



**Response to
Home Office consultation *Making Sentencing
Clearer: A consultation and report of a review by the
Home Secretary, Lord Chancellor and Attorney
General***

January 2007

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Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.
2. We are grateful for the opportunity to respond to this consultation, and are happy for our responses to be made public.

General remarks

3. We welcome the government's acknowledgment that there are people serving prison sentences who 'should not be there'. Where prison is unnecessary, it is a damaging and costly response that is ineffective in reducing reoffending. The overcrowding in the prison estate also compromises the service's ability to engage prisoners in constructive programmes, and to maintain high levels of safety in prisons.
4. We believe that custody should be confined to those serious, dangerous and/or highly persistent offenders for whom it is genuinely necessary, and who would not be better placed in alternative accommodation (such as a mental health bed). It is important to point out that the increase in the number of offenders in custody has in part been driven by legislative change:
 - Mandatory minimum sentences are still being created – as recently as in the Violent Crime Reduction Act 2006 (albeit avoidable in 'exceptional circumstances');
 - The 'dangerous offenders' provisions of the Criminal Justice Act 2003 have enabled indeterminate sentences (in terms of their custodial term, these are life sentences in all but name) to be imposed where a life sentence was not, previously, available;
 - Civil orders that can attract a custodial sentence for breach – ASBOs the chief among them – can result in unnecessary prison terms;
 - Legislation has made custody more likely when a community order is breached;
 - A large number of new criminal offences have been created;
 - The detention and training order has made custody available for many more children who offend, and legislation has limited the use of diversion for children.

5. Amendments to some of this legislation could decrease the unnecessary use of custody. We will suggest below how some of these provisions could be amended. Further, the use of custody and the length of custodial sentences for offences where imprisonment has always been available have increased – in part, we believe, due to the use of punitive rhetoric by politicians and the press. Provision could be made in legislation to limit the use of custody for minor offences by sentencers, but it is also important for political rhetoric to be balanced and informative. Ministerial criticism of judges, such as occurred following the Sweeney case, is deeply damaging to public confidence.
6. We support moves to make sentencing clear and transparent, so that victims and their families, offenders and their families, and other members of the public can understand both why certain sentences are imposed and what their actual effect is or will be. We are concerned that there may be a lack of public confidence in early release/release on licence. It is important that the role of post-release supervision in promoting rehabilitation and preventing further offending, and the possibility of recall, is explained.
7. The consultation reflects a general shift in the focus of sentencing, from dealing with individual offences to dealing with the offender and either changing or containing their offending behaviour. This shift has had serious consequences, including for the Parole Board, which is now effectively determining the length of many custodial sentences. We are concerned that the Parole Board lacks sufficient powers and resources to discharge that duty as best it could. In particular, decisions to release should not, in our view, be taken without the prisoner being seen by the Board so that appropriate questions can be asked of him. Further, while the Parole Board is a court-like body, it does not have all the powers of a court – in particular, the power to compel witnesses. It is also of concern that panels do not always include a legally qualified person.
8. Sentencing in general is increasingly based upon risk prevention: this will naturally result in an increased workload for the probation service and Parole Board. The resources must be found to ensure that this work is done well. Much money could be saved by avoiding the over-use of custody, which is extremely expensive.

Community sentences

Question 1: What more could be done to promote the use of community sentences instead of short periods of custody for lower level offenders?

Confidence in community sentences

9. We believe that if sentencers are to be encouraged to use community sentences they must be confident that they are effective and will be carried out. Courts often see examples where community sentences have ‘failed’ – either because they are breached or because the person offends again – but do not, in most cases, see the successful recipients of such sentences. We would welcome the provision of information on the progress of such sentences to the courts: while it would be costly in terms of time and money to require the court to oversee the progress of each sentence, some provision could be made such as the sending by offender managers/probation officers of review reports to sentencers for them to read outside court, and perhaps a completed questionnaire or letter from the offender on completion of the sentence.

10. Another option is for sentencers – magistrates and judges – to visit local community projects. We welcome provision for community representatives to pinpoint work that needs carrying out in their area – for example, redecorating, cleaning and restoration of public buildings and open spaces. This enhances the restorative and reparative effect of such sentences. We would also welcome the introduction of more community projects with a tangible achieved result, which could have several beneficial effects. For example, unpaid projects could result in a tangible benefit to the community, such as the redecoration of a community centre, the creation of a new public garden, the refurbishment of wheelchairs for a care home, etc. We also welcome the use of plaques on completed projects. Such projects should have several beneficial effects: in addition to promoting confidence among sentencers and the community, a project with a tangible goal may provide better motivation, self-esteem etc for the offender, as well as perhaps providing training. The results of the project eg a redecorated building could be published in the local media as well as to sentencers.

11. To provide sentencers with regular information – perhaps in the form of a bulletin or short newsletter – on community sentences in their region, including case studies of (perhaps anonymised) individuals; projects completed; statistics on sentences successfully completed, etc, would provide extra confidence. Publication of this sort of information in local media would also help to instil confidence in the community.
12. In order to promote confidence in community sentences, however, it is also essential that courts have confidence in the probation service. We are concerned that understaffing in the probation service may lead to reports not being provided in all cases where they would be beneficial. If this is occurring, it may result in issues highly relevant to sentence being missed. In addition to reports being available, the service must also be properly funded and organised to deliver effective community sentences.

Legal restrictions on unnecessary custody

13. Confidence in community sentences alone would, in our view, only reduce the overuse of custody to a certain extent. In our view, the sentencing climate is such that sentencers should be prevented by guidance and, where appropriate, legal restrictions, from imposing custodial sentences in cases where this is unnecessary: that is, where the offending is not serious or highly persistent and the offender is not dangerous.
14. To prevent the overuse of custody, options include:
 - To prohibit or restrict, in law, the use of custody for certain offences, eg:
 - o shoplifting of goods under a certain value;
 - o section 4A Public Order Act 1986; possession of drugs (up to a certain amount, for personal use);
 - o breach of an ASBO, except where the breach would otherwise be an imprisonable offence;
 - o breaches of ASBOs by children and young people
15. If making certain offences non-imprisonable was not thought to provide sufficient deterrent against persistent offending, then options to confine its use to persistent offenders include:

- Prohibiting custody for certain offences except in a case where a person had a certain number of previous convictions for the same offence;
- Prohibiting custody for certain offences unless a community sentence had already been imposed for a previous conviction (perhaps for the same, or a similar, offence).

Care should be taken, however, to avoid the over-use of custody in circumstances such as repeated minor offending (eg shoplifting) by substance addicts.

Preventing people entering the criminal justice system unnecessarily

16. Civil orders such as ASBOs are responsible for people entering the criminal justice system in cases where an ordinary civil action, or an alternative to court proceedings, may have been more appropriate. ASBOs should not be used to deal with minor misbehaviour by children, behaviour triggered by mental conditions, or as a method of merely 'shifting' the location of behaviour – such as street prostitution and begging – that is largely triggered by drug addiction and similar factors. The criminalisation of problem-led behaviour by ASBOs can lead to the presence in custody of the very people - vulnerable women and young offenders; those for whom mental health treatment would be more appropriate – that the consultation explicitly states '**should not be there**'.
17. Narrowing the circumstances in which an ASBO can be imposed and the prohibitions that it can include would therefore be an important step in preventing the needless use of custody. Alternatives – such as civil injunctions; neighbourhood mediation; or access to support services, may be much more appropriate in some cases.
18. In relation to children, the current, pro-custodial legislative framework needs to be re-thought. There are far too many vulnerable children and young people in custody, many of them living under regimes that are unsuitable for their care and rehabilitation. The findings of the Carlile report make sobering reading for anyone who assumes that the sentencing of children to custody will contribute to their rehabilitation. It is essential that custodial sentences are confined to the small number of children who present a serious danger to the public, and that that custody is served in a decent and rehabilitative environment.

19. It is the government's stated policy that custody for children is a 'last resort' – however, as Professor Rod Morgan of the YJB has said, 'a last resort today is substantially lower than 10 to 15 years ago'.¹ Guidelines and, where necessary, legal barriers to the unnecessary use of custody are required in order to ensure that custody is genuinely a last resort for sentencers.
20. Several aspects of the legal framework could be adjusted in order to deal with the over-incarceration of children and young people:
- The rigid reprimand/final warning structure could be adjusted and restorative diversionary programmes expanded;
 - Custodial penalties should not be available for the breach of an ASBO by a child;
 - Referral orders could be made more widely available;
 - Different maximum penalties for children could be established for many offences;
 - Mandatory minimum sentences should never be applied to under-18s, even if they allow for 'exceptional circumstances';
 - A general principle could be established in legislation that no child can be sentenced to custody unless the child presents a significant risk of death or serious physical/psychological harm to one or more members of the public which cannot properly be addressed by another method;
 - More mental health beds could be made available for vulnerable children and young people, funded with the savings made by reducing the numbers in custody.

¹ Professor Rod Morgan, quoted in 'Youth Justice system is in crisis, officials warn courts', *Guardian*, 25 October 2006.

Making sentencing clearer

Question 2: Does the way sentences are explained by courts need to be changed so the public can understand them more easily?

Question 3: Would it make sentences easier to understand if the length of determinate sentences was expressed as an overall term of punishment made up of two parts; a custodial period followed by a period of supervision in the community or if the two parts are expressed as discrete elements?

21. We are concerned that the current manner in which custodial sentences are expressed, despite explanation by courts of the meaning of a sentence and its constituent parts, may be having an adverse effect on public confidence in the justice system.
22. While there are very good reasons why the entirety of a determinate sentence is not spent in custody, the differential between the custodial period and the total sentence could be perceived by victims and their families, and other members of the public, as a deception – giving rise to comments stating that a person should serve the sentence they were given, etc. This can give rise to the view that the system is too lenient, which can put pressure on sentencers to ratchet up tariffs.
23. The situation is compounded since most people will hear about a case through the media, where the sentence may be reported without any explanation of its meaning. We believe that the sentencing exercise would be clearer to the public if determinate sentences were expressed in an alternative formulation. To express the overall sentence length as a period of ‘punishment’ would be confusing, since punishment is only one of the purposes of sentencing set out in the Criminal Justice Act 2003, and the post-release period may not have punishment as its primary purpose, being more concerned with protection of the public and rehabilitation of the offender. To express the sentence as ‘two years’ custody plus two years on licence in the community’ runs the risk that the sentence will be reported as one of ‘two years’ imprisonment’ and that there will be a perception that sentence lengths have decreased.
24. However, despite the risk of hostile reporting the latter formulation is the clearest and simplest option and we therefore endorse it. The meaning of the licence period –

including the possibility of recall – should be clearly explained. For EPP sentences (extended sentences for public protection), an analogous formula should be employed – eg ‘two to four years’ imprisonment plus five years on licence in the community’.

Indeterminate sentences

Question 4: Would it be helpful if the judge was able to express an indeterminate sentence in a way which made the sentence clearer to the public?

25. We preface our comments on indeterminate sentencing by emphasising that we are extremely concerned about the indeterminate sentence provisions in the Criminal Justice Act 2003. If the indeterminate sentence – in terms of its custodial period, equivalent to a life sentence – is to be used, it should be confined to the most dangerous offenders. Instead, what is effectively a life sentence can be imposed in circumstances such as a less serious robbery – even by a child – and is encouraged by the statutory criteria in the case of repeat offending by an adult.
26. The effect of such sentences is unlikely to be well understood by members of the public and, we believe, it is important that they are clearly described and honestly labelled. We support the form of labelling expressed by ‘x years to life’.
27. However, such labelling will give little indication to the offender, the victim and their family or the public as to the likely custodial period. This uncertainty is in effect the essence of the sentence, since past the minimum custodial period the sentence will be aimed at public protection, and the level of risk to the public should be regularly reviewed. To ask the judge to give any binding indication of the custodial period would alter the essence of the sentence. Reference to similar cases could be misleading, as the degree and longevity of the risk presented by each individual will vary.
28. However, we are concerned that all parties should be given an approximate idea of how long the custodial period may be. Too high a degree of uncertainty may have a detrimental emotional/psychological effect on the offender, their family and, in some cases, the victim and their family. The judge should therefore explain the parole process and state the approximate period that, in his opinion, the offender should

expect to spend in custody. This will provide a helpful indication of the judge's view to the Parole Board.

Question 5: Is there merit in the judge giving a recommendation or order for the minimum period to be served for public protection?

Question 6: Would a judge have sufficient information to reach this decision?

29. As set out above, we do not believe that any order should be made by the judge upon sentence, since this would conflict with the purpose of indeterminate sentencing, ie that changes in the levels of risk over time can be assessed and taken account of in determining whether to release. We have concerns about this proposal, mainly since the risk to the public should be assessed at the point of likely release, rather than at the point when sentence is passed. An incorrect judicial order or recommendation could result in unnecessary time spent in custody in a case where the risk diminishes more quickly than the judge thought it would, but may also influence other professionals, most importantly the Parole Board, in favour of release in a case where in fact, the judge could not foresee that the risk would subsist or increase for far longer than was expected at the point of sentence.

30. The assessment of dangerousness at the point of sentence means that the judge has to be satisfied that 'there is a significant risk to members of the public of serious harm occasioned by the commission of the offender of further specified offences'. The judge is not required to assess the longevity of the risk, merely the fact that it subsists at the point of sentence. While he may have sufficient information to reach an opinion – and while it may be helpful if he indicates that opinion - he should not make a formal recommendation, still less an order, as to the public protection period. This period must be assessed on an ongoing basis by the Parole Board.

Question 7: Should the judge be able to disapply the requirement to take into account the duty to release determinate prisoners at the half way point where an exceptionally high seriousness test is met? Would this result in too great a variation in punishment between indeterminate and determinate sentences?

31. This proposal is in our view misconceived and illogical. It should first be recalled – and made clear to the public at the point of sentence – that there is no obligation to release at the early release point and, indeed, in some cases release will be unlikely

at that point. Secondly, where a case is of exceptionally high seriousness, the minimum term imposed for punishment should be higher than in cases of a lesser degree of seriousness where other variables are the same. It is important to concentrate upon what the sentence is rather than how it *sounds*: currently, twelve years imprisonment could sound – especially to a member of the public understandably unfamiliar with the legal complexities – *more* severe than an IPP sentence with a minimum term of six years. However, the latter is of course a more severe sentence, and in both cases the minimum custodial period is the same. Members of the public may focus on the minimum of six years, in the case of the IPP, without realising that the time served is likely in many cases to be much longer and could even be life. Re-labelling of the sentences as, respectively, for example, ‘six years imprisonment followed by six years on licence in the community’ and ‘six years to life in prison’ should assist.

32. It should also be noted, however, that it is *already* possible to apply more than half of the notional determinate sentence to the offence: see *R v Szczerba* [2002] 2 Cr App R(S) 387 paras 31-34. This was noted in *Lang* (para 10). In *Szczerba*, it was emphasised that this should only apply in ‘exceptional circumstances’: the examples given did not relate to exceptionally high seriousness. Further, the case discussed a period also discussed raising the period to ‘two-thirds’. This judgment is not, therefore, sufficiently broad to allow the reduction to be disapplied as envisaged by the government in the consultation.

Determinate sentences: exceptions to automatic release

Question 8: Do you think there should be power for the prison or other authorities to refer a sentence for reconsideration of automatic release if an offender gives serious cause for concern during the custodial part of his sentence and, if so, who should have the power to refer? If so, should this reference be to a High Court judge, or do you have another idea?

33. We are concerned that this proposal could create another level of complexity and uncertainty at the point of sentence as to the amount of time that will be spent in prison. While it might only apply to a small number of people in practice, it would have to be pointed out to the offender and the public by the court when sentencing in all cases where it could be applied. While the threat of such reconsideration might

act as an incentive for an offender to co-operate with treatment programmes etc., in custody, it might also encourage prisoners to conceal problems (eg mental health problems) in order to avoid a referral, impeding rehabilitation.

34. Since the sentence would remain determinate in all events, if the risk persisted beyond the end of the sentence, the offender could not be kept in custody any longer. Further, there would be no power to increase the overall period of the sentence and therefore any time 'gained' in custody would be 'lost' on licence. Unlike in the case of the EPP, a very short licence period could result, impeding settlement back into the community and compromising public protection.

Probation powers

Question 9: Do you agree that the Government should pursue a scheme giving offender managers the power to vary the punishment served by an offender depending on his or her behaviour, without going back to the court?

Question 10: Do you agree with the possible arrangements outlined for such a scheme? If not, what alternative structure would you recommend?

35. There are competing aims at stake in these proposals. Firstly, as outlined above, we favour a system whereby sentencers can be made aware of the successes of community sentences and their rehabilitative effects. Similarly, it is also important for them to hear about sentences that do not work, as part of a 'what works' approach.
36. Secondly, in order to promote confidence in community sentences and in order for them to work, they must be properly enforced, and unacceptable failures to comply with their terms must not be merely tolerated. That said, there are good reasons why every failure should not come back to court: first, this is expensive and time-consuming; secondly, it is simply unrealistic to expect total compliance – for example, absolute punctuality in the case of offenders with chaotic lifestyles. Bringing offenders back to court unnecessarily may impede rehabilitation, causing hostility and preventing further cooperation with probation staff.
37. We therefore support the giving of a measure of discretion to offender managers, within parameters laid down by the court, to adjust the requirements of community

sentences. We envisage that this could be done for reasons other than breach – for example, because the offender demonstrated that he or she needed further support in one area (eg a longer period of drug-testing) or that, by contrast, his or her rehabilitation was going particularly well, so that a shorter curfew period was necessary.

38. It would be necessary, in our view, that the offender manager was given clear guidelines by the sentencer at sentence as to the grounds upon which, for example, hours of unpaid work could be varied within the bracket. These should be stated in open court so that the offender was aware of them, and should be expressed sufficiently specifically so that the offender manager's role was one of implementing guidelines set by the court.
39. There would need to be a fair process in relation to a factual finding of, for example, lateness, leading to the imposition of more hours of work within the bracket. This decision would, in our view, be open to judicial review if, for example, irrelevant considerations were taken into account.
40. It would be important that the overall 'envelope' of discretion is not too wide; 50% would be too wide in at least some cases, in our opinion. It is also important that the offender manager be given guidance as to when breaches are too serious or too numerous for them to deal with and it is therefore necessary to refer the case back to court. The decision whether to refer should be taken on a fair and principled basis, taking into account all relevant and no irrelevant factors.

Probation resources

Question 11: Do you consider that any of the above options should be pursued?

Question 12: Do you consider that it would be appropriate for NOMS to seek to enter into agreements with the courts regarding their requests for reports and use of community orders? If this is acceptable, would a screening process involving the court's assessment of low seriousness and assessment as low risk of reconviction and low risk of harm be the best method for deciding which cases should not have reports and should not normally receive a community order? Do you have any alternative suggestions?

Question 13: Do you think it is likely to make sentencers more willing to impose fines in suitable cases if additional support (provided by organisations other than the Probation Service) can be made available to offenders?

Question 14: If legislation to make the community order unavailable as a penalty for certain offences is introduced, which option do you favour for specifying the offences to which it should apply? Do you consider that a community order should be unavailable for all non-imprisonable offences? Alternatively, should it remain available for non-imprisonable offences attracting a maximum fine of level 5? Or should it also remain available for offences with a maximum fine of level 4?

41. Agreement with the courts to limit requests for reports and use of community penalties for low level offenders:

We believe that where the court is considering a low-level community penalty or a fine, the best option remains an oral report, after a short interview with the offender. This report could be brief, but would, we hope, allow important underlying factors surrounding the offending behaviour and lifestyle issues to be brought to the court's attention. We do not believe that the curfew proposal made here is appropriate. First, a curfew requirement may be seen as more restrictive of liberty than many other community sentences. Secondly, such a requirement may be inappropriate for many offenders, and should not be selected over a more effective requirement merely on the grounds that the probation service does not administer it. This is not a proper reason for a sentence to be chosen.

42. Change in relative distribution of types of reports:

It is important that proceedings do not become so expedited that important features are missed. It is an important aim that the offender should be interviewed and the report completed on the day it is ordered wherever appropriate so that sentencing is not adjourned unnecessarily. However, if it is appropriate for a standard delivery report to be written then this should not be avoided on cost grounds.

43. Voluntary support to offenders receiving fines instead of community orders:

We welcome this, although it remains the case that some offenders will be reluctant, or find it difficult, to take up support voluntarily. The housing of support services within court buildings may be an effective way of encouraging take-up of these services.

44. Legislation to make community orders unavailable as a penalty for certain non-imprisonable offences:

We have concerns about the impact of this proposal in relation to offenders existing on a subsistence income for whom a financial penalty may not be appropriate. A preferable option is to ensure that only community orders in the category of 'low', or 'low' or 'medium', severity are available for appropriate offences.

Information for sentencers

Question 15: Should information be published on the unit costs of remand and sentencing disposals? Should information be published on what the costs of sentencing and remand decisions are at national, regional, area or court level?

Question 16: Would you like to see comparative information for each region or area covering various sources, including demographics, crime patterns and reconviction rates?

45. While it is important that sentencers are fully informed, care should be taken with statistics. In particular, the cost of a particular sentence should not influence a sentencer from imposing it, if it is the most appropriate option. Supportive interventions, for example, may be more expensive than prohibitions, but may also contribute more effectively to rehabilitation in particular cases. We believe that individual costs can also be misleading since if a sentence prevents reoffending then money will be saved in the future.

46. The types of information which should be available to sentencers include:

- the reality of life in custody. Average distance from home of prisoners – in particular, women and children/young people, and difficulty of family visits. Availability of educational and rehabilitative programmes (drug/alcohol treatment; mental health treatment; other programmes) in prisons; availability of work for

prisoners, and exercise. Hours spent in cell per day. Types of accommodation for children and young people and likelihood of different age/gender groups being sent to different types of accommodation;

- Community sentences: local projects and completion rates;
- Fines – enforcement and statistics;
- Reoffending statistics (including indication of trends in the increase/decrease of severity of offending) for different sentences;
- Compensation and reparation – benefits for victims and the community; enforcement and statistics;
- Case studies should be included for all types of sentence.

47. While demographic/crime pattern information may be useful up to a point, it may also present an incomplete picture, since evidently factors such as poverty and unemployment rates in a particular area will have a huge effect on crime. Such information has the potential to mislead and to create prejudice against groups it portrays as particularly criminogenic. However, if properly explained and presented, some information regarding crime patterns and the treatment of different demographic groups by the criminal justice system could assist sentencers. The latter type of information could even help to emphasise the need to avoid unwitting discrimination, for example by demonstrating sentencing differentials for offences of equivalent seriousness between men and women or between people from different ethnic and racial groups.

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January 2007