House of Commons

Home Affairs Committee

Draft Sentencing Guidelines 1 and 2

Fifth Report of Session 2003–04

HC 1207

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Report, together with an annex, appendices and formal minutes

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Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Home Office and its associated public bodies; and the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office.

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The current staff of the Committee are Dr Robin James (Clerk), Mr Mark Etherton (Second Clerk), Kate Akester (Adviser (Sentencing Guidelines)), Dr Ben Morris (Committee Legal Specialist), Mr Ian Thomson (Committee Assistant), Rowena Macdonald (Secretary) and Mr John-Paul Flaherty (Senior Office Clerk).

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Footnotes

In the footnotes of this Report, references to oral evidence previously published by the Committee are indicated by 'Q' followed by the question number.

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Report

Summary

This report describes the Home Affairs Committee's new role in scrutinising draft sentencing guidelines produced by the Sentencing Guidelines Council (SGC). It sets out the background to the new system of guidelines and outlines how we intend to make public our comments on each draft guideline. We also conclude that there are circumstances in which wider debate within Parliament may be desirable on particular guidelines.

We then discuss the first two draft guidelines to be published.

On *Draft Guideline 1: Reduction in sentence for a guilty plea*, we note the rationale behind the long-established practice of the courts of reducing sentences after guilty pleas: that is, that guilty pleas save the time and expense of contested trials, and also save victims and witnesses from the stressful prospect of having to give evidence. We broadly welcome the draft guidelines as providing a useful clarification of the law.

We comment on several specific issues. We express regret at the omission of a race impact question, and query as ambiguous the wording of the section on 'red handed' offenders.

We focus in detail on the application of the draft guideline to the offence of murder. The Criminal Justice Act 2003 carries forward previous provisions in relation to reduction for a guilty plea, and explicitly states that these apply to the new arrangements for murder tariffs.

We note the Home Secretary's comments that this reduction was intended to apply only in "genuinely exceptional circumstances" in cases of murder, but we can find no mention in the Act (or in parliamentary debate during the passage of the Act) of any such limitation of the normal sentence reductions.

We express doubt as to whether, at the time of the passage of the 2003 Act, either the Home Secretary or the House at large realised the full implications of the paragraph in the relevant Schedule which applied guilty plea reductions to murder tariffs. This situation almost certainly arose because the provisions relating to murder tariffs were introduced at report stage in the Commons, which precluded effective parliamentary scrutiny either by select or standing committee. We hope that the lesson will be learnt by the Home Office and the House that it is highly undesirable for major criminal justice provisions to be put before Parliament at a late stage in proceedings on a Bill.

We believe that the SGC acted in a reasonable manner when it included murder as well as other offences within the ambit of the draft guideline. Nonetheless, we believe that the draft in its present form does not fully reflect the wishes of Parliament indicated by the enactment of the special provisions for murder in the 2003 Act. Nor does it fully reflect public disquiet about the extent to which reductions for a guilty plea, especially when applied in addition to reductions for other 'mitigating circumstances', may reduce sentences for murder significantly below the 'starting points' set out in the Act.

We criticise media coverage which suggested that reductions in murder tariffs would be widespread under the new guidelines. This was irresponsible and misleading.

We consider whether the draft guideline might be amended to indicate a 20% limit in sentence reduction in murder cases, but reject this option.

We suggest two ways forward:

- in the *medium term*, legislation by Parliament to remove ambiguity by making express provision for some restriction, in respect of murder, of the normal sentence reductions for guilty plea.
- In the *short term*, that the Sentencing Guidelines Council should consider possible amendment to the draft guideline to reflect Parliament's wish that murder should be treated as a separate and especially grave category of offence.

On *Draft Guideline 2: Overarching principles: seriousness* and *New sentences: Criminal Justice Act 2003*, we welcome the reaffirmation of the five core principles which will underlie sentencing: punishment, reduction of crime, rehabilitation and reform, public protection, and reparation.

We call for being "under the influence of drugs or alcohol" to be added to the draft guideline's list of aggravating factors to be taken into account when sentencers assess the level of culpability of an offender.

We agree that there may be "exceptional local circumstances" that may lead to a local prevalence of offences influencing local sentencing for a time. However, any use of higher levels of sentencing locally should be founded on objective evidence of prevalence. The SGC should consider mechanisms for keeping any such sentencing under review to prevent an unintended knock-on effect on sentencing generally. We also call on the Lord Chief Justice to play a role where necessary in indicating when the increasing frequency of particular crimes across a wide area of the country might justify a consistent approach to higher levels of sentencing.

We welcome the principles underlying the new community sentences and look forward to observing their deployment in practice. We note that one option open to sentencers is to fine offenders. Use of fines has declined steeply in recent years; we call for this decline to be reversed.

On persistent offending, we recommend that the draft guideline be amended to make clear that sentences—within the overall requirement for proportionality—should reflect the need strongly to discourage repeated law-breaking.

We recommend that the draft guideline should place more emphasis on the necessity for sentencers to bear in mind the need to maintain public confidence when they deal with breaches of requirements imposed by a sentence.

We support the draft guideline's general approach to custodial sentences of more than 12 months, though developing practice will need to be closely monitored. We call on the Government to take the necessary steps to secure adequate funding for the Probation Service to enable it to implement the new arrangements effectively.

We will monitor the introduction of the new deferred sentences, suspended sentences and intermittent custody. We are particularly keen to see the development of intermittent custody pilots for women prisoners.

1 Introduction

1. This report arises from a new role for the Home Affairs Committee—that of scrutinising draft guidelines produced by the Sentencing Guidelines Council. The Committee will contribute to the formulation of guidelines within the new sentencing framework established by the Criminal Justice Act 2003. This aims to put the sentencing of offenders in England and Wales on a more systematic and coherent basis. In the report we set out the background to our scrutiny work on sentencing, and make comments on the first two draft guidelines to be published. Draft Guideline 1 is on *Reduction in sentence for a guilty plea.* In our comments we focus specifically on the application of this guideline to the offence of murder. Draft Guideline 2 is on *Overarching principles: seriousness* and *New sentences: Criminal Justice Act 2003.*[1]

Sentencing Guidelines

2. Prior to the implementation of the Criminal Justice Act 2003, guidelines on sentencing for judges and magistrates were issued by the Court of Appeal (Criminal Division). Since 1999, the Court of Appeal had been advised by the **Sentencing Advisory Panel**, a non-departmental public body, sponsored by the Home Office and the Lord Chancellor's Department (as it then was) in order to promote consistency in sentencing.[2] The Panel would conduct a consultation exercise on particular guidelines before submitting them to the Court of Appeal, which was required to take account of, though not necessarily to accept, the Panel's advice. However, the Court of Appeal could only issue guidance in the context of an appeal against sentence in an individual case. The need to relate guidance to an individual case also imposed constraints on how wide-ranging the guidance could be.

3. Under the provisions of the Criminal Justice Act 2003,[3] a **Sentencing Guidelines Council** has been established under the chairmanship of the Lord Chief Justice, comprising both judicial and non-judicial members. This implemented recommendations in the Halliday and Auld Reports.[4] The Council is now responsible for issuing guidelines, but—unlike the Court of Appeal when it delivered guideline judgments—the Council is not tied to individual cases, nor restricted to dealing with specific offences. In addition to sentencing guidelines, it also issues allocation guidelines, i.e. guidelines concerning mode of trial. The Council has also taken over responsibility for the Magistrates' Court Sentencing Guidelines. It is required to produce an annual report to Ministers which will be laid before Parliament.

4. The Sentencing Advisory Panel remains in existence, but with a wider remit, and a duty to provide advice to the Council instead of to the Court of Appeal. The new system

1 The text of the draft guidelines, and of the accompanying advice from the Sentencing Advisory Panel, is available on the Sentencing Guidelines Council's website: www.sentencing-guidelines.gov.uk.

2 The Panel was set up under the Crime and Disorder Act 1998.

3 Henceforward cited as "the 2003 Act".

4 Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales: Making Punishments Work*. (July 2001) [the review was chaired by John Halliday, former Director of Criminal Justice Policy at the Home Office], ch 2; Lord Chancellor's Department, *Report of a Review of the Criminal Courts of England and Wales by the Rt Hon Lord Justice Auld* (October 2001), ch 12, para 111

operates either by the Panel proposing to the Council that it frames or revises particular guidelines; or the Council doing so of its own motion, in which case it must notify the Panel, which will then begin the consultation process.[5]

5. Once the Council, on the basis of the Panel's advice, has produced draft guidelines, it must publish them and consult on them with the Home Secretary, "such persons as the Lord Chancellor, after consultation with the Secretary of State, may direct",[6] and any other persons it considers appropriate. Thus there are two stages of consultation on a draft guideline: the initial stage conducted by the Panel , and a second stage conducted by the Council on the basis of a fully drafted text. (It is at this second stage that the Home Affairs Committee will be consulted.) After making any amendments it considers appropriate, in the light of the second stage of consultation, the Council may issue the guidelines as definitive. Every court must have regard to them when sentencing an offender, or exercising any other relevant function.

6. The 2003 Act sets out matters to which the Council must have regard in framing guidelines:

> (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 reoffending,
>
> (d) the need to promote public confidence in the criminal justice system, and
>
> (e) the views communicated to the Council … by the Panel.[7]

7. The Council began work in April 2004. Its first two guidelines, with which we deal in this report, were issued in August 2004.

The Committee's Role

8. In June 2002 the then Leader of the House wrote to the then Chairman of the Committee to canvass our participation in a consultative or scrutinising capacity. He suggested that "a bridge is built between Parliament and the Council in order to enable Parliament properly to contribute to those guidelines whilst preserving the proper independence of the Council". The purpose of the proposed role, he added, would be for Parliament "to offer observations, advice and suggested amendments to the Council. This will provide an effective means for the views of Parliament to be taken into proper account while respecting the judicial independence of the Council".[8]

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5 2003 Act, Section 171(3)

6 Section 170(8)

7 Section 170(5)

8 Letter dated 13 June 2002 from Rt Hon Robin Cook MP to Chris Mullin MP (printed in Appendix A)

9. **We have agreed to carry out this role of reviewing draft guidelines. We do not envisage our function as being to give or withhold formal approval of each guideline, or to provide extended analysis of its contents, but to focus on particular issues of concern or interest to Parliament or the public. Where we consider that a draft guideline raises major issues, we will make a report to the House on these. In the case of other guidelines we will supply our comments to the Council in the form of a letter from the Chairman, which we will also publish on our website.**[9]

10. **We consider that there may be some circumstances in which it would be desirable for draft guidelines which raise particularly important or sensitive issues to be debated in a forum which other Members of the House could attend. The Government has agreed in principle to the proposal that draft guidelines should be referred, where need arises, to a standing committee on delegated legislation.**[10] **This proposal raises procedural and other issues which require further consideration. An alternative possibility would be for this Committee's report on a draft guideline to be debated in Westminster Hall on a motion for the adjournment. This is an issue on which we may make further recommendations in due course.**

11. In July 2004 we took oral evidence from the Lord Chief Justice, Lord Woolf, in his capacity as Chairman of the Council.[11] We are grateful to Lord Woolf for giving us this opportunity of discussing sentencing issues and the work of the Council with him, and for indicating that he supports the idea of our holding similar sessions with the Lord Chief Justice on an annual basis—perhaps shortly after publication of the Council's annual report.[12]

12. We wish to comment on the particular issue of timing. When we originally undertook to scrutinise draft guidelines, this was on the basis that the public consultation period on each guideline would be two months. Unfortunately, the first two draft guidelines have not been supplied to us on this basis. They were sent to us on 25 August 2004, under embargo until publication on 17 September, and with a request that responses should be submitted to the Council by 27 September.

13. We queried this very truncated timescale with the Council. In response the Head of the Council Secretariat, Mr Kevin McCormac, acknowledged that this was "a highly unusual timescale … driven by the importance of ensuring that the guideline [on seriousness] is available to the judiciary when they are being trained to implement these provisions". He undertook that "we would expect all future consultations to provide for the two-month period previously discussed". However, he did not address the issue of whether any of that two-month period would be under embargo.[13] The Council subsequently indicated that it had deferred consideration of the first two guidelines till its November meeting in order to allow the Committee more time to discuss them.

9 www.parliament.uk/homeaffairscom

10 See correspondence with the then Leader of the House printed in Appendix A.

11 Home Affairs Committee, Oral Evidence taken on 1 July 2004, *Sentencing Guidelines* (HC 844-i of Session 2003-04)

12 Ibid, Q 10

13 Letter dated 3 September 2004 (printed as Appendix B)

14. We are grateful to the Council for this extension of its original deadline. However, we believe that **it is important that in respect of future guidelines, the Council should give all its consultees the full two-month period for scrutiny. It is also essential that that two-month period should follow publication of the draft guideline, and not be subject to any embargo.** This will allow us and other consultees to consult other interested parties, and will reinforce public confidence that the consultation process is being taken with due seriousness by the Council. In this respect we note that the Government's own guidance to departments on consultation exercises is that the minimum period for public consultation is 12 weeks.[14]

2 *Reduction in sentence for a guilty plea*

The general principle of the draft guideline

15. The Sentencing Advisory Panel issued a consultation paper on reduction in sentence for a guilty plea in November 2003. Sixty-two responses were received. The draft guideline reflects the views of the Panel and a large majority of these original consultees (76%) that reductions in sentence are justifiable for "system-based" reasons: that is, that guilty pleas save the time and expense of contested trials. They also save victims and witnesses from the stressful prospect of having to give evidence.

16. The practice of reducing sentences after guilty pleas is long established. Parliament confirmed it explicitly in section 48 of the Criminal Justice and Public Order Act 1994, which placed a statutory duty on sentencers to state in open court that credit had been given for a guilty plea. Section 48 was itself founded on long-established practice. The provision in the 1994 Act was carried further in section 152 of the Powers of Criminal Courts (Sentencing) Act 2000, which placed a new requirement on a court passing a less severe sentence because of a guilty plea to explain in open court that it had done so. Section 152 was re-enacted in almost identical terms in the Criminal Justice Act 2003, as follows:

> **144 Reduction in sentences for guilty pleas**
>
> (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.
>
> (2) In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 of the Sentencing Act, nothing in that subsection prevents the court, after taking into account any matter referred to in subsection (1) of this section, from imposing any sentence which is not less than 80 per cent of that specified in that subsection.

14 Cabinet Office, *Code of Practice on Consultation* (January 2004), para 1.4. The Government notes that "though the code does not have legal force, [it should] generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure from it" (ibid., introduction).

17. The appropriate level of reduction for a guilty plea has never formally been set by the Court of Appeal, but, according to the Sentencing Advisory Panel, "a reduction of one third has generally been accepted as the normal approach". (In respect of two particular offences the Criminal Justice Act 2003, following earlier legislation, restricts the extent of any reduction. Section 144 (2), cited above, refers to the two special statutory rules on presumptive minimum offences, of seven years custody for a third Class A drug trafficking offence, and three years custody for a third residential burglary. The subsection limits credit for a guilty plea in either of these situations to a reduction of no more than 20%.)

18. The draft guideline sets out a sliding scale of possible reduction from one third to one tenth of the sentence: one third applying where defendants plead guilty "at the first reasonable opportunity". The draft guideline does not attempt a definition of "first reasonable opportunity" but leaves the matter to be decided in the context of individual cases. Later pleas will normally attract up to one quarter discount (after trial is set) and up to one tenth "at the door of the court". The consultation process reveals, again, very broad support for the Council's approach.

19. In cases where there is a public protection issue, invoking a longer than commensurate, extended, or indeterminate sentence, the Council accepts the Panel's advice that the fixed element of the sentence be reduced in accordance with these provisions, but that the protection of the public element (involving parole review) remain unchanged. Thus, offenders will have access to earlier review if they plead guilty, but will not be released if they are still regarded as dangerous.

20. The draft guideline departs from the Panel's advice in relation to defendants caught 'red-handed'. The Panel advises that, since the purpose of the giving of credit is to encourage those who are guilty to so plead at the earliest opportunity, there is no reason why credit should be withheld or reduced in cases in which the evidence is particularly strong. Most consultees who responded to this question tended to agree. However, the Council suggests that credit is likely to be less for someone caught red-handed.

21. The Panel's consultation paper did not pose the question of what the impact on minority ethnic groups might be. It has been argued that the guilty plea discounts result in longer sentences for black defendants, because disadvantaged minority groups are less likely than majority group members to plead guilty, and when they do, do it later in the process, because of alienation from the criminal justice system in which they believe they are unfairly treated. There is substantial research evidence in support of this view.[15]

General conclusions

22. **We broadly welcome the draft guideline as providing a useful clarification of the law. We appreciate the necessity of maintaining flexibility, while also providing helpful guidance for courts.**

23. There are three specific matters on which we wish to comment. First, **we note the absence of any race impact question in the consultation process. In view of the evidence**

15 Roger Hood, *Race and Sentencing*, 1992; *Race for Justice* (Crown Prosecution Service 2003)

that minority ethnic groups are less likely to plead guilty, we think this a regrettable omission, and we hope that such questions will be raised in future consultations.

24. Secondly, **we found the wording of the section on 'red-handed' offenders ambiguous. It may be open to misinterpretation and uncertainty; and we are concerned that the suggestion of less credit might be a disincentive to pleading guilty in proper cases. We were in agreement with the Panel's advice in this respect, and we suggest that the Council might wish to reconsider the detailed wording on this one point.**

25. Thirdly, we have considered the application of the guideline to the offence of murder. We discuss this in detail in the next section of this report.

The application of the draft guideline to murder

26. The draft guideline provides for reductions in sentence for a guilty plea to apply in cases of murder as for other offences. When the guideline was published in September 2004, this provision led to considerable comment in the press, much of it hostile. The Home Secretary also issued a statement.[16] In view of the degree of controversy surrounding this subject, it is necessary to set out the background in some detail.

27. An annex to this report gives a brief summary of the recent history of sentencing in murder cases—in particular the development of the idea of the 'tariff' (minimum term) in mandatory life sentences, and the recent removal (following a 1996 Home Affairs Committee recommendation)[17] of the right of the Home Secretary to set tariffs.

28. The Home Secretary was responsible for setting tariffs until 2002. His decisions were judicially reviewable, and since the law has changed trial judges' decisions have been appealable by both defence and (following a reference by the Attorney General) prosecution in the Court of Appeal. Release must be directed by the Parole Board, and cannot occur unless the prisoner is regarded as not dangerous. The Parole Board may only review cases once the tariff has been served, and the majority of mandatory lifers are not released after the first review. Recidivism rates are extremely low (around 3%).

29. In 2002 the Sentencing Advisory Panel issued an 'Advice', later embodied in a Practice Direction from the Lord Chief Justice. The Advice set out "starting points" for murder tariffs of 12 years (normal), 15/16 years (where culpability was exceptionally high or the victim was in an especially vulnerable position) and no minimum term (exceptionally grave cases). It was made clear that these were starting points, subject to variation, and leaving judges "a considerable degree of discretion".

30. The starting points have since been superseded by statutory provision. Schedule 21 to the Criminal Justice Act 2003 (Determination of minimum term in relation to mandatory life sentence) sets out new starting points in relation to the calculation of tariffs in mandatory life cases. They are:

16 See below, para 33 and Appendix D

17 Home Affairs Committee, Second Report of Session 1995–96, *Murder: The Mandatory Life Sentence (Supplementary Report)* (HC 412), para 14

- Whole life tariff where the seriousness of the offence is exceptionally high
- 30 years where the seriousness is particularly high
- 15 years (12 years for under 18-year-olds) for other cases.

31. Paragraph 12 of the Schedule specifically states that "nothing in this Schedule restricts the application of … section 144 (guilty plea)". Sentencing proceeds, as for every other offence, with taking aggravating or mitigating circumstances into account, and considering personal mitigation. There is authority (in a House of Lords decision)[18] that tariffs must be calculated in the same way as determinate sentences. However, section 272 of the Act allows the Attorney General to refer an unduly lenient tariff to the Court of Appeal, where it may be increased if appropriate.

The Council's interpretation of the relation of the guideline to the 2003 Act

32. The draft guideline states that "the content of this guideline will also assist sentencers when arriving at the appropriate minimum term for the offence of murder, applying Criminal Justice Act 2003, paragraph 12 of schedule 21". According to the Council, "the approach to setting the minimum term when sentencing for murder following schedule 21 is set out in the Practice Direction handed down on 29 July 2004 which set out three stages starting with the minimum term set out in the statute, then incorporating the aggravating and mitigating factors peculiar to the offence and, finally, other relevant factors including whether or not a guilty plea had been entered". [19] The Lord Chief Justice has commented that "it was always his practice under the previous statutory regime to take into account the guilty plea in giving his views to the Home Secretary on what the minimum term should be".[20]

The Home Secretary's interpretation of the relation of the guideline to the 2003 Act

33. In a statement issued on 20 September, the Home Secretary, the Rt Hon David Blunkett MP, accepted that the 2003 Act provides for a reduction in sentence for all offences, but argued that, because of the "unique nature of the offence of murder", the normal reduction should not be automatic in all cases but should reflect "genuinely exceptional circumstances". He stated that "this was clear from debates in Parliament when the Act was passed." He added that "we will now need to look not only at the specific proposals but also at the interaction between the guidelines and the principles set out in the Act. I am sure that the Home Affairs Select Committee whose responsibility it is to review today's draft guidelines in the first instance will want to consider this very carefully." The Home Secretary also stated that "I will await the Select Committee's view before taking a final opinion".[21]

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18 *Ex parte Doody* 1993 3 All ER

19 Letter from the Head of the Council Secretariat, Kevin McCormac, dated 20 September 2004 (printed as Appendix C)

20 Ibid.

21 See Appendix D below

Parliamentary scrutiny of the murder provisions in the 2003 Act

34. We asked the Home Office to supply references to the comments made in debate to which the Home Secretary alluded. In response the Home Office referred us to comments by the Parliamentary Under-Secretary at the Home Office, Paul Goggins MP, during consideration stage of the Criminal Justice Bill:

> It is important to emphasise that new schedule 2 [now Schedule 21] does not include mandatory minimum sentences for each category of murder, but provides a starting point that can be varied, up or down, according to circumstances. The starting point for most murders will be 15 years. For the murder of a prison officer or a police officer, it will be 30 years. The starting point for terrorists and those who abduct and murder children will be whole life. Those levels reflect the seriousness of the offence and provide a robust framework in which judges will have discretion to reflect individual circumstances.[22]

35. The fact that the provisions in the Act governing reduction for guilty plea apply to the Act's new arrangements for murder tariffs does not appear to have been remarked on at all during the parliamentary passage of the Act.[23] One reason may be that the provisions relating to murder were not contained in the Bill as introduced into the Commons, but were added by way of Government new clauses at report stage. This meant that they could not be discussed in the Home Affairs Committee's report on the Bill (published before second reading)[24] nor in the standing committee. Debate on these new provisions at report stage was constrained not only by the usual limitations of time on the floor, but by the fact that the new clauses were grouped for debate with two other sets of new clauses dealing with the quite separate issues of firearms offences and penalties for driving offences causing death.[25] The Home Office has argued that the new provisions were in fact brought before Parliament at the earliest practicable opportunity, because the necessity for introducing them arose from the *Anderson* case in the House of Lords, on which judgement was given in late November 2002.[26]

Application of the draft guideline to murder: conclusions

36. The 2003 Act carries forward previous provisions in relation to reduction for a guilty plea, and explicitly states that these apply to the new arrangements for murder tariffs. There is no mention in the Act (or in parliamentary debate during the passage of the Act) of any restriction of these provisions to, in the Home Secretary's words, "genuinely exceptional circumstances".

37. **It is not clear whether, at the time of the passage of the 2003 Act, either the Home Secretary or the House at large realised the full implications of paragraph 12 of Schedule 21 to the Act. This situation almost certainly arose because the provisions**

22 HC Deb, 20 May 2003, col 901. The Home Office subsequently drew our attention to a further brief reference in a debate in the House of Lords: HL Deb, 14 October 2003, col 860.

23 Other than in the brief reference in the House of Lords cited in footnote 22 above.

24 Home Affairs Committee, Second Report of Session 2002–03, *Criminal Justice Bill* (HC 83), published 4 December 2002

25 HC Deb, 20 May 2003, col 865ff

26 Home Office, email communication dated 25 October 2004 (not printed).

relating to murder tariffs were introduced by way of government new clauses at report stage, i.e. comparatively late in the passage of the Bill through the House. This prevented effective parliamentary scrutiny either by select or standing committee. It is a classic illustration of the truth of the maxim, "legislate in haste and repent at leisure". We hope the lesson will be learnt by the Home Office and the House that it is highly undesirable for major criminal justice provisions to be put before Parliament at a late stage in proceedings on a Bill. The House and the public have the right to expect that in future adequate time will be allowed for effective scrutiny of major legislative proposals.

38. The question of the "unique nature of the offence of murder", also referred to by the Home Secretary, has been the subject of debate in legal and political circles. On the one hand, murder is obviously a very serious offence and in many cases crimes of murder are justifiably regarded with deep abhorrence by the public. On the other hand, murder covers a very wide range of circumstances. A former Lord Chancellor, Lord Hailsham of St Marylebone, commented in a case before the House of Lords in 1987 that:

> Murder, as every practitioner of the law knows, though often described as [an offence] of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner.[27]

39. Murder undoubtedly encompasses a range of acts of differing degrees of culpability, which merit a corresponding range of sentencing options. However, **by making express provision for murder tariffs in the 2003 Act, Parliament sent a clear signal that it does wish murder to be treated as significantly different from other offences—and we endorse this view. We believe that the Sentencing Guidelines Council acted in a reasonable manner when it included murder as well as other offences within the ambit of the draft guideline. Nonetheless we believe that the draft in its present form does not fully reflect the wishes of Parliament indicated by the enactment of the special provisions for murder in the 2003 Act. Nor does it fully reflect public disquiet about the extent to which reductions for a guilty plea, especially when applied in addition to reductions for other 'mitigating circumstances', may reduce sentences for murder significantly below the 'starting points' set out in the Act.**

40. It should be pointed out that neither in the 2003 Act, nor in any earlier statute, is the appropriate level of reduction in sentence for a guilty plea stated. The draft guideline's indication that 33% is an appropriate reduction where a guilty plea has been entered early is founded not on statute but on longstanding practice and 'legitimate expectation', and the Panel's assessment of "the normal approach" of the courts in the past.

41. We note that there is no clear statistical evidence on the extent to which reductions in sentence for a guilty plea have hitherto been applied to murder tariffs. It is therefore impossible to be entirely certain that the proposed guidelines do, as is claimed, merely reflect current practice.

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27 *R v Howe* [1987] AC 417, 433G

42. We also note in passing that early guilty pleas are relatively uncommon in murder cases, compared with other crimes. **We believe that media coverage which suggested that reductions in murder tariffs would be widespread and commonplace under the new guidelines was irresponsible and misleading.**

43. The 2003 Act does explicitly limit any reduction in sentence, to 20%, in the case of two specific offences, drug trafficking and third-time burglars. **We considered whether the draft guideline might be amended to indicate a 20% limit in murder cases.** This might be justified by analogy with the 2003 Act's provision in the case of these other two mandatory sentences, on the grounds that in the case of murder the convention of discounting by one third is less well established, because of the relatively recent introduction of tariffs. It could be argued that such a limitation would reflect the particular gravity of the offence of murder and the public's abhorrence of it. **However, there is a strong argument that any such limitation should be imposed through statute, and that in the absence of express statutory provision such a model might be subject to challenge in the courts. There is also the point that the existing 20% limit applies to two categories of the so-called 'three strikes and you are out' rules; there is no obvious analogy with murder cases. For these reasons we do not favour such an amendment to the draft guideline at this stage (but see our further recommendation in paragraph 44 below).**

44. We think there are two ways forward. **In the medium term, the best solution might well be for Parliament to legislate to remove the ambiguity and confusion which has inadvertently arisen out of the conjunction of the 2003 Act's provisions and the draft guideline, by making express statutory provision for some restriction, in respect of murder, of the normal reductions in sentence for a guilty plea.**

45. **In the short term, we recommend that the Sentencing Guidelines Council should consider possible ways of amending the draft guideline in order to reflect Parliament's clear wish that murder be treated as a separate and especially grave category of offence. In particular, we ask the Council to take account of public concern over the extent to which reduction in sentence for a guilty plea, in addition to reductions for other mitigating circumstances, may produce a 'multiplier effect' which reduces individual sentences for murder very significantly below the starting points set out in the 2003 Act. We would wish to see sentencers advised that in the case of murder, reduction in sentence for a guilty plea should not normally be granted in addition to reductions for other mitigating circumstances. It may be that further legislation is required in order to give legal authority to this recommendation; but if it were possible for the Council, without acting *ultra vires*, to amend the draft guideline along these lines, this would undoubtedly help to maintain public confidence in the criminal justice system**.

46. **Finally, we recommend that the guideline should explicitly state, for the avoidance of any doubt, that the starting points for murder tariffs specified in the 2003 Act supersede those contained in the 2002 Advice and any subsequent restatements of it**.

3 *Overarching principles: seriousness* and *New sentences: Criminal Justice Act 2003*

47. The Sentencing Guidelines Council proposes to produce a small number of draft guidelines dealing with 'overarching issues'. This draft guideline deals with the concept of 'seriousness', dealt with in the particular context of the new sentencing framework introduced by the Criminal Justice Act 2003. The draft does not deal with 'Custody Plus',[28] the implementation date of which is as yet uncertain, because of the probation resources it will absorb. However, it does include community sentences, deferred sentences, custodial sentences of 12 months or more, suspended sentences, and intermittent custody. Related questions, such as prevalence of particular offences, persistence, and breaches of orders are also covered. Many of these provisions are due to be implemented in April 2005.

48. The consultation exercise was not carried out in the normal way, by the Sentencing Advisory Panel asking for written responses to a consultation document. This is because of the breadth of the subject matter, and the fact that there was no evidence or experience base to draw on, as the consultation preceded implementation of the new sentences. Instead, interested organisations, individuals, and sentencers were invited to seminars to discuss a consultation paper. The Panel subsequently discussed the emerging findings with representatives of the key stakeholders: judges, magistrates, and the probation service. This process led to the submission of an advice by the Panel to the Council in July 2004.

49. **The draft guideline recites the five principles sentencers should have regard for.** These were given statutory expression in the 2003 Act. They are: **punishment, reduction of crime, rehabilitation and reform, public protection, and reparation.** This statement of principles has been generally welcomed; although there has been some criticism that it does not clarify the process, because it leaves sentencers to choose in which order to apply these principles.

50. **We welcome the substance of the core principles expressed in the draft guideline.** We wish to make further comments on a small number of detailed matters dealt with in the draft.

The assessment of seriousness

51. There appears to be a general consensus about the assessment of 'seriousness'. **Consultees were in agreement that courts must consider both the culpability of offenders, and the harm they intended to cause, might have caused, or did cause. The Act is clear that the impact on victims must be taken into account. We support this approach.** The draft guideline sets out a list of aggravating and mitigating factors to be taken into account when sentencers assess the level of culpability of an offender. We propose one amendment to that list: that **being "under the influence of drugs or alcohol" should be included as an aggravating factor.** This would reflect public concern at the role drugs and alcohol play in offending.

28 Custodial sentence of under 12 months followed by release on conditions such as performance of community service, electronic tagging, supervision orders or exclusion orders.

Prevalence

52. The 'prevalence' of particular offences at certain times and in certain areas, and whether it has any effect on the perceived seriousness of individual offences, is a difficult issue. The Panel's advice reveals that their consultation attracted mixed reactions. While seriousness must be assessed uniquely in every case, there are nevertheless some offences that have a wider psychological impact. The examples cited by the Panel are of sex attacks on women, causing fear in affected localities, or bomb hoaxes at sensitive times causing more distress than they would at other times.

53. These are serious offences, but in practice the influence of 'prevalence' on sentencing is likely to be largely restricted to magistrates' courts cases, such as stealing mark badges from cars or graffiti in telephone boxes. It is at this level that large numbers of cases are dealt with: while in the crown courts, somewhat removed from these localised difficulties that sometimes occur, cases may come from quite a wide catchment area.

54. The Council agrees with the Panel's thinking that, in principle, individual offenders should not be given longer sentences for, say, shoplifting just because it is prevalent in a particular locality. However, both Panel and Council accept that there may be "exceptional local circumstances" that may lead to 'prevalence' legitimately influencing sentencing levels for a time. The key consideration will be "the harm being caused to the community": but any such assertion must be borne out by objective evidence such as, it is suggested, might be provided by the local Criminal Justice Board; and there must be a compelling need to treat the offence more seriously than elsewhere. The draft guideline states that such a local deviation should be exceptional, and that enhanced sentences should be abandoned once the offences are no longer prevalent.

55. **We agree with the draft guideline that there may be "exceptional local circumstances" that lead to the prevalence of particular offences in a particular locality legitimately influencing local sentencing levels for a time. We would support the occasional use by courts of higher levels of sentencing to send out the right message to the wider community, and to enhance public confidence in the system. However, in such cases it is important that the decision to impose harsher sentences is founded on objective evidence of prevalence, perhaps provided by local Criminal Justice Boards.**

56. **There is a danger that increases may have an unintended knock-on effect on sentencing generally, unless prevalence is independently assessed, and kept under review. We recommend that the Council consider possible mechanisms for conducting such assessment and review.**

57. **Finally, prevalence as discussed in the draft guideline is a matter for consideration by sentencers at a very local level. We wish to draw attention also to circumstances in which the increasing frequency of a crime across a wide area of the country might justify a consistent approach to higher levels of sentencing. In these circumstances we would look to the Lord Chief Justice to assess the evidence and indicate the need for such an approach.**

Community sentences

58. Community sentences are at the heart of the new approach set out in the 2003 Act. The sentences will be made up of a selection of requirements (listed in the draft guideline) aiming to punish, to rehabilitate and to provide reparation. The idea is to address the causes of offending in individual cases, and to tailor interventions accordingly. The Parliamentary Under-Secretary at the Home Office, Paul Goggins MP, recently emphasised the importance of community sentences as a component of the Government's strategy for dealing with offenders:

> key features of these reforms are the development of end-to-end management of offenders and a greater use of effective community sentences in place of short-term imprisonment.[29]

59. **We welcome the principles underlying the new community sentences and look forward to observing their deployment in practice.** At this stage we wish to make only one comment. This is to remind sentencers that one option open to them is to fine offenders. The use of fines has declined steeply in recent years. The Carter report published in December 2003 drew attention to the fact that "the use of prison and probation has increased by a quarter since 1996, whilst the use of fines has fallen by a similar amount".[30] HM Chief Inspector of Probation, Professor Rod Morgan, giving evidence to us earlier in 2003, said that:

> Use of the fine has declined disastrously in the last 12 years. We have the lowest unemployment rate nationally since 1992–93, and yet use of the fine for indictable offenders has reduced from 42% to 27–28% in the last 10–12 years. That is the silting up, as I put it, of probation caseloads".[31]

Current low levels of unemployment mean that more offenders than heretofore have higher levels of disposable income and can afford to pay fines. **We encourage sentencers to make greater use of fines where appropriate. We support the Carter report's advocacy of income-related fines for low-risk offenders.**[32]

Persistent offenders

60. Section 151 (2) of the 2003 Act permits courts to impose community sentences on over 16-year-olds who have previously been convicted and fined on three previous occasions, even where the offence for which they are currently being sentenced would not normally be serious enough to justify such a sentence, if this is "in the interests of justice". The draft guideline suggests that the justification for imposing such a sentence is the persistence of the offending behaviour, rather than its seriousness. The draft states that:

29 HC Deb, 11 October 2004, col. 171W

30 Home Office, *Managing Offenders, Reducing Crime*, Patrick Carter, 11 December 2003, p. 3

31 Home Affairs Committee, Oral Evidence taken on 11 February 2003, *Probation* (HC 437-i of Session 2002–03), Q23

32 Home Office, *Managing Offenders, Reducing Crime*, Patrick Carter, 11 December 2003, p. 42

> The requirements imposed should involve the lowest possible restriction on liberty to reflect the fact that the offences, of themselves, are not sufficiently serious to merit a community sentence.[33]

61. **We are concerned that the draft guideline's call for the "lowest possible restriction on liberty" may send out the wrong signal to the public about the seriousness with which the courts regard the problem of persistent offending. We recommend that the draft guideline should be redrafted to make clear that sentences—within the overall requirement for proportionality—should reflect the need strongly to discourage repeated law-breaking.**

Breaches

62. The draft guideline discusses what is an appropriate response to breaches of requirements imposed by a sentence.[34] We welcome the draft guideline's encouragement to sentencers to look at what sentences should try to achieve—and the improved dialogue with the probation service and knowledge of local resources that this should entail. However, we are anxious that public confidence in sentencing should not be jeopardised by the perception that breaches do not attract adverse consequences, or that they may lead to the offender being given a new sentence less onerous than the original sentence. Flexibility is, of course, essential; but sentencers should be aware that if the new framework is to succeed it must command public support. **We recommend that the draft guideline should place more emphasis on the necessity for sentencers to bear in mind the need to maintain public confidence when they deal with breaches.**

Custodial sentences of more than 12 months

63. The new framework established by the 2003 Act changes the nature of custodial sentences significantly. Offenders will be released (unless they are deemed to be "dangerous") after serving half their sentences. The second half will be served in the community, subject to licence conditions that are likely to be more demanding and restrictive than is currently the case. They may be similar to the requirements which make up community sentences. Conditions and supervision will continue until the end of the sentence, and it is probable that any breach will result in a return to custody, where the remainder of the sentence will have to be served.

64. The more challenging and onerous structure of the new sentence argues for decreasing its overall length in order, as the Council puts it, to maintain consistency between the present arrangements and the new ones. The draft guideline suggests that sentences should therefore be cut by up to a quarter. This is a critical strategic argument in the effort to achieve more effective outcomes, and reduce unnecessary prison numbers.

65. **We support the general approach adopted in the draft guideline on this issue, though the development of sentencing practice under the new framework will need to be closely monitored. We look forward to being updated on practice as it evolves.**

33 Para 2.1.15

34 Paras 2.1.42–48

66. The only specific comment we wish to make at this early stage is that the new arrangements will not work unless they are adequately resourced. This was a central concern of the Halliday Report on which the new framework is based: the report observed that "it would be better not to embark on the project than to under-invest either in the management of change or in the essential infrastructure of the new framework".[35] The draft guideline points out that the Probation Service will be ultimately responsible for the conditions imposed on offenders and for supervising them. There are indications that the Probation Service, despite very substantial additional national funding, is over-extended and under-staffed in London, although it is better serviced in other parts of the country. **The success of these bold sentencing reforms depends on adequate funding of the Probation Service in all areas, and we expect the Government to take the necessary steps to ensure that this is secured.**

Deferred sentences, suspended sentences, and intermittent custody

67. The new deferred sentences will incorporate a requirement to fulfil a selection of the same obligations that make up community sentences. The draft guideline states that such sentences should be used for defendants close to a significant threshold in circumstances where, if the conditions are satisfied, such a sentence may be avoided. In the event of default, defendants may be brought back to court before the end of the deferred period.

68. Suspended sentences will, similarly, be tailored to individual circumstances by the imposition of relevant obligations during the period of suspension of the sentence. Courts may review progress, and any breach will normally activate the sentence.

69. Intermittent custody is a new form of prison sentence of less than 12 months currently being piloted at two sites to investigate its effectiveness. It is designed to be used as an alternative to custody where facilities exist and defendants are considered appropriate. Offenders will be on licence between custodial days, as well as when the custodial period has finished; and courts may order conditions or requirements to be fulfilled at both points.

70. **We note that intermittent custody is only, as yet, being piloted, and has not yet been evaluated. We are particularly keen to see the development of intermittent custody pilots for women prisoners. We look forward to the opportunity to monitor the introduction of the new sentences.**

35 *Making Punishments Work*, p 69

Conclusions and recommendations

1. We have agreed to carry out [the] role of reviewing draft guidelines. We do not envisage our function as being to give or withhold formal approval of each guideline, or to provide extended analysis of its contents, but to focus on particular issues of concern or interest to Parliament or the public. Where we consider that a draft guideline raises major issues, we will make a report to the House on these. In the case of other guidelines we will supply our comments to the Council in the form of a letter from the Chairman, which we will also publish on our website. (Paragraph 9)

2. We consider that there may be some circumstances in which it would be desirable for draft guidelines which raise particularly important or sensitive issues to be debated in a forum which other Members of the House could attend. The Government has agreed in principle to the proposal that draft guidelines should be referred, where need arises, to a standing committee on delegated legislation. This proposal raises procedural and other issues which require further consideration. An alternative possibility would be for this Committee's report on a draft guideline to be debated in Westminster Hall on a motion for the adjournment. This is an issue on which we may make further recommendations in due course. (Paragraph 10)

3. It is important that in respect of future guidelines, the Council should give all its consultees the full two-month period for scrutiny. It is also essential that that two-month period should follow publication of the draft guideline, and not be subject to any embargo. (Paragraph 14)

Draft Guideline 1—*Reduction in sentence for a guilty plea*

4. We broadly welcome the draft guideline as providing a useful clarification of the law. We appreciate the necessity of maintaining flexibility, while also providing helpful guidance for courts. (Paragraph 22)

5. We note the absence of any race impact question in the consultation process. In view of the evidence that minority ethnic groups are less likely to plead guilty, we think this a regrettable omission, and we hope that such questions will be raised in future consultations. (Paragraph 23)

6. We found the wording of the section on 'red-handed' offenders ambiguous. It may be open to misinterpretation and uncertainty; and we are concerned that the suggestion of less credit might be a disincentive to pleading guilty in proper cases. We were in agreement with the Panel's advice in this respect, and we suggest that the Council might wish to reconsider the detailed wording on this one point. (Paragraph 24)

7. It is not clear whether, at the time of the passage of the 2003 Act, either the Home Secretary or the House at large realised the full implications of paragraph 12 of Schedule 21 to the Act [which applies the arrangements for reduction for a guilty plea to the new provisions for murder tariffs]. This situation almost certainly arose because the provisions relating to murder tariffs were introduced by way of

government new clauses at report stage, i.e. comparatively late in the passage of the Bill through the House. This prevented effective parliamentary scrutiny either by select or standing committee. It is a classic illustration of the truth of the maxim, "legislate in haste and repent at leisure". We hope the lesson will be learnt by the Home Office and the House that it is highly undesirable for major criminal justice provisions to be put before Parliament at a late stage in proceedings on a Bill. The House and the public have the right to expect that in future adequate time will be allowed for effective scrutiny of major legislative proposals. (Paragraph 37)

8. By making express provision for murder tariffs in the 2003 Act, Parliament sent a clear signal that it does wish murder to be treated as significantly different from other offences—and we endorse this view. We believe that the Sentencing Guidelines Council acted in a reasonable manner when it included murder as well as other offences within the ambit of the draft guideline. Nonetheless we believe that the draft in its present form does not fully reflect the wishes of Parliament indicated by the enactment of the special provisions for murder in the 2003 Act. Nor does it fully reflect public disquiet about the extent to which reductions for a guilty plea, especially when applied in addition to reductions for other 'mitigating circumstances', may reduce sentences for murder significantly below the 'starting points' set out in the Act. (Paragraph 39)

9. We believe that media coverage which suggested that reductions in murder tariffs would be widespread and commonplace under the new guidelines was irresponsible and misleading. (Paragraph 42)

10. We considered whether the draft guideline might be amended to indicate a 20% limit in murder cases…However, there is a strong argument that any such limitation should be imposed through statute, and that in the absence of express statutory provision such a model might be subject to challenge in the courts. There is also the point that the existing 20% limit applies to two categories of the so-called 'three strikes and you are out' rules; there is no obvious analogy with murder cases. For these reasons we do not favour such an amendment to the draft guideline at this stage (but see our further recommendation in paragraph 44 below). (Paragraph 43)

11. In the medium term, the best solution might well be for Parliament to legislate to remove the ambiguity and confusion which has inadvertently arisen out of the conjunction of the 2003 Act's provisions and the draft guideline, by making express statutory provision for some restriction, in respect of murder, of the normal reductions in sentence for a guilty plea. (Paragraph 44)

12. In the short term, we recommend that the Sentencing Guidelines Council should consider possible ways of amending the draft guideline in order to reflect Parliament's clear wish that murder be treated as a separate and especially grave category of offence. In particular, we ask the Council to take account of public concern over the extent to which reduction in sentence for a guilty plea, in addition to reductions for other mitigating circumstances, may produce a 'multiplier effect' which reduces individual sentences for murder very significantly below the starting points set out in the 2003 Act. We would wish to see sentencers advised that in the case of murder, reduction in sentence for a guilty plea should not normally be

granted in addition to reductions for other mitigating circumstances. It may be that further legislation is required in order to give legal authority to this recommendation; but if it were possible for the Council, without acting *ultra vires*, to amend the draft guideline along these lines, this would undoubtedly help to maintain public confidence in the criminal justice system. (Paragraph 45)

13. We recommend that the guideline should explicitly state, for the avoidance of any doubt, that the starting points for murder tariffs specified in the 2003 Act supersede those contained in the 2002 Advice and any subsequent restatements of it. (Paragraph 46)

Draft Guideline 2—*Overarching principles: seriousness* and *New sentences: Criminal Justice Act 2003*

14. The draft guideline recites the five principles sentencers should have regard for: punishment, reduction of crime, rehabilitation and reform, public protection, and reparation. … We welcome the substance of [these] core principles. (Paragraphs 49, 50)

15. Consultees were in agreement that courts must consider both the culpability of offenders, and the harm they intended to cause, might have caused, or did cause. The Act is clear that the impact on victims must be taken into account. We support this approach. (Paragraph 51)

16. Being "under the influence of drugs or alcohol" should be included as an aggravating factor. (Paragraph 51)

17. We agree with the draft guideline that there may be "exceptional local circumstances" that lead to the prevalence of particular offences in a particular locality legitimately influencing local sentencing levels for a time. We would support the occasional use by courts of higher levels of sentencing to send out the right message to the wider community, and to enhance public confidence in the system. However, in such cases it is important that the decision to impose harsher sentences is founded on objective evidence of prevalence, perhaps provided by local Criminal Justice Boards. (Paragraph 55)

18. There is a danger that increases may have an unintended knock-on effect on sentencing generally, unless prevalence is independently assessed, and kept under review. We recommend that the Council consider possible mechanisms for conducting such assessment and review. (Paragraph 56)

19. Prevalence as discussed in the draft guideline is a matter for consideration by sentencers at a very local level. We wish to draw attention also to circumstances in which the increasing frequency of a crime across a wide area of the country might justify a consistent approach to higher levels of sentencing. In these circumstances we would look to the Lord Chief Justice to assess the evidence and indicate the need for such an approach. (Paragraph 57)

20. We welcome the principles underlying the new community sentences and look forward to observing their deployment in practice. (Paragraph 59)

21. We encourage sentencers to make greater use of fines where appropriate. We support the Carter report's advocacy of income-related fines for low-risk offenders. (Paragraph 59)

22. We are concerned that the draft guideline's call for the "lowest possible restriction on liberty" may send out the wrong signal to the public about the seriousness with which the courts regard the problem of persistent offending. We recommend that the draft guideline should be redrafted to make clear that sentences—within the overall requirement for proportionality—should reflect the need strongly to discourage repeated law-breaking. (Paragraph 61)

23. We recommend that the draft guideline should place more emphasis on the necessity for sentencers to bear in mind the need to maintain public confidence when they deal with breaches. (Paragraph 62)

24. We support the general approach adopted in the draft guideline on this issue [custodial sentences of more than 12 months], though the development of sentencing practice under the new framework will need to be closely monitored. We look forward to being updated on practice as it evolves. (Paragraph 65)

25. The success of these bold sentencing reforms depends on adequate funding of the Probation Service in all areas, and we expect the Government to take the necessary steps to ensure that this is secured. (Paragraph 66)

26. We note that intermittent custody is only, as yet, being piloted, and has not yet been evaluated. We are particularly keen to see the development of intermittent custody pilots for women prisoners. We look forward to the opportunity to monitor the introduction of the new sentences. (Paragraph 70)

Annex

The recent history of sentencing in murder cases

Since the Murder (Abolition of Death Penalty) Act 1965, the mandatory life sentence has been applied to all convictions for murder: and responsibility was placed with the Home Secretary to keep prisoners under continuous review, and to authorise release at the most appropriate time. The rationale for this was that trial judges would not be in a position to know the right point at which to achieve appropriate and safe release: and the factors that should be considered were the gravity of the offence, the safety of the public, and the danger of destroying by degrees over long years a life which society had refrained from destroying at the beginning. This was the first call for the establishment of a Parole Board, which was subsequently created (by the Criminal Justice Act 1967) to advise on risk and to make recommendations as to release.

The Home Secretary (Sir Frank Soskice) urged "the greatest care" in the exercise of this discretion saying that, except where absolutely necessary, deterioration of the personality should not be allowed to set in, nor the chances of reintegration permitted to diminish. It was known that 9 or 10 years was the maximum that "normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and becomes useful citizens"[1] This was a clear recognition of the public interest in rehabilitation; and litigation (see below) has gradually had the effect of transferring the Home Secretary's original functions to the Parole Board.

On 11 November 1983, the then Home Secretary, Rt Hon Leon Brittan MP, announced changes in the administration of life sentences. They were not put before Parliament. The new arrangements introduced tariffs: minimum terms that had to be served to satisfy the requirements of retribution and deterrence. On the expiration of the tariff, the Parole Board would review, and might recommend release if the prisoner were not regarded as dangerous. Then the Home Secretary would decide whether to accept the recommendation. If release were not recommended, another date for parole review would be set. Post-tariff detention was therefore justified on grounds of dangerousness. Tariffs, or minimum terms, were to be set by the Home Secretary; and trial judges and the Lord Chief Justice were to be consulted and to make recommendations.

These changes have been controversial, and have sparked off considerable litigation. The Home Secretary lost his role in setting tariffs in discretionary lifer (non murder) cases[2] (when it appeared that their lesser culpability had not been taken into account). Trial judges became responsible for setting tariffs in these cases; and following a European court decision[3] they were granted oral Parole Board hearings, (implemented by the Criminal Justice Act 1991) at which their release could be ordered directly, without reference to the Home Secretary.

These principles have gradually been extended both to HMP detainees (under 18-year-olds convicted of murder) and to mandatory lifers, again by means of litigation. The House of Lords ruled that there should be disclosure of judicial recommendations as to tariff, together with the right to make representations in 1993.[4] By this time, aided by the findings of the 1989 (House of Lords) Select Committee (which had uncovered ministerial increases of tariffs in a large percentage of cases) criticism of the Home Secretary's role gathered momentum. The Home Affairs Committee produced a report in 1996 (Murder: the Mandatory Life Sentence) recommending that both tariff and release decisions should be removed from the Home Secretary; and that the trial judge should decide on tariff, with both prosecution and defence having the right to appeal to the Court of Appeal.

1 HC Deb, 21 December 1964, col 927

2 *Ex parte Handscombe* (1988) 86 Crim App R 59

3 *Thynne Gunnell and Wilson v UK* (1990) 13 EHRR 666

4 *Ex parte Doody* 1993 3 All ER 92-113

These changes did not, however, occur until after the implementation of the Human Rights Act. Successive decisions had made it clear that the courts regarded tariff-setting as a "sentencing exercise"[5] and this argument, taken in conjunction with the provisions of Article 6 (of the European Convention) requiring trials (and sentences) to be conducted by an impartial and independent tribunal, has eventually succeeded. The European Court decision in the case of Venables and Thompson[6] ruled that the Home Secretary, as part of the executive, was not impartial or independent: and thus was precluded from setting tariffs for HMP detainees. A former case[7] had given them access to oral Parole Board hearings.

Mandatory lifers are now in the same position, following other court decisions.[8] It appears that the provisions in the Criminal Justice Act 2003 (Schedule 21) identifying starting points of 15 and 30 years from which trial judges must begin to calculate tariffs may be a response to this litigation.

5 *Ex parte Pierson* (1997) 3 All ER

6 *T& V v UK* 16 December 1999

7 *Hussain and Singh v UK* 26 February 1996

8 *Ex parte Anderson,* HL Judgement 25 November 2002; *and Stafford v UK* May 2002

Appendix A

Exchange of Correspondence between the former Leader of the House and the Committee

Letter dated 13 June 2002 from Rt Hon Robin Cook MP, Leader of the House, to Mr Chris Mullin MP, Chairman of the Home Affairs Committee

One of the proposals in "Making Punishments Work—a review of the sentencing framework" (the Halliday Report) was for improvements in the way that sentencing guidelines are made in order to produce guidelines that are comprehensive, easily accessible and command the confidence of Parliament, the public, the judiciary and practitioners.

The Home Secretary has indicated that he is minded to create a Sentencing Guidelines Council chaired by the Lord Chief Justice which will consist of members of the judiciary drawn from each tier that deals with criminal cases. The Council will be supported by the Sentencing Advisory Panel (which has a wider membership) much as it currently supports the Court of Appeal. The Council will be promulgating guidelines which will apply to all courts, will cover all offences and a number of issues that are not offence specific, and which will be required to be taken into account whenever sentence is passed.

It is important that this Council is clearly seen as independent of the executive but it is also important that a bridge is built between Parliament and the Council in order to enable Parliament properly to contribute to those guidelines whilst preserving the proper independence of the Council.

It has been suggested that the Home Affairs Committee could take on this role, which would complement its existing expertise.

It will be important to ensure a speedy process which does not involve lengthy parliamentary duplication of the enquiries already undertaken by the Council. In the early years of the Council, the volume of guidelines is likely to be quite considerable since each one that currently exists will need to be re-visited in the light of the new framework. It ought to be anticipated that as many as 100 new guidelines will need to be considered in each of the first three years of the Council's existence. The Committee might find it useful to operate through a sub-committee. If the Committee thought it appropriate, I could see an argument for increasing its membership and giving it power to appoint an additional sub-committee to do this work.

It is anticipated that the Council will be formed soon after the legislation is enacted (possibly summer 2003) and that the first draft guidelines will be issued during the course of the following six months.

I would be very grateful to have your views on this proposal as a matter of urgency.

Extract from reply dated 22 July 2002 from Mr Chris Mullin MP, Chairman of the Committee

The Home Affairs Committee has now considered your letter of 13 June about a possible role for the Committee in relation to the proposed Sentencing Guidelines Council. … If the structures are set up as the White Paper envisages, the Committee would be willing to take on the task you suggest.

There are some provisos. We…think that there will be a need, from time to time, for some draft guidelines to be debated to ensure that the widest range of views of Members are taken into account. This may involve some procedure akin to a standing committee on delegated legislation.

Extract from letter dated 11 September 2002 from Mr Cook to Mr Mullin

Thank you for your letter of 22 July. I am extremely grateful for your positive response…

I understand the point you make about the need for some guidelines to be debated, and I can see that, in some circumstances, they could be referred to Standing Committee on Delegated Legislation, just as happens to other proceedings pursuant to an Act which are not strictly speaking statutory instruments. However, I wish to consult colleagues on this matter, before coming to a settled decision—the guidelines in question will be unlike normal documents produced under an Act as they will not have been prepared by the Government, and we should consider how this is best handled.

Letter dated 8 November 2002 from Mr Cook to Mr Mullin

I wrote to you in September thanking you for your Committee's agreement to be involved in the scrutiny of draft sentencing guidelines. I undertook to consult colleagues on your suggestion that on occasions some guidelines might be debated in a wider forum.

I am now in a position to agree in principle that the draft sentencing guidelines should be referred, where need arises, to a Standing Committee on Delegated Legislation. We envisage that this would be necessary only on rare occasions. In order to avoid any charge of government interference in judicial independence, Ministers would be unable to speak on the merits of the guidelines but might attend the Committee in order to listen to the debate.

Clearly some more thought needs to go in to the detailed procedures involved and I should welcome your Committee's further thoughts in due course.

I am copying this letter to Lord Falconer at the Home Office, and also to the Lord Chancellor and the Attorney General.

Appendix B

Letter dated 3 September 2004 from Mr Kevin McCormac, Head of the Secretariat of the Sentencing Guidelines Council, to the Clerk of the Committee

CONSULTATION ON DRAFT GUIDELINES

Thank you very much for your letter of the 26th August which I discussed with the Chairman of the Council, Lord Woolf, this morning.

As the Committee knows, the Council is very keen to ensure that the consultation with the Committee is an effective part of the process of creating sentencing guidelines. The Council is also mindful of the great demands it is placing on those it is consulting in relation to the draft guideline on seriousness and on the new sentences expected to be introduced by April 2005 (indeed, it only allowed itself 10 days from delivery of the Advice from the Sentencing Advisory Panel to formulation of the draft guideline!).

This is a highly unusual timescale and it is driven by the importance of ensuring that the guideline is available to the judiciary when they are being trained to implement these provisions. That training commences in January for both the professional and the lay judiciary but the training material is already being written and the training of those who will be delivering the training will start shortly after the next meeting of the Council on the 8th October.

Ideally, this guideline will be finalised so that the whole of the training process can take place knowing what the guideline says and Lord Woolf hopes that it will be possible for the Committee to consider the draft fully within that time. Knowing that time would be short, we have endeavoured to keep Kate Akester [the Committee's Adviser on Sentencing Guidelines] fully involved in the process of developing the draft guideline.

However, the Council will be greatly concerned to ensure that the final guideline benefits from the consultation process and that matters are conducted in a way that takes full benefit from the consultation process established.

If the Committee does not feel able to complete its consideration and respond by the 27th September, please let me know and we will see what alternative arrangements can be made.

I can confirm that we would expect all future consultations to provide for the two-month period previously discussed.

Appendix C

Letter dated 20 September 2004 from Mr Kevin McCormac, Head of the Secretariat of the Sentencing Guidelines Council, to Rt Hon John Denham MP, Chairman of the Committee

SENTENCING GUIDELINES COUNCIL DRAFT GUIDELINE—REDUCTION FOR GUILTY PLEA

Further to the adverse publicity regarding this guideline, I write to set out more of the background thinking.

As with your Committee, the Council has been taken by surprise by the nature of the response to what is a consolidating guideline. The publicity has concentrated on the application of the general principle to the setting of the minimum term for murder which arises from the statement on the second page of the draft guideline that "The content of this guideline will also assist sentencers when arriving at the appropriate minimum term for the offence of murder, applying Criminal Justice Act 2003, paragraph 12 of schedule 21."

The approach to setting the minimum term when sentencing for murder following schedule 21 is set out in the Practice Direction handed down on the 29th July 2004 which set out three stages starting with the minimum term set out in the statute, then incorporating the aggravating and mitigating factors peculiar to the offence and, finally, other relevant factors including whether or not a guilty plea had been entered (para. 49.12).

This in turn follows the order set out in the schedule, in particular in para. 12 where it affirms that nothing in the schedule restricts the application of section 144 of the Act which is the obligation to have regard to the entering of a guilty plea.

As the Lord Chief Justice said at the Press Briefing this morning, it was always his practice under the previous statutory regime to take into account the guilty plea in giving his views to the Home Secretary on what the minimum term should be.

In those circumstances, there was no expectation that this provision would be controversial.

Clearly, the publicity raises an issue that was not covered by the Home Affairs Committee and the Chairman of the Council has confirmed that he would be willing to extend the deadline also for this guideline if the Committee would like to give further consideration to the matter.

Appendix D

Home Secretary's Statement

The following statement was issued by the Home Office on 20 September 2004:

These are draft guidelines produced by the Sentencing Guidelines Council and subject to consultation with the Home Affairs Select Committee. I will await the Select Committee's view before taking a final opinion.

The Sentencing Guidelines Council has reiterated today that for the most heinous murders, life should mean life as set out in the Criminal Justice Act 2003. Parliament was also very clear when it passed the Act that those convicted of murder should receive minimum sentences ranging from 15 years to whole life, depending on their circumstances. This deliberately toughened up earlier legislation, passed by previous governments.

The only exceptions to the minimum tariffs in the Act should be very specific aggravating or mitigating circumstances such as a mercy killing or where self defence is a factor. The Act also provides for a guilty plea to be a mitigating factor but we believe the unique nature of the offence of murder means that this should not mean an automatic reduction in all cases but should reflect genuinely exceptional circumstances. This was clear from the debates in Parliament when the Act was passed.

These guidelines have been published in draft for consultation and we will now need to look not only at the specific proposals but also at the interaction between the guidelines and the principles set out in Act. I am sure that the Home Affairs Select Committee whose responsibility it is to review today's draft guidelines in the first instance will want to consider this very carefully.

Rt Hon David Blunkett MP
Home Secretary

Formal minutes

Tuesday 26 October 2004

Members present:

Mr John Denham, in the Chair

Mr James Clappison	Bob Russell
Mrs Janet Dean	Mr Marsha Singh
Mr Damian Green	Mr John Taylor
Mr Gwyn Prosser	David Winnick

The Committee deliberated.

* * *

The Committee further deliberated.

Draft Report (Draft Sentencing Guidelines 1 and 2), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 70 read and agreed to.

Annex agreed to.

Summary agreed to.

Several papers were ordered to be appended to the Report.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No. 134 (Select committees (reports)) be applied to the Report.

[Adjourned till Tuesday 2 November at 2.15 pm

Reports from the Home Affairs Committee since 2001

The following reports have been produced by the Committee since the start of the 2001 Parliament. Government Responses to the Committee's reports are published as Special Reports from the Committee or as Command Papers by the Government. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2003–04

First Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HC 109 (*Cm 6132*)
Second Report	Asylum Applications	HC 218 (*Cm 6166*)
Third Report	The Work of the Home Affairs Committee in 2003	HC 345
Fourth Report	Identity Cards	HC 130 (*Cm 6359*)

Session 2002–03

First Report	Extradition Bill	HC 138 (*HC 475*)
Second Report	Criminal Justice Bill	HC 83 (*Cm 5787*)
Third Report	The Work of the Home Affairs Committee in 2002	HC 336
Fourth Report	Asylum Removals	HC 654 (*HC1006*)
Fifth Report	Sexual Offences Bill	HC 639 (*Cm 5986*)

Session 2001–02

First Report	The Anti-Terrorism, Crime and Security Bill 2001	HC 351
Second Report	Police Reform Bill	HC 612 (*HC 1052*)
Third Report	The Government's Drugs Policy: Is it Working?	HC 318 (*Cm 5573*)
Fourth Report	The Conduct of Investigations into Past Cases of Abuse in Children's Homes	HC 836 (*Cm 5799*)