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Sentencing
Advisory Panel

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Overarching Principles of Sentencing

The Panel's Advice to the Court of Appeal

Environmental Offences	March 2000
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Sentencing for Domestic Burglary	March 2010

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(see inside back cover for contact details)

FOREWORD BY THE CHAIRMAN

This advice to the Sentencing Guidelines Council reviews the approach to the assessment of the seriousness of an offence and a number of related issues. It contains 23 recommendations on matters both of general principle and of more specific detail.

In September 2004, the Panel published its advice *New Sentences: Criminal Justice Act 2003* which reviewed fundamental issues relating to the assessment of the seriousness of offences in the context of the new sentencing framework contained in the 2003 Act which was yet to be implemented. The Sentencing Guidelines Council subsequently produced its first guidelines from that advice – *Overarching Principles: Seriousness* and *New Sentences: Criminal Justice Act 2003*. These preceded the implementation of the relevant provisions in the 2003 Act and played an important role in the preparation for that implementation.

With over four years' experience of the new sentencing framework, with offence specific guidelines now covering (or close to finalisation for) almost all the range of commonly occurring offences and with a range of changes in the social and political climate, the Council and the Panel agreed that it would be appropriate to review the earlier guidelines (especially *Overarching Principles: Seriousness*), to re-examine the basis on which seriousness was determined and to consider a number of practical issues that had been identified as appropriate for guidance. In addition, the Panel was conscious that the Sentencing Council proposed in the Coroners and Justice Bill (now Act) would be obliged to produce guidelines on the "application of any rule of law concerning the totality of sentences".

For some time, the Panel has wished to produce advice on the sentencing of women offenders. This important subject appeared to the Panel to be best considered within the context of a wide ranging review of the assessment of seriousness and is contained in Section Three.

The Panel has previously provided advice on the approach to sentencing where the court agrees to take other offences into consideration (TICs); it is anticipated that that advice will be considered alongside this advice.

The Panel received a high number of responses to its consultation; as always, the Panel has considered each response. In addition, the Panel commissioned a survey of public opinion which has produced much valuable information that has been of assistance in developing this advice; the report of this survey has already been published.[1]

The Panel is extremely grateful to all those who have assisted in its deliberations.

Professor Andrew Ashworth
Chairman of the Sentencing Advisory Panel

[1] *Public Attitudes to the Principles of Sentencing*, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

INTRODUCTION

1. In July 2008, the Sentencing Advisory Panel published a consultation paper – *Overarching Principles of Sentencing* – relating to the sentencing of adult offenders.[2] It had been asked by the Sentencing Guidelines Council to review the definitive guidelines *Overarching Principles: Seriousness* and *New Sentences: Criminal Justice Act 2003*.[3] The Council has a statutory duty to keep definitive guidelines under review and the intention was to update the two guidelines to reflect any subsequent legislative or administrative changes, to address any problems experienced when applying them in the courts and to expand them to cover any additional issues of principle that might have arisen since publication.

2. The Panel's consultation also presented a wider opportunity to review the principles currently governing most areas of sentencing practice and, if necessary, to amend them so as to create a coherent set of appropriate and workable principles for use in all courts in England and Wales. This is a timely review in light of the changes in the Coroners and Justice Act 2009.[4] The government has responded to the recommendations in the report of the Sentencing Commission Working Group[5] by proposing a single advisory body with an enhanced remit and this advice seeks to establish an informed and carefully considered framework with which the proposed new Sentencing Council will be able to commence its considerations.

3. The guidelines under review reflect the statutory framework which is based on 'proportionality', that is, that no sentence should be more severe than is justified by the seriousness of the offence(s). Statute requires that the restrictions on liberty arising from a community sentence and the length of a custodial sentence must be no more than is commensurate with the seriousness of the offence committed;[6] it also requires the Council to have regard to "*the need to promote consistency in sentencing*" when framing or revising guidelines.[7] A list of all the definitive guidelines published thus far by the Sentencing Guidelines Council can be found at Annex B.

4. As the Panel was aware of concerns both about the number and characteristics of offenders receiving custodial sentences and about the lengths of sentence being imposed, a large part of the consultation focused on the factors relevant to determining whether a particular sanction is the most appropriate and/or effective in all the given circumstances of both the offence and the offender.

5. Remaining firmly of the view that sentencing must be based on a principled approach, the Panel's provisional proposals were based on consistency and proportionality, principles with which those working in the criminal justice system are already familiar. However, the Panel was anxious that its proposals

[2] www.sentencing-guidelines.gov.uk; the Panel has consulted separately in relation to the sentencing of young offenders (consultation paper published in December 2008 and, on 20 November 2009, the Sentencing Guidelines Council published a definitive guideline)

[3] ibid.; both published in December 2004

[4] s.118–136 provide for the creation of a new Sentencing Council with a wider remit than that accorded to the existing Panel and Council

[5] *Sentencing Guidelines in England and Wales: An Evolutionary Approach*, July 2008, Ministry of Justice

[6] Criminal Justice Act 2003, ss.148 and 152

[7] ibid., s.170(5)(a)

should be understood by, and acceptable to, the general public whose confidence in the criminal justice system is vital. As the established rationale behind many sentencing principles would not be well known to the public, the Panel supplemented its normal consultation process by commissioning independent research. This aimed to test current public attitudes on some of the most fundamental issues raised in the consultation paper and to gauge the extent to which the public would find the Panel's provisional proposals acceptable. The report summarising the findings of this research was published in June 2009[8] and the findings have been considered carefully alongside the responses to the consultation.

6. Some respondents to the consultation, including the Ministry of Justice, pointed to the paucity of sentencing data as a reason for delaying the review of the guidelines. The Panel's consultation paper clearly identified its concerns about the reliability of the statistical material from which it quoted. However, the data collection shortfall is unlikely to be rectified in the near future and the Panel takes the view that poor data should not divert the Council from its statutory obligation to monitor, review and update guidelines.

7. The Panel's advice summarises the key messages emerging from both methods of consultation, highlighting any issues of substance that the Panel needed to consider before confirming or adjusting its provisional proposals. It makes recommendations in relation to the key points of principle that the Council will want to consider including in a draft *Overarching Principles of Sentencing* guideline in addition to the material in the existing guidelines that was not specifically consulted on and in relation to which no changes are proposed.

8. Section One makes recommendations in relation to the sentencing framework and the use of different types of disposal; Section Two considers a number of other factors affecting sentence and Section Three covers equality and human rights issues and makes proposals about the sentencing of women offenders. A summary of the Panel's recommendations can be found at page 81.

[8] *Public Attitudes to the Principles of Sentencing*, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

CONTENTS

SECTION ONE: THE SENTENCING FRAMEWORK

The comparative seriousness of offences

9. Parliament attaches to each criminal offence a maximum sentence that gives a broad indication of offence seriousness and, although not all sentences are available for all offences, Parliament usually leaves the court to select sentence within that statutory maximum. A key question the consultation sought to answer was where the custody and community thresholds should fall, i.e. what characteristics of an offence make it sufficiently serious to justify the imposition of a custodial or community sentence? Additionally, the consultation explored in some detail the circumstances in which factors relevant to the offender may legitimately influence the determination of the sentence to be imposed.

10. The Criminal Justice Act 2003 links the severity of the sentence to the seriousness of the offence[9] giving 'proportionality' a central role and requiring distinction between offences by reference to their relative gravity.[10] In some American states and in the U.S. Federal jurisdiction, a 'sentencing grid' is constructed in which the number and nature of factors that can be taken into account are limited; this enables several types of offence to be grouped together. This approach is very different from the more detailed but less prescriptive approach in England and Wales, which is predicated on a desire to achieve a consistency of approach whilst enabling sentencers to impose a sentence that is both commensurate with an assessment of offence seriousness and takes account of the characteristics of an individual case. The Panel had concluded that such an 'American style' approach would be neither appropriate nor workable and is pleased to note that it has been discounted as a suitable option for the courts in England and Wales.[11]

11. In its consultation paper, the Panel discussed whether it might be possible to rank offences according to their relative level of seriousness in order to help to define where the custody threshold should lie. We considered current sentencing practice as a possible indicator of comparative seriousness. However, although some offences are routinely categorised as the most and least serious, there was far more inconsistency for those offences which commonly result in either custodial and non-custodial sentences;[12] it is for this type of offence that there is the greatest uncertainty both about where the custodial threshold should fall and about the significance of factors personal to the offender in determining whether such a sentence should be imposed. Any attempt to create a ranking of offences will always face the major difficulty that a simple description of an individual offence (for example, 'robbery') will cover a very wide range of conduct; thus the ranking accorded to an offence will vary with each individual's perception of the typical offence falling within that description or the

[9] see para. 13 below

[10] the only significant exception arises out of the provisions relating to 'dangerous offenders', which enable the court to sentence on the basis of future risk: Criminal Justice Act 2003 ss.224–229, as amended. The Council has published a summary of the current dangerousness provisions and relevant case law; this can be found at www.sentencing-guidelines.gov.uk

[11] *Sentencing Guidelines in England and Wales: An Evolutionary Approach*, 4.24, Ministry of Justice, July 2008

[12] for example, assault occasioning actual bodily harm

detail required will become too extensive to be practical.

12. As a result, the Panel consulted on an approach based on determining matters of principle related to the characteristics of an individual offence or offender; this met with widespread support from those who responded to the consultation.

Assessing the seriousness of an offence – general approach

13. The sentencing framework within the Criminal Justice Act 2003 (the Act) uses seriousness as a key factor in a number of important decisions. A custodial sentence may be imposed only where an offence is 'so serious' that neither a fine alone nor a community sentence can be justified;[13] the length of that sentence must be the shortest commensurate with the seriousness of the offence.[14] A community sentence may be imposed only where the offence is 'serious enough' to warrant such a sentence; the restrictions on liberty contained within the sentence must be commensurate with the seriousness of the offence.[15]

14. Under the Act, the 'seriousness' of an offence is determined by an assessment of the culpability of the offender and the harm caused, intended or foreseeable.[16] The Act also provides that the level of seriousness assessed in this way is increased where certain factors are present; some of these are not directly related to the offence (the existence of one or more previous conviction[17] or the commission of the offence whilst the offender was on bail[18]) whilst others are directly related (offence was racially or religiously aggravated[19] or was motivated or accompanied by hostility based on sexual orientation or disability (in either case, actual or presumed)[20]).

The purposes of sentencing

15. The Act sets out five purposes of sentencing – punishment, crime reduction (including its reduction by deterrence), reform and rehabilitation, public protection, and reparation.[21] Sentencers must consider, given the nature and seriousness of the offence committed and the circumstances of the offender, which of these purposes is appropriate and how it (they) might be achieved. For example, 'reform and rehabilitation' may influence the court in deciding what requirements to include in a suspended sentence; and 'reparation' to the victim may influence the selection of requirements within a community order.

a) Distinguishing the relative significance of the different purposes

16. The Act does not accord any weight to the different purposes of sentencing. Both the Panel's consultation and the commissioned research investigated whether any one purpose should be regarded as being more important than the others when deciding on the sentence to impose within the limitation

[13] Criminal Justice Act 2003, s.152
[14] ibid., s.153
[15] ibid., s.148
[16] ibid., s.143(1)
[17] ibid., s.143(2)
[18] ibid., s.143(3)
[19] ibid., s.145
[20] ibid., s.146
[21] ibid., s.142

that the dominant factor in sentencing should be the seriousness of the offence.[22]

17. Some respondents to the consultation identified punishment as the most important purpose of sentencing or as the purpose that inevitably would be a fundamental element of all sentences; others grouped punishment variously with deterrence, public protection or reform and rehabilitation and each individual purpose was selected as the most important by at least one respondent. However, the majority view was that no one purpose should be regarded as intrinsically more important than any other and that the relative importance of each purpose needs to be determined according to the particular facts and circumstances of each individual case.

18. The research findings show that public protection is given high priority by the public but that protection is sought through incapacitation not only from serious and violent offending but from all types of crime. Public protection, punishment and preventing crime were considered by the public to be marginally more important than reform and rehabilitation or reparation. Care must be taken when interpreting these findings as the public were not asked a general question but were asked to consider the relative importance of the purposes of sentencing within given case scenarios; thus the importance accorded to the various purposes varied according to the nature and characteristics of the offence described. In addition, there are circumstances in which imprisonment can increase the likelihood of re-offending (see paras. 48–51 below); a limited period of incapacitation, therefore, may lead to a higher risk of harm in the medium to long term.

19. There is a multitude of socio-economic reasons why people turn to crime; repeatedly committing offences is often associated with a chaotic lifestyle that can be virtually impossible to address through sentencing alone.

20. Data included in the Panel's consultation paper indicate that there is a peak age for offending behaviour, being 19 for male sentenced offenders (both for indictable offences and across all offences) and, although less marked, 16 for women convicted of indictable offences and 21 for all offences.[23] Desistance studies, which seek to identify the factors that lead offenders to end their involvement in criminal activity, can give sentencers a better understanding of the elements in an offender's life that a criminal sanction needs to address in order to reduce re-offending. Such studies have pointed to a range of other reasons, unrelated to sentencing, why offenders may turn their backs on a criminal lifestyle.[24] Some recognised catalysts for male offenders turning away from crime, for example, are increasing maturity, entering paid employment, forging a stable relationship and the responsibilities of parenthood.

[22] Criminal Justice Act 2003, s.143(1) (for example, the court must not impose a community order in order to take advantage of treatment requirements that might benefit an offender if the offence was not serious enough to warrant it)

[23] based on OCJR data

[24] see, for example, *Rethinking What Works with Offenders: Probation, Social Context, and Desistance from Crime*, Stephen Farrall, Willan Publishing, 2002; and *Desistance from Crime*, 2004, 43 Howard Journal of Criminal Justice pp.357–436

b) *Deterrence*

21. Deterrence is intended to operate through a threat (that is, that the consequences of offending are more unpleasant than the consequences of not offending), which leads an individual to modify his or her behaviour.[25] There is an extent to which deterrence is intrinsic to any system through which a sanction is imposed for specified conduct; simply by having such a system, the general determination that certain types of conduct are unacceptable is reinforced. Beyond this, deterrence is generally described as having an effect in two ways. First, the sanctions imposed on an individual offender may be intended to (or may indeed) have the effect of deterring people other than the offender from committing similar crimes (although there is no robust research evidence from which conclusions can be drawn); second, the sanctions imposed may be intended to deter an individual offender from committing any further offences.

22. The most commonly used measure of the second type of deterrence is the reconviction rate, which measures whether an offender has committed a further offence during a specified period or, increasingly, any changes in the frequency or seriousness of the offences committed. There are a number of problems related to traditional reconviction analysis that undermine its credibility as a reliable measure of effectiveness; chiefly these are the time-lag built in by the evaluation period and, where any subsequent conviction is treated as a failure, no significance is attributed to reductions in the frequency or severity of offending.

23. In 2008, the National Offender Management Service (NOMS) Development and Statistics Group published some data comparing reconviction rates according to the type of disposal in an attempt to "*provide some limited understanding of the relationship between sentence and re-offending rates*".[26] The report noted that all findings should be treated with caution, not only because offenders "*do not specialise in the type of offences they commit*" so that predictions about re-offending rates (against which actual re-offending is measured) can easily be proved false, but because of the unknown influence of other extraneous factors. The Panel understands that NOMS has reviewed its methodology for conducting reconviction analyses and is conducting comprehensive research into the complex relationship between re-offending and disposals; we await the resulting findings with interest. The new re-offending measures that have been introduced by the Ministry of Justice[27] may help to address some of the well-known problems with reconviction analysis relating to the seriousness and frequency of offending but reconviction analysis still will be only one part of the picture in terms of assessing the effectiveness of sentencing. As wider measures of effectiveness, such as the overall crime rate,

[25] deterrence is different from the incapacitative effect of being detained in custody. Incapacitation is a different means of achieving prevention by virtue of the fact that an offender cannot commit any further offences whilst in prison. (See, for example, the Coulsfield Commission report examining alternatives to prison, published in November 2004, which concluded that the incapacitative effect of prison is difficult to measure, and that, after a time, the law of diminishing returns will apply. As there is a tendency for offending rates to decrease with age, longer prison sentences may simply mean holding people whose criminal careers are over)

[26] *Re-offending of adults: results from the 2004 cohort*, Reconviction Analysis Team, March 2007

[27] *New national re-offending measures 2008–2011*, David Hanson, written ministerial statement, 7 May 2008

can also be affected by a wide range of socio-economic factors, it is virtually impossible to isolate the impact of sentencing policy.

24. The current delivery strategy of NOMS, which is based on seven reducing re-offending pathways (covering issues such as accommodation, education, health and finance management) and three reducing re-offending alliances with other organisations, focuses on working in partnership with others to help offenders change their behaviour and on addressing the issues that may lead them to re-offend. This strategy is a clear recognition of the fact that tackling re-offending needs to look far wider than the nature and terms of the sentencing disposal.

25. As none of the measures of re-offending can be expected to provide a definitive answer as to which types of sentence are the most effective and, because reconviction rates are not the only measure of effectiveness, the comparative benefits of prison sentences and non-custodial options have to be considered in more general, principle-related terms.

26. The Panel is not aware of any evidence that shows a causal connection between variations in sentence severity and differences in reconviction rates[28] or between the severity of sentences in general and levels of crime.[29] Research evidence suggests that criminals are deterred more by the fear of being apprehended than by the sentence that is likely to be imposed if they are convicted of the crime, about which they may have little knowledge.[30]

27. In its consultation, the Panel asked whether respondents were aware of any more recent research into the deterrent effect of sentencing. No-one was able to point to anything of general significance and a number of respondents entered a note of caution about taking the experiences of other, very different, jurisdictions into account. The Panel continues to believe that, since there is no robust research evidence from which conclusions can be drawn, suggestions about the likely deterrent effect of any sentence should be viewed with caution.

c) Prevalence

28. Inevitably, different types of offence occur with differing levels of frequency and the general perception of the seriousness of the conduct will be reflected both in the maximum penalty set by Parliament and in the general approach to sentencing those convicted. Insofar as there is a relatively stable volume of offending (for example, for theft from a shop or for assault occasioning actual bodily harm), any element of deterrence justified by the national prevalence is allowed for in offence-specific sentencing guidelines and, therefore, should not influence a court at the point of sentence. However, there will be occasions when there is a marked increase in the commission of a particular offence or of a particular activity and where it is considered that an increase in the severity of sentence is

[28] see, for example, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* Halliday, J., Home Office, (2001); also *Criminal Deterrence and Sentence Severity*, Von Hirsch, A. Bottoms, A. (1999); and *Crime Courts and Confidence: Report of an Independent Inquiry into Alternatives to Prison*, Lord Coulsfield et al (2004)

[29] *The Penal System: An Introduction*, Cavadino, H., and Dignan, J., p.37

[30] see for example, *Criminal Deterrence: An Analysis of Recent Research*, Von Hirsch, A. et al (1999) Oxford: *Sentence Severity and Crime: Accepting the Null Hypothesis*, Doob, A. and Webster, C., (2003) *Crime and Justice: A Review of Research*, 30:143

justified in order to play a part in its reduction. This may be a national issue, in which case the Court of Appeal may state that sentences should be increased temporarily in all courts; sentencing levels should return to those in the relevant offence guideline once the increase is deemed to have had the required effect.[31] This requires periodic review.

29. More common is the situation where there is a perception that a certain type of criminal activity has increased significantly in a local area and that an increase in sentence severity will assist in reducing that activity. The existing *Seriousness* guideline states that a court might conclude that such prevalence should influence sentencing levels only where there is independent supporting evidence to justify the claim that a particular crime is prevalent in the area and there is a compelling need to treat the offence more seriously than elsewhere. Two recent Court of Appeal cases reinforce the need to follow this guidance. In *Lanham and Willis*,[32] the Court reduced sentences that were imposed on the strength of the judge's own opinion that the type of offending behaviour involved was prevalent in the local area. In the case of *Peters and others*,[33] the Court reminded sentencers that, in the absence of statistical or other evidence identifying particular prevalence in an area, a judge, however experienced in a locality, should not make the assumption that an offence is more prevalent in the area than it is nationally.

30. In this regard, the Panel has noted the proposals in the Green Paper *Engaging Communities in Criminal Justice*, published in April by the Crown Prosecution Service.[34] The intention is to extend the use of Community Impact Statements and to provide a breakdown of offending statistics at geographical and local ward area so that much better information is available to each sentencing court about the prevalence of particular types of offending behaviour in its region. Assuming the statistics include comparative data, they are likely to be a helpful source that enables a court to comply with the guidelines regarding the appropriate response to local prevalence. Although the 'ceiling' for any sentence still will be determined by the seriousness of the offence, that assessment may be affected by prevalence since that is likely to increase the level of harm caused by the offence. Where the ceiling is increased in this way, there may be greater scope for deterrence to be significant in the sentencing purposes identified by the court.

31. The Panel has concluded that the relative importance of the five statutory purposes of sentencing should continue to be determined by reference to the particular characteristics of an individual case. In some cases, one purpose might take precedence over the rest, for example where the serious nature of the offence or the high risk of harm from further offences means that public protection is paramount, but this should not prevent the court from seeking to achieve additional purposes such as reform and rehabilitation of the offender and the prevention of

[31] see, for example, *R v Povey*, [2008] EWCA Crim 1261 – sentences for possession of a knife have temporarily been increased in light of the perceived prevalence of such offending behaviour

[32] [2008] EWCA Crim 2450

[33] [2005] EWCA Crim 605

[34] the closing date for responses was 31 July 2009; the intention is to pilot the scheme in 30 different areas with a view to rolling out the scheme nationwide

re-offending. In most cases, a court is likely to want to achieve a combination of purposes. In very exceptional circumstances, this consideration might be part of the justification for selecting a sentence that is above or below the range identified in the relevant offence guideline.

Recommendation 1

Once a court has determined whether the threshold for a custodial or community sentence has been crossed, it must consider which of the five purposes of sentencing – punishment, crime reduction, reform and rehabilitation, public protection, and reparation – it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

Recommendation 2

The prevalence of particular types of offending and the need to deter the offender and others from committing similar crimes are taken into account when sentence starting points and ranges are determined for offence guidelines. A sentence should be increased on the grounds of prevalence only exceptionally and where there is statistical or other independent evidence to show that a particular type of offending behaviour is currently more prevalent in a local area and the court is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

The choice between a custodial and non-custodial sentence

32. The Panel's consultation paper noted that recent pressures on prison places had led to much discussion about the type of offences that generally should result in a custodial sentence. In relation to most of the commonly sentenced offences, the level of seriousness justifying a custodial sentence is identified in a sentencing guideline. As far as a general custody threshold is concerned, the existing *Seriousness* guideline states:

"*It would not be feasible to provide a form of words or to devise any formula that would provide a general solution to the problem of where the custody threshold lies. Factors vary too widely between offences for this to be done.*"

The relative costs of custodial and community sentences

33. The decision on whether to impose a custodial or community sentence should be based on issues of principle related to the seriousness of the offence and consideration as to which type of sentence is likely to be the more effective in achieving the purposes of sentencing; the relative cost of a prison and community sentence should not be of any significance at the point of sentence. However, the relative costs of providing community-based interventions and prison places is a legitimate consideration for resource planning and some research has sought to create measures of cost effectiveness. The Matrix research report *The economic case for and against prison*[35] was commissioned by the government to produce evidence about the value for money of different criminal justice interventions; the report identified "significant gaps in current evidence," and suggested that much more research is needed before any sound conclusions about relative effectiveness can be drawn.

[35] Matrix Knowledge Group, November 2007

34. In 2007, the government estimated the average direct cost of a prison place in England and Wales to be £37,500 per annum. This is the amount calculated for 2005/06 based on the total cost of prisons (both public and private) and expenditure met by the Prison Service and NOMS centre (including prison property, prisoner escort service, IT etc).[36] The cost will increase where interventions such as drug treatment or behavioural programmes are delivered in custody. As was identified recently in connection with an attempt to identify the cost of a custodial place for a young person, there are likely to be additional costs incurred by other government departments such as healthcare.[37]

35. The direct cost of supervising a community order varies depending on the nature and duration of the requirements imposed. A National Audit Office (NAO) report[38] noted significant area variations in the cost of delivering individual community order requirements but the overall cost per case for persons supervised under court orders in 2007/8 was estimated at £3,200.[39] An earlier report[40] cited the primary cost estimates for community orders as the average cost per commencement of an individual requirement;[41] each estimate includes the commencement cost of a stand-alone supervision requirement (£652).

36. It is not possible to state the extent to which each type of sentence is more or less costly than another – assessing the comparative costs and effectiveness of various sentences might involve comparing, for example, a three month custodial sentence with a community order involving a 12 month drug rehabilitation requirement accompanied by a supervision requirement, or comparing a six month prison sentence with a community order involving an unpaid work requirement, a curfew and supervision during an 18 month period. The costs arising from prison recalls and community order breaches are further variables. It is, therefore, difficult to ascertain any clear or consistent cost differentials between delivering non–custodial sentences and short custodial sentences and any conclusion that a custodial sentence is significantly more costly derived solely from comparison of direct costs is likely to be too simplistic. Nonetheless, it would be possible to identify the costs for each type of sentence by its basic component[42] which may be of some value to those seeking to compare the actual costs of different sentences that might be imposed for the same offence.

37. However, imposing a custodial sentence may have much wider financial and social ramifications than the simple cost of sentence

[36] *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales*, p.4, Lord Carter of Coles, December 2007

[37] see briefing note from the Foyer Federation: www.foyer.net/press-centre_sub.asp?level2id=22

[38] *National Probation Service – the supervision of community orders in England and Wales*, January 2008

[39] this was calculated by reference to base data that includes the cost of suspended sentence orders, other court orders, licence supervision and the preparation of pre-sentence reports

[40] *Final report: Costing of Community Order Requirements*, Accenture, October 2007, commissioned by the NAO

[41] calculated as an annual average cost per offender commencement for 2007/08 by dividing the total cost for each requirement by the number of offender commencements

[42] for example, the cost of the first month in custody and then the cost for each subsequent month, the costs of a community order with supervision and then the cost of each additional requirement

delivery. Although cost savings may result from the prevention of further offending through incapacitation, an offender may lose gainful employment, the resulting loss of income may move an offender's family onto social welfare and other benefits, including a transfer from private to council accommodation and, in extreme cases, children may be taken into the care of the local authority. Where an offender who is sent to custody was previously living on benefits, the cost of imprisonment may be offset a little but where an offender was previously in gainful employment this also reduces the amount of tax collected by the state to fund the social welfare system.

38. One of the respondents to the Panel's consultation commented that short custodial sentences lead to family breakdown, which reinforces the cycle of poverty, crime and consequential costs to the taxpayer. Another questioned how custodial sentences can be justified if the 'enormous' cost of prison does not bring benefits beyond those of a much cheaper community order. The independent research findings indicate that the public is less inclined to regard the relative costs of prison and community sentences as a relevant consideration in the context of offences of violence as compared with other types of offending and the numbers thinking that relative costs *should* be taken into account in *all* cases was low – 17% in relation to an offence such as social security fraud and 11% for an offence of actual bodily harm.[43]

39. Whilst comparison of direct unit costs would suggest that a custodial sentence is significantly more costly, this is too simplistic; any attempt to calculate the cost differential between custodial and community sentences needs to take account of a vast number of variables and is extremely complex. The wide ranges quoted and the limited data on which the various pieces of research have been based have led the Panel to conclude that much more (and more reliable) information is needed before any authoritative conclusions can be drawn. The extent to which the relative costs of sentences should be taken into account in producing principles of general application should be reviewed only when much more reliable information is available about both relative costs and relative effectiveness in terms of reducing re-offending.

Recommendation 3
Pending more reliable information about costs, which might be relevant in determining overall sentencing policy, the cost of a proposed sentence should not be considered when deciding sentence in an individual case. However, where there is sufficient evidence about the relative probable effectiveness of two or more possible sentences, this should be taken into account by the court.

When is a custodial sentence likely to be unavoidable?

40. A custodial sentence is lawful only where the offence is so serious that neither a fine alone nor a community sentence can be justified.[44] In recent years, there have been a number of judgments referring to the need to reserve custody for serious offences.[45] In *Seed and*

[43] the research question did not link costs with relative effectiveness

[44] Criminal Justice Act 2003, s.152(2)

[45] see, for example, *Stewart* (1987) 9 Cr App R (S) 135, *Mills* [2002] 2 Cr App R (S) 229, *Kefford* [2002] 2 Cr App R (S) 106 and *Attorney General's Reference No. 11 of 2006*

Stark,[46] the then Lord Chief Justice, Lord Phillips, stated that, unless imprisonment is considered necessary for public protection, a court always should give consideration to a community sentence, especially for a first-time offender.

41. In some cases it may be fairly obvious that a custodial sentence is the only option, either because it is the only sentence that properly can mark the seriousness of an offence (for example, almost every offender convicted of manslaughter receives a custodial sentence) or because an offender would present a serious risk of harm through the commission of further offences if not sent to custody. However, for public policy reasons, certain offences that do not obviously fall within these descriptions will commonly result in custodial sentences (for example, attempting to pervert the course of justice, trade mark or counterfeiting offences, certain immigration or passport offences, forgery of a will and false representation offences[47]), often with a view to deterring others from committing similar offences. However, not every instance of such offences will require a custodial sentence and, when such a sentence is unavoidable, it is likely to be for a relatively short period and rarely in excess of two years. This advice has already discussed the issue of deterrent sentencing and the circumstances in which the only justification for a custodial sentence is public policy should be tightly constrained; a range of factors that may dispose a court towards selecting a non-custodial sentence is identified below (see paras. 56–68).

42. In cases where the primary aim of a sentence is punishment, the most comprehensive restriction of an offender's liberty is imprisonment and there will be circumstances in which, notwithstanding the fact that a custodial sentence is not inevitable, it is nevertheless desirable. Where an offender repeatedly commits minor offences,[48] justifications for a custodial sentence include the desirability of giving victims a short break from the offender's criminal activity, the need to respond to the offender's determination to live outside the commonly accepted rules of society and the potential for public confidence in the courts to be undermined if orders are imposed but not complied with. There will be other cases where the nature of the offence is such that ensuring compliance with the law is so important that a court will impose a custodial sentence even though it is clear that it will have a disproportionately negative impact on the offender.[49]

43. In the consultation paper we proposed a list of characteristics typical of serious offending behaviour that should, other than in the most exceptional circumstances, lead to a presumption that a custodial sentence should be imposed. Whilst the majority of respondents did not favour a presumption of this kind, it was apparent that some of the factors we had identified would be acceptable

[46] [2007] 2 Cr App R (S) 436

[47] for examples of such types of offending see *Ballard* [2007] 2 Cr App R (S) 608; *Hatton* [2008] 1 Cr App R (S) 429; *Kidd and Bianchy* [2008] 1 Cr App R (S) 471; and *French* [2008] 2 Cr App R (S) 81 and *O'Hanlon* [2008] 2 Cr App R (S) 96

[48] theft from a shop typically involves items of small value in total but offenders often have large number of previous convictions: *Sentencing in Cases of Theft from Shops* Sentencing Advisory Panel August 2006, www.sentencing-guidelines.gov.uk

[49] see, for example, *R v Francis-McGann* [2002] EWCA Crim 1253 where the Court upheld sentence noting that "*the personal mitigation, although powerful, was not such as would allow the Court to make any exception*" ...notwithstanding the fact that the "*effect of this was likely to be disastrous*"

within a set of general principles highlighting the circumstances in which anything other than a custodial sentence is unlikely to be appropriate. These have been reproduced in the recommendation below and, where they are found to exist, it is likely that a substantial custodial sentence would be imposed, that is, one in excess of two years.

Short custodial sentences

44. For those offences for which a wide range of sentences are commonly imposed (for example, dishonesty and assault offences), the decision whether or not to impose a custodial sentence generally involves consideration of a number of (potentially conflicting) factors. The nature of this group of offences is such that a custodial sentence normally will not be considered as an appropriate option unless there are a number of significant aggravating factors; the decision on whether or not a custodial sentence is justified may have as much to do with the circumstances of the offender as with the characteristics of the offence. A custodial sentence imposed for this group of offences is likely to be for less than two years and often for less than 12 months.

45. A custodial sentence of this length will remove an offender from the community, protecting the public from the risk of harm from further offences for a short period of time;[50] the element of public protection was a factor cited by consultation respondents and research participants alike as a possible justification for imposing a custodial sentence although the public seemed to place as much weight on incapacitation as on the longer term protection that arises from a change in behaviour of lifestyle. Some private individuals who responded to the consultation suggested that there is little point in sending offenders to prison unless they present a threat to an individual victim or to society in general.

46. In our consultation paper we proposed a list of the characteristics that, in relation to offences for which a wide range of sentences is currently imposed, seemed to indicate that a short custodial sentence is likely to be more appropriate than a community order; this was well received. Where there is a risk of further offences being committed by the offender, the Panel's view is that:

    i) the need to protect the public from the risk of *serious* harm from that further offending would *always* justify the imposition of a custodial sentence,

    ii) where the harm risked is of a low level of seriousness, the risk of further offending would not automatically indicate that custody is necessary.

    In this context 'harm' includes physical, emotional and financial harm and also the significant undermining of the administration of justice.

The choice between a community order and a short custodial sentence

47. Even where an offence has crossed the custodial threshold, it is clear that a custodial sentence is not inevitable.[51] A key question raised in the Panel's consultation paper was whether it might be possible to assist the courts by providing guidance about the circumstances in which a community

[50] an offender may be released earlier than the point at which there is an automatic entitlement to release through the operation of schemes such as home detention curfew and early release

[51] *Overarching Principles: Sentencing*, 1.32, December 2004, www.sentencing-guidelines.gov.uk

order, with its various opportunities for rehabilitation, is likely to be a more effective disposal than a custodial sentence (immediate or suspended) and those in which, notwithstanding the limited opportunities for rehabilitation, a custodial sentence is likely to be merited. This issue was also investigated in the Panel's independent research.[52]

48. Where a custodial sentence imposed is for less than 12 months, the offender will be released no later than half way through the sentence;[53] accordingly, any public protection offered is short–lived and may be outweighed by the reduced possibilities for rehabilitation. There are often practical difficulties in providing programmes within such a custodial sentence and, unless aged 21 or under, offenders are released back into the community with no supervision or support. As a consequence of imprisonment, an offender may lose his or her employment and may have difficulty maintaining ties to any support network provided by friends and family. Some consultation respondents commented that short custodial sentences lead to family breakdown, reinforcing the cycle of poverty and crime and resulting in consequential costs to the taxpayer; one commented that imposing a short custodial sentence for its symbolic effect, without regard to it actual effects, is counterproductive.

49. Imposing a community order instead of a short custodial sentence can enable an offender to sustain family ties and maintain any gainful employment, which can help to prevent a return to crime.[54] Some community orders can also meet the objective of public protection, albeit through the different route of more effectively reducing the risk of re-offending through programmes as well as specific requirements such as curfew or exclusion. It seems that the principal outcome of any sentences of less than 12 months is likely to be punishment and, potentially, deterrence of the individual offender; short custodial sentences offer very limited scope for reform and rehabilitation or a general reduction in crime.

50. Those who view preventing re-offending as the main purpose of sentencing may argue that there is little point in using scarce prison resources for short sentences if there is no evidence to suggest that a prison sentence will be more effective at preventing the offender from committing further offences, especially if the offender has already re-offended after completion of a custodial sentence. This point was made by a number of respondents to the Panel's consultation.

51. The data published by NOMS (RDS),[55] indicate that higher rates of re-offending are associated with shorter custodial sentences and would appear to support the argument that short custodial sentences are not as

[52] *Public Attitudes to the Principles of Sentencing*, pp.51–57, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

[53] though see the circumstances in which earlier release may be authorised noted in footnote 49 above

[54] at least one major research study has found a link between unemployment and crime – *Unemployment, School and Leaving Crime*, Farrington, D., Gallagher, B., Morley, L., St Ledger, R. and West, D., (1986) British Journal of Criminology, Vol.26, No.4, pp335–356. The *2001 Resettlement Survey* found that two-thirds of prisoners were unemployed before going into custody and 12% of prisoners over 17 had never had a paid job. It noted a finding of the Social Exclusion Unit (Office of the Deputy Prime Minister) that being in work can reduce re-offending by 33–50% – *Overview: Adult Offending*, www.renewal.net

[55] *Re-offending of adults: results from the 2004 cohort*, Reconviction Analysis Team, March 2007

effective as longer sentences at rehabilitating offenders. Although the report warns that "*the relationship between disposal and re-offending is complex*" and that "*the evidence ...does not prove that longer custodial sentences cause lower re-offending rates*", it is reasonable to conclude that, if an offence justifies only the imposition of a short custodial sentence, a non-custodial sanction will often be a better sentence choice. In particular, a custodial sentence must not be imposed where it is not justified by the seriousness of an offence, simply in an attempt to secure treatment for the offender's condition or to enable participation in a rehabilitative programme. In practice, neither is likely to be available within a short custodial sentence or within a Suspended Sentence Order.

52. The independent research findings show that, when asked to propose a suitable sentence for any offence, most members of the public are likely to think of a custodial sentence in the first instance. The research tested the hypothesis that the public would accept community penalties as a suitable alternative for certain offences if they understood what was likely to be involved in such a sentence. In relation to specific offence scenarios, the research revealed a relatively high degree of public acceptance of community sentences as a viable alternative to imprisonment.[56] As noted in the report, this finding is consistent with earlier research.[57] The research also tested the degree to which certain offence or offender mitigating factors might lead the public to consider that a community order would be justified. The research concluded that, in general terms, the public places a greater emphasis on the nature of the offence committed than on the characteristics of the offender. However, although there were different views on the significance of individual offender-related mitigating factors, there was widespread support for taking such factors into account on a case by case basis, depending on the characteristics of the offence.

53. A further situation in which a community order may be justified is where the motivation for the offending is an addiction. Unless a custodial sentence is deemed unavoidable (see the discussion at paras. 40–43 above), the court may feel that the best way to prevent an offender from committing further offences is to address the circumstances that appear to have triggered, or to have been partly responsible for, the offending behaviour. In many cases this may be an addiction to drugs or alcohol. In *Attorney General's References (Nos. 64/66 of 2003)*,[58] for example, the Court set out a non-exhaustive list of the circumstances in which a drug testing and treatment order (now a drug rehabilitation programme within a community order) generally should or should not be made. It noted that a programme could be appropriate even where a substantial number of offences have been committed or where many offences have been committed under the influence of drugs but also commented that there must be clear evidence that the offender wants to be free of the addiction and that there is a realistic prospect of achieving this.

[56] in relation to an example offence of theft, 47% of those who were originally selected a custodial sentence indicated that they would find the alternative community sanction acceptable; in relation to an assault offence, 39% of those who originally selected custody found the suggested community penalty to be an acceptable alternative

[57] Hough et al., 2008 and Roberts et al., 2008 for the Sentencing Advisory Panel and, in other jurisdictions, Doob et al., for example

[58] [2004] 2 Cr App R (S) 22; [2003] EWCA Crim 3514

54. According to the most recent data,[59] the re-offending rate for offenders given a drug treatment and testing order in 2005 was 70.3%. However, this is largely linked to the higher propensity of such offenders to commit further offences and key findings in a report from the UK Drug Policy Commission last year[60] were (i) that community punishments are likely to be more effective than imprisonment for most problem drug-using offenders and (ii) that there is reasonable evidence to support the effectiveness of community-based drug rehabilitation programmes.[61] In addition, the report *Changes in offending following prescribing treatment for drug misuse*,[62] which looked at a sample of opiate and crack users who had recently offended but had not been in prison, and had started drug treatment in the community, noted that the number of offences committed almost halved following the start of treatment – from 4,381 to 2,348. Reductions were consistent across the board for a range of crimes, although the greatest reduction was in relation to the acquisitive crime (from 1,234 to 635). The researchers found that longer periods in treatment resulted in fewer follow-up offences; they concluded that the results suggested an association between treatment and reductions in crime, although they do not establish a causal link. When sentencing an offender who has committed further offences during or shortly after completing a drug treatment programme, the court will wish to consider the degree to which the programme has impacted on the scale, frequency or severity of offending; it follows that the assessment of the relative effectiveness of such programmes is inherently complex.

Community sentences

55. In relation to an adult offender, there is only one community sentence, the community order.[63] The order must consist of one or more of the requirements set out in the Act.[64] A community sentence may only be imposed if the offence is serious enough to warrant such a sentence. Such an order may not be imposed in the magistrates' court in respect of a non-imprisonable offence. The restrictions on liberty within that sentence must be no more than is commensurate with the seriousness of the offence. A court must not pass a custodial sentence unless the offence was so serious that neither a fine alone nor a community sentence can be justified. In its guideline issued in 2004,[65] the Sentencing Guidelines Council set out the approach to imposing a community sentence.[66] The guideline states:

"Sentencers must consider all of the disposals available (within or below the threshold passed) at the time of sentence, and reject them before reaching the provisional decision to make a community sentence, so that even where the threshold for a community sentence has been passed a financial penalty

[59] *Re-offending of adults: new measures of re-offending 2000–2005*, England and Wales, Ministry of Justice 9 May 2008

[60] *Reducing Drug Use, Reducing Reoffending: Are programmes for problem drug-using offenders in the UK supported by the evidence?*, UKDPC, March 2008

[61] in this regard, it is worthy of note that only 29% of victims of crime think that sending drug addicts to prison is an effective way of reducing the risk of re-offending and 72% would like to see the number of drug treatment programmes increased – *Briefing: Crime victims say jail doesn't work*, SmartJustice, 2006

[62] National Treatment Agency for Substance Misuse, November 2008

[63] Criminal Justice Act 2003, s.147(1)

[64] ibid., s.177

[65] *New Sentences: Criminal Justice Act 2003* at pp.3–13: www.sentencing-guidelines.gov.uk

[66] ibid., p.5

or discharge may still be an appropriate penalty. Where an offender has a low risk of re-offending, particular care needs to be taken in the light of evidence that indicates that there are circumstances where inappropriate intervention can increase the risk of re-offending rather than decrease it. In addition, recent improvements in enforcement of financial penalties make them a more viable sentence in a wider range of cases."

However, as stated in the existing *Seriousness* guideline, even where the threshold for a community sentence has been passed, a financial penalty or conditional discharge may still be the more appropriate sentence.

When is a community sentence likely to be appropriate?

56. The sentencing aims that the court wishes to achieve will help determine the requirements to be included within that order. A community order comprised of carefully selected requirements can be particularly useful where rehabilitation is one of the primary purposes of sentencing. The number and variety of requirements that can be imposed within a community order makes it an extremely flexible sentence. Depending on the number and intensity of the requirements included, a community order can place significant demands on an offender and has the potential to tackle the root causes of offending behaviour more directly than a short custodial sentence. The Panel's consultation paper recorded the government's concern that the courts are not using community orders as fully as they might,[67] especially bearing in mind that, even where a custodial sentence is justified by the seriousness of an offence, this does not mean that a custodial sentence is inevitable[68] (see the further discussion at para. 47 above).

57. Sentencing statistics show that a first-time adult offender (particularly a first-time offender who is a woman) is proportionately less likely to commit further offences; the propensity to re-offend increases in line with the number of previous convictions.[69] Thus, when imposing a community sentence on a first-time offender, the aim should be to identify the sentence that is most likely to prevent the individual from committing any more crimes; this can be a particularly important consideration when the adult first-time offender is relatively young and can be discouraged from entering a cycle of offending. An important consideration will be the degree to which offenders can be encouraged to complete community requirements that are designed to encourage future compliance with the law and which could have the additional benefit of improving an offender's ability to make a positive contribution to society.

58. Analysis of recent sentencing data showed that, in percentage terms, community orders are currently spread fairly evenly across most categories of offence other than sexual and violent offences but the Panel acknowledged that community orders still might be used more often and more imaginatively. The consultation paper investigated whether it is possible to give more detailed guidance on the circumstances in which a community order is likely to be the most appropriate disposal or, potentially, a more effective

[67] *Making Sentencing Clearer*, Home Office, 2006

[68] *Overarching Principles: Sentencing*, 1.32, December 2004, www.sentencing-guidelines.gov.uk

[69] *Re-offending of adults: results from the 2004 cohort*, Reconviction Analysis Team, March 2007

option than a short custodial sentence, given the circumstances of the offender. Key considerations were the relative effectiveness of community orders as compared with short custodial sentences, the sentencing aims the chosen requirements might seek to address and the types of offence or offender for which community orders are likely to be most appropriate.

59. The consultation responses confirmed the Panel's belief that sentencers are aware of the benefits of community orders and that any reluctance on their part to use this sentence stems not from a lack of knowledge or training, as has been suggested,[70] but from concern about the availability of suitable requirements and whether adequate resources and supervision can be found to deliver what is needed. Although such concerns are legitimate, levels of funding and provision vary across the country. The Panel considers that the key issue is how best to target available resources towards cases where the assessment of offence seriousness and risk from further offending dictate that intervention is needed in order to protect the public and reduce re-offending. Whilst courts must be free to reach the appropriate decision in each individual case, they should be aware that using a community order unnecessarily in circumstances where an alternative disposal properly can be found will reduce the resources available in other cases where the risk of re-offending or harm to the public may be higher.

60. The critical need appears to be proper prioritisation supported by robust and honest discussions between sentencers and probation about how the court's requirements can be met in the context of limited resources. In addition, if community orders are to be regarded as a robust and effective alternative to short custodial sentences, more information about compliance rates and effectiveness is needed in order to guide sentencers in sentence selection; the Panel is encouraged to note that statistical data that usefully can be shared between probation and sentencers is now being produced.[71]

61. Re-offending data tend to suggest that offenders who are given community orders have lower frequency rates for re-offending than offenders discharged from prison.[72] However, as already discussed, a comparison between the effectiveness of community sentences and short custodial sentences is complex; comparing disposals by frequency rates alone cannot accommodate variations stemming from the numerous variables and unknowns, such as the characteristics of the individual offender (which also will affect the propensity to re-offend) and the suitability of the requirements imposed within a community order.[73] The report *Crime, Courts and Confidence*[74] noted that the effectiveness of a community order depends on the detailed

[70] see, for example, *Rethinking Crime and Punishment Phase Two, Implementing the findings, A report on the first 18 months of the programme*, Esmée Fairbairn Foundation, January 2008, www.esmeefairbairn.org.uk

[71] re-offending statistics now routinely produced by Ministry of Justice and the *Community Sentence* series reports published by the Centre for Crime and Justice studies, for example

[72] see, for example, *Re-offending of adults: new measures of re-offending 2000–2005 England and Wales*, Ministry of Justice Statistics bulletin, May 2008, which relates to the 2005 cohort

[73] *Re-offending of adults: results from the 2004 cohort*, Reconviction Analysis Team, March 2007

[74] *Report of an Independent Inquiry into Alternatives to Prison*, Esmée Fairbairn Foundation, 2004

content of particular requirements, the character and qualities of those administering them and the selection of offenders for the particular interventions in question.

62. Notwithstanding the limitations of the evidence relating to effectiveness, in general terms it can be said that a community order has the potential to be more effective than a short custodial sentence because it can offer better opportunities for rehabilitative interventions that may be able to address the causes of re-offending, with fewer of the negative influences of imprisonment (though offenders who remain in the community may remain subject to negative influences from a peer group or other sources). A community order also may require an offender to make reparation to an individual victim for the crime committed; this may be difficult to achieve within a prison sentence (although it may be possible to impose a rehabilitative requirement as a licence condition on release from custody).

63. The flexible nature of community orders and the wide range of options they offer can also make them a useful disposal for offenders who repeatedly commit less serious offences, notwithstanding the statutory aggravating nature of any previous convictions. In some cases, the propensity to re-offend may be offset by the circumstances in which previous offences were committed, especially if they were associated with drug or alcohol addiction, social inadequacy or poverty (see also the earlier discussion in relation to the relevance of previous convictions at para. 94). Where offending behaviour is linked to drug or alcohol addiction, the progress made by an offender taking part in a treatment programme within a community order may be irregular, but the significant test is the degree to which the offender is making progress towards addressing the addiction and breaking the cycle of addiction and offending. Although drug addiction and acute social problems may be cited by large numbers of offenders, where those characteristics are present the sentencer always should give careful consideration to whether drug treatment or other rehabilitative requirements might be more effective in preventing re-offending than a short prison sentence.

64. A community order also is most likely to be appropriate in relation to the less serious offences of theft and dishonesty (such as theft from a person, theft in a dwelling and theft in breach of trust), burglary and motoring offences, where there may be clear advantages in requiring an offender to serve a sentence in the community. For example, in response to offences of dishonesty, a requirement to make reparation, an unpaid work requirement or the restriction of liberty stemming from a curfew or attendance centre requirement are all ways in which an offender can be punished and deterred from re-offending whilst still continuing to live in the community.

65. One issue raised in response to the consultation paper was the need for the guideline to make it clear that a community sentence should not be discounted as the most appropriate disposal solely on the grounds that the offender has failed to complete a community sentence in the past. The reasons for that failure should be investigated before determining whether or not a particular choice of requirements within a community order would now be likely to meet the purposes of sentencing, address the offender's needs and deter further offending.

66. In the consultation paper, the Panel proposed a non-exhaustive list of characteristics that should lead to a presumption of a community order being the starting point for sentencing. Although the suggested characteristics received majority support, a number of respondents expressed concern about creating a presumption in relation to the use of any type of sentence. On reflection, the Panel agrees that creating presumptions about the use of custodial and non-custodial sentences is too prescriptive and now proposes a non-exhaustive list of characteristics that point to the circumstances in which a community order is likely to be the most appropriate starting point for sentence.

67. A broader statement could be that a custodial sentence will be justified where the provisional sentence indicated by the seriousness of the offence is a custodial sentence and there are no factors related to the circumstances of the offence or the offender to suggest that a non-custodial alternative would be more appropriate. The various elements that might satisfy a court that a custodial sentence is the only appropriate response and the factors that might conversely predispose a court towards a non-custodial alternative were investigated in turn in the consultation paper; in this regard, a major factor will be the extent to which the sentence is likely to reduce the likelihood of future offending, which is regarded by many as the key measure of the effectiveness of sentencing. A reduced likelihood of re-offending may result from (i) the element of punishment and deterrence within a sentence; (ii) the extent to which a sentence addresses the causes of offending; and/or (iii) external factors wholly outside the sentencing process.

68. In light of what has been said earlier about the negative impacts and high reconviction rates associated with short custodial sentences, the Panel considers that the correct approach, unless custody is considered to be unavoidable, always is to consider whether a community order or other non-custodial sentence can be justified before moving on to consider whether a custodial sentence is needed. This accords with the approach identified later at para. 158, which suggests that the court always should begin its considerations with the least intrusive sentence, moving up the scale as directed by the characteristics of the offence and offender.

Recommendation 4

A. In the following circumstances, a non-custodial sentence is most unlikely to be appropriate and a custodial sentence in excess of two years is likely to be appropriate:

(i) where serious physical, psychological, financial or social harm was intended, whether or not the harm was actually inflicted; or

(ii) where death or serious physical, psychological or social harm was caused by an offender who acted without regard to the harm that was likely to be occasioned.

B. Unless there are offender mitigation factors that would suggest that a community sentence would be more suitable, a short custodial sentence is likely to be a more appropriate sentence than a community order where one or more of the following characteristics is present:

(i) the seriousness of the offence is held to require punishment of a level that only imprisonment can provide;

(ii) the offender is a seriously persistent offender;

(iii) the offender has shown unwillingness to comply with supervision in the community previously and there is evidence to suggest that the offender would not comply on this occasion;

(iv) the offender has committed an offence in relation to which a custodial sentence generally would be regarded as the right option, for example in response to immigration offences or perverting the course of justice.

C. Even where the custody threshold has been crossed, a community order is likely to be the most appropriate sentence where one or more of the following characteristics is present:

(i) no serious physical, psychological, financial or social harm was inflicted and no such harm was intended or risked by the offender's disregard for the likely outcome of his actions;

(ii) the offender has not committed an offence within one of the categories for which a custodial sentence generally would be regarded as inevitable;

(iii) community order requirements are more likely to be effective at addressing the offending behaviour and preventing re-offending;

(iv) a significant purpose of the sentence is reform or rehabilitation;

(v) the primary purpose of the sentence is punishment but rehabilitative interventions are also needed;

(vi) the court considers that a community order can meet the treatment, rehabilitation or reparation needs that have been identified;

(vii) offender mitigation factors suggest that a community order would be the most proportionate response in all the given circumstances of an individual case.

A community sentence should not be ruled out as a suitable disposal solely on the grounds that the offender has failed to complete a community sentence in the past. Careful consideration should be given to the reasons for failure and to the likelihood of compliance with the community order requirements proposed on this occasion.

Alternatives to immediate custody

69. Where a court concludes that a custodial sentence of 12 months or less is justified by the seriousness of the offence but considers that, because of the particular characteristics of the offence and/or the offender, sending the offender to prison is either not necessary or inappropriate, it should consider either making a community order, as discussed above, or avoiding immediate imprisonment by imposing a suspended sentence order (SSO).

Suspended sentence orders

70. Where the court considers that a custodial sentence is justified in order to mark the seriousness of an offence but community order requirements are likely to be more effective at preventing re-offending and at addressing an offender's particular rehabilitative needs (for example where an offender would benefit from a drug rehabilitation requirement), it may, provided the provisional custodial sentence is for a period of 12 months or less, impose a suspended sentence order (SSO).

71. The Panel's consultation paper included a set of principles governing the use of SSOs and

proposed that these should be included in the new guideline; it sought agreement and asked whether there were any practical problems of which the Panel should be aware. The majority of respondents supported the principles but suggested that the courts need to be reminded of these and that more guidance is needed on the characteristics that should be used to guide the choice between imposing an SSO or a community order.

72. The main attraction of an SSO is that it allows an offender to continue employment and to maintain a support network in the community whilst being subject to similar (but less onerous) restrictions and requirements to those under a community order. It also has the added weight that the suspended sentence almost certainly will be activated if the order is breached or if another offence is committed; as a result, the court must give careful consideration to the likelihood of breach when deciding whether an SSO is the most appropriate disposal.

73. One of the key messages in the existing guideline is that an SSO is a custodial sentence that is subject to the same criteria as an immediate sentence of imprisonment, namely that the court must be satisfied that the custody threshold has been passed and that a custodial sentence is unavoidable. We reported in the consultation paper that the government had expressed concern that courts might be imposing SSOs for offences where custody is not justified by the seriousness of the offence or where, although custody is justified, it is not considered essential and a community order would be more proportionate. Sentencing trends[75] demonstrate a marked shift away from community orders in favour of SSOs in all courts in 2005 and 2006 continuing, but at lower rate, in 2007. This has been a particularly significant trend in relation to offences of receiving and handling stolen goods and domestic burglary.[76]

74. A number of those who responded to the Panel's consultation paper suggested that the new guideline needs to stress even more firmly (if that is possible) that an SSO is a custodial sentence and that its purpose and structure differ from those of a community order.

75. The compliance rate with requirements is roughly the same for community orders and SSOs[77] but it seems that a community order might be a little more effective at preventing re-offending.[78] Since statute provides for a more flexible response to breach of a community order, and because the purpose of sentencing for breach is to secure compliance rather than to punish,[79]

[75] *The Sentence, The Sentencing Guidelines Newsletter*, issues 06 (February 2007), 08 (January 2008) and 09 (August 2009)

[76] *The Sentence, The Sentencing Guidelines Newsletter* issue 09 at p.10; this was accompanied by a corresponding decrease in the use of immediate custody, especially in magistrates' courts, which is in keeping with the guideline judgments current at that time, see *R v Webbe* [2002] 1 Cr App R (S) 22 and *R v McInerney and Keating* [2003] 2 Cr App R (S) 39

[77] between the 3rd quarters of 2006 and 2007, 22% of SSOs were breached by failing to comply with requirements and 17% were breached by committing another offence. 47% of community orders and 46% of SSOs over that period ran their full course. (Ministry of Justice National Offender Management Service Probation Statistics Quarterly Brief, July to September 2007, 30 April 2008)

[78] over the same period, 22% of community orders were breached for failure to comply but only 11% were breached by commission of another offence (Ministry of Justice National Offender Management Service Probation Statistics Quarterly Brief, July to September 2007, 30 April 2008)

[79] *New Sentences: Criminal Justice Act 2003*, December 2004, p.13, www.sentencing-guidelines.gov.uk

a high level community order is likely to be more appropriate than a suspended sentence order where the court is of the opinion that, whilst there is a realistic prospect that the requirements will be complied with and the identified purpose of the order achieved, it is nonetheless highly likely[80] that, in the course of completing the order, the offender will breach the order or even commit a further offence. However, where the commission of another offence could place an individual or the public in general at risk of harm, it is possible that neither a suspended sentence order nor a community order will be appropriate; in such cases a custodial sentence would be the most appropriate option. Some respondents suggested that a deferred sentence[81] might be a more appropriate disposal in circumstances where the court wants to monitor an offender's behaviour.

76. Another concern expressed in consultation responses was that the requirements being imposed within an SSO are often too numerous or too onerous. The existing guideline requires that the requirements imposed as part of an SSO generally should be less onerous than those imposed as part of a community sentence. Although the onerousness of the individual requirements is not known, the fact that the sentencing statistics for 4 July 2007–June 2008 show that the number of requirements imposed within the two types of sentence was virtually identical, was taken by respondents to suggest that this part of the guideline also might not be being followed. A particular problem might arise where the pre-sentence report recommends a high-level community order but the court decides to impose an SSO; care must be taken not to include all of the requirements recommended for the community order within an SSO, given the different nature of the two disposals.

77. The court must also give careful consideration to the balance between the severity of the sentence that is justified by the seriousness of the offence and the type of sentence that is most likely to be effective given the circumstances of the offender. It must be remembered that, where the requirements of an SSO are breached, the maximum custodial sentence that can be imposed is 12 months. Where the seriousness of an offence justifies a custodial sentence of more than 12 months but the court considers that there are grounds for not imposing immediate custody, an SSO is unlikely to be the most appropriate disposal. In such cases, a community order, which offers more flexibility in terms of the combination of requirements and the response to breach, will often be the most appropriate sentence choice; where this option is taken, the court should clearly point out the consequences of breach.[82]

78. Having considered all of the points raised in consultation responses, the Panel now proposes that the following expanded list of principles relating to the use of SSOs should be included in the new guideline:

Recommendation 5
The key principles governing the use of suspended sentence orders are:

(i) a suspended sentence order is a custodial sentence. Before imposing a suspended

[80] for example, because the offender has an addiction

[81] see paras. 168–169 below

[82] see, for example, *R v Phipps* [2007] EWCA Crim 2923, where the Court upheld an appeal against a three and a half year prison sentence following breach of the requirements within an SSO

sentence order, the court must be satisfied that the custody threshold has been passed, that a custodial sentence is necessary but does not need to be imposed immediately and that a community order would not be appropriate;

(ii) a prison sentence that is suspended should be for the same term that would have applied if the offender were being sentenced to immediate custody;

(iii) the operational period of a suspended sentence should reflect the length of the sentence being suspended. As an approximate guide, an operational period of up to 12 months might normally be appropriate for a suspended sentence of up to six months and an operational period of up to 18 months might normally be appropriate for a suspended sentence of up to 12 months. However, this is only a general guide and a longer operational period may be justified if more time is needed in order for the most appropriate requirements to be included and completed;

(iv) because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence might be more appropriate;

(v) where a pre-sentence report recommends a high-level community order but the court decides to impose a suspended sentence order, care must be exercised in transposing the proposed requirements to the different sentence; generally, the number or onerousness of requirements will need to be reduced;

(vi) where the court is of the opinion that an offender is highly likely to breach an order or commit another offence, a community order is likely to be more appropriate than an SSO, given the greater flexibility in response to breach;

(vii) where the seriousness of an offence justifies a custodial sentence of more than 12 months but the court does not wish to impose an immediate custodial sentence, it always should consider whether a community order might be a more appropriate sentence than an SSO, given the greater flexibility in response to breach;

(viii) where, in response to breach, the court decides to amend a suspended sentence order rather than activate the custodial sentence, it should give serious consideration to extending the supervision or operational periods (within statutory limits) rather than making the requirements more onerous.

Assessing the seriousness of an offence – individual offences

Culpability and harm

79. The assessment of seriousness of an individual offence is based on the offender's culpability in relation to that offence and any harm that the offence caused, was intended to cause or might foreseeably have caused.[83]

Culpability

80. In general terms, an assessment of offender culpability requires a court to consider whether the offender intended the harm that was caused, could foresee the likely harm but proceeded nevertheless or simply failed to give any thought to the possible outcome of

[83] Criminal Justice Act 2003, s.143(1)

his or her actions. The *Seriousness* guideline[84] describes four levels of criminal culpability – intention, recklessness, knowledge and negligence. Intention is generally regarded as indicating the highest level of offender culpability.[85] Although not specifically stated, it is recognised that the four levels are listed in descending order of seriousness. Current practice within offence specific guidelines is to identify starting points based on the highest level of culpability necessary to commit the offence – usually (but not always) intention – and to note that the starting point may be reduced where the level of culpability is lower.

81. Even within the four levels, a range of factors will influence the assessment of culpability. The *Seriousness* guideline[86] states that the extent of culpability in a particular offence will vary according to factors such as the motivation of the offender, whether the offence was planned or spontaneous and whether the offender was in a position of trust.

82. The Panel had previously given some consideration to whether the culpability levels in the existing guideline were appropriate or whether they needed to be expanded[87] and we asked in the consultation paper whether there should be just two levels – (i) intention and/or knowledge and (ii) recklessness and/or negligence. We suggested that knowledge (being defined as knowledge of the circumstances that result in an offence being committed) is more culpable than recklessness and usually can be ranked alongside intention and that, in principle, intention and knowledge are equal in terms of seriousness and should be identified jointly as being at the highest level of culpability. We also took the view that, as it can be difficult to distinguish between recklessness and (where it is relevant) negligence, these two levels of culpability should be grouped together as a second, lower, level of culpability. At the same time, we stressed that a more refined assessment of offender culpability in an individual case always would be achieved through consideration of the particular facts.

83. The number of consultation respondents agreeing and disagreeing with the Panel's proposal was fairly even. A significant number of respondents expressed concern about grouping recklessness and negligence together, suggesting that recklessness is the more culpable, with recklessness encompassing knowledge and/or foresight of risk, and negligence being a failure to take reasonable care, without any awareness needing to be proved. Committing an offence intentionally is more serious than committing an offence recklessly and so, in broad terms, there are two levels of culpability that need to be distinguished. The most serious is intention (the intent to cause the prohibited result) and/or knowledge (awareness of a prohibited circumstance, such as knowledge that goods are stolen). Below this is recklessness (knowing that there is any risk of causing the prohibited result) and/or reckless knowledge (awareness of the risk that a prohibited circumstance

[84] *Overarching Principles: Seriousness*, p.4, December 2004, www.sentencing-guidelines.gov.uk

[85] it is inherent in certain offences (e.g. causing grievous bodily harm with intent) and this may affect the maximum penalty (e.g. life for GBH with intent, five years for GBH)

[86] *Overarching Principles: Seriousness*, p.4, December 2004, www.sentencing-guidelines.gov.uk

[87] for example, in relation to offences of dishonesty, the Panel considered whether an extra level might be needed but concluded that the requirement for offences to involve both dishonesty and intention will place most offenders within the highest level of culpability – *Sentencing for Theft and Dishonesty*, p.2, March 2008, www.sentencing-guidelines.gov.uk

exists, e.g. that a certain statement may be untrue). However, in addition, planning an offence generally is regarded as more culpable than committing an offence spontaneously, even though both may amount to intention in law. The Panel proposes that the following description of offender culpability should be included in the guideline:

Recommendation 6

Culpability generally may be placed on one of two levels:

(i) Intention or Knowledge: the offender acted with intent to bring about the prohibited harm, or in the knowledge that a prohibited circumstance existed.

(ii) Recklessness or Reckless Knowledge: the offender acted knowing that there was a risk of causing the prohibited harm or knowing that there was a risk that a prohibited circumstance existed.

(iii) In relation to either level of culpability, a planned offence generally will be more culpable than a spontaneous offence, and other motivations may be taken into account where appropriate.

Harm

84. The types of harm suffered by individual victims are diverse and include physical injury, sexual violation, damage to health, psychological distress and financial loss. There will be gradations of harm within all of these categories and an assessment of harm in an individual case requires consideration not only of any physical injury or psychological damage suffered by the victim but also of any temporary or lasting impact the offence has had on the victim or the victim's family. In some cases, no actual harm will have been caused; in assessing the relative severity of the offender's conduct, the court will consider the likelihood of harm having been caused by the offender's actions and the gravity of the harm that might have resulted.

85. By and large, maximum penalties are guided by the seriousness of the harm caused to individual victims by each category of offence, with the maxima for offences causing direct harm to victims, such as violent and sexual offences, generally carrying higher penalties than property offences. However, wider harms caused to the community at large (instead of or in addition to an individual victim), for example fear and degeneration in areas troubled by vandalism, anti-social behaviour or drug addiction, or fear and alarm resulting from apparently random sexual offences or violent assaults committed by an unknown offender, also are a legitimate part of the general assessment of the harm caused by an offence and its overall level of seriousness. These wider forms of harm are considered alongside the harm caused to individual victims and are taken into account by the Panel and Council when assessing the general level of seriousness of different types of offending behaviour and when determining the overall sentencing range for offence groups.

86. The significance of the actual harm caused continues to increase. In 2001, it became possible for the victim of a crime to provide the court with what is now described as a 'victim personal statement' through which a court can receive evidence about the effect of an offence in order to assist in the assessment of seriousness.[88] A recent judgment from the Court of Appeal in relation to domestic

[88] this scheme is described in more detail below in Section Two

burglary has emphasised the importance of the effect on the victim in assessing seriousness even where that is beyond what the offender intended or might have foreseen.[89] Guidelines from the Sentencing Guidelines Council in relation to offences of dishonesty also emphasise the need to consider the significance to the victim of the items stolen rather than just the monetary value.[90]

87. Generally, a court will take no account of arguments from a victim for an increase or a decrease in the severity of a sentence;[91] however, in exceptional circumstances, the assessment of harm has been modified where, for example, the sentence would have made the victim's grieving process more difficult.[92] In relation to offences in which death results from driving, the Sentencing Guidelines Council has provided for the fact that a victim was a close friend or relative of the offender to be a mitigating factor though emphasising that this is likely to be less significant where culpability is high.[93]

88. It is also possible that the views of the victim may affect the selection of sentence where it confirms arguments put forward by the offender as mitigation such as remorse or a reduced likelihood of re-offending.

Imbalance between culpability and harm

89. Individual starting points and sentencing ranges for defined levels of seriousness within an offence are linked to both offender culpability and harm, often with a detailed description of the level of offender culpability and/or the nature of the harm caused or intended.

90. In some cases, there will be a clear imbalance between the culpability of the offender and the harm caused by the offence[94] and the consultation paper investigated the guidance that might be helpful to the courts in such circumstances. These will include offences where an offender intended to commit a high degree of harm which did not result, either because of some intervening event beyond the control of the offender (including where the offence actually was impossible[95]) or because the offender held back, and those where the offender intended much less harm than actually resulted or the offence occurred as a result of carelessness, where the possibility of the degree of harm was not in the offender's mind.

91. The existing *Seriousness* guideline states that the culpability of the offender should be the initial factor in determining the seriousness of an offence but that "*where much* ***more*** *harm, or much* ***less*** *harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate*".[96]

[89] *Saw* [2009] EWCA Crim 1 which refers to the 'true impact' of the crime on the victim

[90] *Theft and burglary in a building other than a dwelling*, www.sentencing-guidelines.gov.uk

[91] see paras. 176–185 below

[92] *Nunn* [1996] 2 Cr App R (S) 136 per Judge LJ

[93] *Causing death by driving*, para. 23, p.5, www.sentencing-guidelines.gov.uk

[94] the offences of *causing death by dangerous driving* and *causing death by driving: disqualified, unlicensed or uninsured drivers*, for example, result in the same level of harm and yet the culpability of the offender is significantly different

[95] an offence under s.14(1) of the Sexual Offences Act 2003, where the intended victim was not actually a child, for example

[96] *Overarching Principles: Seriousness*, p.5, December 2004, www.sentencing-guidelines.gov.uk

Given the importance of culpability, some individual offence guidelines (causing death by careless or inconsiderate driving, for example) already address how the courts should assess seriousness where the level of harm is substantially at odds with the level of culpability.

92. The *Seriousness* guideline already has established a non-exhaustive list of factors that the courts might wish to take into account when assessing offence seriousness in cases involving an imbalance between culpability and harm. In its consultation paper, the Panel proposed additional factors, some of which have been identified already in offence specific guidelines. Two respondents suggested that the seriousness of the intended offence is not relevant at all and that the offence should be assessed on the actual outcome; others questioned the inclusion of factors relating to harm on the basis that they might be outside the offender's control and suggested that only those factors relating to the offender's culpability are relevant. One respondent questioned whether the order in which factors were listed indicated any sense of hierarchy or relative weight; it does not.

93. The Panel's intention is to identify those factors most likely to be relevant in determining why an offender did not succeed in committing the offence intended or, alternatively, why more harm was caused than intended. The court will need to weigh the extent to which the presence of one or more of these or any other relevant factors, and the degree to which they were influential in the outcome of the offence, should impact on the assessment of seriousness. This will vary according to the facts of each individual case but the Panel considers that including a list in the guideline is a useful reminder of the sorts of issues that need to be considered and this approach was supported by the majority of those who responded to the consultation. Some of the factors included in the recommendation below have been amended or added in the light of consultation responses.

Recommendation 7
When assessing offence seriousness:

(i) Where the harm was less than intended, a court should consider:

- *the degree of effort or determination shown by the offender when seeking to commit the offence originally planned or to cause the intended level of harm*
- *the reason why the offender did not succeed (e.g. how close the offender came to success) and how quickly or why the attempt to commit the offence was abandoned (e.g. was it a change of mind or did someone or something prevent the offender from continuing?)*
- *the reason why the harm was less than intended i.e. was it because the offender had desisted or, in the case of physical injury, because of subsequent medical intervention?*

(ii) Where the harm was greater than intended, a court should consider:

- *the reason why greater harm was caused and to what degree this was outside the offender's control and/or was not reasonably foreseeable*
- *the degree to which the imbalance between culpability and harm is inherent in the offence and is already reflected in the maximum penalty and offence guideline (e.g. causing death by careless or inconsiderate driving and causing death by driving: unlicensed, disqualified or uninsured drivers)*

Previous convictions

94. The Council's offence-specific guidelines are for a 'first time offender'[97] who pleads not guilty; the justification for basing the starting point on a first-time offender is the statutory requirement in section 143(2) of the 2003 Act to treat each previous conviction as an aggravating factor if it considers that it can reasonably be so treated having regard both to the nature of the offence to which the conviction relates and its relevance to the current offence, and to the time that has elapsed since the previous conviction.[98] During the passage of the Act through Parliament, the government stated that sentencers must continue to ensure that the severity of the sentence should reflect the seriousness of the current offence committed by the defendant and that some element of proportionality must be retained (see the further discussion in para. 97 below) but that the new provision "*modifies the proportionality principle so that previous, relevant convictions can act as an aggravating factor*".[99]

95. At present, Council guidelines do not prescribe the degree to which previous convictions should influence the sentence and the court is left to determine sentence on an overall assessment of all of the factors present. Guidelines typically apply to offences that can be committed in a variety of circumstances with different levels of seriousness; they describe the type of activity likely to be present at various levels of seriousness of an offence, providing a sentencing *starting point* for each level. The sentencer can depart from the starting point to reflect the presence of aggravating and mitigating factors in order to reach a provisional sentence. The *range* is the bracket into which the provisional sentence is likely to fall but where an offender has previous convictions which aggravate the seriousness of the current offence, the Council's approach allows for this to take the provisional sentence beyond the range given, particularly where there are other aggravating factors present.[100]

96. In its consultation paper, the Panel acknowledged the significance accorded to previous offending in other jurisdictions, including New Zealand and some American states. In England and Wales, the importance of previous convictions in the statutory framework is highlighted by the fact that a few selected offences carry mandatory minimum sentences where a certain number of previous convictions exist.[101] Furthermore, the Coroners and Justice Act 2009 includes a requirement for guidelines published by the proposed new Sentencing Council to "include criteria, and provide guidance, for determining

[97] defined as a person who does not have a previous conviction which (by virtue of s.143(2)of the 2003 Act) must be treated as an aggravating factor, or, in certain cases, does not have a previous conviction for the particular type of offence being sentenced (see, for example, *Breach of an Anti-social Behaviour Order*, December 2008, www.sentencing-guidelines.gov.uk)

[98] the approach in the 2003 Act to the relevance of previous convictions is in contrast to the previous principle of treating good character as a mitigating factor which is progressively lost as more offences are committed. 'Good character' in the sense of a clean record has traditionally been recognised as one of the most powerful forms of offender mitigation; as such it did not affect the assessment of seriousness of an offence but rather influenced the selection of sentence. The degree to which evidence of good character should continue to mitigate sentence is addressed later in para. 13

[99] Baroness Scotland of Asthal, Hansard, House of Lords, 6 October 2003, column 61

[100] see Annex A, para. 2 which is reproduced in every offence specific guideline

[101] *Powers of Courts Sentencing Act 2000*, ss.110–111: a minimum of seven years for a third Class A drug trafficking offence, a minimum of three years for a third domestic burglary

the weight to be given to previous convictions of the offender...".[102]

97. The Panel has previously concluded that it would be inappropriate for each individual previous conviction to have an impact on sentence that resulted in a spiralling aggravating effect as such an approach, especially in relation to offences low on the seriousness scale such as theft from a shop, would quickly lead to sentences that were wholly disproportionate to the seriousness of the offending behaviour.[103] This is in keeping with the government's statement during the passage of the Criminal Justice Bill that:

"*Persistent offenders must know that they will be dealt with progressively more severely each time they offend...that does not mean that wildly disproportionate sentences will be the result.*"

It is also in accordance with the statement from the Council of Europe that:

"*Previous convictions should not, at any stage in the criminal justice system, be used mechanically as a factor working against the defendant. Although it may be justifiable to take account of the offender's previous criminal record within the declared rationales for sentencing, the sentence should be kept in proportion to the seriousness of the current offence(s).*"[104]

98. In its consultation paper, the Panel discounted the idea of calculating a criminal history 'score' by reference to the number, seriousness, similarity or timing of previous convictions, on the basis that this inevitably would be too rigid.

99. Although the number of previous convictions is one of the factors that is capable of being objectively identified by the sentencing court, as are the general nature and timing of the offences to which those convictions relate, it is rare in magistrates' courts for any detail to be available about the particular characteristics of the activity that justified those convictions; the degree to which such information is available in the Crown Court is variable. In the absence of more detailed information, trying to calculate the consequential impact of a certain number of previous convictions on the seriousness of the current conviction offence could lead to considerable practical difficulties, with a court possibly being required to calculate whether the significance of, say, five previous convictions for one type of offence was the equivalent of one previous conviction for another type of offence.

100. The Panel's research in relation to the offence of *theft from a shop* revealed that sentences were influenced both by the number of previous convictions and by the sentences previously imposed.[105] Although sentences tended to be similar to, or more severe than, the sentence imposed on the most recent occasion, sentencers continued to use a range of sentences even where an offender had been sentenced on a large number of previous occasions and had recently received a custodial sentence. Given the many variations

[102] s.121(6)(c)

[103] see the discussion in the consultation paper *Theft from a Shop*, August 2006, p.21 onwards, www.sentencing-guidelines.gov.uk

[104] *Consistency in Sentencing*, 1993, Recommendation R (92) 17, paras. D1 and D2

[105] research conducted in relation to the Panel's consultation found that, on average, an offender had been sentenced on 19 previous occasions and had convictions for 42 previous offences for theft and kindred offences – *Sentencing in Cases of Theft from Shops*, Speed, M. and Burrows, J., Morgan Harris Burrows, August 2006, www.sentencing-guidelines.gov.uk

in previous record, the Panel continues to take the view that it would be artificial to suggest a direct link between previous convictions and a prescribed increase in sentence. We suggested in the consultation paper that the number of previous convictions is not necessarily the most important consideration and that guidance was more likely to be helpful in relation to the nature of the previous convictions, the time that has elapsed between these and the current offence(s), the way in which the offender has responded to any previous interventions and the extent to which an assessment of previous convictions may help to create an overall picture of offending behaviour and assist the courts in forming a view as to whether the offender's behaviour is improving or entrenched. Thus, in addition to the nature, similarity, timing and seriousness of any previous convictions the court also should take into account the reasons why the offender was motivated to re-offend and what may have influenced the frequency of offending. These are the more critical factors that will determine the extent to which previous convictions will influence the assessment of seriousness of the current offence.

101. The majority of those who responded to the Panel's consultation agreed with this position, although opinion was divided over the degree to which further guidance is really needed and how it should be framed, with some respondents suggesting that it was best left to the court to decide the significance of previous convictions depending on all the other circumstances of the offence and offender. Several respondents agreed with the Panel that the most important information that can be obtained from considering previous convictions is the extent to which the offender has responded to sanctions and whether the offending behaviour is improving or becoming more serious. However, as noted in para. 99 above, the court may not always have sufficient information on which to make a well-informed assessment.

102. The Panel has concluded that it would be beneficial to produce a set of principles governing the circumstances in which, and the general degree to which, previous convictions should influence the sentence imposed. In putting together the list that appears below, we have taken into account the views of those who commented on the principles proposed in the consultation paper and also the views of the public as revealed by the Panel's most recent research.[106]

103. The research findings showed that the public took a markedly different approach to sentence severity where an offender had no previous convictions and that an offence committed by a first time offender was considered to require a less severe sentence; the first one or two previous convictions appeared to produce a marked increase in sentence severity but the increase slowed where the number of convictions was higher. In terms of the nature of previous offending, previous convictions were considered always to make a crime more serious by 65% of research participants when they were for the same type of offence and by 38% of participants when they were for different crimes. This supports one of the fundamental principles proposed by the Panel in the consultation paper although, as discussed above, greater relevance may need to be

[106] *Public Attitudes to the Principles of Sentencing*, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

assigned to the degree to which the collective offending of an individual can be said to demonstrate a criminal way of life.

104. A few respondents to the consultation suggested that the comparison between the seriousness of previous convictions and the current conviction offence is more important than the nature of the offences. The Panel continues to take the view that the nature of previous offences is the primary consideration but, where previous convictions for similar offences were for offences *at least as serious as the current offence*, they are likely to aggravate the current conviction offence to a higher degree. The fact that an offender has a number of previous convictions for the same or similar offences indicates a level of persistence that might rightly aggravate the seriousness of the current offence. For example, the Council guideline relating to the offence of theft from a shop states that where the pattern of previous convictions demonstrates persistent or seriously persistent offending, this might justify a sentence more severe than that otherwise warranted by the characteristics of the current conviction offence.[107] The Panel believes that this principle may be applied more widely and considers that, even where previous convictions were for offences of a type different from the current offence, they indicate persistence and may point to a criminal way of life, making such previous convictions equally as relevant as those for similar offending.

105. However, although an offender's criminal history may aggravate the seriousness of an offence, it is likely to be more significant in relation to sentence selection than in relation to sentence severity. In practice, persistent offenders may commit a variety of offences of different levels of seriousness at irregular intervals. In some cases, repeat offending may indicate a determination to carry on offending regardless of the punishments imposed by the court; in others, it may suggest that an offender finds it impossible to avoid a lifestyle that inevitably leads to further offending. Where the presence of a large number of previous convictions, often committed in quick succession, indicates that the offender has an underlying problem, progressively more severe sanctions are unlikely to halt the cycle of re-offending. Where the underlying problem is a dependency on alcohol or drugs, for example, a community order of significant length that includes a treatment programme requirement might be more effective in preventing further offending than a short custodial sentence. In certain circumstances, the presence of numerous previous convictions may be linked to behaviour falling within the description of offender mitigation factors (see the later discussion at paras. 123–155) and may suggest that a more lenient or different type of sentence from that provisionally selected on the basis of offence seriousness might be more appropriate.

[107] *Theft and burglary in a building other than a dwelling*, December 2008, p.16, www.sentencing-guidelines.gov.uk

106. Statute provides that the court should consider the time that has elapsed since each previous conviction. This suggests that, where a significant period of time has passed since the date of the last conviction, a court may consider it unreasonable for the previous convictions to be treated as aggravating factors, or, alternatively, may consider that they should aggravate the current offence to a lesser degree than more recent offences. If, conversely, only a short time has elapsed between offences, it is more likely that a court will consider it reasonable to take the previous convictions into account.[108]

107. One of the findings that emerged from our independent research was that the time lapse between convictions was considered important by the public, with participants wanting to explore the reasons for interruptions in offending. Others asked it if would be possible to identify a particular time that must have elapsed in order to negate the relevance of previous convictions. The Panel considers that it would be inappropriate to bind the sentencing court in this manner as so much will depend on the nature and severity of previous offences, the pattern of offending behaviour that they reveal, the reason for any apparent cessation or breaks in offending and/or the reasons for any delay in bringing a prosecution. This is likely to be particularly relevant in relation to domestic violence cases, where victims may delay reporting offences through fear of provoking further violence, and also in historical sexual or cruelty offences, where child victims may not bring crimes to light until they are adults and where the offender's increasing age may have influenced the nature and scale of offending. As a point of general principle, the Panel has concluded that the relevance of previous convictions will reduce with the passage of time and eventually may cease to have any effect at all but the court must always consider the nature and seriousness of the previous offences and the reasons for the gap in offending.

108. These offender-specific nuances, which only the sentencing court will be able to determine on the facts before it, help to demonstrate why the Panel favours a guideline that includes only a principled approach to previous convictions and does not attempt to create a rigid, formulaic approach. In summary, the Panel has concluded that the following non-exhaustive list of principles might assist the sentencing court when seeking to determine the degree to which previous convictions should aggravate a conviction offence.

Recommendation 8

The following principles should be considered when seeking to determine the degree to which previous convictions should aggravate a conviction offence:

(i) the primary significance of previous convictions is the extent to which they indicate trends in offending behaviour and the response to earlier sentences;

(ii) previous convictions always will be relevant to the current offence if they are of a similar type;

(iii) previous convictions of a type different from the current offence may be relevant where they are an indication of persistent offending;

(iv) numerous and frequent previous convictions might indicate an underlying problem

[108] guidance on the disclosure of spent convictions in court proceedings was provided through a Practice Direction in 1975 and is now part of the Consolidated Criminal Practice Direction (www.hmcourts-service.gov.uk/cms/pds.htm) currently at Part I:I.6

(for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;

(v) the aggravating effect of relevant previous convictions will normally reduce with the passage of time; where a significant period of time has elapsed since the most recent relevant conviction, they may cease to have any effect at all depending on the nature of the offence and the reasons for the gap in offending.

Aggravating and mitigating factors

109. The current *Seriousness* guideline includes a non-exhaustive list of factors over and above those necessary for the commission of an offence which most commonly affect the assessment of seriousness of an offence, either making it more serious (aggravating factors) or less serious (mitigating factors). The aggravating factors are listed separately as being linked either to the harm caused by the offence or to offender culpability.[109] Individual offence guidelines identify the factors from the generic list that are most likely to be present in an offence of its type and may also identify additional offence-specific factors.

110. In general terms, it is left to the sentencing court to determine the degree to which aggravating and mitigating factors should influence the assessment of offence seriousness in each individual case. The Panel's consultation paper investigated whether it would be possible to give more detailed guidance about the relative significance of the various factors, both in general terms and in relation to individual offences. This recognised the views of those responding to Panel consultation papers, who regularly ask that specific factors should be given more weight than others, sometimes suggesting that identified factors should propel an offence into the most serious category; we also took account of a research report published in 2007, which suggested that more guidance is needed.[110]

Aggravating factors

111. The consultation paper reported the fact that some generic and/or specific aggravating factors are already routinely identified in offence guidelines as determinants of seriousness on the basis that they are intrinsic to the commission of the offence; they define the essential nature of an offence and its relative seriousness within the offence type or group. These characteristics place an offence within a particular level of seriousness and accompanying sentencing range; in that context they have more weight than other characteristics identified as aggravating factors, which are additional to the initial assessment of the seriousness of the offence and serve to move an offence upwards within the indicated sentencing range. The decision whether a given factor should have its normal aggravating function or should be a determinant of seriousness depends on the contours of the guideline for each offence. In addition, certain aggravating factors may be identified as moving an offence to a higher starting point within a sentencing range or even to a higher sentencing range within the guideline.

[109] a new statutory aggravating factor – that an offence was connected to terrorism – has been introduced by s.30 of the Counter-Terrorism Act 2008; however, this applies only to a limited number of rarely occurring offences and so does not need to be added to the generic list

[110] *Mitigation: the role of personal factors in sentencing*, Jacobson, J., and Hough, M., Prison Reform Trust, October 2007

112. The consultation paper discussed and dismissed the approach of jurisdictions which have attempted to aid consistency by generally restricting the range of factors that sentencers are allowed to take into account. This would not accord with the much more flexible approach in England and Wales, where it is recognised that there is a wide range of factors that, depending on the circumstances, legitimately can influence the sentencing decision. Depending on the wider circumstances of an offence, the presence of one aggravating factor to a very high degree may be equally or more aggravating than a combination of two or more lesser factors.

113. The current approach, rather than limiting the number of factors that can be taken into account, has led to statutory provisions that emphasise the importance of certain factors by requiring that a court treat them as aggravating factors. Offences sometimes are accorded a higher maximum penalty when one of these statutory aggravating factors is present – racially or religiously aggravated assaults or criminal damage, for example – but, unless an increased penalty is accorded to aggravating factors in this way, the Panel takes the view that their inclusion in statute does not give them greater significance in an individual case than any of the other aggravating factors identified in the *Seriousness* guideline or in offence-specific guidelines. Different offences have been defined by what, in other circumstances, would be an aggravating factor – thus, there is an offence of *causing death by careless driving* and a separate offence of *causing death by careless driving under the influence of alcohol or drugs* and there are racially aggravated forms of assault, harassment and criminal damage.

114. The Panel's consultation paper pointed out that providing guidance on the relative seriousness of the various factors would be hugely complex, not least because the degree to which factors are present, and the combinations in which they appear in different cases, vary so widely. We also noted that the desire to find a more structured approach must be tempered by the need to maintain the flexibility to deal with the individuality of cases and expressed doubts about whether it would be possible to produce acceptable guidance that would make a significant difference to the way in which sentencers approach this task at present.

115. We nevertheless considered three ways in which a more structured approach to the significance of aggravating factors might be achieved – a) the ranking of individual factors; b) grouping factors by culpability and harm; and c) grouping factors according to their underlying nature. The vast majority of respondents agreed with the Panel that, whilst it is acceptable for factors to be accorded different weightings within offence guidelines, which are designed to reflect the particular nature of the offending behaviour, it is not feasible to create any sort of ranking system of general application. Aggravating factors can be present to different degrees and in varying combinations and it is right that they should be able to have a differential impact depending on the nature and circumstances of an individual offence. Most respondents also discounted the option of according different weightings depending on whether factors were linked to culpability and harm, especially as there can be very mixed views about where individual factors should be placed and whether it would be right for the factors relating to culpability always to be given

more weight, especially if there is a marked imbalance between culpability and harm, as discussed in paras. 89–93 above.

116. Consultation responses were fairly evenly split between those who thought that further guidance is not needed and would be overly prescriptive, leading to injustices, and those who favoured option C – groupings according to the underlying nature of the factors. However, it was apparent that some of those choosing option C did so on the basis that it was the most palatable of the three options and not because it would be a positive and welcome step; indeed, a significant number of problems were identified with the groupings that the Panel had proposed.

117. The Panel considers that is not appropriate to seek to accord specific weightings to individual factors other than within the context of offence specific guidelines, where their significance in the context of that particular type of offending can be properly recognised. However, the Panel was interested to note, from the research findings, that members of the public accord significant weight to the fact that the victim of an offence was particularly vulnerable; they also consider the use of a weapon and/or a high level of injury to the victim as strong aggravating factors. In general terms, the public is inclined to accord greater weight to those aggravating factors listed above as indicating a more than usually serious degree of harm. Whilst maintaining the view that it would be inappropriate to accord specific weightings to individual factors, the Panel considers that the guideline should recognise that, where any of the aggravating factors identified as indicating an unusually serious degree of harm is present, these will strongly aggravate the seriousness of an offence.

118. The Panel has concluded that the best approach is to maintain a generic list of aggravating factors. However, a shorter list might be more helpful to the busy sentencing court and, in view of the fact that some of the factors in the list appear to overlap, the Panel has taken this opportunity to pull them together into a slightly more concise list of factors. The Panel has also noted that the 'commission of an offence while under the influence of alcohol or drugs' is of a different nature from those other factors indicating higher culpability. The other factors are ones which, if present, will always make an offence more serious to one degree or another. This particular factor, however, in many circumstances will be neutral, neither increasing nor decreasing culpability.

119. The Panel is aware that, when the list was first compiled, there were concerns that some courts were treating the intoxication of the offender as a factor reducing the seriousness of the offence to a greater extent than was warranted. Many offences are committed by those under the influence of either alcohol or prohibited drugs and care needs to be taken in assessing the weight that is to be placed on that factor as part of the assessment of the seriousness of the offence.[111] Where an offender misuses drugs or alcohol knowing that that increases the likelihood that an offence will be committed, that may well aggravate the seriousness of the offence because it increases culpability but, in most circumstances, the commission of the offence under the influence of alcohol or drugs is likely to be neutral in the assessment of either

[111] it may also influence the selection of sentence where a court determines that the misuse of alcohol and drugs is a significant factor in the assessment of the risk of future offending

culpability or harm. Accordingly, the Panel has not included it in the list of generic factors, thus enabling a court to give it appropriate weight in the circumstances of the offence with which it is dealing.

Recommendation 9
The Overarching Principles guideline should contain the following list of generic aggravating factors:

Factors indicating higher culpability:

- *Offence committed whilst on bail for other offences*
- *Failure to respond to previous sentences*
- *Failure to heed warnings or concerns expressed by others*
- *Offence motivated by, or demonstrating, hostility to the victim based on his or her actual or presumed race, religion, age, gender, disability, sexual orientation, particular lifestyle or membership of a minority group*
- *Deliberate targeting of vulnerable victim(s)*
- *Previous conviction(s), particularly where a pattern of repeat offending is disclosed*
- *Planning of an offence or 'professional' offending*
- *An intention to commit more serious harm than actually resulted from the offence*
- *Offenders operating in groups or gangs*
- *High level of profit from the offence or commission of the offence for financial gain (where this is not inherent in the offence itself)*
- *An attempt to conceal or dispose of evidence*
- *Carrying a weapon*
- *Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence*
- *Abuse of power or a position of trust*

Factors indicating a more than usually serious degree of harm:

- *Multiple victims*
- *An especially serious physical or psychological effect on the victim, even if unintended*
- *A sustained assault or repeated assaults on the same victim*
- *Victim is particularly vulnerable (because of personal circumstances, the nature of their employment (including working in the public sector or providing a service to the public) or the location of the offence – for example, an isolated place)*
- *Presence of others e.g. relatives, especially children or partner of the victim*
- *Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)*
- *In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)*

Offence-based mitigating factors

120. Offence-based mitigating factors can reduce the provisional assessment of offence seriousness of an offence; they may have the effect of reducing a provisional starting point within a guideline sentencing range or, where one factor is present to a high degree or more than one factor is present, may move an offence to a lower sentencing range. The *Seriousness* guideline identifies two commonly arising mitigating factors, which might make an offence less serious:
    - a greater degree of provocation than normally expected
    - the fact that the offender played only a minor role in the offence.

121. The consultation paper noted that *the fact that an offence was committed in a genuine and proven emergency situation* is identified in the Council guideline *Driving Offences: Causing death by driving*[112] as an offence-specific mitigating factor. There is already a developed strand of case law relating to the defence of duress,[113] adopting a generally restrictive approach, which requires a court to examine closely whether an alternative option was realistically available to the offender when the decision to act was made. The more serious the offence, the more restrictive the approach is likely to be, but the independent research carried out for the Panel identified significant public sympathy with individuals who find themselves in such circumstances.[114]

122. Another aspect of this issue, not specifically discussed in the Panel's *Causing Death by Driving Offences* consultation, relates to the circumstances in which an offender causes damage, injury or death when driving a police car, ambulance, fire engine or other public services emergency vehicle. In such cases, the courts will need to consider the extent to which safety procedures were followed and all possible precautions taken. Although the majority of offences involving this factor are likely to arise from driving a vehicle, the mitigating factor is generic and could apply to any offence committed in the course of responding to an emergency situation, with the particular circumstances of the offence directing the factors to be taken into account. The Panel proposed that this factor should be added to the generic list; none of the consultation respondents objected to this suggestion.

Recommendation 10
The fact that an offence was committed in a genuine and proven emergency situation should be added to the generic list of mitigating factors.

Offender mitigation

123. The *Seriousness* guideline also refers to 'personal mitigation'[115] – this relates to factors specifically related to the circumstances of the offender and, generally speaking (but see para. 124 below) does not affect the assessment of seriousness of an offence. Such factors may, however, indicate that a lower starting point within a sentencing range is justified and, more significantly, they may be highly relevant to sentence selection; they are most likely to have an impact on sentence selection in cases where the offence is 'on the cusp' of the custodial threshold. In cases where a custodial sentence is justified by the seriousness of the offence but is not unavoidable, offender mitigation may suggest that a non-custodial sentence might be more appropriate or more effective at achieving the aims of the sentencing court and can be pivotal in the decision to impose a non-custodial sentence.

124. The *Seriousness* guideline lists two mitigating factors that are related to the culpability of the offender:
    - Youth or age, to the extent that it affects the responsibility of the individual defendant
    - Mental illness or disability

[112] June 2008, www.sentencing-guidelines.gov.uk

[113] see, for example, *DPP v Mullally* [2006] EWHC 3448 and *R v Hasan* [2005] UKHL 22

[114] *Attitudes to the sentencing of offences involving death by driving*, ICPR and GfK NOP, January 2008; www.sentencing-guidelines.gov.uk

[115] 1.26 and 1.27, p.7, www.sentencing-guidelines.gov.uk

Both these factors relate to the ability to distinguish right from wrong or to curb strong impulses; thus they are indicators of the culpability of the offender and may affect the assessment of the seriousness of the offence as well as sentence selection.[116]

125. The guideline also mentions remorse and admissions to the police in interview as factors that may be treated as offender mitigation; the guideline *Reduction in Sentence for a Guilty Plea*[117] identifies interview at a police station as a time which might be the 'first reasonable opportunity' for the purpose of justifying the maximum reduction[118] and care will need to be taken to avoid double counting this element. A wider range of factors has been identified within individual offence guidelines including, in relation to theft and dishonesty offences for example, the voluntary return of stolen property and the fact that an offender has acted out of desperation or need arising from particular hardship in exceptional circumstances.[119]

126. The impact of offender mitigation is difficult to define and was investigated in detail within the research report *Mitigation: the role of personal factors in sentencing*.[120]

The researchers concluded that "*the significance of mitigation in sentencing is not recognised in policy*"; they noted that sentencers can take very different views about the relevance or otherwise of different factors and that "*what is needed is consistency in the sentencing approach*".

127. The report includes a list of factors relating to offender mitigation, records how often they were cited in the case studies used for the research and ranks a discrete number of factors according to their influence on the sentencing outcome. The number and nature of factors falling within the definition of offender mitigation are many and varied, being driven as they are by the circumstances of individual offenders committing very different offences and the Panel suggested in its consultation paper that it would be inappropriate to seek to rank them in some sort of order of importance or to accord different weightings to them. However, in line with the approach to aggravating and mitigating factors generally, the Panel suggested that a non-exhaustive list of the most common factors of offender mitigation should be included in an *Overarching Principles of Sentencing* guideline in order to highlight the significance of these factors on sentence selection.

128. Some respondents preferred the approach of listing the factors most likely to be relevant in offence specific guidelines. Although we proposed that, in future, it would be helpful for each offence-specific guideline to identify the elements of offender mitigation most likely to be present in an offence of its type and we remain of that view, this could not possibly account for all the factors that might arise which are, of course, offender-related and not

[116] there are also arguments that the approach in relation to those aged 18–24 should follow more closely the approach for those aged 17 and under: see *A New Start: Young Adults in the Criminal Justice System*, Transition to Adulthood Alliance, September 2009: www.t2a.org.uk. The approach to the sentencing of those aged 17 and under is contained in the definitive guideline *Sentencing Principles – Youths*, Sentencing Guidelines Council, November 2009: www.sentencing-guidelines.gov.uk

[117] revised July 2007, www.sentencing-guidelines.gov.uk

[118] ibid., Annex 1, para. 3

[119] *Theft and burglary in a building other than a dwelling*, December 2008, www.sentencing-guidelines.gov.uk

[120] Jacobson, J. and Hough, M., Prison Reform Trust, October 2007

specifically or uniquely linked to an offence type. A generic list needs to be retained.

129. The consultation paper sought views on the significance of a large number of offender mitigation factors suggesting that, in some cases, they might lead the court to reduce the length of a custodial sentence or, in relation to offences close to the custody threshold, might militate in favour of a non-custodial sentence. Some of these had traditionally been linked with women offenders (see the later discussion in Section Three) but the Panel proposed that they should all be treated as being of general application. The vast majority of respondents agreed with the Panel's approach; specific comments in relation to individual factors are reflected under the sub-headings below and, where appropriate, have been reflected in slightly revised wordings in the list in Recommendation 11.

130. The independent research for the Panel also tested the views of the public on the significance of selected offender mitigation factors; whilst very few participants were prepared to say that any offender mitigation factor would justify a more lenient sentence in all cases, most agreed that all of the factors identified might influence sentence in some types of case. Although the research findings identify those factors most and least likely to justify leniency from the public, this is not reported here in light of the Panel's decision not to rank or attribute weightings to individual factors.[121]

Good character

131. The courts sometimes refer to 'positive good character'. This means more than the absence of previous convictions which is not a relevant factor for the starting points in Council guidelines since they are based on a 'first time offender'.[122] Accordingly, no further credit should be given to an offender for the absence of previous convictions. Good character can encompass a positive contribution to the community, for example through voluntary or charitable work. It also can include selfless acts of bravery or service beyond the call of duty, which, in the Panel's view, are likely to carry more weight in terms of offender mitigation than other indicators of good character. In general terms, when considering whether and to what degree evidence of good character should be treated as mitigation, care must be taken to ensure that the good character is genuine. Evidence of good character cannot be relied on when the offender has used status or position to commit or conceal offences or to make it difficult for a victim's case to be believed – that is more likely to amount to the aggravating factor 'breach of trust'. Similarly, good character will count for little when it comes to light in the context of a first conviction that reveals a pattern of offending behaviour.

132. Moreover, in relation to sentencing for domestic violence, the Council guideline[123] states that an offender's good character outside the home should generally be of no relevance where there is a proven pattern of domestic abuse. Similar issues may arise in relation to other offences, for example sexual offences, where the public perception of an offender's claimed good character is at odds with an established pattern of concealed

[121] *Public Attitudes to the Principles of Sentencing*, p.37, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

[122] as defined, see Annex A

[123] *Overarching Principles: Domestic Violence*, p.6, December 2006, www.sentencing-guidelines.gov.uk

offending behaviour. The degree to which evidence of good character should impact on sentence, if at all, will depend partly on the nature and extent of the offending behaviour and partly on the genuine nature of the offender's positive public persona and whether it has been used as a 'front' to conceal, for example, abuse in the home or fraudulent activity and to enable the offending behaviour to continue.

133. Before deciding that an offender's positive good character should be treated as offender mitigation, a court will wish to examine an offender's conduct very carefully and be satisfied that the good character is genuine and positive and ought properly to be taken into account. It is likely to have less weight where the offender has sought to mislead the court or investigating authority about responsibility in relation to the offence.

Remorse

134. Remorse is already identified as personal mitigation in the existing *Seriousness* guideline.[124] The independent public opinion survey showed that 77% of the public considered that an offender's remorse would be relevant in some or all cases.[125] However, this is a factor that can divide opinion; in the Panel's consultation on *Causing Death by Driving Offences*,[126] many respondents and research participants suggested that remorse should be the normal reaction to having committed an offence and should be neutral for sentencing purposes. Some respondents suggested that an expression of remorse is often nothing more than a calculated attempt to secure a reduced sentence and proposed that, rather than remorse being treated as a mitigating factor, lack of remorse should be an aggravating factor. This approach would not be appropriate as it does not comply with the general sentencing principles that a sentence should not exceed that proportionate to the seriousness of an offence – the remorse or otherwise of the defendant is a consideration that arises after the commission of an offence and, as such, generally is not relevant to the assessment of either culpability or harm (though see para. 136 below for a situation where it may affect the assessment of harm).

135. Although feelings are likely to run high in relation to offences that result in death, the Panel is aware that similar sentiments are often expressed about this factor in other contexts. In domestic violence offences, for example, offenders are often suspected of making false protestations of remorse whilst continuing to abuse their victims and pressurising them into requesting a lenient sentence so that the relationship can continue.[127] It is often said that remorse is very easy to profess and very difficult to disprove and this point also was made by some of the respondents to this consultation. Generally, an offender seeking to advance remorse as a mitigating factor will be expected to have accepted responsibility for the actions leading to the offence for which sentence is to be imposed.

136. The Panel agrees that it is reasonable to expect an offender to feel remorse for committing an offence. Nevertheless, because not all

[124] p.7, www.sentencing-guidelines.gov.uk

[125] *Public Attitudes to the Principles of Sentencing*, p.37, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

[126] see the Panel's advice *Driving Offences: Causing Death by Driving*, p.23, January 2008, www.sentencing-guidelines.gov.uk

[127] *Overarching Principles: Domestic Violence*, p.6, December 2006, www.sentencing-guidelines.gov.uk

offenders show remorse and because lack of remorse cannot properly be treated as an aggravating factor (see the discussion above), the Panel considers that, provided that there is evidence, in the form of actions or behaviour and not merely words, that an offender feels genuine regret or remorse for an offence, this is relevant for sentencing purposes especially where it plays a part in reducing the impact of an offence on the victim or victim's family and so reduces the harm caused by the offence.[128] It cannot be said with any certainty, however, that an expression of remorse is a useful indicator of the likelihood of re-offending.

Coercion or pressure

137. Instances will arise where an offender claims to have committed an offence only as the result of pressure or coercion. Where it falls short of the defence of duress, any coercion or pressure should be treated as offender mitigation; the degree to which it might mitigate the severity of a sentence will depend partly on the seriousness of the likely consequences to the offender or others had he or she refused to commit the offence. A recent example of a case in which sentence was reduced to reflect coercion, involved an offender supplying heroin under threats of violence to himself and his family.[129] Coercion or pressure is often a pertinent consideration in relation to the sentencing of drug couriers, who may be coerced by powerful gangs into carrying illegal drugs.[130]

[128] see also para. 132 (on the impact on the assessment of harm) and paras. 85–87 and 176–184 (Victim Personal Statements)

[129] *R v Hynes* [2008] EWCA Crim 1934

[130] the special circumstances of drug couriers have been considered in the Panel's consultation paper *Sentencing for Drug Offences*, April 2009, www.sentencing-guidelines.gov.uk

Sexual abuse and physical or mental cruelty

138. Some offenders, often but not exclusively women, may have suffered serious sexual abuse or physical or mental cruelty in their childhood, or recently, or both. In many cases this may have an effect on their subsequent behaviour; in some circumstances it may manifest itself in mentally disordered behaviour which is discussed below. Research[131] indicates that, generally, sentencers are rarely minded to accept evidence of childhood abuse as a reason to reduce sentence,[132] although severe clinical depression at the time of the offence or at the point of sentence (which may or may not result from previous or ongoing physical or mental abuse), however, was the factor most likely to mitigate sentence.

139. In the consultation paper, the Panel discussed the arguments in favour of taking evidence of abuse into account as mitigation. In some cases, victims of abuse are so damaged by their experiences that they turn to a criminal way of life, in others they are coerced into crime by their abusers, committing offences without personal gain and bearing the sole risk of detection and prosecution. Some victims commit crimes of violence on their abusers after a slow-burn reaction to years of abuse

[131] *Mitigation: the role of personal factors in sentencing*, Jacobson, J. and Hough, M., Prison Reform Trust, October 2007

[132] when assessing the weight attributed to various mitigating factors by sentencers, the research report reveals that the fact that an offender was physically or emotionally abused and/or in care as a child received the lowest average score of all the factors considered (p.17), although the researchers did not ask what weight might be given to the fact that a women offender was the victim of domestic violence. However, there are cases in which the Court of Appeal has taken account of childhood abuse in reducing sentence. See, for example, *R v Lockey* [2008] EWCA Crim 2149

and suffering.[133] In all of these circumstances, the initial trigger for the offending behaviour is the previous or ongoing victimisation of the offender. One of the findings of the Panel's independent survey of public opinion was that 65% of the public believe that the fact that an offender was abused as a child should result in a more lenient sentence in some or all cases.[134]

140. One factor is the time lapse between the abuse and the commission of the offence, taking into account any evidence about the degree to which the abuse is likely to have influenced the offending. In general terms, the more recent the abuse (especially where it is ongoing), the more appropriate it will be to take it into account as offender mitigation. However, a long time lapse between the abuse and the conviction offence does not necessarily indicate that the two are not connected. The two key factors are evidence relating to the nature and timing of the abuse and evidence relating to its effect on the offender. The fact that an offender has been the victim of abuse in the past may be more significant where the pattern of behaviour displayed by the offender reflects the pattern of abuse experienced, for example where sexual abuse as a child has damaged the victim so much that it triggers repeat offending behaviour as an adult on other child victims. Where there has been a significant time lapse and there is no obvious connection between the nature of the abuse experienced and the type of crime committed by the offender, a court is likely to require independent evidence before accepting that there is a causal link.

[133] see, for example, *Manslaughter by Reason of Provocation*, December 2006, www.sentencing-guidelines.gov.uk

[134] *Public Attitudes to the Principles of Sentencing*, p.37, ICPR and GfK NOP, June 2009; www.sentencing-guidelines.gov.uk

141. The Panel considers that another key issue is whether there is evidence to suggest that an offender is likely to suffer disproportionately from being sent to prison as a result of previous or ongoing abuse – for example that he or she is more likely to self-harm or suffer from mental illness as a result of being incarcerated. Where this is considered to be a possibility, it may, depending on the seriousness of the conviction offence(s), justify a decision to impose a community order or other non-custodial penalty instead of imprisonment (see also the later discussion in relation to women offenders in Section Three).

142. Although there are many victims of abuse who do not turn to offending and evidence of abuse cannot excuse the commission of offences, there may be compelling independent evidence of cause and effect and the Panel considers that the courts have a duty to consider whether this should influence the sentence imposed.

Mentally disordered offenders

143. The mitigating effect of a diagnosis of mental disorder[135] is set out in section 166(5) of the 2003 Act. It is recognised that, when sentencing an offender who has any disorder or disability of the mind, the court should be guided by distinctive principles and, in particular, should seek to make an order that facilitates treatment of the offender's condition.[136] In its consultation paper, the Panel proposed a number of principles relating to the sentencing of mentally disordered offenders, which were supported without limitation by the vast majority of respondents.

[135] The Mental Health Act 2007 (implemented 3 November 2008) defines mental disorder as "any disorder or disability of the mind" and places certain restrictions on the application of the provisions to persons with a learning disability

[136] see, for example, the leading case of *R v Birch* (1989) 11 Cr App R (S) 202

144. Since then, Lord Bradley has published the findings of his review of people with mental health problems or learning disabilities in the criminal justice system.[137] The report points to the significant benefits of community sentences for this group of offenders on the basis that they can "provide safe and positive opportunities for offenders with mental health problems or learning disabilities to progress their lives, as well as receiving a proportionate sanction from the court." Amongst other things, the report recommends that the Department of Health (DOH) and Her Majesty's Courts Service (HMCS) should commission further research on the use of mental health treatment requirements within community orders, noting that they appear to be seldom used at present, and that a service level agreement should be developed between the DOH, HMCS and the NHS to ensure that the necessary mental health treatment requirements are available. The government has accepted these recommendations and has set up a Health and Criminal Justice National Programme Board to consider all of the recommendations made in the report and to prepare a national delivery plan by October 2009.[138]

145. Acknowledging the statutory restrictions that apply, the practical difficulties which can arise from the unavailability of accommodation or specialist treatment, and that many offenders may be suffering from mental health problems that do not fall within the statutory definition,[139] the Panel suggests that the following principles be included in the *Overarching Principles of Sentencing* guideline:

Principles relating to offenders with a disorder or disability of the mind:

a) As a matter of general principle, an offender[140] with a disorder or disability of the mind should not receive a higher penalty than an offender with no such condition. Where it is proved that an offender's mental condition was wholly or partly responsible for the commission of the offence, that may influence either the choice or severity of sentence.

b) Unless the offence passes the community order threshold then a community order with supervision or with a mental health treatment requirement attached should not be imposed, even if the court believes that such an order would benefit the defendant. Similarly a hospital order, which involves detention in a hospital, should not be imposed unless the defendant passes the custody threshold.[141]

c) When an offence passes the community order threshold, or when a short custodial sentence would normally be justified, the court should always consider whether a community order with a mental health treatment requirement is more appropriate than any other sentence and give reasons if some other sentence is imposed.[142]

[137] *The Bradley Report*, p.12, April 2009 www.dh.gov.uk

[138] *Lord Bradley's report on people with mental health problems or learning disabilities in the Criminal Justice System: the Government's response*, April 2009, Ministry of Justice

[139] for example, depression, addiction or mental health issues typically considered to be mild may all trigger or influence offending behaviour

[140] in certain circumstances, a magistrates' court may be considering an order where satisfied that the necessary acts have been committed but where, because of the defendant's mental state, there has been no conviction

[141] as with sentences for 'dangerous offenders' under Part VI of the Criminal Justice Act 2003, certain order under mental health legislation in respect of offenders are exceptions to the general approach based on proportionality

[142] a mental health treatment requirement may not be added to a community order unless the offender consents, so the court should be satisfied that the offender is willing to comply

d) When a court imposes a custodial sentence on an offender who is mentally disordered, reasons should be given for not imposing a non-custodial alternative. In particular, full consideration must be given to the possibility of imposing a community order with a mental health treatment requirement and justification must be given for deciding that this would not be appropriate.

Offenders who are suffering from a serious illness

146. The fact that an offender is suffering from a life threatening or serious long-term illness may be presented as offender mitigation; whilst this may often be combined with representations about the offender's advanced age, it is a factor that merits separate consideration. Health care can be provided in prison and, in principle, there is no reason why an offender of any age who commits a serious offence should be spared custody purely on the grounds of ill health. However, consideration of relevant case law shows that there have been differences of opinion on this point. In *R v Bernard*,[143] the Court of Appeal noted that the courts have not always taken a consistent line on this issue but it identified the following three principles derived from other cases:

    (i) medical conditions that may threaten either future life expectancy or the prison's ability to provide care may justify early release from custody but should not influence sentencing;[144]

    (ii) a serious medical condition, even when difficult to treat in prison, will not automatically justify a lesser sentence;[145] but

    (iii) a serious medical condition may, in the exceptional circumstances of a particular case, rather than as a general principle, justify the imposition of a lesser sentence as an act of mercy.[146]

147. The Panel does not consider it possible to create a hard and fast rule about the degree to which ill health should influence sentencing – the severity of the medical condition and the seriousness of the conviction offence inevitably will need to be weighed against each other – but we propose that it always should be given careful consideration. In some cases, it may lead to a reduction in the length of a custodial sentence; in others it may influence the choice of sentence. Where custody is justified but not considered unavoidable, the court may conclude that something other than immediate custody would be a more compassionate disposal.

Responsibility for caring for others

148. A responsibility for caring for others – whether children or other dependants – can be borne equally by men and women although, in practice, this factor is likely to be relevant more frequently to the sentencing of women. Some of those responding to the consultation took the view that for a person with caring responsibilities to offend is to act particularly irresponsibly, which should make them more culpable; the views of those participating in the research were fairly evenly divided amongst those who thought that a caring

[143] [1997] 1 Cr App R (S) 135; the sentence of five years imprisonment for importation of cannabis was reduced to 3½ years, partly because the starting point had been too high and partly as an act of mercy – the offender had several medical conditions that placed him at risk of a heart attack or stroke

[144] *R v Archibald Moore* (1994) 15 Cr App R (S) 97

[145] *R v Wynne* (unreported, C.A. April 18, 1994)

[146] *R v James Moore* (unreported, C.A. June 27, 1994)

responsibility should or should not justify leniency. However, the Panel takes the view that, in all cases involving offenders with a caring role, the significant consideration is the degree to which a custodial sentence might impact on an innocent third party; the leniency of the court is invoked for the benefit of the dependant and not for the benefit of the offender. This is the kind of consideration that may well tip the balance in favour of a community order where otherwise a custodial sentence would be imposed.

149. Accordingly, the Panel has concluded that the fact that an offender has primary responsibility for the care of young children or other dependants should be a strong factor inclining a court against imposing a custodial sentence, unless the seriousness of the offence makes it unavoidable, on the basis that the effect on the children or other dependants can be strongly negative.[147]

Responsibility towards seriously ill family members

150. A similar form of offender mitigation may arise where a family member, spouse or partner is seriously ill. Even if the offender is not the primary carer, there may be circumstances in which the likely effect of the offender being imprisoned, both on the offender and on the sick family member, may point in favour of a non-custodial sentence. Where a custodial sentence can be avoided in such circumstances, a community order with requirements (such as the supervision requirement) that include an element of support is likely to be a more appropriate disposal.

[147] see Lord Woolf C.J. in *Mills* [2002] 2 Cr App R (S) 229, at [15]

The offender is in gainful employment

151. Where an offender who is in gainful employment is sent to prison for more than a few weeks, that employment almost certainly will be lost. This may impact on the offender's ability to reintegrate into society on release from prison and may also have wider social implications (see the discussion at para. 37 above). In its consultation, the Panel asked whether, where the offence is not so serious that the court considers a prison sentence must be imposed, the fact that an offender has a job which could be maintained while serving a non-custodial sentence is a factor that might militate in favour of not imposing custody. It was recognised that this suggestion might appear to disfavour those who are already disadvantaged by being unemployed. A similar question was posed to those participating in the research.

152. As anticipated, this question evoked divergent responses. Some considered that jeopardising employment makes an offence more serious; some responded that, as employment is a key factor in reducing the risk of re-offending, preserving that employment is important; others took the view that this is a wholly neutral factor. The Panel has concluded that, whilst the offender's gainful employment should be included in the list as a factor that the court should take into account when considering whether or not to impose a custodial sentence, it is not possible to be specific about the circumstances in which either decision should be reached. The impact of this factor will inevitably vary a great deal and, as with other mitigating factors, the more serious the offence, the less impact it is likely to have. Where a court has identified reform and rehabilitation as priority aims of sentencing and is provisionally

considering a short custodial sentence, it might decide that imposing a community order which enables the offender to remain in employment could provide a more realistic prospect of rehabilitation (see para. 49 and Recommendation 4 above). In addition, it may make it possible to make a compensation order and/or to impose a fine.

Older offenders

153. The *Seriousness* guideline includes a mitigating factor related to the youth or age of an offender when it affects responsibility in relation to an offence. In the consultation paper, the Panel suggested that, subject to certain caveats, the advanced age of an offender should be treated as offender mitigation. A large number of respondents did not agree, especially where an elderly offender is finally brought to justice for historical crimes of abuse, and the research findings show that the fact that an offender was of advanced years was one of the factors least likely to deserve leniency in the eyes of the public. The Panel has concluded that an offender's advanced years should not, of themselves, be treated as offender mitigation. However, where an offender is elderly and also has physical or mental problems that are likely to make imprisonment an unduly harsh sentence, the offender's age may be one of the contributory factors in determining that an alternative disposal might be more appropriate.

Offender is suffering from an addiction

154. The influence on sentence selection of the fact that an offender has a dependency on alcohol or drugs is discussed earlier in the advice in relation to the choice between a short custodial sentence and a community order (see para. 53 above). Similar considerations may arise where an offender has an addiction to gambling. Where an offender can demonstrate a genuine willingness to address his or her dependency, a treatment requirement within a community order may provide the prospect of a more effective outcome where rehabilitation is a priority aim of sentencing.

Restorative justice

155. One of the factors identified for consideration as offender mitigation in the Panel's consultation paper was the offender's willingness to be take part in restorative justice. Following consideration of the consultation responses, this has been removed from the list of offender mitigation factors and is discussed separately in para. 189 onwards below.

Recommendation 11

The following factors may be treated as offender mitigation. The degree to which they influence the severity or choice of sentence, if at all, will depend on the nature and seriousness of the conviction offence(s) and the degree to which failing to adjust the sentence would be likely to result in a disposal that is unduly harsh in the particular circumstances of the individual offender. This is not an exhaustive list:

- *the offender is of genuine positive good character (although the court must be satisfied that the offender is not hiding behind a positive public persona in order to conceal and/or continue offending behaviour such as fraud, domestic violence or sexual offending). Acts of bravery or service to the community beyond the call of duty are likely to have considerable impact*
- *the offender was subjected to coercion or pressure short of duress (the degree to which this is likely to influence sentence depends partly on the seriousness of the likely*

consequences to the offender or others had the offender refused to commit the offence)

- *the actions or behaviour of the offender (not merely words) demonstrate genuine regret or remorse*
- *the offender is the sole or main carer of dependent children*
- *the offender is, or has been, a victim of abuse (relevant considerations include the nature, circumstances, duration and timing of the abuse and its relationship to the criminal behaviour of the offender)*
- *the likely impact on the ability to cope with a custodial sentence as a consequence of the offender's experience of abuse*
- *the offender has a serious illness that requires urgent, intensive or long-term medical treatment*
- *the offender has a mental disorder or other serious mental health problems (see the separate principles at para. 141)*
- *the offender is of advanced years (but only in combination with other mitigating factors)*
- *the offender has made voluntary reparation to the victim(s)*
- *the offender acted out of desperation or need arising from particular hardship (in exceptional circumstances)*
- *the offender is making a genuine effort to address a drug, alcohol or gambling addiction*
- *the offender is in gainful employment, which may be helpful in the offender's rehabilitation*

The approach to sentencing

156. Where an offence is included within a definitive Council guideline, a court's first task is to identify the description that most closely matches the offence being sentenced and to determine the appropriate *starting point*, taking account of the culpability and harm involved. The sentencing *range* given in the guideline for that level of seriousness fixes a normal 'ceiling' and 'floor' for the severity of the sentence that should be imposed. In determining the position of the sentence within that range, the assessment of seriousness needs to take account both of factors intrinsic to the offence, for example the degree of harm caused and the circumstances in which the offence was committed, and of certain factors that are personal to the offender (such as the existence of previous convictions or the fact that the offence was committed whilst the offender was on bail) which may make an offence more serious and, accordingly, raise its position within the sentencing range or, exceptionally, take it outside that range; Annex A contains an explanation of the terminology used in Council guidelines and which is included within each offence specific guideline.

157. The choice or severity of sentence may need to be adjusted by increasing it to reflect multiple offending or the fact that an offender has asked for a number of offences to be taken into consideration. On the other hand, issues relating to offender mitigation[148] may influence the court to reduce the severity of the sentence or to select a different type of sanction. Where the offender has entered a guilty plea, a reduction in sentence is almost always required; and the making of ancillary orders that are punitive in nature may also lead to a reduction in sentence severity. The Panel has investigated all of these issues and the outcome of its deliberations is set out in this advice.

[148] factors relating to the specific circumstances of an individual offender (see the discussion at paras. 123–155)

Sentence selection

158. Earlier discussion has considered the situations in which a custodial or community sentence is most likely to be appropriate. Except where offences are so serious that nothing less than a custodial sentence would be appropriate (discussed earlier at para. 40 onwards) the proper approach is to start with the sentence containing the least restrictions on liberty and assess whether that is commensurate with the seriousness of the offence.

159. Applying this approach, general principles relating to the relative merits of custodial sentences and non-custodial alternatives will need to be taken into account but the characteristics of the offence or the offender are the most critical factors. In the following paragraphs, further consideration is given to the sentencing options of discharge and fine, to some consequential issues relating to community orders and to the power to defer sentence.

Discharges

160. A discharge may be imposed for any offence (other than one for which a mandatory penalty is provided in statute) where a court "is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment";[149] a discharge may be absolute or subject to the condition that the offender does not commit another offence during the lifetime of the order (maximum period three years).[150] Absolute discharges do not amount to a criminal conviction for most purposes and are rarely used by the courts; conditional discharges are used more often. If an offender is convicted of another offence during the lifetime of a conditional discharge, the offender should be sentenced separately for the original offence as though it had just been committed. A discharge is a stand-alone disposal which may not be combined with a fine, but it does not prevent the award of compensation or costs or the imposition of a banning order, disqualification from driving or an anti-social behaviour order. The Panel recognises that courts should use a conditional discharge where it is considered important for the court to retain the power to re-sentence in the event of breach of the condition; for this reason, it is likely to be particularly appropriate for a first time offender because of its rehabilitative effect. It may also be used where a fine does not appear to be appropriate, though care should be taken to ensure that that decision is not influenced by the means of the offender since the approach to the calculation of fines[151] makes specific provision for those with low income.

Fines

161. If the statutory framework is regarded as a virtual ladder linked to offence seriousness, a fine normally would be seen as a less severe penalty than a community sentence but this is not a view to which everyone would subscribe and it does not fit with the Panel's preferred approach of considering all the factors relating to an offence and an offender 'in the round' in order to determine the most appropriate

[149] although not in relation to breach of an anti-social behaviour order where statute prevents a court from imposing a conditional discharge (s.1(11) Crime and Disorder Act 1998)

[150] Powers of Criminal Courts (Sentencing) Act 2000, s.12

[151] *Magistrates' Court Sentencing Guidelines* pp.148–155, May 2008, www.sentencing-guidelines.gov.uk; note particularly the power to impose detention in lieu of immediate payment in certain circumstances

sentence. Even where other sentencing options are available, a fine generally should be the normal sentence for most cases of low/medium seriousness in a magistrates' court. It also may be the most proportionate response (as provided for in statute[152]) where an offence crosses the community sentence threshold. A fine may be a particularly appropriate sentence where punishment is the sole or primary purpose of sentencing.

Enforcement of fines

162. In the past, concerns about lack of enforcement have undermined confidence in the effectiveness of the fine as a suitable disposal. Provisions in the Courts Act 2003 relating to collection orders, attachment of earnings orders, reductions in benefit payments and imprisonment in default of payment were designed to improve compliance.[153] There is a further power to disqualify from driving for up to 12 months in response to default in payment.[154] The powers against defaulters also include attendance centre orders (although these are applicable only for offenders under 25), curfews and unpaid work.

When to impose a fine

163. Under current legislation a fine is the most punitive sentencing option for a number of summary offences. Provisions in the CJIA 2008[155] restrict community orders to those offences punishable by imprisonment in the sentencing court and, as a result, a fine is the most punitive disposal for a wide range of offences in magistrates' courts. A fine is also the only available sanction for a number of serious regulatory offences, being directed at corporate bodies rather than individual offenders[156] and can have a very significant impact on an offender's assets.

164. In recent years, the number of fines imposed for indictable offences has decreased whilst the number of suspended sentences and community sentences has increased, suggesting that these sanctions have been used in circumstances where, previously, the sanction would have been a fine;[157] such sentences must be imposed only where the relevant statutory sentencing threshold has been crossed. Bearing in mind that financial penalties can place serious restrictions on an offender's freedom of choice, the Panel considers that fines should be used more widely. The Panel takes the view that a fine could be used more often in cases where the offence is serious enough to justify the imposition of a community order but where punishment is the sole or primary purpose of sentencing. However, where the community sentence threshold has been crossed and rehabilitation of the offender is considered to be an important aim of the sentence, a community sentence consisting of a community order alone or a community order and fine combined (see further discussion below at paras. 174–175), is likely to be more appropriate.

[152] Criminal Justice Act 2003, s.163

[153] a summary of enforcement powers is set out in the revised *Magistrates' Court Sentencing Guidelines*, pp.131–133, May 2008, www.sentencing-guidelines.gov.uk

[154] Criminal Justice Act 2003, s.301

[155] section 11

[156] offences under Health and Safety legislation and the new offence of Corporate Manslaughter, for example

[157] see, for example, *The Sentence, The Sentencing Guidelines Newsletter*, issues 07 (May 2007), 08 (January 2008) and 09 (August 2009); increases in the types and use of out of court penalties for a wide range of offences will have had an effect also

165. Whenever a court is considering imposing a fine, it must pay particular regard to the circumstances[158] and offending history of the offender. Where there is a realistic prospect that an offender is likely to commit further crimes in order to pay a fine, for example where an offender has numerous previous convictions for theft and dishonesty offences committed to fund an addiction, it may be preferable to select an alternative non-custodial disposal. Unless an offender's circumstances have changed, there may also be little virtue in imposing a fine if financial penalties previously imposed by the courts have not been paid.

166. Where a fine is imposed in a magistrates' court, the *Magistrates' Court Sentencing Guidelines*[159] sets out a method for assessing the amount.[160] For the purposes of offence guidelines, a fine is based on one of three bands (A, B and C). The selection of the relevant fine band, and the position of the individual offence within that band, is determined by the seriousness of the offence. These three fine bands cater for the majority of offences sentenced in a magistrates' court. However, two further bands are provided to assist a court in calculating a fine where the offence and general circumstances otherwise would warrant a community order (band D) or a custodial sentence (band E) but the court has decided that a financial penalty is more appropriate in all the circumstances of the offence and the offender.

[158] there is detailed guidance on the calculation of fines in the recently revised *Magistrates' Courts Sentencing Guidelines*, May 2008, www.sentencing-guidelines.gov.uk. See also the discussion relating to fines for women offenders at paras. 256–258

[159] www.sentencing-guidelines.gov.uk

[160] p.148 onwards, December 2007, www.sentencing-guidelines.gov.uk

167. Consideration also needs to be given to the potential impact of a fine on third parties in cases where an offender is the sole or primary financial provider. Some consultation respondents suggested that financial penalties are inappropriate in domestic violence cases, as offenders may force the victim to pay any fine imposed. The Panel appreciates that point and also acknowledges that, in wider circumstances, some offenders might choose to deprive immediate dependants rather than personally bearing the burden of a fine.

Recommendation 12

A fine is likely to be the most appropriate disposal, even if the community threshold has been crossed, where:

(i) the sole or primary sentencing aim is punishment; and

(ii) there is no evidence to suggest that rehabilitation of the offender is required; and

(iii) there is no evidence to suggest that a third party will suffer inappropriate deprivation in order for the fine to be paid; and

(iv) there are no outstanding financial penalties.

Deferred sentences

168. A court can defer sentence for a maximum of six months where it considers this to be in the interests of justice and provided that the offender undertakes to comply during the period of deferment with any requirements related to conduct that the court considers it appropriate to impose.[161] The court may appoint a responsible officer to oversee the offender's conduct during the deferment period and to prepare a report that can be used when the offender comes back before

[161] Powers of Criminal Courts (Sentencing) Act 2000, ss.1 and 2, as amended by Criminal Justice Act 2003, sched. 23

the court for sentence. Offenders who fail to comply with any of the requirements can be brought back to court for sentence at any point during the deferment period. Where an offender is convicted of another offence committed during the period of deferment, the court may impose sentence for both the original offence and the new offence at the same time.

169. The *New Sentences* guideline[162] includes guidance on the use of deferred sentences and the Panel proposed in the consultation paper that these principles should be reproduced in the *Overarching Principles* guideline. We asked for information about the frequency with which, and the circumstances in which, deferred sentences are currently being used and asked for views on whether they could be used more widely. The majority of respondents expressed the view that deferred sentences should continue to be used only in the small number of exceptional cases covered by the existing guideline. A few respondents suggested particular circumstances in which a deferred sentence is likely to be particularly useful but the Panel considers that these would be captured by the existing guidance. The Panel considers the power to defer sentence could be used more often but that the criteria in the guideline do not need to be enlarged for that to occur; situations in which deferment is likely to be suitable include those where an offender's co-operation may best be obtained by requiring an account to be given to the court prior to sentence being imposed, for example, where there is an expectation of employment or where the offender is voluntarily undertaking treatment for an addiction or other therapeutic programme.

[162] *New Sentences: Criminal Justice Act 2003*, pp.14–15, December 2004, www.sentencing-guidelines.gov.uk

Recommendation 13

Deferred sentences are particularly appropriate for cases close to either the community or custodial sentence threshold where, should the offender be prepared to adapt his or her behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence; when deferring sentence:

(i) the court should impose specific and measurable conditions that do not involve a serious restriction on liberty;

(ii) the court should give a clear indication of the type of sentence it would have imposed had it not decided to defer; and

(iii) the court should also ensure that offender understands that non-compliance with any requirements will result in the imposition of a sentence of the type being considered when the decision to defer sentence was made.

The structure of a community order and appropriate requirements

170. When imposing a community order, a court must ensure that the restriction on an offender's liberty is commensurate with the seriousness of the offence committed and that the requirements are the most suitable for the offender.[163] Where two or more requirements are included, they must be compatible with each other.[164] In Annex C of the consultation paper, the Panel provided information about the nature of each of the available community order requirements and suggested the types of offence/offender for which they might be a suitable disposal. The *New Sentences* guideline[165] provides that the seriousness of the offence should be the *initial* factor in

[163] Criminal Justice Act 2003, ss.148(2)(a) and 148(2)(b)

[164] ibid., s.177(6)

[165] *New Sentences: Criminal Justice Act 2003*, December 2004, www.sentencing-guidelines.gov.uk

determining which requirements to include in a community order and identifies three ranges of order – low, medium and high – based on offence seriousness; it gives examples of the types of offence likely to fall within each range and suggests the nature and severity of the requirements that might be included within a 'package' at each level. The guideline focuses on punitive requirements but recognises that these may not be required for all packages; it notes that requirements of a rehabilitative nature, such as treatment programmes, may be appropriate to the specific needs of an individual offender and may be particularly beneficial for offences in the medium and high ranges. The guideline also urges the sentencing court always to consider whether programme requirements or restorative justice might be suitable as an additional or alternative part of any community order. All of this guidance needs to be reproduced by the Council in the *Overarching Principles* guideline that will be published following receipt of the Panel's advice.

171. A detailed picture of the way in which requirements are currently being used cannot be identified from sentencing data although statistics cited in the consultation paper show that, between January and December 2007, the most commonly used requirements were supervision, unpaid work and accredited programmes and that, between April 2005 and July 2006, half of the community orders imposed consisted of just one requirement and one third included two requirements. None included more than four requirements and this, in itself, was rare. This suggests that the existing guideline is being followed and there is nothing arising from the consultation responses to suggest that it needs any modification.

172. In terms of the way in which community order requirements would best be selected and combined, one measure of the effectiveness of different types of community order is the completion rate. After considering the published data available, which does not include the reasons for failure to comply with individual requirements, the Panel concluded that it is difficult to reach any firm conclusions about the relative merits of different types of community order or to determine the degree to which compliance and effectiveness might be influenced by offence/ offender type, which could help inform future sentence selection.

173. A key recommendation in a National Audit Office report in 2008,[166] which the Panel fully endorses, was that more research is needed on the completion rates for community order requirements and the extent to which they reduce reconvictions or achieve other sentencing outcomes. The Panel considers that much more data collection and analysis is needed to inform the evidence-based assessment of comparative effectiveness which is needed to enable better sentence planning. The Panel, therefore, is not proposing that any additional guidance should be included in the guideline at this stage.

Imposing a fine in addition to a community order

174. There is nothing to prevent a court imposing a sentence that is a combination of a community order and a fine, as statute provides that the court sentencing an offender "may impose a fine instead of or in addition to dealing with him in any other way".[167] The Council guideline *Sentencing for Fraud*

[166] *National Probation Service – The supervision of community orders in England and Wales*, January 2008

[167] Criminal Justice Act 2003, s.163

– *Statutory Offences*[168] states that courts normally should not impose fines alongside custodial sentences. This reflects the difficulty of calculating the degree to which a custodial sentence should be reduced to reflect the impact of the fine and concerns about wealthier offenders being able to 'buy their way out of prison.'

175. These issues are not as stark in relation to community orders, where a fine might be imposed instead of one or more other requirements within an order and still fulfil the purpose the court wishes to achieve. However, care must be taken to ensure that the overall sentence remains proportionate to the seriousness of the offence. A particular concern is that an offender with financial resources will be able to 'buy themselves out of' a more severe sentence; however, the approach in the *Magistrates' Court Sentencing Guidelines*[169] provides both for the amount of a fine to be directly related to relevant weekly income and for separate (higher) bands to be used where the alternative sentence would have been a community or custodial sentence.

Recommendation 14

It may be appropriate to impose a fine in conjunction with a community order where to do so would not impose a punishment disproportionate to the seriousness of the offence and:

(i) the aims of sentencing include both punishment and rehabilitation; and

(ii) it is possible to reduce the number or severity of community order requirements to reflect the imposition of the fine without reducing its overall effectiveness; and

(iii) the loss of income is likely to have a significant impact on the offender but there is no evidence to suggest that a third party will suffer inappropriate deprivation in order for the fine to be paid; and

(iv) there are no outstanding financial penalties.

[168] effective from 26 October 2009 at p.12; www.sentencing-guidelines.gov.uk

[169] at pp.148–153; Sentencing Guidelines Council, May 2008, www.sentencing-guidelines.gov.uk

SECTION TWO – OTHER FACTORS AFFECTING SENTENCE

The views of victims

176. An important issue discussed in the Panel's consultation paper is whether the views of the victim(s) of an offence (or the relatives of a victim who has died or cannot otherwise represent him or herself) should have any impact on the sentence imposed on the offender.

177. The victim of a criminal offence[170] may make a victim personal statement, designed to inform the court about the effect that the offence has had on him or her.[171] When taking a statement from a victim, a police officer must make the victim aware of the opportunity to make such a statement; where a statement is made, it can be updated at any point prior to sentence.[172] The evidence in the statement must be in the form either of a witness statement (under section 9 of the Criminal Justice Act 1967) or of an expert's report; a court must not make assumptions about the effect on a victim unsupported by evidence, except insofar as inferences can be drawn from the proved facts of the offence.[173]

178. A court must pass the appropriate sentence having regard to all the circumstances of the offence and the offender and taking into account, as far as the court considers it appropriate, the consequences of the offence for the victim. The evidence in a victim personal statement about the effect that an offence has had, or continues to have, on the victim should be taken into account as a legitimate part of the assessment of the harm caused by (and hence the seriousness of) the offence.[174] A court may refer to the evidence provided by the victim when announcing sentence;[175] it may be beneficial for the court to request that a copy of those remarks be transmitted to the victim.[176]

179. Recognising the particular issues faced by family members where a death had been caused, a Victim's Advocate Scheme was established in October 2006 to test out three different ways of supporting bereaved family members. The Scheme related to prosecutions for murder and manslaughter and contained three elements – enhanced pre-trial support, a family impact statement and personal and social legal advice. It was piloted in five Crown Court Centres between 24 April 2006 and 23 April 2008 and, in October 2008, the Ministry of Justice published an evaluation report.[177]

180. The family impact statement enabled an oral or written statement to be made to the court either by a lawyer or by a lay person; legal assistance could be provided to assist in the preparation of the statement either by the CPS or by an independent advocate. The evaluation

[170] minimum obligations regarding support for victims of crime are set out in the *Code of Practice for Victims of Crime* www.homeoffice.gov.uk/documents. Under the Code, a 'victim' is either the direct victim of criminal conduct or, where that person has died or is incapacitated, a 'family spokesperson' usually nominated by close relatives of the victim

[171] Consolidated Criminal Practice Direction, III.28 www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm

[172] ibid., III.28.2

[173] ibid., III.28.2(b)

[174] ibid., III.28.2(c)

[175] ibid., III.28.2(d)

[176] when applicable, *The Code of Practice for Victims of Crime* paras. 6.7 and 6.8, requires the joint police/CPS Witness Care Units to notify victims of the sentence imposed: www.homeoffice.gov.uk/documents/victims-code-of-practice

[177] *Evaluation of the Victims' Advocate Scheme Pilots*, Ministry of Justice Research series 17/08, October 2008; www.justice.gov.uk/publications/research-victims-advocate.htm

reported that families generally appreciated the opportunity to make a statement but that there were circumstances in which distress was exacerbated because only part of the statement was allowed to be read out or because of the apparent lack of effect on sentence. However, whilst practitioners were reported as recognising the benefits to the families, there were also considerable concerns both about the inappropriate increase in the level of emotion brought to the proceedings and about "the inherent ambiguity about the impact of the statement on sentencing which both judges and families found difficult to dispel". The scheme has not been continued.[178]

181. Whilst it is valuable for the defendant to be made aware of the impact of his or her actions, any views expressed in a victim personal statement about the sentence to be imposed, whether a harsh sentence or clemency is being urged, cannot be taken into account. As noted above (paragraph 13), the sentence that is imposed by the court must be commensurate with the seriousness of the offence.[179]

182. Whilst it is generally acknowledged that the sentence for an offence must not be increased beyond that which is proportionate solely in response to a request from the victim or relative that a harsh sentence should be imposed, the consultation paper questioned whether it was right for the same approach to be taken in response to making sentences less severe in response to requests for leniency. In particular, situations will arise where it is asserted that additional suffering would be caused (especially to the victim or the victim's family) by the imposition of a proportionate sentence. The factors for consideration often relate to the relationship between the offender and the victim or relatives of the victim, for example, where an offender convicted of a driving offence caused the death of a relative or close friend, other relatives and friends can be torn by distress for both the victim and the offender and may feel that the consequences of the offence are punishment enough for all concerned.

183. In its consultation paper, the Panel identified a number of risks involved in reducing sentence on the basis of pleas for leniency, and the majority of those who responded agreed. One of the main concerns was that it might be difficult for the court to be satisfied that a plea for leniency is genuine. The Council guideline on domestic violence[180] already cautions that the sentencing court must be sure that pleas for leniency have not been secured through coercion and this was an area in relation to which a number of respondents expressed concern. A policy of responding to requests for leniency might also encourage more attempts at victim or witness intimidation in an attempt to secure a more lenient sentence. As was pointed out in the Panel's consultation paper this would also would create a certain level of inconsistency. Also, it could be criticised by victims, on the grounds that their views are taken into account only when they favour the offender, and by offenders, on the grounds that the length of their sentence is partly within the gift of their victim(s). Another

[178] *Evaluation of the Victims' Advocate Scheme Pilots*, Ministry of Justice Research series 17/08, October 2008; www.justice.gov.uk/publications/research-victims-advocate.htm

[179] for further consideration of the impact of the evidence of a victim on the assessment of the seriousness of an offence, see paras. 84–88 above and 185 below

[180] *Overarching Principles: Domestic Violence*, December 2006, www.sentencing-guidelines.gov.uk

concern expressed in responses was that the possibility that a plea for leniency might result in a reduced sentence could place an inappropriate and potentially harmful responsibility on the victim of an offence.

184. The independent research investigated whether a plea for leniency would impact on sentence in a given fraud scenario. Interestingly, 43% of research participants accepted this as a reason to reduce sentence from custody to a community order; this factor was not tested in any other scenarios. Having considered all of the responses to the consultation, however, the Panel has concluded that pleas for leniency should not influence the court at the point of sentence.

185. However, the views of a victim will be relevant to sentence where an element of that sentence will have a direct impact on the victim. A court is obliged to consider whether a compensation order should be made whenever a loss has arisen and to give reasons when an order is not made. As recognised in Sentencing Guidelines Council guidelines,[181] an order should not be made where a victim does not wish to receive compensation from the offender. A similar approach is necessary where any aspect of reparation would require the co-operation of the victim as recognised in the statutory provisions.[182]

Recommendation 15

Information in a victim personal statement about the effect that an offence has had, or continues to have, on the victim should be taken into account as a legitimate part of the assessment of the harm caused by (and hence the seriousness of) the offence. Where a court refers to that information when pronouncing sentence, the court should request that a copy of the remarks be transmitted to the victim. Except insofar as it influences the assessment of harm, the views of the victim should not influence the sentence imposed except where part of that sentence includes compensation to the victim or some involvement of the victim in the sentence. In particular, pleas for leniency from a victim (or relative of a victim) should not influence the sentencing court.

Burden of proof

186. In relation to establishing an offender's guilt, the standard of proof is 'beyond a reasonable doubt' and the burden of proof rests on the prosecution. Even where an offence is committed where an offender does an act 'without reasonable excuse', in the absence of specific provision to the contrary, it is for the prosecution to prove the lack of such an excuse once the defence has raised the issue.[183] The prosecution must prove the facts material to the alleged offence; where a defendant admits an offence but disputes some of the facts that are significant in relation to the sentence, this may be resolved by means of a *Newton* hearing,[184] where the sentencer will apply the same standard of proof.[185]

[181] for example, *Theft and burglary in a building other than a dwelling* at p.6; December 2008: www.sentencing-guidelines.gov.uk

[182] for example, Criminal Justice Act 2003, s.201(4)

[183] *Charles* [2009] EWCA Crim 1570 (a case alleging breach of an ASBO) following and applying *Evans* [2004] EWCA Crim 3102

[184] *Newton* (1983) 77 Cr App R 13; see also, for example, *Underwood* [2004] EWCA Crim 2256; *Temple* [2008] EWCA Crim 2511

[185] *R v Ahmed* (1985) 80 Cr App R 295; see also *Davies* [2009] 1 Cr App R (S) 79, where the Court stated that the prosecution had to prove to the criminal standard that an offence of murder fell into the higher sentencing bracket

187. As has been noted earlier in this advice, a wide range of factors may be considered when a court is determining sentence. Some of those will relate to information presented by the defendant and about which the prosecution is unlikely to be able to comment, for example, where the defendant asserts that the offence was committed after threats were made, in an emergency or as a result of significant misunderstanding. Normally in such situations, a court will determine the effect on sentence on the basis of representations made rather than by evidence and the approach set out in the preceding paragraph will not be applicable. In deciding the extent to which such an assertion should be accepted, it seems to the Panel that the fact that the prosecution is unable to contradict it does not mean that the court must accept it. Where an assertion is likely to make a significant difference to sentence, it would appear to be appropriate for a court to be able to reject an assertion that is implausible applying the same approach that is adopted in determining whether a *Newton* hearing is needed. Where a court requires an assertion to be substantiated, it would appear appropriate for the defendant to bear the burden of proving the assertion on the balance of probabilities.

188. In the light of the continuing significance of both offence and offender mitigation in determining sentence, the Panel considers that there needs to be clarity about the extent to which a court can accept or reject such claims without hearing evidence. However, the Panel recognises that the Council is unlikely to consider that such an issue can be resolved by guidelines and therefore **recommends** that the Council consider whether this issue needs to be resolved and, if so, how that resolution can best be achieved.

Restorative justice

189. Restorative Justice, which can take the form of victim–offender mediation, indirect communication between third parties, and restitution or reparation, is said to improve victim satisfaction and can help offenders to take some responsibility for their actions; the consent of both the offender and the victim is required. Restorative Justice can take place at any stage of the criminal justice process; currently it is more common for the process to start, or even be completed, before a case comes to court but it can also form an integral part of any sentencing disposal (although the Panel understands that such cases are rare, largely due to the fact that many Probation areas do not have the resources to provide Restorative Justice).

190. At present, the evidence about the effectiveness of Restorative Justice is rather patchy; it is particularly difficult to measure the extent to which it is of benefit to the victim, an aspect that many regard as the primary function of such schemes. On 16 June 2008, the Ministry of Justice published an evaluation of three pilot schemes that have been running since 2001[186] which pointed to high levels of victim and offender satisfaction.

191. In relation to reducing the likelihood of the commission of further offences, some international research suggests that Restorative Justice impacts differently on different kinds of people and results in fewer reconvictions for young offenders.[187] It also

[186] *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes*, Shapland, J. et al, Ministry of Justice Research Series 10/08, June 2008

[187] *Restorative justice: the evidence*, The Smith Institute, February 2007

indicates that Restorative Justice results in fewer reconvictions for more serious crimes, especially crimes of violence (as opposed to offences around the custody threshold). The evaluation noted in the previous paragraph found that those offenders who participated in Restorative Justice committed statistically significantly *fewer* offences (measured by reconvictions) in the subsequent two years than those in the control groups. However, in relation to the *severity* of offences for which a reconviction was recorded, there were no significant differences between those taking part in Restorative Justice and the control group. Overall, the researchers concluded that the small sample sizes meant that the findings on reconviction (while positive) were not statistically significant.

192. In some cases, the seriousness of an offence will demand a custodial sentence, notwithstanding any involvement in Restorative Justice, but where custody is not considered to be unavoidable and an offender shows a genuine willingness to take part in Restorative Justice, the Panel's consultation paper questioned whether this should influence the choice of disposal in favour of a non-custodial sentence.

193. Three reasons were put forward in the consultation paper as to why a reduction in sentence to reflect Restorative Justice would be unacceptable. These were (i) because it would be unfair in cases where the offender's willingness to take part is negated by the refusal of the victim(s) to engage in the process;[188] (ii) because it would be unfair in cases where Restorative Justice programmes are not available; and (iii) because it could result in reduced sentences where, for whatever reason, attempts at Restorative Justice are subsequently abandoned or deemed ineffective. An additional concern raised in consultation responses was that, where an Restorative Justice initiative is being contemplated by the court as part of a sentence, this could add an unwelcome and complex consideration for the victim. A victim's decision on whether or not to take part in Restorative Justice must be taken freely without the added complication that it might impact on the sentence that is likely to be imposed on the offender. Another point raised is that a willingness to take part in a restorative justice initiative is an indication of remorse which can be acknowledged separately; care would need to be taken not to credit an offender twice for what amounts to the same element.

194. If a court is satisfied that *effective* Restorative Justice[189] had taken place prior to sentence being imposed and that the harm caused by the offence had been reduced (which may be evidenced by the content of any Victim Personal Statement), that may be relevant to sentence. Given the limited evidence about effectiveness (either from the perspective of a victim or in reducing re-offending) and the difficulties in establishing the effect within the time prior to sentence, the Panel considers that a cautious approach is needed.

[188] although the Panel is aware of a pilot scheme in the Thames Valley where a police officer takes the role of the victim in RJ programmes

[189] for example, the facilitation of voluntary reparation

Indications of assessment of seriousness when adjourning after conviction but before sentence

195. The guideline *New Sentences: Criminal Justice Act 2003* states that, when ordering the preparation of a pre-sentence report (PSR) in anticipation of a community order, it is desirable for a court give a preliminary indication of the level of seriousness of an offence in order to assist the report writer.

196. When a case is adjourned for sentence, usually but not invariably for a PSR, the court should make comments designed to assist the report writer, possibly identifying any particular areas that need to be explored. Difficulties have arisen where such comments have been seen by the defendant as an implied promise of a particular type of sentence.

197. Where a court adjourning for a PSR fails to warn an offender that all sentencing options remain open, a legitimate expectation may be created in the mind of the offender that a non-custodial sentence (or a sentence within the power of a magistrates' court) may be imposed by the sentencing court.[190] In those circumstances, appeals have been upheld where a more severe sentence has been imposed.[191] This case law on 'implied promises' has caused practical difficulties and has resulted in some benches being reluctant to give any guidance to the report writer, which is regrettable. The Panel believes it is important that sentencers should be able to assist report writers in providing all relevant information by giving a provisional assessment of offence seriousness that is, nevertheless, not binding on the sentencing court once all the available information is before it.

198. In its consultation paper, the Panel suggested that it might assist in many cases if a court could give a non-binding indication of its assessment of the seriousness of the offence. It was noted that this approach might be more justifiable with the increase in circumstances in which an offender may seek a *binding* indication of the court before entering a plea – see *Goodyear*[192] for proceedings in the Crown Court and the proposed amendments to the allocation proceedings in magistrates' courts.[193]

199. The overwhelming majority of those responding to the Panel's consultation paper agreed with the proposal that a court should be enabled to give a non-binding indication of its assessment of the seriousness of a case when adjourning after conviction but prior to sentence, provided a court makes a very clear statement as to whether or not all options remain open to the sentencing court. The Panel recommends that comments made at the adjournment stage should be viewed as provisional and not binding on the sentencing bench. As a matter of good practice, a court should remind a defendant of the effect of the indication but a failure to do so should not invalidate its provisional nature.

Recommendation 16
Comments made by the court when adjourning a case for sentence should be regarded as provisional; as a matter of good practice, the adjourning court should make it clear that all options remain open to the sentencing court.

[190] *Gillam* (1980) 2 Cr App R (S) 267

[191] see, for example, *R v Inner London Crown Court, ex p. Mentesh*, [2001] 1 Cr App R (S) 94

[192] [2005] EWCA Crim 888

[193] Magistrates' Courts Act 1980, ss.20 and 20A, as substituted by Criminal Justice Act 2003, sched.3, para. 6 when in force

Multiple offending

200. Where an offender is convicted of two or more offences and the court imposes a separate custodial sentence in relation to each, it must determine whether the sentences imposed should run concurrently or consecutively.[194]

Concurrent sentences

201. Where separate offences arise out of the same incident, the generally accepted principle is that the sentences should run concurrently. Where concurrent sentences are imposed for offences of varying gravity, the individual sentences should be commensurate with the seriousness of the individual offences for which they are imposed;[195] thus the sentence to be served will be that for the most serious of the offences committed.

Consecutive sentences

202. When offences arise out of separate incidents, the generally accepted practice is to impose consecutive sentences, with each sentence being commensurate with the seriousness of the individual conviction offence. Where the offences are of a different nature or where there is a marked variation in the level of seriousness, the court may impose consecutive sentences or a mixture of concurrent and consecutive sentences. When imposing sentences to run consecutively, care must be taken to ensure that the overall sentence remains proportionate to the seriousness of the cumulative offending behaviour.

The totality principle

203. The determination of the length of concurrent or consecutive sentences is governed by section 153(2) of the 2003 Act, which requires that any discretionary custodial sentence must be for the shortest term (not exceeding the permitted maximum) that is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.

204. This calculation also may need to include any number of offences that the offender asks the court to take into account at the point of sentence. The Panel has previously consulted[196] on the degree to which offences taken into consideration should affect the sentence imposed for the conviction offence; a separate advice on this topic is submitted herewith for incorporation into the *Overarching Principles* guideline.[197]

205. When imposing consecutive sentences, the court must calculate the sum of the individual sentences and consider whether this aggregate is just and appropriate in all the given circumstances. If the court considers that the combined term is out of proportion to the totality of the offending behaviour, it should be reduced to a sentence that is proportionate. The generally accepted principle is that the reduction should be effected by ordering the sentences to be served concurrently rather than by passing a series of shorter consecutive sentences.[198]

[194] where an offender is being sentenced in accordance with the 'dangerous offender' provisions, particular issues arise depending on the sentences to be imposed: see *Dangerous Offenders: Guide for Sentencers and Practitioners*, www.sentencing-guidelines.gov.uk

[195] *R v Smith*, unreported, February 13, 1975

[196] *Offences Taken into Consideration*, February 2007, www.sentencing-guidelines.gov.uk

[197] in *R v Lavery* [2008] EWCA Crim 2499, the Court reinforced one of the key principles in the Panel's advice, namely that it is bad practice to take offences into consideration which are more serious than the offence in the indictment

[198] *R v Simpson*, unreported, February 1, 1972

206. Although the totality principle is widely recognised and is preserved by the Criminal Justice Act 2003,[199] there is nothing in statute or anywhere else to guide sentencers on assessing whether the overall sentence for multiple offences is proportionate or how to adjust a disposal to ensure that the sentence remains commensurate with the seriousness of the totality of offending.

207. In its consultation paper, the Panel asked whether it might be possible to define a formula to assist the courts when considering whether a sentence is proportionate to the totality of the offending behaviour. Of those who responded to this question, the majority considered there would be no approach that would be helpful given the variety of circumstances in which the totality principle needs to be applied. Some respondents suggested that a provisional sentence should be determined for the most serious offence and that the lesser offences should be treated as aggravating factors; the Panel does not consider that this approach would assist in any significant way, as the level of aggravation, i.e. the degree to which the provisional sentence would need to be increased, would still need to be determined.

Time spent on remand

208. The Criminal Justice Act 2003 provides that time spent on remand in custody (or, in certain circumstances, on bail subject to curfew and electronic monitoring) normally will be set off against any custodial sentence imposed on an adult.[200] The court must make a direction to that effect – without a specific direction, no deduction can be made.[201] The court may disallow part or all of the period spent on remand only where the remand comes within circumstances prescribed by rules (which seek to avoid double counting)[202] or the court considers it just not to make such an allowance. The court must give reasons whenever it decides not to issue a direction or if it decides that the sentence should be reduced by a period shorter than that for which the offender was remanded in custody. Guidance on calculating reductions for time on remand is currently provided in the *New Sentences* guideline;[203] this continues to apply to the revised rules governing release and should be reproduced in the new guideline. In the light of the potential for information about the qualifying period to be incomplete when a court imposes sentence, a recommended form of wording has been provided which makes it clear whether or not the court was providing for the whole period to be allowed.

209. The Panel suggested in its consultation paper that a guideline could helpfully cover the circumstances in which it might be appropriate for a court not to allow full credit for time spent on remand. The existing guideline states: "The court should seek to give credit for time spent on remand (in custody or equivalent status) in all cases". Credit should only be denied if it is not justified, would not be practical or would not be in the best

[199] s.166(3)(b)

[200] s.240 and s.240A

[201] section 67 of the Criminal Justice Act 1967 continues to apply to sentences of imprisonment imposed in respect of offences committed before 4 April 2005 so that time spent in custody on remand is automatically deducted from the sentence; no order by the court is required

[202] e.g. *Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005* SI.2005/2054

[203] *New Sentences: Criminal Justice Act 2003*, p.12, December 2004, www.sentencing-guidelines.gov.uk

interests of the offender. The implication is that it will be rare for full credit not to be given save in those situations covered by rules. In response to suggestions raised by those responding to its consultation paper, the Panel recommends that the new guideline should include a clear statement about the need to avoid double-counting.

210. Where a court is imposing a custodial sentence following breach of a community order or suspended sentence order and the offender has been subject to a qualifying remand prior to the imposition of that order for which credit would have been given if a custodial sentence had been imposed at that time, there is the same presumption that this period should be taken into account when re-sentencing.[204]

211. Other circumstances in which difficulties arise tend to be the practical ones of ascertaining with confidence the number of days to be taken into account. The extension of the credit to time on bail subject to a curfew does not appear to raise any different issues and it appears appropriate that there should continue to be a strong presumption in favour of the credit being allowed in full. The majority of those responding to the consultation agreed that this should be the generally accepted principle.

212. Some respondents suggested that credit should be withheld where a defendant spins out an unmeritorious not guilty plea or deliberately and pointlessly extends court proceedings in some other way. However, in *R v Vaughan*,[205] the Court of Appeal stated that the fact that the defendant was continuing, on remand, to maintain a denial or non-admission of guilt is not a factor that can amount to sufficient justification for directing that the period spent in custody on remand should not count towards sentence. A number of other respondents suggested that credit should be withheld where the defendant was held on remand in custody following a failure to comply with bail conditions; however, Parliament has not provided for a custodial sentence to be imposed following failure to comply with the terms of a remand on bail and the Panel does not consider it to be appropriate for a court effectively to impose such a sentence by means of the refusal of credit for the time on remand in custody following such a failure.

Recommendation 17
There should be a strong presumption in favour of credit being allowed in full for time spent on remand prior to sentence.

Recommendation 18
If a defendant was held on remand in custody after failing to comply with bail conditions and a custodial sentence is subsequently imposed, that failure should not normally be grounds for refusal to allow credit for the time spent in custody or on bail subject to the qualifying conditions.

Ancillary orders

213. The Panel's consultation paper included a brief discussion about the impact of ancillary orders on sentence. The key principles, which were not challenged by any of those responding to the consultation, are reproduced in the recommendation below – the only change from the proposals is to omit confiscation orders; although such an order would

[204] *Stickley* [2007] EWCA Crim 3184
[205] [2008] EWCA Crim 1258

normally be regarded as punitive,[206] the extent to which the order may affect sentence is restricted by statute.[207]

Recommendation 19

The following ancillary orders are primarily intended to have a punitive effect on an offender and should be taken into account when assessing whether the provisional sentence is commensurate with the seriousness of the offence:

- *Deprivation orders, except where the property identified in the order can be used only for the purposes of crime*
- *Disqualification from holding a driving licence**

** only if the order is imposed under the general provisions in section 146 of the Powers of Criminal Courts (Sentencing) Act 2000.*

The following ancillary orders are primarily intended to protect the public from the risk of harm from further offending and should not influence the choice of sentence:

- *Anti-social behaviour order*
- *Banning order*
- *Binding over order*
- *Disqualification from working with children or vulnerable adults*
- *Disqualification from driving*
- *Disqualification from acting as a company director*
- *Deprivation order where the property identified in the order can be used only for the purposes of crime*
- *Exclusion order (licensed premises)*
- *Financial reporting order*
- *Forfeiture order*
- *Parenting order*
- *Restraining order*
- *Sexual offences prevention order*
- *Travel restriction order*

The following ancillary orders are primarily reparative and should not influence the choice of sentence:

- *Compensation order**
- *Reparation order*
- *Restitution order*

** except that a compensation order must take priority over a fine[208] and, where an offender has freed assets in order to be able to pay compensation, this may be regarded as offender mitigation.*

[206] see, for example, *Welch v United Kingdom* 20 EHRR 247

[207] Proceeds of Crime Act 2002, s.13

[208] s.130(12)

SECTION THREE: WOMEN OFFENDERS AND OTHER EQUALITY AND HUMAN RIGHTS ISSUES

General

214. In line with the approach set out in the Panel's statement of intention on diversity issues,[209] the Panel carried out an initial consultation with selected groups to make sure that any known or suspected diversity issues were covered in its consultation paper; we also included a question in this regard. No new issues were identified by respondents; we are satisfied that existing Council guidelines take account of any general diversity issues and that the principle of offender mitigation will address any specific concerns raised in connection with individual offenders. The particular issues relating to the sentencing of women offenders, which some respondents highlighted as potentially resulting in discrimination or unfair treatment, are covered below.

Women offenders

215. Particular issues relating to women offenders have been the subject of much debate in recent years[210] and the government has recently published the findings of a research study into the particular characteristics and needs of women offenders.[211] In addition, an independent review sponsored by the government has culminated in the publication of a final report about the courts and sentencing.[212] The report makes a large number of recommendations about the criminal justice system as a whole and the Panel notes that the government has responded positively to the work of the Commission on Women and the Criminal Justice system by setting up a cross-departmental Criminal Justice Women's Unit and commencing a number of initiatives designed to address perceived inequalities and improve the effectiveness of criminal justice interventions for women offenders.

216. In an article published in *Home Affairs* magazine last year,[213] Maria Eagle, the Ministerial Champion for Women in the Criminal Justice System, stated that the government is determined to do all it can "*to make our criminal justice system properly responsive to the needs and characteristics of women, to challenge existing ways of working and to identify new and more innovative ways to deliver services and interventions for women*". The reproduction below of much the research and data from the Panel's consultation paper is intended to set in context the need for the recommendations being made by the Panel in this advice.

[209] www.sentencing-guidelines.gov.uk

[210] see, for example, *Gender, Crime and Criminal Justice*, Walklate, S., Willan Publishing, 2004; *Gendered (In)Justice: Theory and Practice in Feminist Criminology*, Schram, P.J., and Koons-Witt, B., Waveland Press, 2004; *Gender and Crimes: Patterns of Victimization and Offending*, Heimer, K. (ed) and Kruttschnitt, C. (ed) NYU Press, 2005; *Gender and Justice: New Concepts and Approaches*, Heidensohn, F. (ed), Willan Publishing, 2006; *Women and Justice: Third Annual Review of the Commission on Women and the Criminal Justice System*, Fawcett Society, July 2007; *Working together to reduce re-offending: Women's offending reduction programme, 2006 Review of Progress*, National Offender Management Service; *Priorities for the Ministers for Women*, Cm. 7183, House of Commons Library, July 2007

[211] *Short Study on Women Offenders*, Cabinet Office Social Exclusion Task Force and Ministry of Justice, May 2009

[212] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009

[213] public service review: issue 18

217. The Panel has been careful always to identify any diversity issues, including those relating to women offenders, when producing advice in relation to specific offences[214] but this latest consultation paper discussed some of the overarching concerns about women offenders; it also made a number of proposals with a view to setting out in one place a coherent set of general principles relating to the sentencing of women. Some of those who responded to the consultation were critical of the suggestion that separate principles are needed for male and female offenders and considered that this, in itself, would be discriminatory. Many of the issues of concern in relation to women revolve around matters of offender mitigation, which sentencers should be able to take into account at the point of sentence, and these might be present in relation to both male and female offenders. The majority of the Panel's recommendations in this advice are gender neutral and, where an individual offender has particular vulnerabilities, the sentencing court should be able to take account of these through consideration of offender mitigation factors.

218. However, it is recognised that many women offenders are particularly vulnerable and that sentencing them within a criminal justice system that primarily has been developed to deal with the majority of offenders, who are male, may sometimes result in unfair treatment and outcomes. The Panel, therefore, considers that it is appropriate to recommend a number of principles relating to the way in which the approach to sentencing, whilst remaining faithful to generic values, may need to be slightly adjusted to allow for the particular vulnerabilities of women offenders.

Women offenders in general

219. Adult women commit far less crime than men;[215] although women represent roughly 50% of the general population, they do not commit anywhere near 50% of the crimes; in 2006/07 for example, men were five times more likely than women to be arrested for committing a criminal offence.[216] As at April 2009, women represented only 3.7% of the prison population and 3.9% of offenders under sentence.[217]

220. However, there has been a general upward trend in the number of women (aged 18 and above) sentenced for all offences in all courts in recent years. In 2007, a total of 289,500 were sentenced compared with 258,600 in 2002, an increase of 12% compared with a decrease for men of 3%.[218]

221. The number of women in prison also has risen proportionately more sharply than the number of men; between 1997 and 2007 the female population rose by 60%.[219] Between 1992 and 2002, the number of women coming before the courts for sentence increased by only 1.1%.[220] During this time, there was a five-fold increase in the number of women sentenced to custody in a magistrates' court

[214] for example, specific factors were identified in our work on manslaughter by reason of provocation and domestic violence – *Manslaughter by Reason of Provocation*, November 2005 and *Overarching Principles: Domestic Violence*, December 2006, www.sentencing-guidelines.gov.uk

[215] see, for example, *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009, p.viii

[216] ibid.

[217] *Population in custody monthly tables April 2009 England and Wales*, Ministry of Justice Statistics bulletin, 29 May 2009

[218] *Statistics on Women and the Criminal Justice System, A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991*, Ministry of Justice, January 2009

[219] *Offender Management Caseload Statistics 2007*

[220] Sentencing Statistics, Ministry of Justice

and a two-fold increase in the Crown Court, with a woman convicted of theft or handling stolen goods in the Crown Court at the end of the period being twice as likely to go to prison as she was at the beginning; over the same period, custodial sentences for male offenders tripled in magistrates' courts and doubled at the Crown Court.[221] The prison population does now appear to have begun to stabilise, however; the rate of increase slowed in 2004 and 2005 and the female prison population fell by 1% in 2006 (the first decrease since 1992[222]) and by 4% in 2007.[223]

[221] *Justice and Equality: Second Annual Review of the Commission on Women and the Criminal Justice System*, Fawcett Society, 2006

[222] *Offender Management Caseload Statistics 2006*, Ministry of Justice, December 2007

[223] *Offender Management Caseload Statistics 2007*, Ministry of Justice, October 2008

222. Also, as can be seen from Table 1 below, current sentencing practice shows that, for indictable offences, women are more likely than their male counterparts to be given a discharge, a community order or an SSO (marginally) and are less likely to be given a fine or a custodial sentence. In addition, women are more likely to be cautioned than men.[224]

[224] *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009 at p.83

Table 1

Indictable Offences

Types of disposal imposed for adult offenders in all courts in 2007[225]

Sentence type	Women		Men		All	
	No.	%	No.	%	No.	%
Absolute or conditional discharge	9,010	24	29,979	14	38,989	15
Fine	5,196	14	39,637	18	44,833	18
Community order	11,483	30	55, 010	26	66,493	26
Custody	6,223	16	61,372	28	67,595	27
Suspended sentence	4309	11	22,072	10	26,381	10
Other	1543	5	9,492	4	11,035	4
Total	37,764	100	217,562	100	255,326	100

[225] taken from *Criminal Statistics England and Wales, Supplementary tables 2007* vol.5, OCJR, November 2008

223. The largest proportion of offences committed by women are acquisitive crimes; over the last ten years, on average 36% of female offenders have been sentenced for theft and handling offences and more women were sent to prison for theft and handling stolen goods in 2007 (31%)[226] than for any other crime. Sentences for theft and handling offences also accounted for the largest (27%) of all commencements of community sentences by women in 2007.[227]

224. In addition, between 2000 and 2007, on average around 18% of women coming before the courts had no previous convictions. This compares with a figure of 11% for men.[228] The fact that the crimes committed by women are largely non-violent and mainly at the lower end of the seriousness scale has led observers to question the use of short custodial sentences for women offenders,[229] especially as there are serious doubts about their effectiveness.[230]

225. The perception that courts are reluctant to impose fines on women offenders, largely because many have no independent income and could be fined only at a relatively low level,[231] has raised concern that women are being sentenced more harshly than men (see the later discussion from para. 229 onwards). Concern has been further heightened by the fact that offender mitigation tends to feature more strongly in the profile of women offenders (when recommending that community sentences should be 'the norm', the Corston report suggested they should be designed to take account of women's needs, vulnerabilities and domestic responsibilities)[232] and the fact that they are likely to suffer disproportionately from imprisonment. It is widely reported that women offenders tend to be less well educated,[233] poorer than their male counterparts, have a greater tendency to self-harm[234] and have more mental health problems.[235] These characteristics are discussed in more detail in the paragraphs that follow.

226 *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009, p.83

227 ibid.

228 provided by OMS, Analytical Services, Ministry of Justice

229 the majority of women serve very short sentences. In 2007, 63% were sentenced to custody for six months or less (*Short Study on Women Offenders*, p.8, Cabinet Office and Ministry of Justice, May 2009)

230 64% of women released from prison in 2004 re-offended within two years (*Re-offending of adults: results from the 2004 cohort*, Home Office, 2007). See also *Short Study on Women Offenders*, p.20, Cabinet Office and Ministry of Justice, May 2009

231 in 2007, where a fine was proposed to magistrates by the Probation Service, 57% of the sentences imposed were fines but 24% were community orders and 4% SSOs – Concordance data taken from monthly court reports data for female offenders, December 2007 (*Short Study on Women Offenders*, p.22, Cabinet Office and Ministry of Justice, May 2009). But see also the further discussion at para. 256 onwards below)

232 concerns are often raised about the difficulties faced by women attempting to comply with community order requirements when they often have little or no support from relatives or friends in the community (see later discussion)

233 in 2002, the Social Exclusion Unit found that 33% of the sentenced female population had been excluded from school, with 71% claiming to have no educational qualifications (*Short Study on Women Offenders*, p.15, Cabinet Office and Ministry of Justice, May 2009)

234 in 2006/07, 19% of women had attempted suicide during the year before custody, nearly three times the rate reported for men and, in 2008, around five times as many women compared with men (333 per 100,000 prisoners as compared with 62 per 100,000) self-harmed in custody (*Short Study on Women Offenders*, p.12, Cabinet Office and Ministry of Justice, May 2009)

235 many women in prison have chronic psychiatric needs – around three quarters suffer from two or more mental disorders – *Justice and Equality: Second Annual Review of the Commission on Women and the Criminal Justice System*, Fawcett Society, 2006

226. A MORI poll commissioned by the Fawcett Society in 2004[236] revealed that a majority of the public favours a wider use of community sentences to deal with the growth in the number of women in prison; a UK-wide survey carried out for the prison reform association *SmartJustice* in 2007 confirmed this finding, showing that 86% of respondents support community alternatives to prison for women offenders[237] and that two thirds believe that prison is unlikely to reduce re-offending.[238] These findings have been replicated in an ICM survey carried out for the Ministry of Justice in July 2008, which also reported that "73% of the public do not think that mothers, particularly those of young children, who commit non-violent crime should be locked up", and that "77% also thought that it would be more effective for female drug addicts who commit non-violent crimes like shoplifting to undergo drug rehabilitation treatment as well as doing compulsory work, rather than being sent to jail."[239]

227. The Panel's independent survey of a representative sample of the public revealed that, when considering two particular case scenarios involving male and female offenders, the public was just slightly more inclined to support the use of community sentences for women than for men, although it was notable that one of the factors widely accepted as justifying a non-custodial sentence – the fact that an offender is the sole or primary carer of children – had the same impact whether the offender was male or female.

228. One of the recommendations in the *Engendering Justice* report reinforces the proposal made in the Panel's consultation paper (see the further discussion at para. 240 below) that a pre-sentence report (PSR) always should be obtained before sentencing a woman to custody and adds that the PSR should include community sentence options for non-violent offences and an assessment of the impact of incarceration on any dependants.[240]

Sentencing of women

229. Under the Equality Act 2006 there is a duty to eliminate gender discrimination and to promote equality. Thus, the same principles should apply to women and men; how those principles apply, however, may vary since it is well recognised (as discussed above) that women offenders have a different profile. A report by the Centre for Crime and Justice Studies in 2008[241] noted that women have multiple problems and a range of social needs that differ in their make-up and severity from those of men. The joint report by the Cabinet office and Ministry of Justice published in 2009 also reports the multiple and wide ranging needs of women offenders.[242]

[236] Fawcett Society press release – polling on women and prison – March 2004

[237] www.smartjustice.org/Pr26nov.html

[238] in *Unlocking Value: How we all benefit from investing in alternatives to prison for women offenders*; www.neweconomics.org, it was suggested that there are huge benefits from investing in alternatives to prison and that support-focused alternatives that deal with the underlying causes of women's offending could be more effective than prison sentences in helping them to lead law-abiding lives

[239] www.justice.gov.uk

[240] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009, p.102

[241] *The Use of the Community Order and the Suspended Sentence Order for Women*, Patel, S., and Stanley, S., Centre for Crime and Justice Studies, May 2008

[242] *Short Study on Women Offenders*, pp.10–11, Cabinet Office and Ministry of Justice, May 2009

230. In principle, many of these issues should be addressed through broader social policy and through diversion projects operating both outside and within the criminal justice system. The Panel agrees with the conclusion in Baroness Corston's report that a separate sentencing framework for women is not required[243] but that guidance is needed in respect of women offenders who come to court for sentence and there are a number of concerns relating to the imprisonment of women offenders that need to be taken into account by the court when deciding whether a custodial sentence is absolutely necessary.

231. Sentencing guidelines are based on a first time offender (male or female) pleading not guilty. As a higher proportion of women than men are first time offenders (see para. 224 above), their sentences are not subject to the enhancement of sentence that results when previous convictions are present; a higher proportion of women than men also plead guilty. In addition, as already mentioned, mitigation is likely to play a greater part in the sentencing of women offenders. It follows that the current position of applying the same general sentencing principles to male and female offenders should mean that, when sentencing women, the courts are already likely to consider a provisional sentence starting point below that indicated in offence guidelines or a sentence below that indicated in the range, simply by virtue of their particular range of common characteristics.

232. This does not discriminate against male offenders; mitigating factors and offender mitigation are not the sole preserve of women and where they apply equally to men they should have a similar impact. Male and female offenders should not be sentenced on the basis of their gender but in light of the offence committed and according to their own personal circumstances. However, experience demonstrates that mitigating factors and/or offender mitigation are likely to be present more often, to a higher degree or in a more serious form where the offender is a woman.

233. Some of the differences between male and female offenders can be taken into account through the availability of generic mitigating factors relating to low culpability (as a result of mental illness for example) or playing a minor role in an offence. As far as offender mitigation is concerned, women are more likely than men to have sole or primary care responsibilities for dependent children[244] or other relatives or to be caring for seriously ill family members. Incarceration of a woman offender is likely to result in children having to be cared for by other relatives or placed in voluntary foster care[245] and elderly dependants may need to be placed in care homes, often at significant social and financial cost to the community.

[243] *A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007 – on p.53, at 5.18, the report notes "this is not the time to recommend the introduction gender specific sentencing laws; this is for the future" although the Panel's view is that this would never be appropriate

[244] 66% of women prisoners are mothers with dependent children under 18 – *Bromley Briefings Prison Factfile*, p.20, Prison Reform Trust, November 2009; more than half have a child under 16 and more than a third have a child under the age of five – Ministry of Justice press release, 12 June 2008

[245] 17,700 children a year are separated from their mothers by imprisonment and only 5% of women prisoners' children remain in their own home once their mother has been sentenced – *Bromley Briefings Prison Factfile*, p.16, Prison Reform Trust, November 2006; the *Short Study on Women Offenders*, Cabinet Office and Ministry of Justice, May 2009, also cites various research studies into the wider impact on children of parental imprisonment (p.19)

234. Many women are also far more likely to have suffered in the past or to continue to suffer from physical, sexual or mental abuse[246] – behaviour that may perpetuate abuse suffered as a child; in some cases, a woman's offending behaviour may be instigated or controlled by an abusive partner.[247] Although there may not be a direct causal link between victimisation and crime, a more constructive response to offending, based on an appreciation of the impact of victimisation on a woman's circumstances and behaviour, may be justified.

235. Like their male counterparts, women offenders tend to suffer from poor general and physical health (with many seeing a doctor or dentist for the first time in their lives whilst on remand) but a higher percentage of women than men suffer from mental health problems.[248] Women in custody are five times more likely to have mental health problems than women in the general population and up to 80% of women in prison have diagnosable mental health problems.[249] In addition, around 70% of women coming into custody have an addiction and require clinical detoxification (as compared with 50% of men).[250]

236. Women are more likely than men to be held on remand pending trial, largely because insufficient information is readily available to the courts and they are quickly assessed as being at risk of harm and/or risk of further offending because of mental health problems, substance abuse, unemployment, unstable accommodation, domestic abuse, an unsupportive family or their criminal associates.[251] Of those held in custody on remand, approximately 20% are subsequently acquitted or have the proceedings terminated and over 40% receive a non-custodial sentence; of those who are given a short custodial sentence Baroness Corston said "*Prison …is not the place for respite, for access to services which should be available in the community and nor should it become a home for these very unfortunate women who simply have nowhere else to go*".[252] The report noted the finding of the Chief Inspector of Prisons that "*prison is being use to contain (literally), usually for short but repeat periods, those for whom there is no proper provision outside prison, or who have already been excluded from society*". One of the specific recommendations is that "*Women must never be sent to prison for their own good, to teach them a lesson, for their own safety or to access services such as detoxification*".[253]

[246] over half of women in prison have experienced domestic violence, compared to a quarter of women in the general population and a third have experienced sexual abuse – *Reducing re-offending by ex-prisoners*, Social Exclusion Unit, 2002, p.138; see also *Short Study on Women Offenders*, p.13, Cabinet Office and Ministry of Justice, May 2009

[247] see *When Victims Become Offenders: In Search of Coherence in Policy and Practice*, Rumgay, J., Fawcett Gender and Justice Policy Network, 2004

[248] 40% of women in prison have received help for a mental or emotional problem in the year prior to custody – *Justice and Equality: Second Annual Review of the Commission on Women and the Criminal Justice System*, Fawcett Society, 2006; see also *Justice for Women and the Need for Reform*, Wedderburn, J., Prison Reform Trust, 2000

[249] *Short Study on Women Offenders*, p.12, Cabinet Office and Ministry of Justice, May 2009

[250] two-thirds of women are drug dependent or report harmful levels of drinking in the year prior to custody – *Justice and Equality: Second Annual Review of the Commission on Women and the Criminal Justice System*, Fawcett Society, 2006

[251] *Lacking Conviction: The rise of the women's remand population*, Edgar, K., Prison Reform Trust, 2004

[252] *A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007, p.57

[253] ibid., p.58

237. Two of the recommendations in the *Engendering Justice* report are that "*Adequate and robust alternatives to remand must be made available to the judiciary…*" and "*If women are unavoidably placed on remand, this time should also be used to properly inform the sentencing process through a complementary assessment of the needs of each individual woman*". [254]In this regard, it is encouraging to note that the report records that the percentage of the all women held on remand has decreased from two thirds to one fifth between March 2004 and March 2009.[255]

238. The Panel is aware that a new conditional caution for women was launched in August 2008 to be piloted by the Together Women Project in Leeds, Bradford and Liverpool. The main purpose of the project was said to be to "*head off at the pass women at the outset of a life of court appearances*".[256] The Ministry of Justice is currently reviewing the success of these pilots.

239. By way of conclusion, it is unfair to seek to address any perceived shortfall in the provision of services for women in the community by unnecessarily holding them on remand, or by imposing custodial sentences within which it is hoped that suitable interventions might be provided when this is not commensurate with the seriousness of an offence, and such an approach must be avoided.

[254] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009, p.102

[255] ibid., p.16

[256] Vera Baird QC, MP, Justice of the Peace, volume 172, 30 August 2008

Women and prison sentences

240. When considering whether imprisonment is the most appropriate option, there are a number of factors particularly pertinent to women that should be taken into account by the court. First, as the number of women's prisons is small, those in custody are located much further away from their homes than their male counterparts; this will limit family visits and increase the chance of family breakdown and mental depression and isolation for the offender.[257] As already mentioned, women are also less likely than men to have a partner in the community to look after their families and/or home[258] whilst they are in prison; consequently, they are at greater risk of losing both.[259]

241. The needs of women released from prison are likely to be complex – "*many women would benefit from community services that include both psychological therapy directed towards personal development and practical assistance aimed at improving social and economic prospects in order to redeem the life chances that were lost because of victimisation*".[260]

242. It is also widely recognised that women offenders are more likely (16% of the female

[257] one example of an attempt to address such issues is the Stepping Stones project being run at HMP Downview; this provides accommodation just outside the prison gates where offenders can spend time with their children outside the prison environment in an attempt to rebuild their relationships

[258] *Resettlement outcomes on release from prison*, Niven, S., and Stewart, D., Home Office, 2005

[259] nearly 40% of women prisoners lose their homes while in prison (ibid.) and 80% of women lose the support of their partner (*A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007, p.20)

[260] *When Victims Become Offenders: In Search of Coherence in Policy and Practice*, Rumgay, J., Fawcett Gender and Justice Policy Network, 2004

prison population) than men (3%) to self-harm[261] and their self-harming behaviour is more persistent.[262] The *Engendering Justice* report notes that self-harm among women in custody has increased by 48% between 2003 and 2007 and that women commit around 50% of self-harm incidents although they represent only 5% of the total prison population.[263] Furthermore, women offenders are much more likely than male offenders to try to take their own lives; in the community, men are proportionately more likely to commit suicide but it seems that this trend is reversed in prison and that women find it much harder to adjust to being in prison than men.

243. 40% of women (compared with 20% of men) entering custody say that they have previously attempted suicide[264] and the number of women who have committed suicide in custody in recent years is alarming.[265] The Howard League for Penal Reform has reported[266] that the effects of imprisonment, especially for first time offenders, are greatest during the early stages of custody,[267] with the lack of suitable care heightening the risk of self-harm and suicide; it has called for better procedures for managing new inmates and 'first night custody centres' in all prisons.[268] It is also reported that women recently released from prison are 36 times more likely than the general population to commit suicide whereas men are eight times more likely to do so.[269]

244. In this regard, the Panel notes that, in response to a recommendation in the Corston report, the government is currently piloting a *Women Awareness Staff Programme* at Send prison, to ensure that prison regimes and provision "are appropriate and responsive to women's needs". The training course includes modules on the background to women's offending, female behaviour in custody, conflict resolution and self-harm and abuse.

Recommendation 20

The statutory requirement that a custodial sentence must not be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified has a special force in relation to women offenders because of the multiple harms that are likely to result from incarceration.

245. Whenever a court is asked to consider offender mitigation, and especially where the matters put forward are significant, a Pre-Sentence Report (PSR) can be obtained. Section 156(4) of the 2003 Act allows a court to dispense with a PSR if it is "of the opinion that it is unnecessary" but the Panel believes it will always be of vital importance when sentencing

[261] more than half of all reported incidents of self-harm occur in the female estate, despite the fact that less than 6% of the prison population is female (*Reducing re-offending by ex-prisoners*, Social Exclusion Unit, 2002)

[262] in the last five years, women deliberately mutilated themselves 50,000 times in prison – Frances Crook, Director, Howard League for Penal Reform, *The Guardian*, 11 April 2008

[263] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009, p.8

[264] Frances Crook, Director, Howard League for Penal Reform, *The Guardian*, 11 April 2008

[265] 70 between 1998 and June 2007 (press release 13 June 2007, Howard League for Penal Reform)

[266] *Care, Concern and Carpets*, June 2006

[267] about 30% of female prisoner suicides take place within the first month (ibid.)

[268] see also *Preventing Suicide and Other Self Harm in Prison*, Dear, G., (ed), Palgrave and MacMillan, 2006; in this regard, it is of note that a 'First Night in Custody Scheme' introduced in 2000 by the Prison and Advice Care Trust for women entering Holloway Prison was so successful that it has since been extended to other prisons

[269] *Suicide in recently released prisoners: a population-based cohort study*, Pratt, Appleby, L., Webb, R., Shaw, J., *The Lancet*, Vol. 368, Issue 9530, 8 July 2006, pp.119–123

an offence that lies around the community/custody threshold, in order that a thorough and objective assessment of the offender's particular vulnerabilities can be made. In so far as it is possible, there should be a presumption that such a report will be obtained while the woman is on bail in the community, so as to avoid holding her on remand for an offence for which a custodial sentence is most unlikely to be imposed. Where the court concludes that it is necessary to hold the woman on remand pending the preparation of the PSR, it must try to ensure that the time spent on remand does not extend the time likely to be spent in custody as a result of the sentence.

Recommendation 21

A court always must obtain a PSR before sentencing a woman offender to custody; wherever possible, the defendant should be granted bail whilst the PSR is being prepared.

Women and community sentences

246. In the decade since 1996, the number of women starting community sentences rose by 22%,[270] with the flexibility of the order potentially making it an attractive disposal for sentencers aware of the damage that can be caused by a custodial sentence.[271] There also is emerging evidence to suggest that the use of community sentences for women can reduce re-offending rates.[272] Whilst only one in ten female offenders (all courts) received this disposal in 2007,[273] almost one in three received this disposal for indictable offences; the lower proportion for summary offences is attributable, at least in part, to the proportionately greater use of conditional discharge and fines than for male offenders.

247. When considering the circumstances in which a non-custodial sentence would be more appropriate than custody for a woman offender, it is interesting to note that concerns are often raised about the suitability of community interventions for women offenders and the lack of support available to help them successfully complete a community sentence (but see the further discussion on breach rates in para. 250 below). Reflecting the much higher proportion of men in the offending population, most community interventions have been developed to address men's offending with the outcome that the distinctive features of women's offending are not fully addressed by the interventions available. Although the number of high risk offenders under Probation supervision is in the region of 15%–20% of the total caseload, the current emphasis on risk-driven practice has led to concerns that women, often assessed as presenting a lower risk than male offenders, will not receive adequate and appropriate attention and support from the Probation Service. It has been asserted that there is a lack of women-specific community provision and work placement opportunities which, in turn, increases the pressure on women offenders as they sometimes have to travel long distances

[270] *The Use of the Community Order and the Suspended Sentence Order for Women*, Patel, S., and Stanley, S., Centre for Crime and Justice Studies, May 2008

[271] 78% of community sentences proposed to magistrates by probation officers in 2007 were handed down by sentencers (Concordance data taken from monthly court reports data for female offenders, December 2007)

[272] 32.5% of female offenders commencing a community order re-offended in one year, compared with 45% of female offenders discharged from prison (*Reoffending of adults: Results from the 2006 cohort*, Ministry of Justice 2008)

[273] the community sentence rate for women was 10.6 % (for all crimes) compared to 14.8% for men (*Sentencing Statistics 2007*, Ministry of Justice 2008)

to complete their requirements.[274] Alternatives include work in mixed groups or single placements with individual organisations in local communities but these are dependent on the suitability for the offender.

248. The Fawcett Society has suggested that more research is needed into the needs of women on community sentences and into whether the current range of requirements meet these needs.[275] The *Corston* report endorsed the earlier findings of Lord Coulsfield[276] that community programmes should "*reflect the realities of women's needs in relation to childcare, school holidays and so on*" and recommended that "*community sentences must be designed to take account of women's particular vulnerabilities and domestic and childcare commitments*".[277]

249. The Centre for Crime and Justice Studies suggests that the new community order introduced by the CJA 2003 offers courts and the Probation Service the opportunity to create sentences that are more innovative and more responsive to the circumstances of the offender and so, potentially more effective, but reports that there is little evidence of this happening in practice.[278] For community orders made in 2006, OASYs analysis showed that 76% (8,978) of women offenders had two or more needs.[279] However, the majority (48%) of women were given only a single requirement; only 38% were given two requirements, 12% three requirements and 2% four requirements. The most frequently used requirements were supervision (44% of all requirements) and unpaid work (24%), which can do little to treat underlying problems. Accredited programmes were imposed in only 12% of cases, drug treatment programmes in 9% and alcohol treatment programmes in only 1%.[280] It is suggested that community orders are not currently addressing the complexity of women's needs.[281] In addition, the majority (62%) of community orders imposed on women offenders in 2007 lasted only one year and 8% of women (as compared with 4% of men) were given orders lasting less than one year;[282] there are concerns that this is insufficient to address the entrenched and enduring nature of many women's problems.[283]

250. 2006 breach statistics[284] showed that less than half (41%) of all community orders were completed by women offenders (as compared with 39% for men) but the completion rate increased to 60% (as compared with 57%

[274] *Counterblast: women and criminal justice: saying it again and again and again*, Gelsthorpe, L., The Howard Journal 2006, 45(4), pp.421–424

[275] *Women and Justice: Third annual review of the Commission on Women and the Criminal Justice System*, July 2007

[276] *Crime, Courts and Confidence: report of an Independent Inquiry into Alternatives to Prison*, p.80, Esmée Fairbairn Foundation, 2004

[277] *A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007, p.58

[278] *The Use of the Community Order and the Suspended Sentence Order for Women*, Patel, S., and Stanley, S., Centre for Crime and Justice Studies, May 2008, p.37 and *Short Study on Women Offenders*, p.23, Cabinet Office and Ministry of Justice, May 2009

[279] *Short Study on Women Offenders*, p.23, Cabinet Office and Ministry of Justice, May 2009

[280] *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009

[281] *Short Study on Women Offenders*, p.23, Cabinet Office and Ministry of Justice, May 2009

[282] *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009

[283] *Short Study on Women Offenders,* p.23, Cabinet Office and Ministry of Justice, May 2009

[284] *Offender Management Caseload Statistics 2006*, Ministry of Justice, 2007

for men) in 2007.[285] In 2007, terminations were less likely to be for conviction for another offence (10% as compared with 12% for men) and much the same for failure to comply with requirements (21% as compared with 22%). The Centre for Crime and Justice Studies has previously suggested that the relatively high rate of failure to comply with requirements supported the concern expressed by Baroness Corston about the lack of flexibility when dealing with breaches[286] (her report noted that 50% of the new receptions at Holloway prison were for breach of a community order).[287] One of the recommendations in the *Engendering Justice* report was that "the restrictions placed on sentencers for breaches of community orders should be made more flexible as a matter of urgency".[288] The increase in 2007 in the number of women offenders completing a community sentence successfully, or having the sentence terminated for good progress, is encouraging.

251. The Fawcett Society has previously reported[289] that community provision for women is variable and geographically patchy; it is said to be generally inadequate with many probation areas failing to provide sentences sufficiently tailored to meet the needs of women offenders. The report suggested that specialist community provision is needed that addresses women's complex needs, including poverty and debt, abuse and domestic violence, addictions and housing and noted that there is "*evident capacity within voluntary sector projects already working with women to suggest that the National Offender Management Service may be able to utilise available expertise to commission provisions which is appropriate to women offenders' needs*". The report set out nine lessons that should be taken into account when providing for women offenders in the community; these include providing practical help with transport and childcare and taking an holistic and practical stance to help women address the social problems that may be linked to their offending. Two of the needs identified in the *Engendering Justice* report are long term funding for community provision and the development of a national network of women-only community-based centres with accommodation facilities for women and their children.[290]

252. The recent introduction of the Together Women programme, funded by the Home Office and the setting up of women specific community based services, such as the Asha centre in Worcester, the Calderdale Women's Centre in Halifax and the Together Women Project in Salford, all of which are networked into local services – have been hailed as a real step forward. However, as it will be some time before similar provisions become available in all areas, the sentencing court must always consider the extent to which support services will be available to a woman offender before deciding whether a community sentence is appropriate and, if so, which requirements are realistically achievable.

[285] *Statistics on Women and the Criminal Justice System*, Ministry of Justice, January 2009

[286] *A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007, p.37

[287] ibid., p.37

[288] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009, p.102

[289] *Justice and Equality: Second Annual review of the Commission on Women and the Criminal Justice System*, Fawcett Society, 2006

[290] *Engendering Justice – from Policy to Practice* – final report of the Commission on Women and the Criminal Justice System, Fawcett Society, May 2009, pp.12 and 104

253. In cases where it is feared that the necessary support services are unlikely to be available in the community or suitable requirements for a community order cannot be identified in the local area, it is essential that the court does not 'go up-tariff' and impose a more severe, custodial, sentence, as this would be contrary to the principle of proportionality.

254. In cases where the custodial threshold is crossed but a custodial sentence is not essential, it may be much easier for the court to identify suitable community order requirements for a male offender than for a woman but this should not militate in favour of a custodial sentence. Use of the curfew requirement may be particularly appropriate and it will remain possible for a court to impose either a fine[291] or a conditional discharge. Women offenders must not be sentenced more harshly because of any perceived lack of community sentence provision.

Recommendation 22

Where an offence committed by a woman merits a community sentence, the court must not impose a custodial sentence because of a perceived lack of community sentence provision or difficulty in identifying suitable community order requirements.

Women and discharges

255. The statement made earlier in relation to all offenders (see para. 160) is worth repeating here. A conditional discharge can be a particularly useful disposal, especially for a first-time offender, in cases where a fine is not appropriate or where it is considered important for the court to retain the power to re-sentence in the event of breach of the condition. As a higher percentage of women offenders coming before the courts have no previous convictions (compared with men – see para. 224 – increases in the type and use of out of court penalties may become more significant over time), a discharge is likely to be a suitable disposal for a woman offender in many circumstances. As can be seen from Table 1 (page 69), 24% of sentences imposed on women offenders in 2007 for indictable offences were absolute or conditional discharges which accords with the principles set out in this advice.

Women and fines

256. Where an offence is not serious enough for a custodial sentence, the court always should consider a fine or discharge as an alternative to a community order. Home Office research published in 1997[292] identified that sentencers appeared reluctant to fine women (either because of a perceived inability to pay or in order not to penalise offenders' children[293]). In 2007, although 79% of sentences imposed on women were fines,[294] the majority of these (94%) were imposed in a magistrates' court. For indictable offences, only 14% of sentences imposed were fines. Whilst this partly reflects the relative seriousness of summary and indictable offences, the Panel considers that there is still scope to increase the use of fines for serious offences.

[291] the *Magistrates' Court Sentencing Guidelines* provides for a separate band (Band E) in such circumstances

[292] as mentioned in *A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, March 2007, p.18

[293] *Understanding the sentencing of women*, Hedderman, C. and Gelsthorpe, L., (eds.), Home Office Research Study 170, 1997

[294] *Sentencing Statistics 2007*, Ministry of Justice, 2008

257. Sentencing statistics for the period between 2003 and 2007 show that, in relation to women offenders, the number of community orders and SSOs imposed for indictable offences sentenced in a magistrates' court has increased whilst the use of fines has reduced proportionately,[295] and it may be that more severe sentences may have been imposed in circumstances where the proportionate sentence should have been a fine. In the Crown Court, the comparative fine rate has remained relatively steady although the number of community orders imposed has decreased and the number of SSOs has increased.[296] As stated earlier in relation to the inappropriate use of custody because preferred community order requirements are not available (see para. 239), sentencers must take great care not to 'up-tariff' because of concerns about the ability of a woman offender to pay a financial penalty. Apart from the risk of imposing a sentence that is disproportionate to the seriousness of the conviction offence, it increases the chance of a more severe sentence being imposed if the woman breaches sentence or commits any further offences.

258. Insofar as there might still be some reluctance to fine women, this needs to be overcome. This is part of the general issue of fining people on low incomes, which has been addressed in the most recent edition of the *Magistrates' Court Sentencing Guidelines*.[297] The 'deemed relevant weekly income' (currently £100) is likely to be used in such cases. It is certainly not an acceptable reason for taking the offender up-tariff and imposing a community sentence or an SSO.

Recommendation 23

Where an offence committed by a woman offender is not serious enough to merit a community order, the appropriate sentence is a fine or a discharge. The fact that a woman offender is on a low income or in receipt of state benefits should not prevent the court from imposing a fine if this is the most appropriate sanction for an offence.

[295] *The Sentence, The Sentencing Guidelines Newsletter*, issue 09 (August 2009), pp.7–8, www.sentencing-guidelines.gov.uk

[296] ibid.

[297] published 12 May 2008; www.sentencing-guidelines.gov.uk

SUMMARY OF THE PANEL'S RECOMMENDATIONS

Recommendation 1

Once a court has determined whether the threshold for a custodial or community sentence has been crossed, it must consider which of the five purposes of sentencing – punishment, crime reduction, reform and rehabilitation, public protection, and reparation – it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

Recommendation 2

The prevalence of particular types of offending and the need to deter the offender and others from committing similar crimes are taken into account when sentence starting points and ranges are determined for offence guidelines. A sentence should be increased on the grounds of prevalence only exceptionally and where there is statistical or other independent evidence to show that a particular type of offending behaviour is currently more prevalent in a local area and the court is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

Recommendation 3

Pending more reliable information about costs, which might be relevant in determining overall sentencing policy, the cost of a proposed sentence should not be considered when deciding sentence in an individual case. However, where there is sufficient evidence about the relative probable effectiveness of two or more possible sentences, this should be taken into account by the court.

Recommendation 4

A. In the following circumstances, a non-custodial sentence is most unlikely to be appropriate and a custodial sentence in excess of two years is likely to be appropriate:

- *(i) where serious physical, psychological, financial or social harm was intended, whether or not the harm was actually inflicted; or*
- *(ii) where death or serious physical, psychological or social harm was caused by an offender who acted without regard to the harm that was likely to be occasioned.*

B. Unless there are offender mitigation factors that would suggest that a community sentence would be more suitable, a short custodial sentence is likely to be a more appropriate sentence than a community order where one or more of the following characteristics is present:

- *(i) the seriousness of the offence is held to require punishment of a level that only imprisonment can provide;*
- *(ii) the offender is a seriously persistent offender;*
- *(iii) the offender has shown unwillingness to comply with supervision in the community previously and there is evidence to suggest that the offender would not comply on this occasion;*
- *(iv) the offender has committed an offence in relation to which a custodial sentence generally would be regarded as the right option, for example in response to immigration offences or perverting the course of justice.*

C. Even where the custody threshold has been crossed, a community order is likely to be the most appropriate sentence where one or more of the following characteristics is present:

- *(i) no serious physical, psychological, financial or social harm was inflicted*

and no such harm was intended or risked by the offender's disregard for the likely outcome of his actions;

(ii) the offender has not committed an offence within one of the categories for which a custodial sentence generally would be regarded as inevitable;

(iii) community order requirements are more likely to be effective at addressing the offending behaviour and preventing re-offending;

(iv) a significant purpose of the sentence is reform or rehabilitation;

(v) the primary purpose of the sentence is punishment but rehabilitative interventions are also needed;

(vi) the court considers that a community order can meet the treatment, rehabilitation or reparation needs that have been identified;

(vii) offender mitigation factors suggest that a community order would be the most proportionate response in all the given circumstances of an individual case.

A community sentence should not be ruled out as a suitable disposal solely on the grounds that the offender has failed to complete a community sentence in the past. Careful consideration should be given to the reasons for failure and to the likelihood of compliance with the community order requirements proposed on this occasion.

Recommendation 5

The key principles governing the use of suspended sentence orders are:

(i) a suspended sentence order is a custodial sentence. Before imposing a suspended sentence order, the court must be satisfied that the custody threshold has been passed, that a custodial sentence is necessary but does not need to be imposed immediately and that a community order would not be appropriate;

(ii) a prison sentence that is suspended should be for the same term that would have applied if the offender were being sentenced to immediate custody;

(iii) the operational period of a suspended sentence should reflect the length of the sentence being suspended. As an approximate guide, an operational period of up to 12 months might normally be appropriate for a suspended sentence of up to six months and an operational period of up to 18 months might normally be appropriate for a suspended sentence of up to 12 months. However, this is only a general guide and a longer operational period may be justified if more time is needed in order for the most appropriate requirements to be included and completed;

(iv) because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence might be more appropriate;

(v) where a pre-sentence report recommends a high-level community order but the court decides to impose a suspended sentence order, care must be exercised in transposing the proposed requirements to the different sentence; generally, the number or onerousness of requirements will need to be reduced;

(vi) where the court is of the opinion that an offender is highly likely to breach an order or commit another offence, a community order is likely to be more appropriate than an SSO,

given the greater flexibility in response to breach;

(vii) where the seriousness of an offence justifies a custodial sentence of more than 12 months but the court does not wish to impose an immediate custodial sentence, it always should consider whether a community order might be a more appropriate sentence than an SSO, given the greater flexibility in response to breach;

(viii) where, in response to breach, the court decides to amend a suspended sentence order rather than activate the custodial sentence, it should give serious consideration to extending the supervision or operational periods (within statutory limits) rather than making the requirements more onerous.

Recommendation 6

Culpability generally may be placed on one of two levels:

(i) Intention or Knowledge: the offender acted with intent to bring about the prohibited harm, or in the knowledge that a prohibited circumstance existed.

(ii) Recklessness or Reckless Knowledge: the offender acted knowing that there was a risk of causing the prohibited harm or knowing that there was a risk that a prohibited circumstance existed.

(iii) In relation to either level of culpability, a planned offence generally will be more culpable than a spontaneous offence, and other motivations may be taken into account where appropriate.

Recommendation 7

When assessing offence seriousness:

(i) Where the harm was less than intended, a court should consider:

- *the degree of effort or determination shown by the offender when seeking to commit the offence originally planned or to cause the intended level of harm*
- *the reason why the offender did not succeed (e.g. how close the offender came to success) and how quickly or why the attempt to commit the offence was abandoned (e.g. was it a change of mind or did someone or something prevent the offender from continuing?)*
- *the reason why the harm was less than intended i.e. was it because the offender had desisted or, in the case of physical injury, because of subsequent medical intervention?*

(ii) Where the harm was greater than intended, a court should consider:

- *the reason why greater harm was caused and to what degree this was outside the offender's control and/or was not reasonably foreseeable*
- *the degree to which the imbalance between culpability and harm is inherent in the offence and is already reflected in the maximum penalty and offence guideline (e.g. causing death by careless or inconsiderate driving and causing death by driving: unlicensed, disqualified or uninsured drivers)*

Recommendation 8

The following principles should be considered when seeking to determine the degree to which previous convictions should aggravate a conviction offence:

(i) the primary significance of previous convictions is the extent to which they indicate trends in offending behaviour and the response to earlier sentences;

(ii) previous convictions always will be relevant to

the current offence if they are of a similar type;

(iii) *previous convictions of a type different from the current offence may be relevant where they are an indication of persistent offending;*

(iv) *numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;*

(v) *the aggravating effect of relevant previous convictions will normally reduce with the passage of time; where a significant period of time has elapsed since the most recent relevant conviction, they may cease to have any effect at all depending on the nature of the offence and the reasons for the gap in offending.*

Recommendation 9

The Overarching Principles guideline should contain the following list of generic aggravating factors:

Factors indicating higher culpability:

- *Offence committed whilst on bail for other offences*
- *Failure to respond to previous sentences*
- *Failure to heed warnings or concerns expressed by others*
- *Offence motivated by, or demonstrating, hostility to the victim based on his or her actual or presumed race, religion, age, gender, disability, sexual orientation, particular lifestyle or membership of a minority group*
- *Deliberate targeting of vulnerable victim(s)*
- *Previous conviction(s), particularly where a pattern of repeat offending is disclosed*
- *Planning of an offence or 'professional' offending*
- *An intention to commit more serious harm than actually resulted from the offence*
- *Offenders operating in groups or gangs*
- *High level of profit from the offence or commission of the offence for financial gain (where this is not inherent in the offence itself)*
- *An attempt to conceal or dispose of evidence*
- *Carrying a weapon*
- *Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence*
- *Abuse of power or a position of trust*

Factors indicating a more than usually serious degree of harm:

- *Multiple victims*
- *An especially serious physical or psychological effect on the victim, even if unintended*
- *A sustained assault or repeated assaults on the same victim*
- *Victim is particularly vulnerable (because of personal circumstances, the nature of their employment (including working in the public sector or providing a service to the public) or the location of the offence – for example, an isolated place)*
- *Presence of others e.g. relatives, especially children or partner of the victim*
- *Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)*
- *In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)*

Recommendation 10

The fact that an offence was committed in a genuine and proven emergency situation should be added to the generic list of mitigating factors.

Recommendation 11

The following factors may be treated as offender mitigation. The degree to which they influence the severity or choice of sentence, if at all, will depend on the nature and seriousness of the conviction offence(s) and the degree to which failing to adjust the sentence would be likely to result in a disposal that is unduly harsh in the particular circumstances of the individual offender. This is not an exhaustive list:

- *the offender is of genuine positive good character (although the court must be satisfied that the offender is not hiding behind a positive public persona in order to conceal and/or continue offending behaviour such as fraud, domestic violence or sexual offending). Acts of bravery or service to the community beyond the call of duty are likely to have considerable impact*
- *the offender was subjected to coercion or pressure short of duress (the degree to which this is likely to influence sentence depends partly on the seriousness of the likely consequences to the offender or others had the offender refused to commit the offence)*
- *the actions or behaviour of the offender (not merely words) demonstrate genuine regret or remorse*
- *the offender is the sole or main carer of dependent children*
- *the offender is, or has been, a victim of abuse (relevant considerations include the nature, circumstances, duration and timing of the abuse and its relationship to the criminal behaviour of the offender)*
- *the likely impact on the ability to cope with a custodial sentence as a consequence of the offender's experience of abuse*
- *the offender has a serious illness that requires urgent, intensive or long-term medical treatment*
- *the offender has a mental disorder or other serious mental health problems (see the separate principles at para. 141)*
- *the offender is of advanced years (but only in combination with other mitigating factors)*
- *the offender has made voluntary reparation to the victim(s)*
- *the offender acted out of desperation or need arising from particular hardship (in exceptional circumstances)*
- *the offender is making a genuine effort to address a drug, alcohol or gambling addiction*
- *the offender is in gainful employment, which may be helpful in the offender's rehabilitation*

Recommendation 12

A fine is likely to be the most appropriate disposal, even if the community threshold has been crossed, where:

(i) the sole or primary sentencing aim is punishment; and

(ii) there is no evidence to suggest that rehabilitation of the offender is required; and

(iii) there is no evidence to suggest that a third party will suffer inappropriate deprivation in order for the fine to be paid; and

(iv) there are no outstanding financial penalties.

Recommendation 13

Deferred sentences are particularly appropriate for cases close to either the community or custodial sentence threshold where, should the offender be prepared to adapt his or her behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence; when deferring sentence:

(i) the court should impose specific and measurable conditions that do not involve a serious restriction on liberty;

(ii) the court should give a clear indication of the type of sentence it would have imposed had it not decided to defer; and

(iii) the court should also ensure that offender understands that non-compliance with any requirements will result in the imposition of a sentence of the type being considered when the decision to defer sentence was made.

Recommendation 14

It may be appropriate to impose a fine in conjunction with a community order where to do so would not impose a punishment disproportionate to the seriousness of the offence and:

(i) the aims of sentencing include both punishment and rehabilitation; and

(ii) it is possible to reduce the number or severity of community order requirements to reflect the imposition of the fine without reducing its overall effectiveness; and

(iii) the loss of income is likely to have a significant impact on the offender but there is no evidence to suggest that a third party will suffer inappropriate deprivation in order for the fine to be paid; and

(iv) there are no outstanding financial penalties.

Recommendation 15

Information in a victim personal statement about the effect that an offence has had, or continues to have, on the victim should be taken into account as a legitimate part of the assessment of the harm caused by (and hence the seriousness of) the offence. Where a court refers to that information when pronouncing sentence, the court should request that a copy of the remarks be transmitted to the victim. Except insofar as it influences the assessment of harm, the views of the victim should not influence the sentence imposed except where part of that sentence includes compensation to the victim or some involvement of the victim in the sentence. In particular, pleas for leniency from a victim (or relative of a victim) should not influence the sentencing court.

Recommendation 16

Comments made by the court when adjourning a case for sentence should be regarded as provisional; as a matter of good practice, the adjourning court should make it clear that all options remain open to the sentencing court.

Recommendation 17

There should be a strong presumption in favour of credit being allowed in full for time spent on remand prior to sentence.

Recommendation 18

If a defendant was held on remand in custody after failing to comply with bail conditions and a custodial sentence is subsequently imposed, that failure should not normally be grounds for refusal to allow credit for the time spent in custody or on bail subject to the qualifying conditions.

Recommendation 19

The following ancillary orders are primarily intended to have a punitive effect on an offender and should be taken into account when assessing whether the provisional sentence is commensurate with the seriousness of the offence:

- *Deprivation orders, except where the property identified in the order can be used only for the purposes of crime*
- *Disqualification from holding a driving licence**

** only if the order is imposed under the general provisions in section 146 of the Powers of Criminal Courts (Sentencing) Act 2000.*

The following ancillary orders are primarily intended to protect the public from the risk of harm from further offending and should not influence the choice of sentence:

- *Anti-social behaviour order*
- *Banning order*
- *Binding over order*
- *Disqualification from working with children or vulnerable adults*
- *Disqualification from driving*
- *Disqualification from acting as a company director*
- *Deprivation order where the property identified in the order can be used only for the purposes of crime*
- *Exclusion order (licensed premises)*
- *Financial reporting order*
- *Forfeiture order*
- *Parenting order*
- *Restraining order*
- *Sexual offences prevention order*
- *Travel restriction order*

The following ancillary orders are primarily reparative and should not influence the choice of sentence:

- *Compensation order**
- *Reparation order*
- *Restitution order*

** except that a compensation order must take priority over a fine[298] and, where an offender has freed assets in order to be able to pay compensation, this may be regarded as offender mitigation.*

Recommendation 20
The statutory requirement that a custodial sentence must not be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified has a special force in relation to women offenders because of the multiple harms that are likely to result from incarceration.

Recommendation 21
A court always must obtain a PSR before sentencing a woman offender to custody; wherever possible, the defendant should be granted bail whilst the PSR is being prepared.

Recommendation 22
Where an offence committed by a woman merits a community sentence, the court must not impose a custodial sentence because of a perceived lack of community sentence provision or difficulty in identifying suitable community order requirements.

Recommendation 23
Where an offence committed by a woman offender is not serious enough to merit a community order, the appropriate sentence is a fine or a discharge. The fact that a woman offender is on a low income or in receipt of state benefits should not prevent the court from imposing a fine if this is the most appropriate sanction for an offence.

[298] s.130(12)

THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 8 July 2008. The Panel's provisional views on some of the overarching principles of sentencing were set out.

Copies of the consultation paper were sent to 125 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace Journal. 41 responses were received.

Responses were received from the following:

Council of Her Majesty's Circuit Judges, Criminal Sub Committee

Council of Her Majesty's District Judges (Magistrates' Courts)

Criminal Bar Association

Criminal Justice Alliance

Fawcett Society

General Council of the Bar, Law Reform Committee

Justices' Clerks' Society

Magistrates' Association

Police Federation of England and Wales

Prison Reform Trust

Victim Support

Responses were also received from:

Action for Prisoners' Families

Martin Alderman JP

Vera Baird QC MP

Bedfordshire Magistrates' Courts Chairmen

Criminal Law Solicitors' Association

Daniel Benjamin

George Coombs

Criminal Justice Group, Ministry of Justice

Gavin Dingwall & Tim Hillier, De Montfort University, Leicester

Grimsby and Cleethorpes Bench

Anthony Edwards, solicitor and member of the Sentencing Guidelines Council

Environment Agency

Herefordshire Bench

Neville and Kate Hydes

Justice for Women

Leicestershire and Rutland Benches

Northumbria Bench Chairmen

Nicola Padfield, Faculty of Law, University of Cambridge

His Honour Judge David Pearce-Higgins QC (Birmingham and Worcester)

Plymouth District Bench Chairmen

Restorative Justice Consortium

Revenue and Customs Prosecutions Office

Rights of Women

John Sharrock, JP

South West Surrey Magistrates' Bench

George Tranter, solicitor and former Justices' Clerk

Walsall and Aldridge Magistrates' Bench

Welsh Women's Aid

Margaret Williams, Anglesey Bench Chair

Martin Wright

ANNEX A

MEANING OF 'RANGE', 'STARTING POINT' AND 'FIRST TIME OFFENDER' WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to "*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*".

In particular, "*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*" the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

1. a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.

   b) As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed 'type/ nature of activity'.

   c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.

   d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.

2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council

Sentencing Advisory Panel

May 2007

ANNEX B

DEFINITIVE GUIDELINES PUBLISHED BY THE SENTENCING GUIDELINES COUNCIL as at March 2010

Overarching Principles: Seriousness	December 2004
New Sentences: Criminal Justice Act 2003	December 2004
Manslaughter by Reason of Provocation	November 2005
Robbery	July 2006
Overarching Principles: Domestic Violence	December 2006
Breach of a Protective Order	December 2006
Sexual Offences Act 2003	April 2007
Reduction in Sentence for a Guilty Plea (revised)	July 2007
Fail to Surrender to Bail	November 2007
Overarching Principles: Assaults on children and Cruelty to a child	February 2008
Assault and other offences against the Person	February 2008
Magistrates' Court Sentencing Guidelines	May 2008
Causing Death by Driving	July 2008
Breach of an Anti-Social Behaviour Order	December 2008
Theft and Burglary in a building other than a dwelling	December 2008
Attempted Murder	July 2009
Sentencing for Fraud – Statutory offences	October 2009
Overarching Principles – Sentencing Youths	November 2009
Corporate Manslaughter and Health and Safety Offences Causing Death	February 2010

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of Appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Andrew Ashworth CBE QC (Hon) (Chairman)

His Honour Judge Anthony Ansell

John Crawforth OBE

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joan Webster QPM

Christopher Woolley

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