Response to the Proposals in

Making Sentencing Clearer

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Section 1

Q1: We fully support measures to move more offenders from short custodial sentences to community sentences and to move more offenders from community penalties to fines.

Recent research[1] would suggest that one method of reducing the use of custody would be by focusing on cases where offenders are on the in/out line - on 'the cusp' of a custodial sentence - and where there are mitigating reasons (such as greater impact of the punishment on the offender because of ill health, old age, youth or family circumstances) why a custodial sentence ought not be imposed. Some recent cases would suggest that the Court of Appeal would uphold in some instances a less punitive and more 'merciful' approach.[2]

Ways of encouraging the greater use of financial penalties are, in principle, worth pursuing although they would need to be carefully thought out in view of problems in the past. The moving 'down' of some cases from community to financial penalties would also help combat the current trend to use community sentences for cases which in the past might not have been viewed as 'serious enough' to warrant them.

We also endorse the proposals to encourage non-custodial sentences for the categories of people listed in para 1.14, although the treatment of foreign nationals would need to be carefully considered to comply with human rights obligations.

Comment:

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[1] See M. Hough, J. Jacobson and A. Millie, *The Decision to Imprison: Sentencing and the Prison Population*, (Prison Reform Trust, London, 2003); Tombs, J. (2004) *A Unique Punishment: Sentencing and the Prison Population in Scotland. Edinburgh*: Scottish Consortium on Crime and Criminal Justice; J. Tombs and E. Jagger, 'Denying Responsibility, Sentencers' Accounts of their Decision to Imprison' (2006) 46(5) *British Journal of Criminology* 803-821.

[2] See Piper, C. 'Should impact constitute mitigation?: structured discretion versus mercy' *Criminal Law Review* [2007] 141-155.

We believe other aspects of proposed and current government policy may work against the success of these proposals. As para 1.1.5 notes, sentencing has become tougher. The increase in the use of (longer) custodial sentences by judges and magistrates has been influenced by policies which encourage punitiveness. The increasingly harsh penalties proposed for particular (and new) categories of offender (the targeting of the serious and violent offenders – Para 1.13) and the new prison building programme (i*bid*) will impact on sentencing generally if the nature of the twin track policy is not made entirely clear to sentencers and to the public. The public focus on 'get tough' prison sentences encourages the very prevalent public view that only prison is a 'real' punishment. The greater use of community and financial penalties requires that this view be challenged more openly.

Further, the non-implementation of custody plus and intermittent custody is to be regretted. The gradual lowering of sentencing levels and the desirability of keeping particular categories of offender, notably mothers, within the community for at least part of a sentence, both point to the advantages of diverting more resources to the implementation of custody plus rather than more prison places. It is regrettable that this consultation paper does not mention intermittent custody. The pilots have proved successful on several indicators but IC orders were withdrawn from 20 November even in the pilot areas serving two IC centres.

We also have a query in relation to par 1.10 where it states that earlier legislation did not distinguish between offenders in relation to risk. However those sections of the Criminal Justice Act 1991 which allowed 'longer than commensurate' sentences did just that. As re-enacted in the PCCSA 2000 sections 79(2)(b) and 80(2)(b), the courts could impose a longer sentence if necessary 'to protect the public from serious harm'.

Section 2

Q2 / Q3: The proposal to make clearer the structure of determinate sentences is to be welcomed (para 2.5) though that probably cannot be achieved solely via the explanation given to the prisoner in court. The target is the public. Within the youth justice system the same structure has been made clearer by the use of 'detention and training' order although 'training' is probably not the most appropriate word for either minors or adults. 'Custody and supervision order' is the most accurate description. What needs to be conveyed to the public is not only the punishment aspect of supervision but also the risk of recall as a deterrent tool and the benefits of supervised re-integration. The level of public ignorance is very high as we find when Law students start our Sentencing and Punishment course.

Section 3

Q4: We would endorse any measures to make the reasons for sentencing clearer to the public (see above).

Q5 and 6:
These questions relate to the proposed alternative ways of responding to the 'problem' that the public believes that life and other indeterminate sentences are too lenient. The cause of this problem is public misunderstanding about the nature of indeterminate sentences and a belief that the minimum term announced in court represents the time the offender will be in prison. This is a misperception that can best be dealt with by expressing the sentence differently. Option One is, therefore, an appropriate type of response.

The other options would seem to us to be resurrecting the use of the 'add on' portion of custody which was necessary when judges imposed the previous 'longer than normal' sentence. That sentence caused judges endless difficulties[3] because there is no clear principled basis on which to determine the extra custody for public protection. If offenders are 'dangerous' a slightly longer period in custody is ineffective as incapacitation or as a means of reassuring the public. If the minimum term is effectively greatly increased there are human rights implications.

Q7
A substantial variation between sentences might result from this option and so any review needs to consider carefully how the proposed changes can be applied in a way that is consistent with retributivism and if not, whether the deviation from a retributivist rationale can be justified and on what basis. We consider this might be an insurmountable hurdle.

Section 4

Q8: This is a difficult issue as it raises rights concerns about the use of a criminal sentence as a trigger for detention, which would not otherwise be justifiable. However, this would seem to be a proposal worth pursuing but only as long as the issue was determined by a High Court judge in an open court with full procedural rights for the prisoner.

Section 5

Q9: We are opposed to the offender manager having the discretion to vary the content of a community sentence without referral to the court. This would seem to be an unjustifiable blurring of the line between the sentencing and punishment processes. It might also prove detrimental to the relationship between the supervising officer/project manager and the offender. We appreciate the resource implications of referral back to court but believe this would in any case be necessary to protect decisions from article 6 challenges.

Q10: See comments in response to Question 9 above.

[3] See, for example, S. Easton and C. Piper *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 2005) pp.138-9.

Section 6:

Q11:
(i) We do not feel we have sufficient knowledge of current practice regarding report writing to comment on the proposals relating to reports although – in the light of our comments about cases on the cusp of custody – we would not wish any reduction in the possibility for a full review of the offenders circumstances as well as his/her risk status.

(ii) However, we are firmly of the opinion that it would be detrimental - in terms of public attitudes and the possibilities for using certain aspects of community sentencing as rehabilitation tools - to make community orders unavailable as a penalty for certain non-imprisonable offences

Q 12: see response (i) to Q11 above

Q 13: Whilst various support and treatment services for offenders may be advantageous, this does not appear to be an appropriate means to encourage sentencers to use fines. This will not address the perception that fines are not a 'proper' punishment.

Q 14: see response (ii) to Q11 above.

Comment
Using any of these methods to reduce the use of community penalties in favour of fines is, we think, misguided and likely to backfire. The focus should be on constructing a sound system of day or unit fines which is properly explained to the public and to JPs, is carefully and gradually implemented and which draws on the lessons of the introduction of a version unit fines in 1993. The current focus in on enforcement, which is necessary, but the wider issue of calculating and explaining impact of variable amounts of fines is also necessary.