems. For the reason described above, these misleadingly suggest that severely operated discretionary release systems have better cost-benefit ratios, and should be ignored. Table 7 shows the results on the basis of:

- “custody plus” having a maximum initial custodial term of 3 months;
- fixed release dates, except for dangerous offenders;
- increased severity for persistent offenders (using all four options covered in the analysis of costs).

This table is more useful as a basis for comparisons.

9.27 The Tables offer two ways of looking at the comparisons: through the cost-benefit ratios in column 8 and the net crime benefits in column 7. The cost-benefit ratios exclude the costs and benefits of incapacitation through imprisonment, because the cost-benefit ratio for the incapacitation effect is constant (1.16) for any level of resources, and omitting it does not therefore affect the comparisons. Also, the size of the relevant costs tends to dwarf other items and make comparisons more difficult. The net crime benefit estimates the value of the crime reduction benefits (including incapacitation) on top of the relevant additional expenditure. A positive figure indicates that the value of the benefits is greater than the cost of achieving those benefits. All the net crime benefits for the proposed changes are positive, but need to be compared with the estimated net crime benefits of the existing framework.

9.28 All the cost-benefit ratios for the new framework, excluding incapacitation, are positive. The net crime benefit of the existing framework is estimated at £613m. For the preferred model, in Table 7, the possible net crime benefits of the new prison sentences are estimated at £786m, before any account is taken of increased severity for persistent offenders. When increased severity for persistent offenders is taken into account, the net crime benefits are between £781m and £813m. This means that the net benefits of a new framework, over and above its additional costs (excluding review courts), could exceed those of the existing one by between £170m and £200m per annum. That would be a substantial return on the additional investment.

9.29 These estimates need to be treated with caution. They depend crucially on the effect that the new framework has on service providers, and their ability to achieve better results as measured by

reduced re-offending. Although the underlying assumptions are based on the available evidence of “what works” in changing offenders’ behaviour, that evidence has yet to be fully tested and proved in England and Wales. Also, causes and effects are difficult to disentangle. Greater success in reducing re-offending could be achieved within the existing framework. The analysis suggests it is reasonable to assume that increased benefits could be achieved through a framework which targeted persistent offenders more explicitly, and increased the leverage over them while under sentence, for longer periods. How great any increase in benefits might be must remain to some extent a matter of judgement. The sensitivity analysis in Figure 1 of Appendix 7 provides some comfort, by showing that the assumed impact on re-offending could drop by two thirds and still more than break even.

9.30 Two other benefits are possible, but have not been estimated. First, underpinning the proposed new framework is the idea that persistent offenders will be encouraged, through sanctions and rewards, to adopt non-criminal lifestyles sooner than they would otherwise have done so. This attritional, deterrent effect is speculative and cannot be estimated. If it materialised it would be additional. Secondly, the framework is intended to earn and deserve increased public confidence. This too is highly speculative, since the subject is inherently controversial and opinions will always vary. Nevertheless, any gains in public confidence would also be in addition to those that have been evaluated.

### Cost-benefit: “What if?” analysis

9.31 Table 14 of Appendix 7 shows the results of applying the cost-benefit model to the “What if?” scenarios. This Table is particularly vulnerable to the limitations in the methods used, which has already been noted – i.e. the built-in preference for sentences with longer proportions in custody and shorter in the community. Again, all the results show significantly greater net crime benefits, by comparison with the existing framework. It would be unsafe, however, to draw conclusions about the comparative cost-benefit of the various options in the long run. Further work on the data needed and methods to be used for this sort of analysis is needed to inform future judgements.

### Combined effects

9.32 Table 15 shows the combined effects of three “What if?” scenarios, at the upper and lower ends of the cost range. The “combined” scenarios are:

- at the lower end of the range, a reduction in average length of prison sentence; a reduction in the custody rate; and no “drift” from under 12 month to 12 month prison sentences; and
- at the upper end, an increase in average length of prison sentences; an increase in the custody rate; and upward “drift” from under 12 month to 12 month prison sentences.

The range indicated is from £300m at the lower end to £650m at the upper, and from a reduction in the prison population of 1500 to an increase of 9500. Probation workloads do not vary greatly.

### Further work

**9.33** Further work, building on the framework for costs and benefits set out here is necessary. Other possible costs to the criminal justice system, for example for the police, will need to be taken into account. It would also be helpful to consider ways of incorporating wider social costs, such as the effects of sentences on offenders’ families, and benefit payments. This will require further research and analysis. The analysis to date should enable a start to be made in the necessary dialogue between sentencers and service providers about what is wanted from the framework, in terms of its impact on offenders and services, and how the proposed new sentencing guidelines would contribute to that impact. If, as is proposed, responsibility for guidelines is placed with an independent, judicial body, there will need to be a dialogue between that body and the Government about the combined effect of legislation and guidelines on outcomes for offenders, and estimated impacts on services. If done successfully, that should reduce the risk that unexpected demands would undermine work with offenders to reduce re-offending. Meanwhile, it would be helpful if the Home Office developed its thinking further on ways to develop existing methods of estimating cost-benefit in this area, so as to inform future reviews of public spending.

### Conclusion

**9.34** The analysis has shown that, measured in terms of crime reduction, the estimated additional expenditure on the new framework should be capable of achieving sufficient added value by comparison with the present framework to justify the necessary investment. This conclusion is highly sensitive to assumptions about the impact of work by the prison and probation services to reduce re-offending, and the extent to which a new framework would improve the outcomes of that work. It also depends on a large number of

assumptions. The figures, however, reflect only the benefits that can be modelled in this way. They take no account of possible additional deterrent effects resulting from increased severity on persistent offenders, nor of any benefits in terms of increased public confidence. Any additional benefits of this sort would be a bonus, on top of those shown in the figures.

### *Recommendations*

- **The Government, consulting sentencers, should use the analysis of costs and benefits to make choices about how it expects the new framework to be used.**
- **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.**
- **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.**
- **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.**

## Chapter 10

# IMPLEMENTATION – MAKING IT HAPPEN

Experience in England and Wales, and in comparable jurisdictions, shows that sentencing reform projects can, but do not always, gain their intended results. The risks of unintended or sub-optimal outcomes are high, and several factors are critical for success. Important conditions for a successful and intended outcome include:

- sufficient understanding of, and commitment to the main elements of the reform programme, including its goals and how it is expected to work, amongst all those directly involved, and a wider public (the “hearts and minds” aspect of implementation);
- comprehensive assessment of needs for investment in infrastructure and services, including completing necessary policy development; constructing essential systems; obtaining necessary human and financial resources; and enacting legislation;
- adequate planning for the change process, through a comprehensive plan that recognises the needs of all concerned and commands a sufficient level of confidence across all agencies.

10.2 The rest of this chapter describes what will be needed to meet these conditions of success.

### Understanding and commitment

10.3 This report provides a basis for deciding on the shape and content of a new sentencing framework. It calls for a strategic decision by the Government on whether to go ahead; if so in what directions, and with what intended or expected demands on service providers – especially prison, probation, and courts. Consultation with those who would be most closely involved in any reform programme will be essential before final decisions are taken, or conclusions reached about their impact on services. When launching the review, the Government committed itself to consult over the outcome (see House of Commons Hansard, Written Answers for 16 May 2000, column 72). Consultation should help to test levels of confidence in the reform programme, and how its implementation should be managed to secure best results.

10.4 At an early stage, it will be important to look for opportunities to explain the case for change and the opportunities for better outcomes. Any change programme of this sort will produce a range of reactions. Many will fear that change will not necessarily be for the better – and some will be sure

that it will be for the worse. The review has also found enthusiasm, however, for exploiting the opportunities that a new framework would permit and encourage. Consultation need not, and should not be passive. Pending discussion with sentencers, it will be important to keep open the effects the new framework will have on demand for services, and the size of the prison population, since the extent of those effects will depend on how sentencers use it. A proper dialogue should take place, both to communicate and explain the proposals, as well as to listen to responses. This will work best if those who already have some enthusiasm for change are engaged in the process from the beginning, without prejudicing their independent roles. The result of consultation should be a higher level of confidence in the prospects of a well run project, likely to gain desirable benefits, than existed beforehand.

10.5 Some messages will have an important impact on that level of confidence. Two are particularly important. First, the thoroughness of the planning, and the time and resources allowed for it, will weigh heavily with many practitioners, who will be well seized of the magnitude of the tasks they will have to undertake, on top of their already full time jobs, to implement change successfully. The timetable, as in all such cases, must be challenging and rigorous – but also realistic; and all involved must be provided with the time, space and resources to enable them to operate the new system successfully when it starts.

10.6 A second key message will be whether Parliament is looking to produce a framework that will last. The overpowering feeling amongst practitioners, following the last decade, is that legislation is unceasing, and there is never a chance to make things work as they should, before more change has to be taken on board. When formal rules are too complex, or contradictory, there is a risk that unwritten rules may begin to operate. Of course, there must be a continual search for improvement: but there is a strong case for ensuring that the basic framework is designed in a way that permits some commitment to its longevity. The basic framework should have at least a 10-15 year life. Otherwise the forecast benefits will not materialise. As with any major investment, such as a new building, the goal should be to ensure that the structure lasts long enough to justify the costs of construction and use through the “pay back” of benefits that will accumulate over the life of the new

structure. To pursue the analogy, the foundations should not be laid, through legislation, until the building plans are complete. A feeling that the new framework would last would help to convince busy sentencers and service providers that their enthusiastic commitment would be worthwhile.

10.7 Levels of enthusiasm and commitment in the field will also be influenced by the political process. Many contributors to the review have been looking for a deliberative and measured approach to the subject – a “new politics of sentencing” – which heeds the evidence about how much can be expected of sentencing, and about the comparative costs and benefits of different approaches. Sentencing – it should go without saying – will always be a topic of public interest, and political importance, on which divergent views are likely to be held. This report has tried to provide a basis for informed debate, including areas where efforts to improve present levels of knowledge would be helpful.

10.8 Communicating and listening should not be confined to those most closely involved. It must embrace a wider audience. Public confidence in sentencing is an important part of confidence in the criminal justice system. Communication with the public over the goals of a sentencing reform project will be important from the start, although it will also be important to ensure that messages given do not pre-empt conclusions to be drawn from the consultations with practitioners. Misunderstandings are all too easy, and will be inevitable if communications are inadequate.

### Investing in the new framework

10.9 Many ingredients will need to be in place before a new framework can succeed. These include:

- final resolution of policy issues and testing of proposals;
- new systems for a variety of purposes, all of which will need to be identified quickly;
- human and financial resources to meet assessed needs for services;
- legislation.

(i) Policy issues

#### Guidelines

10.10 Policy development will need to be taken forward in one key area – sentencing guidelines – and will be useful in others. Early discussion will be needed about the contribution of guidelines to the sentencing framework, including their scope and how they should be drawn up. A clear view will be needed before legislation is introduced, and will

turn on important discussions between the senior judiciary and the Government, and involving the Sentencing Advisory Panel. Agreement on a general approach would enable decisions to be taken on the future role of the Panel, including any extension of its existing terms of reference, and definition of its role in relation to guidelines.

10.11 From these decisions would come a plan for the production of guidelines, of a given scope and within a given timescale, and with the support of defined resources. This work would be an important stage along the critical path for the project as a whole, since new guidelines will be an essential ingredient of the new framework. Simply bolting new legislation, and new types of sentence, on to the existing non-statutory guidelines would not serve the interests of justice or secure best value for money.

#### Piloting

10.12 Policy development could usefully be taken further in other areas by defining the scope for “pilots” aimed at testing and developing ideas in practice, before full implementation. This might be possible in advance of legislation in areas like:

- review hearings;
- pre-release plans;
- co-operation between police, probation and suppliers of electronic monitoring services, in monitoring offenders under sentence in the community;
- reparation and restorative justice schemes;
- involving the community in the selection of work to be undertaken in the community and making greater use of the voluntary sector, and volunteers in resettlement work.

#### ‘Intermediate estate’

10.13 Finally, the proposed review of the “intermediate estate” should be launched without delay. This would produce an “inventory” of available accommodation and its existing ownership and use, as a basis for developing the increased use of “containment in the community”, whether as part of a custodial or non-custodial sentence. Whether to embrace in this review the long term scope for “community prisons”, which could provide an added contribution to the “intermediate estate”, should be decided at an early stage.

10.14 Other policy issues will arise during the implementation phase, and time and resources to deal with these will be needed.

## (ii) Systems

10.15 Many existing systems will need to be further developed or adapted, and several new ones created. Workstreams in a project plan for sentencing reform must include systems for:

- **Risk and needs assessment** – ensuring that the preferred system for assessing the risks presented by offenders, and the work needed to reduce and manage those risks (OASys) is in place and working well for all who need it, ideally in electronic form and capable of being communicated within and between agencies electronically;
- **Case management** – creating adequate case management systems in all probation services, for the design and monitoring of recommended community sentences and the management of custodial sentences in the community, in partnership with other service providers;
- **National standards** – reviewing and where necessary revising national standards for the probation service, in particular for pre-sentence reports, and achieving agreed understandings, or formal protocols, with essential partners, such as the Crown Prosecution Service over the provision of case files;
- **Sentencing records and offender histories** – creating new systems for recording sentencing decisions, along with key elements bearing on the seriousness of the relevant offence (or offences) and making them available electronically. These systems must enable sentencing decisions to be compiled in an up to date electronic “dossier” about an offender, as part of their criminal record, and must include the detail of their offending history. There should be agreements between services as to access (this will need to be taken on board as part of wider efforts to improve data storage, retrieval and access for all criminal justice agencies);
- **Pre-release plans** – the prison, probation and courts services to design systems for submitting to review hearings, proposals for the content of restrictions and programmes to be imposed on prisoners after release into the community, while serving sentences of more than 12 months;
- **“Seamless” offender programmes** – prison and probation services to work out how to ensure that offenders moving from prison to the community, or from the community to prison, are enabled to continue as “seamlessly” as possible the work aimed at reducing the risks of re-offending, in ways that are at least compatible and minimise discontinuity;
- **“Partnerships” in the community** – as part of developing its case management role, the probation service will need to take further its work with “partners” who provide services like drug treatment, electronic monitoring, training for employment; it will also need to develop ways of involving the community more closely and systematically in its work, especially in the selection of work to be done in the community by offenders, and the use of volunteers and voluntary organisations in service provision. Involving voluntary organisations in areas like employment, housing and mentoring will be essential, to reduce risks of re-offending. How that should be done – independently or within contracts or service level agreements with statutory services – is beyond the scope of this review; but if all provision for work with offenders under sentence were to be made through statutory services, it would be desirable to have a substantial component earmarked for funded partnerships with voluntary organisations. The police and probation services jointly will need to establish how they are to work more closely together over the supervision of offenders under sentence in the community who are judged to have relatively high risks of re-offending, including agreed protocols for information sharing. Links with providers of electronic monitoring services, and with court enforcement officers will need to be forged;
- **Review hearings and enforcement** – courts services, in consultation with prison and probation services, will need to develop systems for all types of review hearing; the probation service with the police will need to develop systems for “fast track” arrest procedures when an offender in the community is failing to comply with conditions and there is judged to be a high risk of re-offending;
- **ICT needs and impact** – the impact of change on existing information and communications systems will need to be assessed, along with new requirements;
- **Parole and electronic monitoring** – parole systems will need to be reviewed and adapted to reflect the more limited population to be dealt with, and new contracts for curfew with electronic monitoring of prisoners on release will be needed;
- **Information needs** – new arrangements for providing information to sentencers about their practice in relation to comparable others (to help further consistency) and about the costs and outcomes of sentencing will need to be developed, along with methods of informing the general public about how sentencing is intended to work and how it is working in practice.

(iii) Resources

**10.16** Early steps should be taken to establish a shared understanding between Government and sentencers about how the new framework is likely to be used and with what resulting impact on the prison and probation services. The natural way of achieving this would be to construct the dialogue with the body responsible for the guidelines that will play a large part in determining demand. A shared understanding of what is expected to happen can then feed into plans for meeting the needs of services. The importance of this cannot be exaggerated. The benefits of the new framework will not accrue if services are knocked sideways by unforeseen demands. If prisoners have to be moved round the system to relieve pressure for places, the work to tackle their offending behaviour will not be done, or will be severely disrupted, so that forecast benefits are not achieved. Simply to reform the law, with no idea how it would be used, or with what effect on demand for prison, probation, or court services, would be reckless.

**10.17** Mock sentencing exercises could be considered as a possible way of testing how the new framework might be used. It would be important to ensure, however, that any such exercises did not take place in a policy vacuum. Both governmental policy, in terms of the underlying aims of the legislation, and judicial policy, in terms of the proposed guidelines, would need to inform the exercises so as to bed them into reality. The policy steer would take account of the options described in the chapter on costs and benefits.

**10.18** On the basis of shared expectations about use of the framework, service needs would be assessed. Adequate availability of programmes to reduce re-offending must be achieved by the prison and probation services before implementation, as part of the essential infrastructure.

**10.19** The human resources needed for success must also be assessed, not just in terms of numbers, but also in terms of expected roles, and the skills needed to perform those roles well. To assume that existing staff and skills, or more of the same, would fit the new needs would be unsafe. All services will need to review their recruitment and training plans, not just to meet transitional needs, but also to meet continuing needs once the new framework is in place. The extent to which services are provided by “partners”, whether other public services, or private or voluntary organisations, should be part of this.

**10.20** Experience of reform projects of this scale demonstrates the need for a development fund, to develop and test new systems and processes, requiring effective joint working and communication between different agencies, prior to

full implementation. The scope, size and purpose of such a fund, to cover current as well as any capital costs, should be considered.

**10.21** The product of the planning should feed into the next available review of public spending, with estimates of costs and benefits that build on the illustrative scenarios in chapter 9 and appendix 7 of this report.

(iv) Legislation

**10.22** Preparation of legislation can begin once the direction and content of the reform programme is determined, and enough work has been done on other essential parts of the infrastructure to ensure that the legislation can be “got right”. Practitioners say that the track record of legislation on sentencing is not good, because too little account is taken of practical considerations. This suggests that there would be great advantage in consulting on legislation in draft and allowing time for this. An early decision will be needed on whether to try to produce, in effect, a first statutory Penal Code, containing all the main statutory elements of the framework (see paragraph 8.8 to 8.10). The new framework will in any event require a Bill of wide scope.

**10.23** If such a Code is to be continuously available in up to date form, Parliament will need to find ways of enabling it to be amended from time to time without opening up the whole Code to review and debate, even as a consequence of the smallest proposal for amendment. Discussion with the Parliamentary authorities will be necessary to establish what might be possible by way of new Parliamentary procedures to secure the desired outcome, and over what timescale. The possibility of a Penal Code could be used as a pilot development for codification of criminal law more generally. Experience has already shown that traditional “consolidation” does not go far enough.

**Planning for change**

**10.24** A pre-requisite for successful management of change is an agreed, and comprehensive project plan. This must cover all the necessary workstreams; make clear who is expected to do what by when; and ensure that targets are set in an appropriate sequence (for example where one thing has to be achieved before another can be).

**10.25** There must also be suitable arrangements for direction and control, at high level, and at working level. In this case, a high level steering group, within Government, will be needed, but it should also engage directly at a high level with those who are involved outside central Government. At senior working level, a suitably skilled and staffed team will be needed to draw up the plan, assess risks, keep

both under review, report progress, and propose change when necessary.

10.26 This machinery would enable decisions to be taken not just on the content of the plan, but also on the overall timetable, taking account of what needs to be done, and how quickly it can be done. Without pre-empting a judgement which requires more detailed assessment, it is clear that legislation could not be before 2002-03 at the earliest. Once a full implementation plan has been drawn up it will be possible to work out the earliest feasible implementation date, taking account of any other changes to the criminal justice system, including those likely to result from Lord Justice Auld's report on criminal courts.

10.27 Whatever the timetable, those leading the changes must:

- communicate, communicate, communicate
- listen, listen, listen

and ultimately

- train, train, train.

A target implementation date should be set as far in advance as possible, once a sufficient level of confidence about meeting essential needs is reached. The communicating and listening process would be used not only to learn and adjust where necessary, but also to raise confidence in the deliverability of the project and its desired outcomes. To support this, the initial project plan should be published widely, as should subsequent periodic progress reports, and recipients should be invited to comment if they wish. Occasional conferences or seminars with practitioners and others could help this process.

10.28 Planning must include arrangements for post implementation review, and evaluation. This will ensure that the effects of the changes are monitored, to check whether they are working as intended, whether any remedial work is needed, and whether desired outcomes are materialising. Research plans should take into account needs of this sort. Responsibility for monitoring, after implementation, could be assigned to a standing group, meeting from time to time and reporting to the Strategic Planning Group for the Criminal Justice System, within Government. Such a group could be convened by the Home Office and consist of representatives of all those affected by the changes. Its task would be to hear evidence from practitioners, and the monitoring and research programme, about the changes and their effects, and to make proposals. The review has not been able to consider suggestions that a much more formal responsibility should be established, akin to the Youth Justice Board, for identifying and

encouraging best practice, funding development projects, and advising Government. Such possibilities can be considered further.

## Conclusion

10.29 This chapter has set out some of the factors to be borne in mind when implementing sentencing reforms. It would be better not to embark on the project than to under-invest either in the management of change or in the essential infrastructure of the new framework. This report provides only a design for a framework. Whatever decisions are reached, much greater resource will be needed to turn design into reality.

10.30 That resource would not be justifiable if the framework were to be short lived. Again, it would be better not to go ahead if the risk of a short-lived framework was too high. A new framework will call for a great deal from those who work the present system. For some considerable time they will have to grapple with the complexities of different frameworks applying to different offenders, depending on when they committed their offences or were convicted and sentenced. Such costs, along with all the others, are only justifiable if the framework runs long enough to score cumulative benefits. The first goal, in implementation, should be to create sufficiently high levels of confidence not just in the direction of change, but also in the way it will be managed and resourced, and in the commitment to long-term goals.

### *Recommendations*

- **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.**
- **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.**
- **The Government should commit itself to changes that are intended to last long enough to deliver the estimated benefits.**
- **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.**
- **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.**