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One King's Bench Walk

# **Criminal Justice Act 2003 Sentencing**

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**Pelham House  
St Andrews Lane, Lewes**



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# Shorter Sentences of Imprisonment, Community Orders, Deferment of Sentence and Release on Licence

## Sentences of Imprisonment of Twelve Months or More

Offenders will now be subject to licence requirements for the whole duration of their sentence rather than just up to the three quarters point. It is expected that the licence requirements imposed under the new regime will be more demanding and involve a greater restriction of liberty than previously; added to that is the longer time actually spent on licence. Consequently, the Sentencing Guidelines Council has issued guidelines covering the transitional period until sentencing guidelines reflect the reality of the new regime. *"The Council's conclusion is that the sentencer should seek to achieve the best match between a sentence under the new framework and its equivalent under the old framework so as to maintain the same level of punishment. As a guide, the Council suggests the sentence length should be reduced by in the region of 15%".*<sup>1</sup>

## Sentences of Imprisonment of Less Than Twelve Months

When the provisions of the Act are brought into force, the courts will have the following options when passing a sentence of less than twelve months' imprisonment:

- (a) "Custody plus", which will replace all custodial sentences of less than twelve months unless the court makes an intermittent custody order; possible implementation date of May 2006, with possible earlier pilot scheme;
- (b) Intermittent Custody: "weekend jail", currently being piloted in Lancashire and Lincolnshire;
- (c) The court will be able to suspend the sentence of imprisonment on condition that the offender undertakes activities in the community. The new suspended sentence regime was brought into force on 4<sup>th</sup> April 2005.

The new provisions will not apply to custodial sentences for offenders under 18, for whom detention and training orders will continue to be the standard sentence.

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<sup>1</sup> SGC Guideline on New Sentences under CJA 2003, para 2.1.9.

## **“Custody plus”**

The new regime of sentences under twelve months (“custody plus”) introduced by section 181 replaces *all* sentences of less than twelve months, unless a intermittent custody order is made. Consequently, whenever the court passes a sentence of less than twelve months’ imprisonment, it will have to:

- (a) express the term of the sentence in weeks;
- (b) the term must be of at least 28 weeks;
- (c) must not be more than 51 weeks in respect of any one offence; and
- (d) must not exceed the maximum term permitted for that offence.<sup>2</sup>

When passing sentence, the court must specify the period the period of the sentence which must be spent in custody. At the conclusion of that period, the offender will be released on licence, at which point the mandatory “custody plus” element becomes operational: when passing sentence, the court must (unless it is passing a suspended sentence, in which case the “custody plus” element does not apply) order that the licence be granted subject to the offender’s compliance during the licence period or any part of it with one or more requirements as specified in the order.<sup>3</sup> The period spent in custody must be at least two weeks and, in respect of any one offence, must not be more than thirteen weeks (although the home detention and curfew scheme applies to custody plus, so the offender may be released early). The court must ensure that the licence period is at least 26 weeks in length.

Where consecutive sentences of imprisonment are imposed, the maximum aggregate length of the sentence must not be more than 65 weeks, and the maximum aggregate length of the periods to be spent in custody is 26 weeks.<sup>4</sup> It therefore seems that where consecutive sentences are imposed, and each individual sentence is less than twelve months, the court must make the appropriate custody plus orders, ensuring that the maximum aggregate periods do not exceed these limits.

Where the court imposes two terms of imprisonment, one of more than twelve months and the other of less than twelve months, it seems that the latter must be made in the form of a custody plus order.

The licence conditions the court may impose under a custody plus order are:

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<sup>2</sup> Section 181 (2)

<sup>3</sup> Section 181 (3)

<sup>4</sup> Section 181 (7)

- (a) an unpaid work requirement
- (b) an activity requirement
- (c) a programme requirement
- (d) a prohibited activity requirement
- (e) a curfew requirement
- (f) an exclusion requirement
- (g) a supervision requirement
- (h) in a case where the offender is aged under 25, an attendance centre requirement.

These requirements are subject to the same provisions as apply to community orders. The court cannot make a residence requirement, mental health requirement, drug rehabilitation requirement or an alcohol treatment requirement pursuant to a custody plus order.

The court has a power to revoke custody plus orders pursuant to Schedule 10 of the Act if it would be in the interests of justice to do so.

Note that custody plus does not apply to detention and training orders.

## **Suspended Sentence Orders**

A court which passes a sentence of imprisonment of at least 28 weeks but not more than 51 weeks may order that the offender comply for a specified period with one or more specified requirements, and order that the sentence of imprisonment is not to take effect unless either the offender fails to comply with the specified requirement(s) or, during the specified "operational period", he commits another offence in the United Kingdom (whether or not punishable with imprisonment). The supervision period and the operational period must each be for a term of not less than six months and not more than two years, beginning with the date of the order. The supervision period must not end later than the operational period. Presumably (although the Act does not say so in terms) the operational period may extend beyond the supervision period.

The court passes the sentence in accordance with section 181 (custody plus, etc.), so it must specify the custodial period in weeks. If the offender commits an offence during the operational period of the suspended sentence, he will be required to serve the specified custodial period which will be subject to the custody

plus provisions. However, licence requirements under a section 181 “custody plus” order would only be specified if the custodial part of the suspended sentence were to take effect.

The community requirements which may be included in a suspended sentence order are all of those which may be included in a community order. If a suspended sentence order is made, the court cannot also impose a community sentence.

Where consecutive sentences are imposed, the court may suspend them only if the aggregate term does not exceed 65 weeks.

Section 191 of the Act gives the court a discretionary power to order periodic review of the suspended sentence order by the court which made the order, unless the requirement is a drug rehabilitation requirement, in which case there will be automatic reviews in any event.

Where breach of the order is proved, the court must order the sentence to take effect unless it would be unjust to do so in all the circumstances. On ordering a sentence to take effect, the court may order the sentence to take effect with the original term unaltered, or reduce the custodial term. It may impose more onerous community requirements, or extend the supervision or operational periods.

Note the guidance from the Sentencing Guidelines Council on suspended sentences.

## **Intermittent Custody**

Sections 183 to 186 allow the court, when passing a sentence of imprisonment of between 28 and 51 weeks, to specify the number of days the offender must serve in prison before release on licence, and to specify the periods during which he is to be temporarily released on licence before he has served the specified number of days in prison. The court may also require that any licence be granted subject to conditions as set out above for custody plus orders. Such conditions can operate during either the temporary licence period and/or during the licence period beginning once the requisite number of days has been served. The number of custodial days must be at least 14 and not more than 90 in respect of any one offence. In respect of consecutive terms of imprisonment, the maximum aggregate length of the sentence is 65 weeks and the maximum aggregate number of custodial days is 180.

The court will not be able to make such an order unless an offender has expressed his willingness to serve his time in custody intermittently. Amongst other

restrictions, the offender must have suitable accommodation available to him during the licence periods, and the Secretary of State must have issued notification that suitable prison accommodation is available.

The requirement(s) specified in the order may apply to all or part only of the licence period. For example, the offender may have to comply with a prohibited activity requirement during the temporary licence periods, and a supervision requirement during the licence period following the completion of the custodial period.

If the offender fails to comply with the community part of the sentence he will be returned to custody. He will then be treated as a recalled prisoner and his re-release will be at the discretion of the Parole Board. The Act makes it a separate offence to remain at large at the end of a temporary licence period.

## Community Orders

The Act provides for a single, generic community order with various different requirements, replacing community rehabilitation orders, community punishment orders and drug treatment and testing orders. Drug abstinence orders disappear altogether. The new orders are available for offenders aged 16 or over. For younger offenders there are “youth community orders” derived from existing orders in the PCC (S) Act 2000: curfew orders, exclusion orders, attendance centre orders, supervision and action plan orders.<sup>5</sup> Section 279 and Sch 24 of the Act (in force in certain pilot areas) will allow the court to add a drug treatment and testing requirement to action plan or supervision orders.

The important change is that there is no restriction on the combination of community penalties which can be imposed. Note also that the requirement for an offence to be imprisonable before a community punishment order or a community punishment and rehabilitation order was imposed has disappeared: under the new Act, the equivalent community orders can now be imposed for non-imprisonable offences.

The criteria for making a community order are essentially the same as those under the PCC (S) Act 2000, section 35. They are (a) that the offence or combination of offences was serious enough to warrant such a sentence, (b) the requirement(s) forming the community order must be the most suitable for the offender and (c) the restrictions imposed by the order must be commensurate with the seriousness of the offence or combination of offences for which the sentence is imposed.<sup>6</sup>

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<sup>5</sup> As defined by section 147 (2).

<sup>6</sup> Section 148

Section 151 of the Act permits the court to make a community order instead of imposing a fine where a person aged 16 or over has on three or more occasions after attaining the age of 16 been convicted in a U.K. court of any offence and he has had passed on him a sentence consisting only of a fine.

Guidelines on community sentences have been issued by the SGC.

A new feature of the Act is the provision for time spent on remand by an offender to be taken into account by the court when it passes a community sentence, in determining the restrictions on liberty to be imposed by the order.<sup>7</sup> The SGC's Guideline (para 1.1.37) states that the court should seek to give credit for time spent on remand in all cases.

Section 150 of the Act prevents the court from imposing a community order where the sentence is fixed by law or falls to be imposed under the minimum sentence provisions of PCC (S) A 2000 ss 110 or 111 or section 51A of the Firearms Act 1968. The court is also prohibited from imposing a community penalty where the offender is convicted of a "specified offence" and the court is of the opinion that there is a significant risk of harm pursuant to the provisions of the Act dealing with dangerous offenders.

The following requirements may be made of an offender who is 16 or over:

- (a) **an unpaid work requirement** (as defined by section 199). This replaces community punishment orders. The maximum number of hours is increased from 240 to 300. The minimum remains at 40 hours. The work must be completed within twelve months unless the period is extended by the court. Unpaid work requirements may be made in respect of each offence of which the offender is convicted, and the hours imposed for each offence may be concurrent with or consecutive to each other, but the total must not exceed 300 hours. The consent of an offender to an unpaid work requirement is not necessary.
- (b) **an activity requirement** (as defined by section 201). This requires the offender to present himself to person(s) specified in the order, at a specified place or places on such number of days as may be specified, or to participate in activities specified in the order on the number of days specified, or both. The court must be satisfied that it is "feasible to secure compliance with the requirement". The aggregate number of days must not exceed 60.
- (c) **a programme requirement** (as defined by section 202). This requires an offender to participate in an "accredited programme" specified in the

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<sup>7</sup> Section 149

order, or to participate in activities specified in the order. A programme requirement may not be made unless the probation service/Y.O.T. has recommended it as suitable for the offender. There is no restriction on the number of days on which the offender may be required to participate.

- (d) **a prohibited activity requirement** (as defined by section 203). This requires the offender to refrain from participating in activities on a specified day or days. Section 203 (3) provides that the order may require that the offender does not possess, carry or use prohibited firearms.
- (e) **a curfew requirement** (as defined by section 204). This replaces curfew orders. The offender may be required to remain at a place or places specified in the order for not less than two hours and not more than twelve hours in any day. All specified periods must fall within a period of six months beginning with the day on which the order is made. The court must also impose an electronic monitoring requirement unless it is inappropriate in the particular circumstances of the case.
- (f) **an exclusion requirement** (as defined by section 205), prohibiting the offender from entering any place(s) for any period(s) not exceeding two years as specified in the order. The court must also impose an electronic monitoring requirement unless it is inappropriate in the particular circumstances of the case.
- (g) **a residence requirement** (as defined by section 206). The court must consider the "home surroundings" of the offender before making such a requirement. A hostel or other institution may not be specified except on the recommendation of an officer of a local probation board.
- (h) **a mental health treatment requirement** (as defined by section 207). The court may make such a requirement where it is satisfied, on the evidence of a medical practitioner approved under the Mental Health Act, that the mental condition of the offender is such as requires and is susceptible to treatment, but does not warrant his detention under a hospital order. The court may not include such a requirement unless the offender expresses his willingness to comply with it. The required treatment may be inpatient treatment (other than in a high security hospital), out-patient treatment at a specified place, or treatment under a medical practitioner specified in the order.

- (i) **a drug rehabilitation requirement** (as defined by section 209). Replaces the DTTO. As before, the order may be made if the court is satisfied that the offender is dependent on or has a propensity to misuse drugs, and that such dependency or propensity is such as requires and may be susceptible to treatment. The treatment and testing period must be for at least six months. If the order is for less than twelve months, the court may provide for review hearings at intervals of not less than one month; if the order is for longer than twelve months, the review hearings (and the offender's attendance at them) is compulsory.
- (j) **an alcohol treatment requirement** (as defined by section 212) may be made if the court is satisfied that the offender is dependent on alcohol, and that his dependency is such as requires and may be susceptible to treatment. The offender must submit during a period specified in the order to treatment by or under the direction of a specified person having the necessary qualifications or experience with a view to the reduction or elimination of the offender's dependency on alcohol. A court may not impose an alcohol treatment requirement unless the offender expresses his willingness to comply with its requirements. The period of treatment must be not less than six months.
- (k) **a supervision requirement** (as defined by section 213). During the relevant period, the offender must attend appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the officer. The purpose for which a supervision requirement may be imposed is that of promoting the offender's rehabilitation. The supervision requirement runs for the period for which the community order is in force.
- (l) in a case where the offender is aged under 25, **an attendance centre requirement** (as defined by section 214). The offender may be required to attend for a total of not less than 12 hours and not more than 36 hours. The court may not impose an attendance centre requirement unless the court is satisfied that the attendance centre to be specified in it is reasonably accessible to the offender concerned, having regard to the means of access available to him and any other circumstances. An offender may not be required under this section to attend at an attendance centre on more than one occasion on any day, or for more than three hours on any occasion.

The court making a community order may include in the order a requirement securing the electronic monitoring of the offender's compliance with any other requirements of the order. It must be included in any community order which includes a curfew or exclusion requirement (subject to availability; see s 218).

Schedule 8 to the Act contains provisions dealing with breach, revocation and amendment of community orders, and the effect of the offender being convicted of a further offence. The responsible officer must first give the offender a warning if he is of the opinion that the offender has failed without reasonable excuse to comply with any of the requirements of the order. If there has been a warning, and there is a further failure to comply within twelve months of that warning, the responsible officer must cause an information to be laid before a magistrate or the Crown Court in respect of the second alleged breach.

## **Deferment of Sentence**

Schedule 23 of the Act (in force since 4<sup>th</sup> April 2005) makes new provision for deferred sentences. The two main changes are (i) procedural (clarifying the conditions of the deferment and providing that copies of the order be provided to the offender and any supervisor) and (ii) extending the court's powers to specify the requirements of the deferral period. Although the requirements are not specified (and they are not limited to the requirements which may be imposed pursuant to a community order) it is provided that a residence requirement may be imposed, and the court may appoint a probation officer or any other person with their consent to act as supervisor.

The offender is still required to consent to the deferment and the court must still be satisfied that, having regard to the nature of the offence and to the character and circumstances of the offender, it would be in the interests of justice to defer sentence. Sentence may be deferred for a period of not more than six months. If the offender fails to comply with the requirements imposed, he may be brought before the court and dealt with before the end of the deferment period.

See the SGC's Guidelines on Deferred Sentences.

## **Release on Licence**

Chapter 6 of Part 12 of the Act introduces a new scheme for early release on licence.

The main changes are as follows:

- (a) Distinction between long and short-term prisoners disappears; whether the sentence is more than or less than four years, the normal rule will be automatic release on licence at the halfway point
- (b) The focus of the Parole Board will now be on offenders given extended sentences for specified offences. Such prisoners will not be eligible for automatic release at the halfway or three-quarters point, but will only be released at the end of the sentence unless the Parole Board has directed early release on licence at some point after halfway.
- (c) Licence periods now continue to the end of the sentence and do not expire at the three-quarters point.

Section 238 gives the court a power to recommend licence conditions on sentencing an offender to a term of twelve months or more in respect of any offence. The Secretary of State may have regard to such recommendation when setting the licence conditions.

Recall to prison remains in the power of the Secretary of State. Offenders will now be on licence to the end of their sentence rather than to the three-quarters point,

## **Automatic Release on Licence**

Section 244 (3) defines the requisite custodial periods, at the expiry of which a fixed term prisoner will be entitled to release:

- (a) for sentence of imprisonment of 12 months or more, the period is one half of the sentence;
- (b) for sentences of imprisonment of less than 12 months (other than intermittent custody orders) the period is the custodial period specified in the sentence;
- (c) for intermittent custody orders, it is any part of the term which is a licence period (i.e. a separate entitlement to release after each period of intermittent custody)<sup>8</sup>; and
- (d) for a person serving two or more concurrent or consecutive sentences, the period is that required for the longest sentence (in the case of concurrent

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<sup>8</sup> There is an exception to this where such a prisoner returns to custody after being unlawfully at large (section 245). In summary, the prisoner will be held for 72 hours even though he would otherwise be entitled to release. Application to amend the intermittent custody order can be made during that period. If no amendment is made to the order, the prisoner will then be eligible for intermittent release in accordance with the original order. If during the 72 hour period he completes his custodial period, he is entitled to be released in any event. If no amendment is made to the order, the prisoner will then be eligible for intermittent release in accordance with the original order.

terms) or the aggregate of the custodial periods (in the case of consecutive terms).

## Discretionary Release on Licence

- (a) Home Detention Curfew: power of the Home Secretary to release a fixed term prisoner on licence up to 135 days earlier than the expiry of the requisite custodial period. If the sentence is intermittent custody, the prisoner may be released with 135 or fewer custodial days still to be served. The power to release on H.D.C. applies only where the custodial period was at least six weeks *and* the prisoner has actually served a minimum of four weeks *and* at least half the requisite custodial period. If the sentence is intermittent custody, for H.D.C. to apply the requisite number of custodial days must be at least 42, and at least 28 days must have been served, being at least one half of the total.
- (b) Discretionary release for prisoners serving extended sentences under ss 227 and 228: half the custodial term must be served, after which the decision is one for the Parole Board, not the Secretary of State. The Parole Board may not direct release unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (section 247 (3)).
- (c) The old law regarding release on compassionate grounds has largely been re-enacted in section 248.

## Remand Time Directions (section 240)

Section 240 of the Act is particularly important. It applies only to offences committed after the commencement of the section, i.e. 4<sup>th</sup> April 2005. Where the offender has been remanded in custody in connection with the offence or a related offence, that is to say, any other offence the charge for which was founded on the same facts or evidence, the court must direct that the number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by him as part of the sentence. It is essential that the court is asked to do this: if the direction is not made, the offender will not be credited with time spent on remand. The court has a discretion not to give such a direction if in the opinion of the court it is just in all the circumstances not to do so.

Where the court gives a section 240 direction, it must state in open court (a) the number of days for which the offender was remanded in custody, and (b) the number of days in relation to which the direction is given.

It is immaterial for the purposes of section 240 whether the offender has also been remanded in custody in connection with other offences, or detained in connection with other matters. For the purposes of section 240, a suspended sentence is to be treated as a sentence of imprisonment so it is essential that the court be asked to make a remand time direction where relevant. The custodial part of an intermittent custody order may also be affected by a section 240 direction.

[SGC Guidelines are available on their website, at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)]

Alan Gardner  
June 2005

# The Sentencing Provisions of The Criminal Justice Act 2003

These provisions are contained in PART 12 of the Act and Schedules 8 to 32. Radical changes have been made to the type of sentences available to the Court e.g. community penalties, intermittent custody, custody plus and sentences for dangerous offenders. It is impossible in a lecture of this nature to do more than highlight some of the provisions. Some of the provisions are not yet in force. There are resource implications for many of the non-custodial options and the supervision requirements of e.g. custody plus. It has to be questioned how successful many of these provisions will be in reducing recidivism unless HMG is prepared and able to make substantial resources available for the management of offenders.

## General Provisions about Sentencing

- 1 These are contained in Chapter 1.
- 2 It is important to note that a new body has been set up, namely, the Sentencing Guidelines Council (s167). The LCJ chairs the Council and it has 7 judicial members and 4 non-judicial members. The Council may initiate the framing of any guidelines in relation to the sentencing of offenders in general or offenders or offences of a particular category. It must also consider any proposal by the Sentencing Advisory Panel or the Secretary of State. By s170 (5) the SGC must have regard in framing guidelines to:
  - (a) the need to promote consistency in sentencing,
  - (b) the sentences imposed by courts in England and Wales for offences to which the guidelines relate,
  - (c) the cost of different sentences and their relative effectiveness in preventing re-offending,
  - (d) the need to promote public confidence in the criminal justice system and
  - (e) the views communicated to it by the Panel.

- 3 By s172, every court in sentencing an offender must have regard to any guidelines which are relevant to the offender's case and by s174 (2) must give reasons for passing a sentence which is outside the guidelines.
- 4 Accordingly, it is essential for practitioners to keep abreast of the SGC guidelines in order to give appropriate assistance to the court and advice on appeal.
- 5 The SGC has a web site: [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) Guidelines are posted on the web site.
- 6 The purposes of sentencing are set out in s142. They are:
  - (a) the punishment of offenders,
  - (b) the reduction of crime (including its reduction by deterrence)
  - (c) the reform and rehabilitation of offenders,
  - (d) the protection of the public, and
  - (e) the making of reparation by offenders to persons affected by their offences.
- 7 A court dealing with an offender must have regard to those purposes. There is no order of priority. It is obvious that there is the potential for conflict. The court appears to have a free choice between the purposes. This provision does not apply where an offender is under the age of 18 at the time of conviction, where the sentence for the offence is fixed by law i.e. murder, to the minimum sentence provisions of the Firearms Act 1968 s51A(2) and s110 or 111 of the Sentencing Act 2000 or under s225 to 228 of the 2003 Act (dangerous offenders), or in relation to the making of hospital orders etc under Part 3 of the Mental Health Act 1983.
- 8 Section 143 sets out a number of matters which the court must consider in considering the seriousness of any offence. The court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. The SGC has identified 4 levels of criminal culpability:-
  - (a) intention to cause harm-highest culpability when offence planned
  - (b) recklessness as to whether harm is caused

(c) knowledge of specific risks entailed by his actions

(d) negligence

- 9 The SGC has dealt with harm. Much of the guidance may be thought to be a statement of the obvious. Harm may be diverse. It may involve physical injury, sexual violation, financial loss, damage to health or psychological distress. There may only be a risk of harm. Harm or risk of harm may be to individuals or to the community at large. The impact of the crime will depend upon the individual characteristics of the victim. Reference should be made to the full guidelines.
- 10 The court must, in considering the seriousness of the current offence, treat each previous conviction as an aggravating factor if ( in the case of that conviction) the court considers that it can reasonably be so treated having regard to the nature of the offence to which the conviction relates and its relevance to the current offence, and the time which has elapsed since the conviction. This provision is mandatory. Will this displace the traditional approach of the court to the relevance of previous convictions? That approach has been normally not to pass a heavier sentence than is justified by the latest offence but to deprive the offender of mitigation to which he would otherwise be entitled.
- 11 "Previous conviction" is a reference to one by a court in the UK or a finding of guilt in service disciplinary proceedings. It does not apply to discharges or probation orders. There is no obligation to treat a conviction outside the UK as an aggravating factor but the court has a discretion to do so.
- 12 The fact that the offence was committed whilst on bail must be treated as an aggravating factor.
- 13 The court must treat the fact that an offence was racially or religiously aggravated as an aggravating factor and must state in open court that it has done so except in the case of offences charged as being specifically aggravated i.e. racially or religiously aggravated common assault or criminal damage etc. There is a similar obligation to treat hostility towards a victim based on sexual orientation or disability (actual or presumed) as an aggravating factor.
- 14 Section 144 makes provision for reduction in sentences for guilty pleas. The court must take into account the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty and the circumstances in which this indication was given. The court is empowered to pass a sentence not less than 80% of a minimum sentence

under subsection (2) of section 110 or 111 of the Sentencing Act after taking into account the above-mentioned factors.

- 15 The SGC has published guidelines. All aggravating and mitigating factors other than the guilty plea must be taken into account in arriving at the appropriate sentence. The court must then apply to that sentence the appropriate reduction for the guilty plea. The level of reduction is on a sliding scale ranging from a maximum of one third where the plea was entered at the first reasonable opportunity, reducing to a maximum of one quarter where a trial date has been fixed and to a maximum of one tenth at the door of the court or after the trial has begun.
- 16 There is no clear indication as to what constitutes "first reasonable opportunity". The SGC has stated that this "will vary with a wide range of factors and the Court will need to make a judgement on the particular facts of the case before it". The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts to deal more quickly with other cases. The SGC acknowledges that the "first reasonable opportunity" may be the first time that a defendant appears before the court and has the opportunity to plead guilty but goes on to state that the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps whilst under interview. There is an important caveat. The court will need to be satisfied that the Defendant and any legal adviser would have had sufficient information about the allegations.
- 17 In the past the court has often given little or any credit for a guilty plea where D has been caught red-handed. The SGC has stated that the normal sliding scale should still apply in this case because the whole purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity. Similarly, a court cannot refuse to give credit because it considers that the charge is inadequate or the maximum penalty is too low. The court must sentence for the actual offence before it.
- 18 Where a court is sentencing a dangerous offender under s224-237 of the 2003 Act, the minimum custodial term but not the protection of the public element of the sentence should be reduced to reflect the plea.
- 19 The SGC has stated that where the maximum sentence for a summary only offence is 6 months imprisonment and 2 or more such offences fall to be sentenced and the sentence for each offence should be reduced for a guilty plea, it may be appropriate for the sentences to be ordered to run

consecutively to each other. It is stated that the overall sentence would not undermine the general principle that the maximum sentence should not be imposed following a guilty plea since the decision whether or not to make the individual sentences concurrent or consecutive will follow the normal principles applicable to such a decision. However, the totality of the sentence should make some allowance for the guilty plea.

- 20 A magistrates court may impose a sentence of 6 months imprisonment for a single either-way offence despite a guilty plea where that offence would have attracted a sentence of in the region of 9 months if it had been committed to the Crown Court.
- 21 A detention and training order of 24 months may be imposed on an offender aged under 18 if the offence but for the guilty plea would have attracted a sentence of long-term detention in excess of 24 months under the Powers of Criminal Courts (Sentencing) Act 2000, s91.
- 22 Where an offence crosses the threshold for the imposition of a community or custodial sentence, the application of the reduction principle may properly form the basis for imposing a fine or discharge rather than a community sentence or an alternative to an immediate custodial sentence. Where the reduction is applied in this way, the actual sentence incorporates the reduction.
- 23 In murder cases, there will be no reduction for a guilty plea where a whole life minimum term is appropriate. In other cases, where it is appropriate to reduce the minimum term having regard to a guilty plea, the maximum reduction will be one sixth. The SGC has stated that the reduction should never exceed 5 years even where a minimum term of over 30 years (but not whole life) is fixed. There is a maximum of 5% for a late guilty plea. Courts are directed to avoid an inappropriately short minimum term.
- 24 There is a difference in wording between s152 of the Sentencing Act 2000 and s144 of the 2003 Act. Under the former the court "shall" take into account the stage when the guilty plea is indicated etc. whereas in the latter it "must". I doubt whether there is much difference in practice but "must" certainly indicates a positive duty.
- 25 Clearly, it is important for practitioners to be alert to the need to advise clients about the benefits of a guilty plea. In order to obtain maximum benefit for a "guilty" client, it will be necessary to indicate a willingness to plead guilty at the earliest possible stage which may be during the police interview. The SGC has stated that if a not guilty plea is entered and maintained for tactical reasons such as retention of privileges on remand,

a late guilty plea will attract little, if any, discount. In view of the SGC guidelines, there would be a fairly cast iron ground of appeal against sentence if any court failed to follow them.

- 26 AG will deal with the general restrictions on imposing community sentences.
- 27 The court must not pass a discretionary custodial sentence unless it is of the opinion that the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine nor a community sentence can be justified for the offence (s152(2) ). The court is not prevented from passing a custodial sentence where an offender indicates an unwillingness to comply with a requirement proposed to be added to a community order (where an expression of willingness is required). The relevant requirements are a mental health treatment requirement, a drug rehabilitation requirement, and an alcohol treatment requirement. It is not necessary for an expression of willingness to comply with an unpaid work requirement. A custodial sentence may also be passed where an offender fails to comply with a pre-sentence drug testing order under s 161(2).
- 28 Whereas in previous legislation the length of a discretionary custodial sentence had to be commensurate with the seriousness of the offence or offences, under s 153(2), the sentence is required to be the "shortest term" which would be commensurate with the seriousness of the offence or offences.
- 29 The court must give reasons for and explain the effect of its sentence.

## **Dangerous Offenders**

- 1 The relevant provisions are contained in Chapter 5 s224-237 and schedule 15.
- 2 The previous provisions for dealing with dangerous offenders were discretionary life sentences, automatic life sentences, longer than commensurate sentences, and extended sentences. These provisions have been replaced with 3 new sentences, namely, life imprisonment, imprisonment for public protection and extended sentences. There are significant differences between the old and new life sentence and extended sentence.

- 3 The new provisions apply only to offences committed on or after 4 April 2005.
- 4 There is important terminology associated with these provisions. First, "specified offence" means a specified violent offence as specified in Part 1 of Schedule 15 or a specified sexual offence as specified in Part 2. "Serious harm" means death or serious personal injury, whether physical or psychological. "Serious offence" means an offence which is a specified offence and one which, apart from s 225, is punishable in the case of a person aged 18 or over by imprisonment for life or a determinate sentence of 10 years or more.
- 5 To qualify for any of the new sentences, the offender must be convicted of a "specified offence". Each of the new sentences is intended to be used to protect the public from "serious harm". Separate provision is made for offenders over 18 on the day of conviction and those under 18 on that day.
- 6 Note that no reference is made in the relevant sections to offenders between the ages of 18 and 21. The Act appears to assume that the Criminal Justice and Court services Act 2000, s 61, which abolishes sentences of detention in a young offender institution and reduces the minimum age for imprisonment to 18, will be in force. It is likely that transitional arrangements will be contained in the relevant commencement order to allow these provisions to apply to 18-21 year olds.

## **Life Imprisonment**

- 1 If the following 5 conditions are satisfied, the court must impose a sentence of life imprisonment:-
  - (a) the offender must be 18 or over on the date of conviction (irrespective of his age on the date of commission of the offence)
  - (b) he must be convicted of a specified offence, whether violent or sexual
  - (c) the offence must be punishable with life imprisonment
  - (d) the court must be "of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences"

- (e) the court must consider that the seriousness of the offence, or the offence and one or more offences associated with it, is such as “to justify the imposition of a sentence of imprisonment for life”.

## **Imprisonment for Public Protection**

- 1 If the following conditions are satisfied, a sentence of imprisonment for public protection must be imposed:-
  - (a) the offender must be 18 or over on the date of conviction (irrespective of his age on the date of commission of the offence)
  - (b) he must be convicted of a specified offence which is punishable with 10 years imprisonment or more (including life imprisonment)
  - (c) the court must be “of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences”
  - (d) either the offence of which the offender has been convicted is not punishable with life imprisonment or the court does not consider that it together with any associated offences is serious enough to justify life imprisonment.
- 2 Accordingly, the principal differences in qualification are that where the offence is not punishable with life but is punishable with 10 years or more or although punishable with life, it is not considered serious enough to justify life, the offender must receive a sentence for public protection rather than a life sentence.
- 3 A court which imposes either of these 2 sentences must fix a minimum term in accordance with s82A of the Sentencing Act 2000. If there is a life sentence, the court may decline to fix one if it is of the opinion that it should not do so in view of the seriousness of the offence or the combination of that and associated offences. The approach is likely to follow the previous practice in relation to discretionary and automatic life sentences. The court should identify the notional determinate sentence, take half of that sentence as the basis for calculating the minimum term unless there are reasons for taking more and deduct a period equivalent to any time spent remanded in custody. The prisoner will serve the minimum term specified by the court and will then be eligible for release on the direction of the Parole Board if it considers that his continued detention is not necessary for the protection of the public.

- 4 If the offender has been sentenced to life, he will remain on licence for the rest of his life. If sentenced to imprisonment for public protection, he will remain on licence for a minimum of 10 years. After the expiry of that period, the Parole Board may direct that his licence shall cease to have effect. If the PB does not give such a direction, he will remain on licence for the rest of his life. Save for the power of the PB to make the direction to discharge the licence, there is no difference between the two sentences.
- 5 Offenders sentenced to imprisonment for public protection may be detained in prison for a period longer than the normally permitted maximum for all the offences of which they have been convicted if the PB considers that their continued detention is necessary for the protection of the public.

## Extended Sentences

- 1 If an offender is:-
  - (a) 18 or over on the day of conviction
  - (b) has been convicted of a specified offence which is not punishable with 10 years imprisonment or more and
  - (c) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences,

the court must impose an extended sentence.

- 2 The major difference between the new extended sentence and that under s85 of the 2000 Act is that the new one does not apply to any offence punishable with 10 years or more. This excludes many sexual offences for which extended sentences have hitherto been commonly imposed. In practice, the new extended sentence will be limited to offences of violence such as s20 unlawful wounding, ABH or their racially aggravated versions. Most of the commonly encountered sexual offences carry a maximum of 10 years or more under the Sexual Offences Act 2003.
- 3 The threshold of risk is substantially higher than that required under the old law.

- 4 An extended sentence has 2 components; the “appropriate custodial term” and “the extension period”. During the extension period the offender is subject to a licence which shall be of such length as the court considers necessary to protect members of the public from serious harm occasioned by the commission by him of further specified offences. The combined length of the 2 components must not exceed the maximum sentence for the offence.
- 5 The “appropriate custodial term” must be at least 12 months and must not exceed the maximum sentence for the offence. The “extension period” must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. In practice the extension periods will never be as long as 5 or 8 years.
- 6 An offender serving an extended sentence will be considered by the Parole Board for release on licence after he has served one half of the appropriate custodial term. The PB may direct his release if it is satisfied that it is no longer necessary for the protection of the public that he should be confined. If his release is not so directed, he must be released when he has served the whole of the appropriate custodial term.
- 7 For offenders under the age of 18 years on the day of conviction, sentences of detention for life under s91 of the 2000 Sentencing Act, detention for public protection and extended sentences of detention are available. In a case of murder, the court should not normally make a whole life order in the case of an offender under 18 see schedule 21 para. 5. This exception does not apply to a sentence of detention for life.
- 8 In the case of a serious specified offence which does not qualify for detention for life, the court has a choice between detention for public protection and extended sentence of detention. The former may be imposed only if the court considers that an extended sentence of detention would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by him of further specified offences. In considering the adequacy of an extended sentence of detention, it might reasonably be submitted that the court should take into account the likely effect of any available disqualification order, sexual offence prevention order or ASBO.
- 9 All these new sentences are mandatory if the conditions are satisfied. The sentence of imprisonment for public protection may well have the result that offenders who, prior to this Act, would have received a relatively short

determinate sentence will face the risk of indefinite imprisonment. Two examples provided by Dr. David Thomas demonstrate what might happen.

- (a) an offender pleads guilty to downloading indecent photos of children contrary to the Protection of Children Act 1978. This is a “specified sexual offence” punishable with 10 years imprisonment. Accordingly, it is a “serious offence”. There is evidence which suggests that the offender will or may commit further similar offences in the future. Assume that the court finds that such offences will involve a significant risk of serious harm to members of the public. The court must impose a sentence of imprisonment for public protection. It may fix a relatively short minimum term but the offender remains at risk of remaining in custody indefinitely.
  - (b) An offender pleads guilty to sexual activity with a child contrary to s 9 of the Sexual Offences Act 2003. The offence involves non-penetrative touching e.g. sexually motivated spanking. The maximum sentence is 14 years. Assume that the court has evidence which suggests that the offender is likely to repeat the offence and that some potential victims will suffer serious psychological injury as a result. The conditions for a sentence of imprisonment for public protection would appear to be satisfied. Accordingly, the court must impose such a sentence.
- 10 There is no provision for “exceptional circumstances” in order to avoid the imposition of such a sentence.

## **The Assessment of Dangerousness**

- 1 Section 229 makes provision for the assessment of dangerousness where an offender has been convicted of a specified offence.
- 2 The first category of case is where an offender is under 18 or who has not been convicted previously of any “relevant offence” in any part of the UK. “Relevant offence” means any specified offence, an offence specified in Schedule 16 (Scottish offences) or specified in Schedule 17 (Northern Irish offences). The court in making the assessment must take into account all such information as is available to it about the nature and circumstances of the offence, may take into account any information which is before it about any pattern of behaviour of which the offence forms part and may take into account any information about the offender which is before it.

- 3 The second category is where the offender is over 18 and has a UK conviction for a "relevant offence". In that event, the court must assume that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences unless, having taken into account all such information as is available to it about the nature and circumstances of each of the offences, where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part and any information about the offender which is before it, the court considers that it would be unreasonable to conclude that there is such a risk.
- 4 This second category applies to anybody convicted of a specified offence who has been convicted previously of a specified offence. Neither offence need be a "serious offence". For example, an offender convicted of ABH who has a previous conviction for unlawful sexual intercourse falls within the scope of the section.

## **Determination of Minimum Term in Relation to Mandatory Life Sentence**

- 1 The relevant provisions are set out in schedule 21.
- 2 In summary, a whole life order is the appropriate starting point where the offender is over 21 at the date of commission of the offence and the court considers that the seriousness of the offence or the combination of the offence and one or more associated with it, is exceptionally high.
- 3 The appropriate starting point in determining the minimum term is 30 years where the seriousness of the offence etc is particularly high and the offender was 18 or over at the date of commission.
- 4 Otherwise, the appropriate starting point is 15 years. If the offender was aged under 18 when he committed the offence, the appropriate starting point is 12 years.
- 5 Having chosen the appropriate starting point, the court should take into account any aggravating or mitigating factors to the extent that it has not allowed for them in its choice of starting point.

Richard Anelay QC  
June 2005

# Appendices



# SCHEDULE 21

## Determination of Minimum Term in Relation to Mandatory Life Sentence

### *Interpretation*

1. In this Schedule

"child" means a person under 18 years;

"mandatory life sentence" means a life sentence passed in circumstances where the sentence is fixed by law;

"mandatory life sentence" means a life sentence passed in circumstances where the sentence is fixed by law;

"minimum term", in relation to a mandatory life sentence, means the part of the sentence to be specified in an order under section 269(2);

"whole life order" means an order under subsection (4) of section 269.

2. Section 28 of the Crime and Disorder Act 1998 (c. 37) (meaning of "racially or religiously aggravated") applies for the purposes of this Schedule as it applies for the purposes of sections 29 to 32 of that Act.

3. For the purposes of this Schedule an offence is aggravated by sexual orientation if it is committed in circumstances falling within subsection (2)(a)(i) or (b)(i) of section 146.

### *Starting points*

4. (1) If-

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include-

(a) the murder of two or more persons, where each murder involves any of the following-

- (i) a substantial degree of premeditation or planning,
- (ii) the abduction of the victim, or
- (iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious or ideological cause, or

(d) a murder by an offender previously convicted of murder

5 (1) If-

(a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b) the offender was aged 18 or over when he committed the offence, the appropriate starting point, in determining the minimum term, is 30 years.

(2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include-

(a) the murder of a police officer or prison officer in the course of his duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

- (e) a murder involving sexual or sadistic conduct,
- (f) the murder of two or more persons,
- (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
- (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

6. If the offender was aged 18 or over when he committed the offence and the case does not fall within paragraph 4(1) or 5(1), the appropriate starting point, in determining the minimum term, is 15 years.

7. If the offender was aged under 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years.

*Aggravating and mitigating factors*

8. Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.

9. Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

10. Aggravating factors (additional to those mentioned in paragraph 4(2) and 5(2)) that may be relevant to the offence of murder include-

- (a) a significant degree of planning or premeditation,
- (b) the fact that the victim was particularly vulnerable because of age or disability,
- (c) mental or physical suffering inflicted on the victim before death,
- (d) the abuse of a position of trust,
- (e) the use of duress or threats against another person to facilitate the commission of the offence,

(f) the fact that the victim was providing a public service or performing a public duty, and

(g) concealment, destruction or dismemberment of the body

11. Mitigating factors that may be relevant to the offence of murder include-

(a) an intention to cause serious bodily harm rather than to kill,

(b) lack of premeditation

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability

(d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,

(e) the fact that the offender acted to any extent in self-defence,

(f) a belief by the offender that the murder was an act of mercy, and

(g) the age of the offender.

12. Nothing in this Schedule restricts the application of-

(a) section 143(2) (previous convictions),

(b) section 143(3) (bail), or

(c) section 144 (guilty plea).