



## THE HALLIDAY REPORT: IN PURSUIT OF A NEW SENTENCING FRAMEWORK OR A CATASTROPHIC FAILURE?

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### Abstract

In 2001 the Halliday Report, *Making Punishments Work: A Review of the Sentencing Framework for England & Wales* devised a sentencing framework where sentences – custodial and non-custodial - meant what they said, benefited offenders and society, and ultimately made sense. The new framework was designed to successfully rehabilitate offenders, reduce re-offending and reserve prison for those offenders that justify it by creating novel but ingenious ways of changing the attitudes and behaviours of offenders. The framework was to be one that generated public confidence. Changes were proposed of such magnitude that it was believed the reform would lead to an overhaul of the dismal state of the sentencing framework.

This article examines three major proposals from the Halliday report; the reform and use of custodial sentences and non-custodial sentences and the formulation of sentencing guidelines. It argues that despite specified aims the proposals have been implemented in such diluted ways that they have limited the chance of achieving the success predicted. The discussion seeks to show that despite the extensive Report, heralded by the government as the way forward in improving sentencing practice, the government has failed to acknowledge the recommendations made and use the Report to its full benefit. The underlying question posed is whether the government has successfully put the 'sense back into sentencing'?

**Keywords:** Halliday Report, sentencing reform, custodial sentence, non-custodial sentence, custody plus

### Introduction

In 2000 under Jack Straw's leadership, the Home Office commissioned a report into the sentencing framework in England and Wales because there was a dire need for a sentencing framework which 'sends a clear, tough message about sanctions [as]...it must be made far clearer to offenders what the consequences of their actions will be, without ambiguity.'<sup>1</sup> Thus the report *Making Punishments Work: A Review of the*

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<sup>1</sup> Home Office press release, *Home Secretary Announces Sentencing Framework Review*, (16 May 2000).

*Sentencing Framework for England & Wales* - the Halliday Report (hereinafter the Report) - was born.<sup>2</sup> Conducted by John Halliday,<sup>3</sup> the Report fostered ambitious initiatives that were proposed in the pre-election policy document *Criminal Justice: The Way Ahead*, a strategy which promoted aims such as 'ensuring that punishments fit the criminal as well as the crime,' and establishing a sentencing framework that focuses on 'crime reduction as well as punishment for the immediate crime.'<sup>4</sup>

When the Report was completed in 2001 David Blunkett had superseded Jack Straw as Home Secretary. Its release was subject to a great deal of hype and it was boldly stated that the underlying principle was to put 'the sense back into sentencing'<sup>5</sup> because 'the public are sick and tired of a sentencing system that does not make sense.'<sup>6</sup> As a consequence the government set about implementing the recommended proposals and further publications were released based on the foundation John Halliday had created. The most important of these publications came in the form of a White Paper: *Justice for All*, and a new Criminal Justice Bill which became the Criminal Justice Act 2003 (CJA 2003). In *Justice for All* the Home Office vowed, 'our goal is strong, safe communities.' This, it was claimed, meant being tougher on offenders, focusing more on the victim and giving the police and Crown Prosecution Service the resources necessary to bring more offenders to justice.<sup>7</sup> The government claimed the Criminal Justice System (CJS) had become less effective and stressed its commitment to creating 'a system that meets the needs of society and wins the trust of citizens, by convicting the guilty, acquitting the innocent and reducing offending and reoffending.'<sup>8</sup>

The White Paper provided a hard line and, therefore, vote-winning approach to how this would be achieved claiming:

the proposals ...form a coherent strategy, from the detection of offences to the rehabilitation of offenders, designed to focus the CJS on its purpose -

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<sup>2</sup> Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England & Wales*, (2001).

<sup>3</sup> former Director of Criminal Justice Policy at the Home Office.

<sup>4</sup> Home Office, *Criminal Justice: The Way Ahead*, Cm 5074, (2001), p.10.

<sup>5</sup> Blunkett, D, 'Putting the Sense Back into Sentencing,' (2002) 166 *Justice of the Peace* 320.

<sup>6</sup> Home Office, *Justice for All*, (2002) Cm 5563, para.5.2.

<sup>7</sup> *Ibid.* Executive Summary.

<sup>8</sup> *Ibid.* para.0.1.

fighting and reducing crime and delivering justice on behalf of victims, defendants and the community.<sup>9</sup>

It is clear from the Report and the White Paper that many of the sentencing proposals were geared at producing the 'coherent strategy' the government promised. However, by the time the proposals reached the Criminal Justice Bill they had significantly changed in form, were watered down and their future was uncertain. The CJA 2003 was supposed to be the culmination of the effort put into creating a new sentencing framework. The Explanatory Notes state that Part 12 of the Act contains statutory measures that are largely based on the recommendations of the Halliday Report. Here the word 'based' should be used very loosely because the provisions are not exactly as the Report proposed. While some proposals do exist in their original form others have changed significantly, and it is likely that they will never see the light of day.

## **1 Making Sense of Custodial Sentences**

In assessing the shortcomings of the sentencing framework the Halliday Report examined the use of custodial sentences under 12 months and their practical impact on crime reduction and protecting the public. The Report was particularly unforgiving of the regime in place; the scheme was categorically rebuked on three main grounds:<sup>10</sup>

- 'Prison sentences of less than 12 months literally mean half what they say;'
- 'shorter prison sentences are ill-equipped to do anything to tackle the factors underlying criminal behaviour, by comparison with any other sentence';
- 'Of released prisoners, reconviction rates are higher for those who have served short sentences than for those released after longer terms.'<sup>11</sup>

According to Halliday an alarming number of offenders received sentences of less than 12 months.<sup>12</sup> The Report also drew attention to the high reconviction rate within this group of offenders observing that 60% reoffended within two years of release and that these statistics demonstrated that sentences of less than 12 months have 'limited effect;

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<sup>9</sup> Ibid. Executive Summary.

<sup>10</sup> Ibid. paras.1.16, 1.18.

<sup>11</sup> Appendix 6, para.3.

<sup>12</sup> Appendix 2; the Report stated that official statistics demonstrated a 67% increase of those receiving the sentence in the 10 years between 1989-1999.

often offenders 'could equally well be dealt with through a community sentence.'<sup>13</sup> With the (public) concerns that short prison sentences raised the Report identified that there was a need to provide a sentence that required:

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.<sup>14</sup>

### ***Custody v Custody Plus***

The proposed solution to the issues of short terms of imprisonment was 'Custody Plus,' which involved a prison term followed by release on licence where an offender would carry out a specified community order<sup>15</sup> 'engaging the offender in programmes aimed at reducing reoffending.'<sup>16</sup> The rationale behind Custody Plus was to provide a sanction that addressed the negatives attached to short-term prison sentences as there was 'little opportunity to work on the factors which underlie the criminality because the time served in custody is so limited.'<sup>17</sup> It is a commonly held view that rather than deter, short sentences 'damage offenders with no offsetting benefit.'<sup>18</sup> Halliday asserted that a sentence that could engage offenders and help them address the issues that created their criminality would be more beneficial than a custodial sentence of less than 12 months. The Report proposed that the 'custody' element of the sanction would involve an initial period of imprisonment of between two weeks and three months submitting that this would be the equivalent of a six month sentence under the existing regime. The custodial period would be followed by a conditional licence of a minimum of 26 weeks with the total length for the Custody Plus sentence not being able to exceed 51 weeks when the two measures were combined. It was intended that the new sentence have the

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<sup>13</sup> Appendix 6, paras.3, 3.6, 3.7.

<sup>14</sup> para.3.8.

<sup>15</sup> Under s182(1) CJA2003 a court may attach to a Custody Plus order: unpaid work; a specified activity; an accredited programme, a curfew, a prohibited activity, exclusion from a particular place, supervision (by way of attending appointments) or presence at an attendance centre.

<sup>16</sup> Ashworth, A., *Sentencing and Criminal Justice*, (2005, Cambridge University Press) p.279.

<sup>17</sup> *Justice for All*, para. 0.10

<sup>18</sup> Rex, S., and Tonry, M., 'Reconsidering sentencing and punishment in England and Wales', in same eds., *Reform and Punishment The Future of Sentencing*, (2002, Cullompton, Willan Publishing) p.12.

ultimate consequence of bringing transparency to the sentencing system because 'prison sentences would mean what they said, instead of half of what they say.'<sup>19</sup>

### ***The potential for Net-widening***

The government had big plans for Custody Plus, evidenced in two ways. Firstly, the provision is enacted in the CJA 2003, and secondly, mechanisms were put in place to ensure it could be implemented into the sentencing framework for adoption by the courts. At the government's request a comprehensive guideline was prepared highlighting how Custody Plus had the potential to be more onerous than the existing sentence and as a result should be reserved for those offences where the court is sure the seriousness warrants it.<sup>20</sup> This would appear to be a widespread view. It is submitted that the 'plus' elements would inhibit an offender's independence and freedom in much the same way as prison does<sup>21</sup> as offenders would be obliged to carry out a specific condition intended to restrict their behaviour. The Sentencing Guidelines Council (SGC) highlighted the potential for the sentence to be used where a community punishment would have normally applied; net-widening. It was suggested that although some sentencers who would have previously handed out a sentence of 12 months or more would be drawn to a Custody Plus order, others that would ordinarily have imposed a community penalty could find Custody Plus more attractive because the sentence permits the punitive element without sacrificing the benefits of community orders.<sup>22</sup>

The Report seeks to counteract this potential by suggesting comprehensive guidelines to help sentencers restrict the sentence to cases where it is applicable. Ashworth argues that there was always potential for Custody Plus to have a net widening effect,<sup>23</sup> especially as there was a high focus on increasing public confidence in the CJS in the Report, and also because even the most robust non-custodial penal measures do not rouse as much public backing as the harsher prison sentences.<sup>24</sup> The guideline

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<sup>19</sup> para.3.13

<sup>20</sup> See Sentencing Guidelines Council and Sentencing Advisory Panel, *Council Consults on Custody Plus Guideline*, Press release (March 2006); SGC, *Custodial Sentences of Less Than 12 Months: Criminal Justice Act 2003*, Consultation Guideline, at para.26.

<sup>21</sup> Suggested in Tonry, M., *Punishment and Politics*, (2004, Cullompton: Willan Publishing).

<sup>22</sup> Roberts, J, and Smith M., 'Custody Plus, Custody Minus,' in Tonry, M., *Confronting Crime, Crime Control policy under New Labour*, (2003, Cullompton: Willan Publishing).

<sup>23</sup> Ashworth, *Sentencing and Criminal Justice*, p.280.

<sup>24</sup> Ashworth, p.191.

produced by the SGC was more than effective and it is hard to see how close adherence to it could not combat the net-widening disadvantage.

### ***The rehabilitative potential of Custody Plus***

The Report made clear the sentence was only to be used for those offenders it was appropriate for. Roberts and Smith argue that beginning the rehabilitative programme in prison was essential as 'a foundation for subsequent, non-custodial work on the skill deficits and antisocial attitudes which...explain an offender's criminal behaviour and...the impotence of short prison sentences'<sup>25</sup> and provides a useful platform for the rehabilitation of offenders. This in turn creates seamless sentencing where an offender's transition from prison to community and the programme they have started is orchestrated in a way to 'minimise discontinuity.'<sup>26</sup> The White Paper supports this approach suggesting it awards the best potential for rehabilitation.<sup>27</sup>

Critically this is where weaknesses in the sentence appear. The Report and the White Paper seem to wrongly equate rehabilitation in custody and rehabilitation in the community as having the same effect; the concept of prison being rehabilitative is an 'implausible rationale [because]...the very idea that imprisonment will improve human beings has been out of favour for so long.'<sup>28</sup> Seamless sentencing is laudable but whether it is realistic to expect that rehabilitation begun in prison will work is debatable. It is suggested that the impact of starting a rehabilitation programme in custodial time is 'vanishingly small'<sup>29</sup> mainly because of the disruptive nature of short custodial periods. Despite the potential issues the sentence raises the 'plus' elements effectively 'rescue' the sentence. In both the Halliday Report and the White Paper reasons for the 'plus' element of the sentence are well vocalised, the White Paper states that the plus elements are 'designed to address the particular factors that underlie...criminal behaviour and cause them to reoffend.'<sup>30</sup>

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<sup>25</sup> Roberts and Smith, 'Custody plus, Custody Minus,' p.189.

<sup>26</sup> *Justice for All*, para 10.15.

<sup>27</sup> para.5.26

<sup>28</sup> Roberts and Smith, 'Custody plus, Custody Minus,' p.189.

<sup>29</sup> *Ibid*, p.190.

<sup>30</sup> *Justice for All*, para.5.25.

There is a wealth of opinion confirming that short sentences are damaging,<sup>31</sup> principally because little proper evaluation of the offender can be undertaken in prison and additionally because any programmes to 'transform' an offender's attitude are often unsuccessful in short timescales. The entire 'prison experience'<sup>32</sup> is too disruptive for most offenders serving a short sentence to benefit in a positive way. The likelihood of the offender returning to the community and reoffending is highly probable, so any time spent in prison is as good as useless, and ultimately that has a rippling effect, affecting communities, crime rates and the prison population. Longer term programmes are, therefore, the most effective way of challenging the attitudes and behaviour that create criminality because custody damages the 'social infrastructure that is likely to be necessary to the maintenance of a crime-free life';<sup>33</sup> the 'plus' element compensates for this. The White Paper rightly suggests that simply imprisoning offenders and then releasing them without some form of help to counteract the damaging effect of custody puts both an offender and the community they live in at risk.<sup>34</sup>

### ***Gaining public confidence***

Custody Plus was presented as useful and effective in providing punishment on two levels. Initially, adequately punishing the offender and secondly, punishing the offender in a way that sufficiently appeals to the public. Evident by the onerous nature of the sentence is the requirement of adequate punishment. However, whether the sentence is acceptable in the public's eyes is an interesting point raising some controversial issues. A positive aspect of the sentence is that it provides a *punitive* ingredient which consequently distinguishes the sentence from a community order, which 'might appear insufficiently punitive.'<sup>35</sup> There may be some truth in the theory<sup>36</sup> that the public, somewhat naively, consider custodial sentences to be the best way of dealing with

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<sup>31</sup> Tonry, Rex, Howard League for Penal Reform, Sentencing Advisory Panel, Sentencing Guidelines Council etc..

<sup>32</sup> Settling into prison and a routine, making friends, seeing counsellors etc.

<sup>33</sup> Roberts and Smith, 'Custody Plus, Custody Minus,' p.196.

<sup>34</sup> *Justice for All*, ch.5.

<sup>35</sup> Roberts and Smith, p.189.

<sup>36</sup> Advanced by both Ashworth and Tonry.

crime, punishing offenders and in turn keeping them safe, but that in reality the exact opposite is true for *reducing* reoffending,<sup>37</sup>

it might be argued that more and longer prison sentences ought to deter criminals from offending and re-offending but the evidence casts doubt on the marginal, general or individual deterrent effect of increasing custodial sentences.<sup>38</sup>

This is acknowledged in the Report<sup>39</sup> and is the basis for promoting sanctions that involve rehabilitative programmes, albeit the Report actually proposed 'to win the public's confidence by supplying 'effective' sentences which the public is presumed to desire out of self-interest.'<sup>40</sup> Instead of focusing the public's mind on the rehabilitative potential of the sentence the government directed public attention to the punitive quality of the sentence because the government believed that sentences need 'rigorous enforcement to command public confidence.'<sup>41</sup> Actions such as these will give the public confidence that the government is being 'tough on crime' but in turn it defeats the key purpose of reducing the prison population.

Policy makers do, to a certain extent, need to make sure the public are happy with the decisions taken, partly to ensure they stay in power and also because

any plausible strategy to win public confidence without crass appeal to penal populism is likely to require an imaginative campaign to increase the public's knowledge about how security is and is not put at risk by offenders in our midst – and about how little sentencing and sentences have to do with it.<sup>42</sup>

While advocating rehabilitative programmes as the most effective in reducing crime and protecting the public, the general public has proved less receptive. Sanctions therefore need to 'punish' offenders in ways in which the public understands. Imprisonment is

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<sup>37</sup> As evidence shows that a large majority of people sentenced to short custody re-offend, demonstrated in the 60% reoffending rate.

<sup>38</sup> Ashworth, A., 'Criminal Justice Reform: Principles, Human Rights and Public Protection,' (2004), *Criminal Law Review*, Jul, 516-532 at p.520.

<sup>39</sup> Appendix 6

<sup>40</sup> Roberts and Smith, p.189.

<sup>41</sup> At para.5.48.

<sup>42</sup> Roberts and Smith, p.189.



popular because it awards ‘immediate gratification’<sup>43</sup> which it is suggested the public would happily, but possibly, unwittingly trade for security.

### ***The ‘Sentence of Choice?’***

The government intended to implement Custody Plus in autumn 2006, but as this deadline approached it was overtaken by the need to prioritise prison and probation resources for serious offenders.<sup>44</sup> It is surprising, given the government realised the potential of the measure, that it is not going to be implemented. Custody Plus, although inventive and novel had the capability to be an effective sentence for the group of offenders it was designed to target. Custody Plus is now sitting on the statute book gathering dust. The government has not offered any substantive explanation as to why it is not being implemented, nor if it ever will. However, given the commission of guidelines by the SGC it is hard to imagine why the government would encourage such an intensive approach if they did not want to implement it. In devising the new sentence the Report’s intention was to make Custody Plus the ‘sentence of choice’<sup>45</sup> for the types of offenders who routinely received short prison sentences. Seemingly it does not matter any longer what Custody Plus could have done.

## **2 Non-Custodial Sentences: Assessing Community Penalties**

The Halliday review acknowledged that the current regime regarding community sentences was less than satisfactory; the ‘proliferation of community penalties over the past 10 years...complicated the statute book and increased the risks of inconsistent sentencing...[especially in terms of] content and enforcement.’ The review also seemed concerned with the image community penalties had attracted and that they were not viewed as ‘sufficiently punitive’ due to a ‘lack of clarity in their stated aims.’<sup>46</sup> In order to combat the confusion created by having various community orders Halliday suggested that it would make more sense to create a ‘single, non-custodial penalty with specified ingredients.’<sup>47</sup> Halliday observed that ‘the law needs to be simplified and made more

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<sup>43</sup> *ibid*, p.191.

<sup>44</sup> Home Office, *Rebalancing the criminal justice system in favour of the law-abiding majority Cutting crime, reducing reoffending and protecting the public*, (Home Office, 2006).

<sup>45</sup> *Justice for All*, para.2.36

<sup>46</sup> para.0.17.

<sup>47</sup> para.6.6.

understandable to the community, sentencers and offenders<sup>48</sup> and so promoted a generic 'community punishment order'<sup>49</sup> comprising of different requirements.

It would appear from the Report that Halliday expected re-branding the sentence to be the proverbial 'magic wand' that would wave away the main issues with community punishments, however it is suggested this belief was misconceived. The very idea that a single generic name could create consistency is criticised by Taylor as 'optimistic...since consistency can hardly be achieved simply by giving all community orders the same name.' He asserts that 'consistency will depend upon how the new 'community sentence' is used, and on the number and complexity of requirements which are written into it by sentencers and not on what the new measure is called.<sup>50</sup> Rex suggests that the name as it was proposed obscured some of the purposes of sentencing that are so notably promoted in the Report as it 'does not acknowledge the aims of crime reduction and reparation' which the Report intends to reconcile with community penalties arguing that

if the intention is to make the public believe that a community order is indeed a 'punishment' by calling it such, one suspects that this will prove futile. Worse, such a name may well obscure the constructive aspects of the sanction that might attract public support.<sup>51</sup>

Opinion as to the single generic name was always going to be divided. Rex observes that 'the public, and offenders, seem more likely to understand what an order means when its name describes the activity involved.'<sup>52</sup> Whatever the opinion, the White Paper although stating 'very little about the details'<sup>53</sup> accepted the proposals:

there was a high level of support for changing the existing arrangements for community sentences...they are still not tough enough nor do they allow the sentence to be matched to the individual offender.<sup>54</sup>

Halliday's model for the elements a community penalty should include was closely followed by the government when the CJA 2003 was enacted.<sup>55</sup> By offering a 'menu' of

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<sup>48</sup> para.6.2.

<sup>49</sup> The term that Halliday chose to refer to all the orders.

<sup>50</sup> Taylor, R., et al., *Blackstone's Guide to the Criminal Justice Act 2003*, (2004, Oxford University Press) p.181.

<sup>51</sup> Rex, S., 'Reinventing community penalties; the role of communication,' in Rex and Tonry, *Reform and Punishment*, p.141.

<sup>52</sup> Rex, 'Reinventing community penalties,' p.142.

<sup>53</sup> Ashworth, *Sentencing and Criminal Justice*, p.313.

<sup>54</sup> para.5.20.

options Halliday hoped that the sentences would become more flexible. Halliday's specification that in imposing a community penalty courts 'must consider the aims of punishment, reparation and prevention of reoffending',<sup>56</sup> has been criticised. Taylor asserts that it is 'very unsatisfactory to say that sentencers must 'balance' aims which are prima facie conflicting, such as deterrence and reparation, or punishment and rehabilitation.'<sup>57</sup>

### ***Using the Community Sentence***

Community orders became available in April 2005 for offences committed on or after that date, as a result two sentencing schemes were running in parallel while the number of offenders sentenced under the 'old' scheme gradually decreased.<sup>58</sup> By December 2005 three times as many new orders as old were being made,<sup>59</sup> and by July 2006 the number of new orders had risen to 71% with only 7% of sentences being for 'old' orders.<sup>60</sup>

Statistics also revealed how many requirements were being attached to these new community orders: around half had one requirement, one-third had two requirements and just under 20% had three or more requirements.<sup>61</sup> The most common requirement was 'unpaid work' now dubbed 'Community Payback' with 65% of offenders being assigned to it. This large number is not unsurprising because the government placed much emphasis on its significance as evidenced in a recent Home Office Report that states, 'we think that unpaid work should be at the heart of community sentences, because it is about offenders making amends to the community for the harm they have done.'<sup>62</sup> The government intends the trend in 'unpaid work' being the most used community sentence to continue, 'we expect the number of hours of unpaid work done by offenders to rise from 5 million hours in 2003 to approaching 10 million in 2011.'<sup>63</sup> The

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<sup>55</sup> s177 CJA 2003; these include *inter alia* programmes to tackle offending behaviour, electronic monitoring, curfew and exclusion orders.

<sup>56</sup> para.6.13.

<sup>57</sup> Taylor, et al, *Blackstone's Guide to the Criminal Justice Act 2003*, (2004, London, Blackstone Press) p.176.

<sup>58</sup> Mair, G., et al., *The use and impact of the Community Order and the Suspended Sentence Order*, (2007, London, Kings College: Centre for Crime and Justice Studies), p.17.

<sup>59</sup> 22% for the old orders and 67% for the new orders

<sup>60</sup> Home Office, *A Five Year Strategy for Protecting the Public and Reducing Re-offending*, (2006, Cm 6717), at p.5 (Executive Summary).

<sup>61</sup> *Ibid.* p.18.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* at para.3.17.

government also claims 3 million hours of unpaid work was carried out in 2007 alone and that based on the National Minimum Wage this is the equivalent of £33 million benefiting local communities.<sup>64</sup> It would seem the government is fond of its new community sentence order and pleased with the way it is progressing, the reoffending rates of those on community orders is yet to be released but the government would have us believe it looks positive, it would seem that at least one of the Report's proposals has been implemented in a way that allows the measure to appreciate some if not most of its potential.

### ***Suspended Sentences of imprisonment***

In line with Halliday's desire to revolutionise sentences came proposals for a new suspended sentence. The original suspended sentence had earned itself - perhaps legitimately - the label of offenders 'walking free'<sup>65</sup> and as such had 'fallen into disuse'<sup>66</sup> and was 'effectively on life support.'<sup>67</sup> As a result the Halliday Report identified a need to change the existing suspended sentence in a manner that complemented the other sanctions proposed. The new suspended sentence was deemed an 'intermediate sanction' and would involve 'a new sentence of suspended imprisonment combined with (in effect) a community sentence,'<sup>68</sup> in essence although an offender would not spend any time in prison they would be required to adhere to requirements derived from a community sentence.

The new measure was thus promoted as a 'conditional' prison sentence, in reality the sentence is much more reconcilable with Halliday's model for community orders. The Report was keen to reiterate that 'the prison sentence is suspended, and provided that the community sentence is observed, is never invoked,'<sup>69</sup> Thus the sentence would be in effect conditional. The proposal for the new suspended sentence was developed further in the White Paper which rebranded the sentence as 'Custody Minus,' stating that an

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<sup>64</sup> Offenders on community sentences have paid back £33m in unpaid work this year, 27 December 2007, <http://www.justice.gov.uk/news/newsrelease271207a.htm>

<sup>65</sup> Roberts and Smith, 'Custody Plus, Custody Minus,' p.200.

<sup>66</sup> Tonry, M., *Alternatives to Prison*, (2004, Cullompton, Willan Publishing), p.306.

<sup>67</sup> Roberts, J., 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales', Howard league, (2003), 32(3), *The Howard Journal*, 229-247 at p.232.

<sup>68</sup> At para.5.17.

<sup>69</sup> Ibid.

offender would be required to undertake 'a demanding programme of activity in the community'<sup>70</sup> which would be made up from a range of the community sentence options.

The new suspended sentence was adopted by the CJA 2003. A prison sentence can be suspended for a maximum of two years if an offender's custodial time is between 28 and 51 weeks for a single offence<sup>71</sup> or 65 weeks for two or more offences.<sup>72</sup> During the time in which the sentence is suspended the offender is to carry out requirements in the community from the full range available under a community sentence.<sup>73</sup> The White Paper was at pains to reiterate that the sentence was 'more rigorous than existing provisions'<sup>74</sup> particularly as 'any breach will lead to immediate imprisonment.'<sup>75</sup> It could be argued that this was a way of incorporating Halliday's sentiments that adding the immediate imprisonment element 'should make a significant difference to the perceived 'toughness' of the 'toughest' community penalties.'<sup>76</sup> The White Paper's statement on immediate imprisonment on *any* breach of a community sentence is extremely arbitrary and unforgiving. The zero tolerance approach runs counter to the mentality of the Report however it reinforces the government's ethos of 'tough on crime, tough on the causes of crime.'<sup>77</sup> The focus was meant to be on avoiding custodial sentences where possible and as a result it is hard to see how the Report and White Paper intended on reconciling this with sending offenders to prison on *any* breach of a condition.

The imposition of an immediate imprisonment qualification for breaches was bound to receive a mixed reception. On the one hand the media and public were almost largely guaranteed to be in support of the sentence after all it represents the hard-line approach desired. Academics and human rights groups on the other hand perhaps unavoidably were going to take an opposite stance and be critical of the measure, especially in its actual application. Maybe the error was with the government's stated intent that

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<sup>70</sup> para.5.30

<sup>71</sup> s189(1)

<sup>72</sup> s189(2)

<sup>73</sup> s190

<sup>74</sup> para.5.32

<sup>75</sup> para.5.30

<sup>76</sup> para.5.16

<sup>77</sup> Part of the 1997 Labour Party election manifesto

offenders would have 'the threat of imprisonment hanging over them'<sup>78</sup> whilst they carried out their community order.

### ***Doomed from the start?***

It was suggested before the sentence was implemented that a major downfall was that it 'takes no account of predictable high rates of failure to comply with conditions.'<sup>79</sup> Tonry argued that 'many offenders, probably a substantial majority violate conditions'<sup>80</sup> upon their release and as a result there are important practical reasons to doubt that the immediate imprisonment proposal would work. The most pertinent reason the suspended sentence would fail is that the imprisonment element would, instead of decreasing the prison population, cause it to increase.<sup>81</sup> There was dissatisfaction with the way in which the sentence was structured; its poor organization suggests either plain 'ignorance' on the government's part or equally a wish to appear 'tough.'<sup>82</sup> Tonry confirms that the only way forward would be for those imposing the sentence to resist the temptation to imprison offenders on any failure and that a better approach would be to assess breaches on a case-by-case analysis or build 'flexibility'<sup>83</sup> into the breach provisions or 'willful circumvention of breach rules by probation officers and magistrates.'<sup>84</sup>

### ***Suspended Sentences – What now?***

The position of the new suspended sentence is currently unclear. The Criminal Justice and Immigration Bill 2008<sup>85</sup> proposed their use be restricted to indictable or triable either way offences.<sup>86</sup> This is because 'the Government believes...suspended sentence orders have often been used in place of community rather than custodial sentences.'<sup>87</sup> Addressing the Magistrates Association in 2007, Jack Straw confirmed this position stating the government's newly refocused position,

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<sup>78</sup> *Justice For All*, para.4.56

<sup>79</sup> Tonry, M., 'Evidence, elections and ideology in the making of criminal justice policy', in Tonry, M., *Confronting Crime Crime control policy under new Labour*, (2003), at p.11.

<sup>80</sup> Tonry, *Punishment and Politics*, p.11.

<sup>81</sup> Tonry, *Alternatives to Prison*, p.306.

<sup>82</sup> Tonry, *Punishment and Politics*, p.12.

<sup>83</sup> Tonry, *Alternatives to Prison: Options*, p.307.

<sup>84</sup> Tonry, *Punishment and Politics*, p.11.

<sup>85</sup> Published on 26 June 2007.

<sup>86</sup> Part 2, Clause 10, Criminal Justice Bill.

<sup>87</sup> Turner, A., 'Suspended Sentences,' (2007), 171 *Justice of the Peace* 697.

the expectation, when we introduced Suspended Sentence Orders, was that they would be used instead of custody, where appropriate. But it seems that Suspended Sentence Orders are being used instead of community sentences. So I think our proposals, in the Criminal Justice and Immigration Bill, are right.<sup>88</sup>

During the debates throughout the second reading it was clear that views on the continued use of the suspended sentence were mixed, one Lord remarked

the suspended sentence is a thoroughly admirable device, it marks the gravity of the offence while...allowing the offender the chance, by his reformed behaviour, of avoiding going to prison...He has not got away with it...if he reoffends, he can be made to serve the remainder of his term, with more for the latest offence.<sup>89</sup>

Others were clearly not in support of the measure continuing and argued that the abolition of suspended sentences for summary offences 'is a step in the right direction...prisons have become too much a dumping ground for the socially excluded.'<sup>90</sup>

### ***The future of the Suspended Sentence***

At the time of writing the Criminal Justice and Immigration Bill is still in session but it is clear that the subsequent Act will significantly alter the use of the suspended sentence. This change has been both criticised and welcomed with suggestions that courts will impose *immediate custodial* sentences for summary offences as opposed to suspended sentences. The government believes that courts would be reluctant to impose custodial sentences for summary offences and that accordingly 'limiting the use of Suspended Sentence Orders to indictable-only and either way offences will result in a reduction in the demand for prison accommodation by about 400 places.'<sup>91</sup> Consequently it would appear that an underlying, but very significant, issue of the adaptation of the use of suspended sentence is the crisis with the prison population and the lack of available spaces, and the government's perception that sentencers are misusing the provision. [Postscript: it appears that

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<sup>88</sup> The Magistrates Association Annual General Meeting 29 November 2007, The Russell Hotel, London, statement on <http://www.justice.gov.uk/news/sp301107a.htm>

<sup>89</sup> HL Deb 22 January 2008 col.148.

<sup>90</sup> Ibid. col.189.

<sup>91</sup> Ministerial Correspondence with Stakeholders, <http://www.justice.gov.uk/docs/crim-justice-min-corres.pdf>

sections 10 and 11 Criminal Justice and Immigration Act 2008 have circumscribed the use of suspended sentences for summary offences].

#### **4 Sentencing Guidelines**

In the review, it was claimed that successful implementation of the Report's proposals hinged on the formation of comprehensive and detailed guidelines. This was necessary because there was a substantial amount of unfettered judicial discretion which governed what sentences were passed and consequently led to inconsistency. Halliday recommended that as the judiciary and Parliament shared the burden of generating sentencing policy there needed to be an independent institution that stood betwixt the two 'charged with implementing sentencing decisions.'<sup>92</sup> Initially the sentiments towards judicial discretion seemed to leave judicial involvement in applying sentences defunct. The Report suggested that the impact of the sentences was so significant it was irrational to leave solely to judicial preference, and thus the amount of discretion awarded to the judiciary should be somewhat lessened. Adversely it does not advocate sentencing decisions left entirely up to Parliament, instead opting for a balance between the two,

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*...if no judgement were needed, there would be no need for *judges*.<sup>93</sup>

The Report highlighted a weakness in the sentencing scheme in the form of how sentencing guidelines were created; existing Court of Appeal judgments were 'capable of further development...to fill existing gaps; distinguish between different levels of seriousness...and show how seriousness levels within various offences overlap with each other.'<sup>94</sup> In addition to this the Magistrates Court had its own method for creating sentencing guidelines which took an entirely different form to those of the Court of Appeal and adherence to which remained optional. The Report was critical of both sentencing systems because no statute compelled either to have guidelines or follow the ones that were in place, further there was no check and balance system in place for the

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<sup>92</sup> ch.8.

<sup>93</sup> para.8.3 [emphasis added]

<sup>94</sup> para.8.6



guidelines themselves. Overall the Report was dissatisfied with both arrangements concluding that 'having two separate sets of guidelines for the two sentencing tiers, done in two different ways is less than ideal.'<sup>95</sup> The Report expressed that 'if guidelines were grounded in law, there would be a firmer basis for compliance and consistency.'<sup>96</sup>

Criticism, however, was not limited to the judiciary, the Report suggested more direction was needed from Parliament as although it supervised the operation of the two systems from a close distance '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.'<sup>97</sup> In other words the Report advocated a slightly *more* hands on approach from Parliament and a slightly *less* hands on approach from the courts which would in turn be beneficial to a new sentencing framework.

### ***Creating an 'independent' sentencing body***

In the review three different commission models were set out which might best manage the task of creating sentencing guidelines. The main variations between the models were as to the amount of judicial input and the degree to which the judiciary would control the commission.

***Option A*** This model involved the Criminal Division of the Court of Appeal chaired by the Lord Chief Justice drawing input from several sources within the Criminal Justice System.<sup>98</sup> Under this model the Court of Appeal would 'prepare draft guidelines for consultation...under the authority conferred on it by statute'<sup>99</sup>. Option A would have completely preserved judicial discretion in sentencing and therefore not been a significant departure from the existing system. The reaction to an Option A council was mixed, some suggested that 'Halliday's option of having the Court of Appeal in effect be the commission or having a judicial or judicially selected commission are not unlike

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<sup>95</sup> para.8.6

<sup>96</sup> para.8.4

<sup>97</sup> para.8.4

<sup>98</sup> such as the Attorney General, the magistracy, the prison, police and probation services and government departments.

<sup>99</sup> para.8.13.

asking a fox to provide hen-house security.<sup>100</sup> Other views suggested that an Option A model overestimated judicial capabilities, 'a judicially run and dominated commission is unlikely to adopt guidelines of sufficient ambition to effect major changes in sentencing practice.'<sup>101</sup>

**Option C** This would be an independent body appointed by the Lord Chancellor but whose leadership would not be limited to the judiciary and so would have a 'more even mix of members, between those with sentencing responsibilities and those with more general qualifications.' Halliday observed when designing the commission models that Option C was a 'risky' option and most likely to cause 'conflict with the Court of Appeal and other courts.'<sup>102</sup>

**Option B** This would be an independent body separate from the Court of Appeal, but 'under strong judicial leadership.' It was supposed the body could work with two slightly different compositions. Firstly, where members would be appointed by the Lord Chancellor and include a required number of judges, professionals and academics, with the balance in favour of sentencers, or as an alternative, where the body would be made up entirely of sentencers but with the option of additional members with 'prison, probation, research, statistical or analytical background.'<sup>103</sup> In the Report 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.'<sup>104</sup> It is submitted that the decision is 'based on beliefs that cooperation and support from English judges is essential to a successful sentencing law overhaul.'<sup>105</sup> In the Report there is a subtle suggestion that the judiciary is unlikely to support the proposals if they are not in charge.<sup>106</sup>

Although it is difficult to argue that the Report is preoccupied with preserving judicial control of sentencing, it can be argued that it was simply not bold enough to specify expressly why judicial dominance should be avoided, instead skirting around the issue

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<sup>100</sup> Tonry and Rex, 'Reconsidering sentencing and punishment in England and Wales' p.11.

<sup>101</sup> Tonry, M., 'Setting sentencing policy through guidelines', in Rex, S., and Tonry, M., *Reform and Punishment The future of sentencing* (2002, Cullompton, Willan Publishing) at p.75.

<sup>102</sup> para.8.17.

<sup>103</sup> para.8.15.

<sup>104</sup> para.8.22.

<sup>105</sup> Tonry, 'Setting sentencing policy through guidelines,' p.79.

<sup>106</sup> A view shared by Ashworth, see *Sentencing and Criminal Justice*, (2005)

because it recognised that ‘judges by training and ideology are especially committed to the desirability of judicial discretion and reluctant to establish sentencing rules that seriously constrain that discretion.’<sup>107</sup>

### ***Deciding which model to choose: White Paper recommendations***

By the time the White Paper was released the government had decided on creating a council ‘responsible for setting guidelines for the full range of criminal offences’<sup>108</sup> which would consult with the judiciary and ‘not seek to infringe upon its independence’<sup>109</sup> but also ‘to make provision for Parliament to have a voice in the creation of guidelines’<sup>110</sup> to ‘ensure democratic engagement in the setting of guidelines.’<sup>111</sup> Despite its bold statements the White Paper was only paying ‘lip service’ to the Report’s recommendations<sup>112</sup> and proposed just about the weakest possible version of a Sentencing Guidelines Council.<sup>113</sup> Not wanting to step on any judicial ‘toes’ the White Paper presented a council made up entirely of judicial members, which it claimed was crucial to acknowledging ‘the importance of an independent judiciary.’<sup>114</sup> In order ‘to divorce the function of creating guidelines from that of deciding individual appeals...it was assumed an entirely judicial body was needed;’<sup>115</sup> especially as it was recognised ‘that the creation of sentencing guidelines is a judicial function.’<sup>116</sup>

Another explanation is that too many of the responses during the consultation period expressed concerns about Options B and C.<sup>117</sup> Justice<sup>118</sup> preferred Option A and dismissed Option B as unlikely to work,<sup>119</sup>

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<sup>107</sup> Tonry, ‘Setting sentencing policy through guidelines,’ p.83.

<sup>108</sup> *Justice for All*, para.5.15

<sup>109</sup> para.5.15.

<sup>110</sup> Ashworth, *Sentencing and Criminal Justice*, p.54.

<sup>111</sup> para.5.17.

<sup>112</sup> Tonry, *Punishment and Politics*, p.97.

<sup>113</sup> *Ibid.* p. 92.

<sup>114</sup> para.5.15.

<sup>115</sup> Ashworth,, *Sentencing and Criminal Justice*, p.55.

<sup>116</sup> *Ibid.*

<sup>117</sup> The Church of England Board for Social Responsibility preferred Option A in their response to the Halliday Report.

<sup>118</sup> Justice, *Justice Response to the Halliday Review*, (2001)

<<http://www.justice.org.uk/images/pdfs/Halliday.pdf>>

<sup>119</sup> No mention is made of Option C.

while Parliament should certainly be involved in setting a broad framework, "setting the boundaries of political permission", it should not have too much influence in drawing up guidelines.<sup>120</sup>

Liberty's response was not dissimilar; 'conceptually, there are difficulties with fettering judicial discretion in sentencing by any means,' the response went on to denounce 'over-intervention by the legislature into the realm of judicial discretion.'<sup>121</sup> Liberty's response was quite critical of the implication that there should be no judicial membership,

the role of a judiciary which is independent of ill-informed public opinion...provides one of the key characteristics of vibrant democracy...the formulation of the guidelines should be led by the senior judiciary (in consultation with other interested groups). This is the best way to prevent over-politicisation and to achieve legitimacy and adherence amongst those who will operate them<sup>122</sup>

This view is surprising because although it might be expected that Liberty be critical of *Parliament's* involvement in guidelines, it would not necessarily be expected that Liberty would find little fault in *judges* having sole control of a sentencing council. In their response Liberty seems to be suggesting that the risks involved in judicial discretion are negligible, accepting that although it can create 'unpredictable and inconsistent outcomes,' having Parliament too involved can also have this effect. Tonry suggests that the government 'proposed a sentencing council that can't possibly achieve Halliday's purposes, and creation of guidelines that can't possibly serve as the glue that will hold a refashioned punishment system together,' not due to

evidence or ignorance, the most economical hypothesis is that the government wanted neither to be seen to reject so central a recommendation from Halliday's Report, nor to take on the judiciary.<sup>123</sup>

### ***Teething problems: The Criminal Justice Bill***

When the Criminal Justice Bill was first presented to Parliament it provided for a body comprised solely of judges.<sup>124</sup> However, as the Bill advanced through Parliament the

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<sup>120</sup> Justice, *Justice Response to the Halliday Review*, para.54

<sup>121</sup> Liberty, *Liberty's Response to 'Making Punishments Work': the Halliday Review of the Sentencing Framework for England and Wales*, (2001) para.12

<sup>122</sup> *Ibid.* paras.13-14.

<sup>123</sup> Tonry, *Punishment and Politics*, p.17.

form of the council changed fundamentally, the Home Secretary seemed 'to have decided that an entirely judicial body could not be trusted with [such] an important social function.'<sup>125</sup> In the Lords opinion was split. Lord Woolf expressed dismay at having the membership of the council extended to non-judicial members despite the fact that persons would be drawn from *within* the CJS: 'if the council is to carry real clout, as it must if it is to be effective, its membership should be confined to the judiciary.'<sup>126</sup>

What is also apparent from the debate during the second reading of the Bill is that not everyone had a problem with the council having non-judicial members, 'while fully acknowledging the experience of the judiciary in sentencing, I do not see any principled reason why lay people should not be part of a sentencing guidelines council.'<sup>127</sup> The differing opinion within the House of Lords would seem to support the proposition that judges

...tend to believe that sentencing is a craft that cannot except very crudely be subjected to rules...Put bluntly judges centrality in the process and their common belief in their need for discretion mean that they often are fierce and effective opponents of proposed changes in sentencing policy or practice.<sup>128</sup>

Regardless of the split in views the amendments went ahead as planned and four non-judicial members<sup>129</sup> were added to the council judicial ownership of which is guaranteed in the Act itself, non-judicial members are not allowed a leadership role.<sup>130</sup>

### ***Abandoning principles - failure of the comprehensive guidelines approach?***

It is hard to deny that the Report's proposals for the new SGC were not radical, after all, the recommendations sought to displace the status quo and bring a wider perspective to the task of creating sentencing guidelines. The guidelines necessary to support the new framework were always going to have to be of a 'scope, complexity and specificity

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<sup>124</sup> s151 Criminal Justice Bill 2002. The original body comprised 7 members; The Lord Chief Justice, two Lord Justices of Appeal, a High Court judge, a Circuit judge, a District Judge (Magistrates' Courts) and a lay justice (magistrate)

<sup>125</sup> See Ashworth, *Sentencing and Criminal Justice*, p. 55.

<sup>126</sup> HL Deb 16 June 2003 col.574-575

<sup>127</sup> HL Deb 16 June 2003 col.591.

<sup>128</sup> Tonry, 'Setting sentencing policy through guidelines,' p.99.

<sup>129</sup> s164(4) CJA 2003 persons involved in/experienced in policing, criminal prosecution, criminal defence, and the promotion of the welfare of victims of crime

<sup>130</sup> s167(8).

several orders of magnitude beyond those of existing case law guidelines.<sup>131</sup> But there has to be a reason why the sentencing council never completely took the form which the Report wanted. Perhaps the government had an insurmountable task ahead of them and therefore the recommendation was never going to work in the way intended, maybe the scheme was just too complex. The SGC 'remains a body with considerable authority'<sup>132</sup> but not the one the Report envisaged because the government 'abandoned the sentencing guidelines that were the centrepiece of the recommendations.'<sup>133</sup>

It is argued that the government did not share the aims of the Report or have the same opinion as to the best way to create guidelines which achieved those aims.<sup>134</sup> While, the recommendations for a sentencing council were justified throughout; the Report equated establishing guidelines with lessening sentencing inconsistencies, creating fairness for offenders, reducing the prison population and thus reducing the impact on public expenditure. The Report suggested that these should be the primary aims of providing comprehensive guidelines.<sup>135</sup> In regards to the formulation of sentencing guidelines there was little sign in the White Paper<sup>136</sup> or the CJA 2003<sup>137</sup> of increased fairness to offenders and consistency in application of any penalties let alone the new ones. It is suggested this is because the popular press, the public, and therefore the government<sup>138</sup> is not really concerned with fairness to offenders, the government does not 'much care about how the sentencing council will operate or what it will not accomplish.'<sup>139</sup> This as it may be, the justifications behind the proposals were legitimate and the

proposal was a good one, not just because of the concern about disparities but because of the financial implications of the excessive use of

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<sup>131</sup> Tonry, 'Setting sentencing policy through guidelines,' p.75.

<sup>132</sup> Ashworth, A., and Player, E., 'Criminal Justice Act 2003: The Sentencing Provisions,' (2005), 68(5) *Modern Law Review* 822-838 at p.829.

<sup>133</sup> Tonry, *Punishment and Politics*, p.92.

<sup>134</sup> *Ibid* p.94.

<sup>135</sup> para.8.1.

<sup>136</sup> Unless one implies that eradicating disparity is all that is needed to create fairness for offenders

<sup>137</sup> The Act states the council must have regard to promoting consistency in sentencing

<sup>138</sup> The popular press tend to focus on 'justice' being done for those who commit crimes and invites its readership to share that view with sensationalist headlines and misrepresentation of the facts and the government naturally prefer to be in favour with the voting public

<sup>139</sup> Ashworth, *Sentencing and Criminal Justice*, p.17

imprisonment and the overcrowding, deteriorating conditions and increased suicide rates.<sup>140</sup>

As to the creation of comprehensive guidelines, the White Paper was not specific and even contradictory, at one point stating the council will be responsible for setting guidelines for the 'full range of criminal offences'<sup>141</sup> but later suggesting that changes to the guidelines will be incremental,<sup>142</sup> and issued 'as and when they are completed.'<sup>143</sup> The original approach was all-inclusive, not piecemeal, but perhaps the reason why the guidelines have continued to be implemented 'bit by bit' is because the 'government grossly underestimated the complexity and difficulty of what's involved in developing comprehensive guidelines.'<sup>144</sup> There is no mention at all in the White Paper, the Bill or the CJA 2003 itself of how comprehensive the guidelines should be, which supports the view that the treatment of the sentencing council and guidelines by all three was 'half-hearted and perfunctory.'<sup>145</sup>

### ***Sentencing Guidelines: the Verdict***

Clearly there are differences between what the Report visualised and what was actually created. The SGC's approach *is* wide ranging and incremental,<sup>146</sup> guidelines are created on generic offence groups,<sup>147</sup> individual offences,<sup>148</sup> and general principles across the sentencing range,<sup>149</sup> but often the projects are large and complex so inevitably they take time. The benefits of the process of the new SGC cannot be underestimated, the SGC is effective in many areas, there is some truth in the suggestion that 'it is unthinkable now that we should abandon guidelines in sentencing and return to general judicial discretion.'<sup>150</sup>

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<sup>140</sup> Ibid. p.93

<sup>141</sup> *Justice for All*, para.5.15.

<sup>142</sup> Tonry, *Punishment and Politics*, p.94.

<sup>143</sup> *Justice for All*, para.5.18.

<sup>144</sup> Ibid. p.92.

<sup>145</sup> Ibid. p.95.

<sup>146</sup> Wasik, M., 'Sentencing guidelines in England and Wales – state of the art?' (2008), *Criminal Law Review*, 253-265

<sup>147</sup> Such as all the offences in the Sexual Offences Act 2003.

<sup>148</sup> For example, robbery, reduction in sentence for guilty plea.

<sup>149</sup> For example domestic violence.

<sup>150</sup> Wasik, 'Sentencing guidelines in England and Wales, p.257.

The 'production of sentencing guidelines in England and Wales is a highly consultative exercise,<sup>151</sup> the SGC has to give sufficient time for consultation in order to bring 'transparency and accountability'<sup>152</sup> to the whole process, which the Report specified was imperative. The SGC also has to take on board the views expressed during the consultation periods and make changes where appropriate, but the Council rightly accepts that not every view can be accommodated, which ultimately means the guidelines are of value.<sup>153</sup>

### **Conclusion – Does it make Sense?**

This article has sought to assess three major sentencing proposals from the Halliday Report on the sentencing framework in England and Wales and their potential and actual impact on the criminal justice system. As has been discussed, the Halliday Report was originally commissioned to radically reform the structure of the sentencing framework in a way that benefited both society and the offender. Most of the proposals from the Report were endorsed in the government White Paper and the majority of the Report is visible in Part 12 of the CJA 2003. Both the Report and White Paper were concerned with what sentences *represented* to the public, they were very keen for them to 'mean what they say'. It could be suggested that given the state of affairs with these sentences it does not matter much what they *mean* because they no longer *say* anything at all!

Despite many of the proposals having the capacity to improve the CJS it would appear that the government has failed to implement them effectively and seven years after the Halliday Report they are still having little impact.

Custody Plus was a carefully thought out sentence with the potential to target the group of offenders most likely to perpetuate the problem of an increasing prison population: offenders on short prison sentences by challenging offenders' behaviours and attitudes to crime. Though not without its pitfalls, it is astonishing that such a useful sentence has not at least been trialled. It would be interesting to know whether it is true that 'the

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<sup>151</sup> Ibid.

<sup>152</sup> para.8.11.

<sup>153</sup> Roberts and Smith, 'Custody Plus, Custody Minus.'



implications of 'custody plus' are so scary that the Government dare not implement it.<sup>154</sup> The position of custodial sentences is certainly no better today than seven years ago and on assessment of official statistics the position is worse;<sup>155</sup> prisons are nearly full. The current trend of increase shows no sign of waning and the government is racking its metaphorical brain with how to change this. This seems somewhat ironic, especially as if the government had employed the resources necessary to put in place many of Halliday's recommendations then the situation may not have been as bad as it is today. However, it clearly is not just down to the *type* of sentences offenders are serving, it is equally dependent on Labour's 'tough on crime' agenda and its continued pursuit of pleasing the voting public.

The government did accept Halliday's recommendations for the new community order and its implementation has seen a positive step. If the government figures are to be believed requirements such as 'unpaid work' are having a significant positive and quantifiable impact. It would be hard to argue that 3 million hours worth of unpaid work in the communities the offender betrays is a bad thing. However not much is said by the government about the other requirements that can be imposed in a community order. Success rates of programmes to assist those with substance abuse problems and programmes to tackle reoffending are not known, nor are the figures for those who reoffend after a community order. Arguably there is more clarity in the types of community penalty offenders will undergo and the wide range means that it should be easily tailored to offender needs. As the community order only came into force in 2005 it will still be some time before the reality of what it achieves is known. Only time will tell if the measure stays in place. One would hope that community sanctions do not suffer the same potential fate the new style suspended sentence, a much improved sanction evident in its popularity. However research shows that sentencers have been caught by the net-widening trap<sup>156</sup> and clearly the government once aware of this could not allow it to continue. Suspended sentences are currently in the most precarious position, the

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<sup>154</sup> Turner, A., 'The Criminal Justice Merry-Go-Round,' (2007), 171 *Justice of the Peace* 729

<sup>155</sup> When the CJA 2003 came into force the prison population stood at 74,055  
<http://www.homeoffice.gov.uk/rds/pdfs2/prisnov03.pdf> the prison population on 18 April 2008 stood at 82,105 an increase of approx 9%  
[http://www.hmprisonservice.gov.uk/assets/documents/1000383218042008\\_web\\_report.doc](http://www.hmprisonservice.gov.uk/assets/documents/1000383218042008_web_report.doc)

<sup>156</sup> Jack Straw, The Magistrates Association Annual General Meeting 29 November 2007, The Russell Hotel, London, statement on <http://www.justice.gov.uk/news/sp301107a.htm>

government's intention to limit their use to indictable only or triable either way offences will have significant effects on the sanction but with the current fashion of change it is conceivable it will follow in its predecessor's footsteps and fall into disuse once again.

The SGC is another proposal implemented in a diluted form and adapted in ways that make it hard for it to reach its full potential. Although it is argued the SGC does a good job it would appear 'good' just is not 'good enough,' speaking six years after the Report, John Halliday himself professed,

the nearest thing to an independent sentencing authority in England...is the...SGC. My hope, in recommending a body of this sort, was that it would work towards a comprehensive set of guidelines...So far, there is no sign of either the government or the SGC seeking to develop...the strong leadership and imagination...needed.<sup>157</sup>

However, it would be wrong to deny that some of Halliday's central aims are unidentifiable in the SGC. There is an increased amount of transparency in the new process, the Council consults widely; public opinion is invited, Parliament has a degree of input and unfettered judicial discretion is curtailed on a case to case basis.

It is far too easy to apportion blame on the different agencies within the CJS. Fault can effortlessly be placed at sentencers' feet for net-widening with some sentences, or with the SGC for not implementing 'comprehensive guidelines', or with Halliday himself for producing a report that although 'intelligently, ambitiously and professionally executed was misconceived.'<sup>158</sup> This, however, simply diverts attention from those arguably most at fault; the government and its desire to be seen as hard on crime, because they do not 'wish to be pilloried for being soft on offenders.'<sup>159</sup> Yet it is the government who is currently the weakest link in the sentencing framework. In order to remain in power it has to be seen to be doing 'something', crime is, in the eyes of most a taboo, and so the public will always hunger for assurances from those high up that crime is being tackled. What is evident is that not very much in the CJS is being tackled very well at the moment. The Halliday Report was supposed to be the beginning of a new era for sentencing, the government has failed to exploit its full potential and as a result things

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<sup>157</sup> Halliday, J., 'Our judges have had enough 'messages' from ministers', *The Guardian*, Tuesday 6 February 2006.

<sup>158</sup> Rex, and Tonry, *Reform and Punishment The future of sentencing*, p.2.

<sup>159</sup> Halliday, 'Our judges have had enough 'messages' from ministers',

are not looking good. It is argued<sup>160</sup> that the solution to solving the problems of the CJS lies mainly in stopping the over-legislating of criminal justice. The government needs to take a step back and look at ways to make the system work more effectively instead of making sentences 'tougher'. Tougher sentences do not equal less crime; they equal an increasing prison population.

It would appear the government is still trying to find out 'what works' with the CJS, but surely they recognise that 'nothing will ever work unless those entrusted with...implementation are given the necessary time, opportunity and resources to achieve.'<sup>161</sup> Ironically although wanting to put 'the sense back into sentencing' it would seem seven years later the government have not given the Halliday proposals the chance to work, instead slowly abandoning the majority of them. The government keep on legislating and amending and changing the CJS in an attempt 'to persuade the public that with clearer goals and better integration and management of the CJS, crime reduction can be achieved through sentencing and punishment.'<sup>162</sup> It *must* be possible for the government to achieve these aims. However, catastrophically failing to implement key proposals from the Halliday report has done nothing to help the government in its quest for a new sentencing framework; one that ultimately makes sense.

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<sup>160</sup> Robson, G., 'Time for a Tribute: the Work of the Sentencing Advisory Panel', (2007) 171 *Justice of the Peace* 496.

<sup>161</sup> Turner, A., 'The Criminal Justice Merry-Go-Round', (2007) 171 *Justice of the Peace* 729.

<sup>162</sup> Koffman, L., 'The rise and fall of proportionality', (2006), *Criminal Law Review*, Apr, 281-299.