JUDICIARY OF
ENGLAND AND WALES

1 Introduction

1.1 This is a response to the Consultation Paper issued by the Sentencing Commission Working Group. It has been prepared by a group of High Court Judges put together by the Senior Presiding Judge as having considerable experience both at the Crown Court and at High Court level of trying, sentencing and sitting on appeals in criminal cases[1]. It has also been endorsed by the members of the Rose Committee[2].

1.2 For the avoidance of doubt, we make clear that we have no objection to this paper being published.

2 Executive summary

2.1 We strongly advise against the introduction of any 'presumptive' system, with a sentencing range which is too narrow to permit the judges to reflect the aggravating and mitigating features of each offence and each offender. Such a system would not command respect or authority; it would, furthermore, lead to so many sentences being passed 'out of the range' that the scheme would not achieve its purpose of enabling any reliable prediction to be made as to prison numbers.

2.2 We are firmly of the view that the grid based models of Minnesota and North Carolina are particularly unsuitable. We note, with some relief, that the Working Group do not: '... consider the wholesale adoption of this system appropriate for England and Wales' but it is not altogether clear what they might recommend in its place. Lest there be any lingering enthusiasm for a 'grid' type system, we have set out a number of other factors which we suggest would render such a system wholly inappropriate and indeed ineffective. Furthermore, if introduced, it might drive prison numbers up yet further.

2.3 We suggest that a detailed investigation of sentencing practices in other countries, and other states within the US, may produce ideas which might actually reduce prison

[1] In order of seniority, these judges are Fulford, Openshaw, Griffith Williams, Saunders and Maddison JJ.
[2] The Rose Committee consists of a sub-group of Lord and Lady Justices sitting in the Court of Appeal, Criminal Division. The members of the Sentencing Guidelines Council are not part of this response; for these purposes, the relevant members of the Committee are Hooper, Hallett, Hughes, Leveson and Toulson LJJ.

populations rather than drive prisoner levels up further. The work of the new Sentencing Commission set up in New Zealand may warrant particular examination.

2.4 We point out that the presumptive sentences so far introduced in this country have tended to operate in ways which could not have been – and certainly were not – predicted. No 'structured sentencing framework' would have made any difference to the huge increase in prison numbers which has resulted from these changes.

2.5 We think that the difficulty of drawing up any comprehensive 'presumptive' guidelines for all offences has been significantly underestimated; we believe it will take a considerable time, even if the proposed Sentencing Commission were to agree on ranking offences in a 'severity scale', which is doubtful.

2.6 It should be recognised that the Sentencing Guidelines Council (SGC) is already administering a system of advisory guidelines, in a narrative style. We commend its work and suggest that it is allowed to continue proceeding incrementally, offence by offence until it has covered all the high profile, high custody offences (which we understand may well be completed within 12 months). It should then take an overview of all the offences to compare the seriousness of one offence with another, making amendments to the guidelines if necessary.

2.7 We have concluded that the introduction of a 'recidivist premium' would attach too much weight to previous convictions, whilst not attaching sufficient weight to other aggravating factors and mitigating factors. We do, however, recommend that the SGC should be asked to consider whether the guidelines on the weight to be given to previous convictions and other aggravating and mitigating circumstances can be formulated with greater precision. Having said that, however, because of the great variety in the possible range of factors and weight attached to them, we are doubtful that such guidance could sensibly be other than in general terms.

2.8 We are persuaded that detailed sentencing statistics lie at the heart of any attempt to achieve predictability but the way they are collected needs radical overhauling and improvement, so that the sentences for offences recorded correspond with the types of offence identified by the SGC in its Definitive Guidelines and the principal factors which influenced the sentence are properly identified.

2.9 We regret past failures accurately to predict the effect of legislative change on prison numbers. We recommend that there should be set up some more effective procedure for wider consultation, including with experienced sentencers and practitioners, to attempt to predict the impact and effect on prison numbers of proposed changes of the

criminal law before its implementation; this can all be done within the existing framework (including by involving the SGC).

2.10 We have (at paragraph 16) put forward detailed proposals which will enable prison numbers to be predicted with greater precision, within the existing framework of the advisory guidelines issued by the SGC. We encourage a debate upon the wider issues of sentencing less serious offenders, who present no risk to the public safety.

3 The problem of prison over-crowding recognised

3.1 In spite of the new prison-building programme, the rapidly rising prison population in England and Wales is likely for some years to outstrip the speed at which new prisons can be built and staffed. We recognise that sufficient extra prison places to meet the demand rising at current rates simply cannot be built within the available time, even if Parliament voted the resources to do so. This will necessarily result in a continuing inconsistency between the demand for and supply of prison places. For these reasons, we welcome public debate to consider any strategies which might more accurately predict the future demand for prison places, so as to allow a prison-building plan which in the future more closely aligns demand and supply.

3.2 In this paper, we will seek to identify systems by which prison numbers can more accurately be predicted but we will also go on to suggest an alternative strategy by which the rise in prison numbers might be tackled.

3.3 It is important to re-state what has always been the conventional understanding: that it is for the executive to find the necessary prison places to accommodate those sentenced by the judges according to the laws passed by Parliament. We note that that Working Group describe this principle as being the position 'historically' (at paragraph 2.24); we suggest that it should not lightly be discarded.

3.4 We deprecate recourse to the expediency of earlier and earlier extra-statutory releases unconnected to sensible sentence planning. The Working Group are surely right when they say (at paragraph 1.2) that: 'new measures to release offenders from prison early ... diminish the authority of the court and erode both public confidence and the integrity of the criminal justice system'. In some states in the US – including incidentally some which have a 'structured sentencing framework'[3] - the prisons are now so full that the executive operates a 'one in, one out' policy; that is to say for each new prisoner sentenced to imprisonment, the state has to release one serving prisoner early to make room; this is completely unacceptable.

[3] We use this expression throughout, as it is how the Working Group refers to their preferred option.

4 The judges' principled objection to 'presumptive' guidelines

4.1 We welcome the clear statement of principle (at paragraph 1.5.a of the Consultation Paper) 'that individual sentencers will not under any of the measures discussed [in the Consultation Paper] be required to have regard to resources at the time they sentence in individual cases'.

4.2 It is important to stress the principled objection that the judges[4] have to any scheme which restricts their freedom to do justice in any individual case. The Working Group correctly foresaw this objection at paragraph 4.11: '... flexibility of application [in the present system] is thought by some, including many judges, to be a key feature of the system in England and Wales'.

4.3 The danger is that any 'structured sentencing framework', particularly one which is too presumptive – and certainly one which proceeds upon a 'grid' with only a narrow measure of variation, calculated mathematically[5] - will deprive the judges of the power to do justice in the particular case, whether that be by passing a mid range sentence for a standard offence or a severe sentence in a grave case or a merciful one in another, as the circumstances of the case demands. It is for these reasons that the judges of England and Wales are opposed to unduly 'presumptive' guidelines.

4.4 It is in the nature of the judicial process – of which sentencing is a part - that judges are required to use their own judgment. In sentencing offenders in this country, there already exist clearly defined limits within which that judgment must be exercised. For a hundred years, judges have been required to follow the guidance given by the Court of Appeal Criminal Division[6] ('CACD'). More recently, the Criminal Justice Act 2003 established the SGC; judges are now required (by section 172(1) of the Act) 'to have regard' to the guidelines issued by the SGC and (by section 174(2)) to give reasons for imposing any sentence which falls outside the range of the guidelines. Any sentence passed may be appealed by the defendant if too high and sentences passed on indictable offences may be appealed by the prosecution if too low.

4.5 The CACD in hearing appeals continues to have a vital role in applying those guidelines, in giving guidance in sentencing those categories of offences with which the SGC has not yet dealt[7] and in interpreting the relevant statutory provisions as laid

[4] We refer in our response to 'judges' but many of the points which we make will also apply to magistrates.
[5] As in Minnesota: a point to which we turn later.
[6] Formerly the Court of Criminal Appeal, established in 1907.
[7] For example Corran [2005] EWCA Crim 192 where the CACD gave guidance on the sentencing for offences under the then newly created Sexual Offences Act 2003.

down by Parliament, often to the extent of supplementing the bare bones of the statute with a raft of detail to make the scheme understandable and indeed workable[8].

4.6 The Criminal Justice Act 2003 gives other general guidance: as to the purpose of sentencing (section 142); determining the seriousness of an offence (section 143); making reduction in sentences for guilty pleas (section 144); increasing sentences for racial or religious aggravation (section 145); and increasing sentences for aggravation related to disability or sexual orientation (section 146).

4.7 It seems to us, therefore, that we already have in place in this country a system of sentencing in accordance with advisory guidelines; we will argue that the development of this system is the way forward rather than the introduction of a 'presumptive' system.

5 The inflexibility of Sentencing Guidelines Grids

5.1 The Sentencing Guidelines Grids in use in most of the states in the US (including Minnesota and North Carolina, both of which are seen by the Consultation Paper as possible models) are unsophisticated, if not crude. The New Zealand Law Commission, which is investigating just the same problems as we have here in this country, looked at Minnesota's system and found it to be 'too crude and blunt to ensure justice in the individual case'[9].

5.2 In Minnesota all criminal offences are compressed into just 11 broad bands of 'severity level', ranging from murder in the second degree and 'drive-by shootings' in the highest level[10] to the sale of 'simulated controlled substances' in the lowest. The operative part of the Sentencing Guidelines Grid is printed on just two sheets of A4 paper: there is one for non sexual offences (copied at page 42 of the consultation paper) and one for sexual offences (not copied, but it is in the same format). In the North Carolina 'Felony Punishment Chart' there are only 9 'offense classes'. We reflect later on the considerable difficulties that there will be to produce a comprehensive list of the thousands of criminal offences in England and Wales but any idea of shoe-horning them into so few bands is surely unthinkable and indeed unworkable.

5.3 The next important point to note is that the permitted range of sentences in the Sentencing Guidelines in both Minnesota and North Carolina (and indeed in all American 'presumptive' systems) is very narrow. For example in Minnesota, once the

[8]Striking recent examples are the judgment of Rose LJ in Lang [2006] 2 Cr App R (S) 3 on the dangerousness provisions in Criminal Justice Act 2003 and the judgment of Lord Woolf CJ in Sullivan [2004] EWCA Crim 1762 (a five judge court) on sentencing in murder under Schedule 21 of that Act.
[9] NZ Law Commission Report 94: Sentencing Guidelines and Parole Reform (2006), paragraph 98.
[10] Murder in the first degree is excluded: the prescribed penalty in Minnesota is death.

starting point is fixed for a basic example of an offence of the relevant 'severity level', the permitted range of sentence is fixed at between just 20% higher than the starting point and just 15% lower. It is possible to sentence 'outside the range', but only if the judge finds that there are: 'substantial and compelling circumstances', which the judge must formally identify and explain[11]. Sentencing within the range is further encouraged by giving the defence an automatic right to appeal sentences imposed above the range and the prosecution an automatic right to appeal sentences passed below the range. By these means fully 87% of sentences passed in Minnesota fall within the range. Thus, once the 'severity level' of the offence has been fixed, much of the flexibility in sentencing is removed. The role of the judge is merely to apply a sentence within the parameters of the range as laid down on the grid: there is otherwise no discretion. This may achieve 'consistency', and a higher degree of predictability, but at the cost of injustice and unfairness, since many sentences passed in accordance with the narrow guidelines laid down in the grid must be either too high or too low.

5.4 In North Carolina, there is a 'presumptive range' for typical offences, a higher 'aggravated range' and a lower 'mitigated range' but the bands are still narrow by our standards and the sentencer simply may not lawfully sentence outside the range at all (with the result that there are no appeals against sentence allowed: all sentences are passed within the grid, so – it is said - no one can have a legitimate complaint).

6 The proposed "recidivist premium"

6.1 We agree with the Working Group that the system in Minnesota and North Carolina is 'overly formulaic' and places too much weight on previous convictions compared with our system. The Working Group propose a "substantially modified" version of the American system in this country. We believe that, even modified, and with the retention of a significant degree of judicial discretion, such a system will be unfair in a substantial number of cases. Nor do we think that the introduction of a modified American model will make it any easier accurately to predict the demand for prison places. We fear that such a system is likely to increase sentences, for the reasons explained below.

6.2 The Working Group have produced an illustration of how a grid could be used to produce a 'recidivist premium' which would provide an increased starting point depending on the number of the offender's previous convictions (Annex I). They

[11] Explanations and reasons of this kind are not normally necessary in Minnesota since in an ordinary case the judge merely recites the sentence from the grid, so there is no need for the structured and reasoned sentencing remarks of the type which we have in England and Wales.

suggest that only "recent and relevant" convictions would count; some judicial discretion would remain to reflect aggravating and mitigating factors in the previous convictions; previous offences would be weighted in proportion to their seriousness by the use of a scoring system; and once the new starting point had been calculated, other aggravating and mitigating factors would be considered as at present.

6.3 The full range of those aggravating and mitigating factors can be found in the SGC guideline on "Overarching Principles: Seriousness". Although only 9 pages long, this guideline is written in a terse style; it gives very detailed guidance. It identifies fully 22 factors indicating a higher culpability. Since not everyone who reads this paper will be aware of them, it is as well to spell them out: offence committed whilst on bail for other offences; failure to respond to previous sentences; offence was racially or religiously aggravated; offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation or disability; previous conviction(s), particularly where a pattern of repeat offending is disclosed; planning of an offence; an intention to commit more serious harm than actually resulted from the offence; offenders operating in groups or gangs; 'professional' offending; commission of the offence for financial gain (where this is not inherent in the offence itself); high level of profit from the offence; an attempt to conceal or dispose of evidence; failure to respond to warnings or concerns expressed by others about the offender's behaviour; offence committed whilst on licence; offence motivated by hostility towards a minority group; deliberate targeting of vulnerable victim(s); commission of an offence while under the influence of alcohol or drugs; use of a weapon to frighten or injure victim; deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence; abuse of power and abuse of a position of trust. The SGC makes clear that even this comprehensive list is not exhaustive.

6.4 The guideline also lists the mitigating factors, being: 'a greater degree of provocation than normally expected'; mental illness or disability; youth or age, where it affects the responsibility of the individual defendant; and the fact that the offender played only a minor role in the offence. It also draws attention to the general mitigation which can be offered by the offender's personal circumstances and plea of guilty.

6.5 We realise that the Working Group have put forward only a tentative suggestion to give some general idea of the sort of system which could be employed. However, we consider that any system based on a grid is likely to give undue weight to previous convictions and allow insufficient flexibility in relation to other factors and will therefore carry with it an unacceptable level of unfairness.

6.6 At paragraph 3.1.5, the Working Group identify three main reasons why a sentencer moves from a specified starting point, being: aggravating and mitigating factors relating to the offence, criminal record and the offender's personal circumstances. At 3.1.6 the Working Group say that, of the three, "criminal history is the only factor that has to be considered in every case". We do not agree: all three factors are relevant in nearly every case and criminal history is not always the most significant. We think that the Working Group have attached undue weight to previous criminal history: precisely the same mistake that has been made in Minnesota and North Carolina.

6.7 There are many reasons why it is important that a sentencer should be able to adopt a flexible approach in relation to previous convictions. Sometimes a previous record or lack of it will be of little significance; for example the CACD has repeatedly said that lack of convictions should carry very little weight in cases involving theft by breach of trust or drug smuggling (the reasons are obvious: by and large people with a number of convictions are not trusted with large amounts of money and people without convictions are targeted by drug importers to bring drugs into the country).

6.8 There are also cases where previous convictions, even for similar offences, have little or no effect. A drug addict with a history of committing many acquisitive crimes, who makes a very determined effort to become drug free, but lapses on one occasion may actually end up with a lesser sentence than someone with no convictions. Also, there are genuine "turning point cases": it may be an overused mitigation but in some cases, a sentencer can recognise a genuine case where after a life of crime, an offender may be turning the corner. The same point can sometimes effectively be made on behalf of the hardened offender who, after a bad start, has gone straight for a number of years and then had an isolated lapse. It is often not in the public interest to pass an increased sentence in these cases, simply because the offender has previous convictions.

6.9 Previous convictions vary enormously in seriousness and in relevance to the instant offence; section 143(2) of the Criminal Justice Act 2003 recognises this. When sentencing for a domestic assault, a previous conviction for assaulting the same victim should increase sentence more than an assault not in a domestic context. On the other hand a previous conviction for manslaughter for the mercy killing of a spouse after a long marriage should not necessarily increase sentence for a drunken assault in a pub, committed with provocation - indeed it may explain it and lead to a reduction in sentence. These are extreme examples which have a very significant effect on sentence in the particular case but lesser examples occur all the time.

6.10 The proposal that previous offences should be weighted in accordance with their seriousness would produce anomalies. The seriousness of a previous offence, indeed of

any offence, depends on its circumstances and not on the label attached to it. A previous theft may have been a shop-lifting or the picking of someone's pocket, or the carefully organised appropriation of a huge sum of money by an employee from his employer.

6.11 In addition, the model (Annex I) excludes convictions more than 10 years old and convictions for offences committed when the offender was under 16; but what about offences committed when 17 by a defendant now aged 26? Are these to have the same effect on sentence as offences committed one year ago when the offender was 25? Similarly, there are sometimes crimes committed by offenders under 16 can be highly relevant, if there is a continuing pattern of offending or there is evidence of early mental illness or instability.

6.12 The circumstances of previous convictions and personal mitigation relating to them vary enormously: no grid, chart or 'recidivist premium' can reflect all of them. The Working Group are therefore right to recognise the need to retain judicial discretion in this area.

6.13 It is said that the 'recidivist premium' will reflect present sentencing practice; in support of this Annex I relies on research into sentences passed in 2006 demonstrating that, on average, sentences increase in severity depending on the number of previous convictions. That is hardly surprising but may not be simply because of the previous convictions. It may also be because the personal circumstances of the offender mean he is more likely to re-offend and less likely to benefit from a community sentence and therefore a more severe sentence is needed.

6.14 The research was into sentences passed for assaults occasioning actual bodily harm. In calculating an average increase, no account was taken of the different facts of the offences, aggravating and mitigating features or personal mitigation. Only the number of previous convictions was taken into account and any increase is therefore said to reflect the greater number of convictions. This is, at best, only a very rough and ready calculation. It may be that all those other factors average out but it is just as likely that they do not. We do not accept that a 'recidivist premium' can sensibly be calculated in this way or that it is possible to calculate a 'recidivist premium' which truly reflects present sentencing practice.

6.15 Until the Criminal Justice Act 2003, the general rule was that a good character could reduce sentence, whereas a bad character could not increase it. The rationale was that once an offender had paid the penalty for his crime he should not have to pay again. Section 143(2) of the CJA 2003 has changed that. The effect has been to increase the

level of sentences. A 'recidivist premium' will, we believe, further increase the length of sentences because the automatic imposition of a higher starting point will mean that sentencers will no longer be permitted to consider whether a previous conviction can reasonably be treated as an aggravating factor in each case. Nor is it at all clear how the new dangerousness provisions (as amended) would fit into the proposed system, or how the principle of totality, which protects against overlong sentences in cases of multiple offending, could be reflected in such a system.

6.16 In summary, therefore, we suggest that the proposed system will work injustice by failing properly to reflect the variable factors affecting previous convictions described above; that it will not make it any easier accurately to forecast the demand for prison places; and that it is likely to lead to yet further increases in sentencing levels, with yet more prison places required.

6.17 The proposed system is also likely substantially to increase the number of applications to the CACD for permission to appeal against sentence. This is the result whenever further complexities are added to an already complicated sentencing system. The number of appeals resulting from the dangerousness provisions referred to above illustrates the point. There will be numerous appeals on the basis that the grid, chart or 'recidivist premium' has not been properly applied in the particular case; as a result complex case law will develop around the application and refinement of the guidelines, as has happened in Minnesota. All this will result in meritorious appeals in other cases being delayed and additional courtrooms and judges would be needed to cope with the increased flow of work. A more detailed sentencing grid will almost inevitably add to the time (and thus the cost) of the sentencing process at first instance, especially when first introduced. It is not that the sentencer is likely to have difficulty in identifying the points that matter; but the prosecution and defence advocates will go through the details and the judge will have to go through the process of demonstrating that he has properly considered them. This will increase the workload of the Crown Court which is already under pressure.

6.18 It is neither necessary nor desirable to adopt what we contend is a "very blunt instrument". If the Working Group are correct in the assumptions made in producing the model at Annex I, it should be possible to calculate at least a rough average by which sentencers increase sentences now to reflect previous convictions; in which case it ought to be possible to use that model to predict prison requirements as far as possible without any changes to the system. This has not so far been done. If further advice is given to sentencers about the relevance of recent previous convictions, then

greater consistency will result, and the prediction of prison populations should become more reliable.

6.19 Whilst we strongly advise against a system that uses the ‘‘recidivist premium’, we think that the SGC should be asked to consider whether some more specific advice might be given to sentencers as to how and to what extent previous convictions might affect sentences.

7 The Sentencing Guidelines Council (SGC)

7.1 As we have already said, we suggest that we already have in place a system of sentencing by advisory guidelines; we will argue that the development of this system is the way forward rather than the introduction of a ‘presumptive’ system.

7.2 The way in which guidelines are issued by the SGC is well known. The SGC fixes a recommended ‘starting point’ for the sentence appropriate to a standard offence of the ‘type’ identified. However, in practice, there is rarely any completely standard example of a typical offence; nearly every offence is attended by some aggravating or mitigating factor. Similarly nearly every offender has some factor in his or her personal circumstances, or offending history, which will require the sentencer to vary the starting point up or down.

7.3 Having fixed the ‘starting point’, the SGC identifies a number of aggravating and mitigating features and then suggests a ‘range’ of sentences, the range being wide enough to cover both the offender without any personal mitigation, with recent and relevant previous convictions, who is convicted of an offence with many aggravating features and the offender, who has no previous convictions, who is convicted of an offence of the same type without any aggravating factors but with many mitigating factors.

7.4 Our present system, operated within these clear guidelines, is sufficiently flexible to allow the sentencer to identify the ‘starting point’ and to vary the sentence up or down to reflect all the many and various aggravating or mitigating factors of the offence and the offender, so as to do justice in the particular case. In this way the SGC, following upon the guidance formerly given by the guideline decisions of the CACD, is gradually achieving one of its statutory objects, which is ‘to promote consistency in sentencing’, as the Working Group recognises (paragraph 2.19). By hearing appeals, the CACD ensures compliance with the guidelines and thereby secures consistency of approach in such cases.

7.5 The guidelines which the SGC has issued command general respect and authority. There are a number of reasons for this. First, much of its work is informed by the

detailed reports of the Sentencing Advisory Panel ('SAP') which are issued after much public consultation, often backed up by specially commissioned research. Secondly, its members – as indeed the members of the SAP – are themselves respected; they have expertise in the field; membership includes experienced sentencers, but they are not in a majority. Thirdly, the guidelines are in large part based on the past sentencing practice of the courts, as derived from decisions of the CACD and the contribution of the experienced sentencers. Fourthly – and we suggest critically - the guidelines allow for all manner of circumstances, both aggravating and mitigating, to be considered; the sentencing ranges are wide, and certainly much wider than is commonly allowed in the guidelines grids in use in the US. Furthermore, judges here can sentence outside even those wide guidelines, if the circumstances so require. Our present system is inherently flexible: it allows the judges to do justice in the individual case.

7.6 We should also make the important point that, under our system, discounts are given for guilty pleas[12], the amount of the discount varying according to the cogency of the evidence and the stage in the proceedings at which the plea is entered. Any range under our system must be sufficiently wide to cover those who are convicted after a trial, defiant to the end, and those who plead guilty at the earliest opportunity, being truly remorseful. This is an important point of difference between our system and the system in place in the US, where 'plea bargaining' is more or less universal (a point with which we deal below).

7.7 The result, under our present system, is that the usual range or range of acceptable sentences is much wider than the range of sentences permitted or contemplated under most 'structured sentencing frameworks'.

8 An example: sentencing robbery

8.1 We have sought to contrast the inflexibility of the US 'presumptive' systems with the flexibility of the SGC's guidelines. The point is best understood by taking an example. We have chosen the offence of robbery, which is suitable because the essential elements of the offence are the same here as in the US; the offence features on all US sentencing grids; and the SGC has issued guidelines for most - but not yet all – types of robbery. To make a direct comparison, we will assume that the robber has no previous convictions and is convicted after a trial.

8.2 The 'starting point' on the Minnesota Sentencing Guidelines Grid for the punishment for an 'aggravated robbery', on an offender with a 'nil' criminal history score, is 48

[12] With the anomalous statutory exception of the possession of prohibited firearms and various 'three strikes' offenders.

months, with a range of between 41 to 57 months (being from 20% higher to 15% lower than the 'starting point'). Except within this narrow range, going up to 57 months, there is no allowance for any aggravating factor except previous convictions and here – as we have said – the offender has no previous convictions, therefore there is no uplift at all for any other aggravated features that there might be. Except within the narrow range, going down to 41 months, there is no allowance for any factors of personal mitigation.

8.3 Contrast the position here: under the SGC's Guidelines for robbery where 'a weapon is produced and used to threaten and/or force is used which causes some injury to the victim'; here the 'starting point' is also 4 years but the range is from 2 years up to 7 years imprisonment. In order to do justice in the individual case, the range available to judges in this country is much wider. (The SGC's guidelines on robbery are set out in tabular form at Annex A, where the breadth of typical SGC's guidelines can readily be seen at a glance).

8.4 The contrast is even more striking after a timely plea of guilty, for the position in Minnesota and North Carolina is unchanged but the lower range in the SGC's guidelines must be reduced by one third (to give credit for the early plea).

8.5 We hope that the Working Group will understand from this exercise the strong reservations which the judges would have to any system which compelled them to sentence – unjustly as we would see it - within a much narrower range. Although judges would loyally apply the law as laid down by Parliament - as they have applied the 'dangerousness' provisions under the Criminal Justice Act 2003 – a narrow range of sentences would be likely to result in a high number of sentences being passed outside the range; the narrower the range the more sentences there will be outside the range. This is likely to make predictions of prison numbers very unreliable, thereby defeating the purpose of the scheme. Quite apart from the likelihood of a greater number of appeals (see paragraph 6.17 above), it is equally troubling to contemplate that judges might stay within the prescribed range, even when justice demands otherwise. This, itself, is likely to have a negative impact on public confidence in the criminal justice system.

9 Improving the status of the SGC's guidelines

9.1 We do however think that there is considerable force in the suggestion that section 172 of the Criminal Justice Act 2003 needs to be strengthened. We doubt whether it is now sufficient just to 'have regard' to the definitive guidelines of the SGC or to the guideline cases of the CACD.

9.2 We think that advocates should be under a clear – perhaps professional - duty to identify any relevant guidelines and that prosecuting advocates should be under a duty also to identify the relevant aggravating and mitigating factors in every case.

9.3 How far this should be taken, however, is another matter. On the one hand, as a matter of generality, we endorse the practice of the many sentencing judges who normally state what starting point they have taken, identify any relevant aggravating and mitigating factors and give reasons why any adjustment has been made to the starting point.

9.4 The value of such a system is that there will always be cases where the circumstances of the offence or the offender, or perhaps of both, may make it necessary to sentence 'outside the range': 'guidelines ... are only guidelines: no more, no less'[13]. In that event, we think that the reasons for departing from the range should normally be identified.

9.5 On the other hand, there is a potential concern. The sentencing exercise requires the judge to jump through many legislative hoops and if good practice becomes a legislative requirement, there is a real risk that sentencing remarks will become longer and more formulaic. Worse still, appeals will, even more frequently, be based on complaints based around process such as the judge's failure to mention one or more aggravating or mitigating factor or some other feature which the legislature requires to be addressed rather than upon the fundamental issue namely whether the sentence is wrong in principle or manifestly excessive. The balance to be struck between these two potentially competing requirements may be better left to the Court of Appeal Criminal Division.

10 Improving the statistical data

10.1 The Sentencing Statistics provided by Ministry of Justice presently classify indictable offences into ten very broad 'offence groups' being: violence against the person, sexual offences, burglary, robbery, theft and handling stolen goods, fraud and forgery, criminal damage, drug offences, other (excluding motoring offences) and motoring offences.

10.2 It is our view that the sentencing statistics should be gathered in a different way: the offences recorded should correspond with the types of offending identified by the SGC in its Definitive Guidelines; they should record whether or not the defendant pleaded guilty and if the sentencer went outside the guidelines, the reasons for doing so. If the methods of recording sentencing data were changed in this way, we suggest that a far greater degree of predictability within the context of present sentencing practice would

[13] Per Judge LJ in Peters [2005] 2 Cr App R (S) 101.

be secured. In this regard it is to be stressed that the Working Group envisages the "... first iteration of the framework [is] to be based on current sentencing practice..." (Consultation Paper at paragraph 6.7). Therefore, even under the Group's sentencing framework proposals, the first version which is to be presented to Parliament will reflect the relatively broad bands that have been established for most types of offending within our system rather than the narrower bands that are to be found in many of the grid models. In our view, rather than dismantling the existing sentencing framework by setting up a Sentencing Commission, most, if not all, of the benefits of predictability that are sought – based on current sentencing practice – can be achieved if the collection of sentencing data is dramatically improved.

10.3 Let us again take the example of robbery. The Sentencing Statistics will tell us in any given year how many persons were sent to prison for robbery (4,238 in 2006) and it can tell us the average sentence (35.7 months) but we have no idea how many offenders fell within any particular SGC band. Nor do we know how many of these sentences represented sentences passed after a trial and how many were discounted – and if so by how much – on account of pleas of guilty. As the Working Group helpfully point out (at paragraph 2.12) we are unable presently to identify the aggravating features or the mitigating features of either the offence or the offender, or the weight (if any) that the sentencer gave to these features. If the statistics were collected in this way, it would be a much more useful tool in predicting overall sentences. The same principle would apply to all offences in respect of which there was a relevant SGC guideline. We recommend that this is done.

10.4 A short 'data collection' survey is presently being undertaken in ten large Crown Court centres to examine whether statistics can be gathered in precisely this way. However, a survey lasting a few weeks is, we suggest, an inadequate foundation for recommending fundamental changes in our system of sentencing offenders.

11 Creating a list of offences of comparable severity

11.1 The Working Group are contemplating the creation of a list which ranks all offences by seriousness: an 'over-arching guide to the relative severity of different offences' (paragraph 3.6). They recognise (at paragraph 3.7) that creating a severity scale 'will not be easy'. They examined (at Annex G) the attempt by researchers at Lancaster University to rank offences by seriousness and suggested that this might give some idea of what such a list might look like. This list of 'ranking' has just ten levels of seriousness; the highest is confined to murder; the lowest to the relatively trivial (unlawful touting for hire, speeding, careless driving and seatbelt offences); all other offences in England and Wales are put into just eight levels of seriousness. Any one of

these levels covers a huge range of criminality; let us take level 4, which comprises: 'actual bodily harm, non-aggravated burglary, obtaining property by deception, conspiracy to defraud and possession of indecent photographs of children'; the sentencing range for typical such offences at the moment might range from a community sentence, for a low grade assault in a public house charged as an assault occasioning actual bodily harm, to ten years or more for a major professional fraudster. The Lancaster list gives no financial values to the crimes in this – or indeed in any other - level of seriousness: theft of £1 and £1 million are all at the same level. The same point can be made in respect of each of the offence levels taken (level 3 places attempted rape in the same category as making threats to kill and possessing a class B drug with intent to supply; the first of these will always be a serious offence, almost invariably calling for a custodial sentence but examples of the second and third vary enormously, and need not necessarily require a custodial sentence).

11.2 We think that a table of seriousness of this type to offer any kind of practical help to sentencers would have to have very many more bands; whether this would result in 50 or 100 bands would be difficult to say without embarking upon the exercise but the practicality and indeed the utility of such an arrangement is questionable.

11.3 As an experiment we have set out (at Annex B) bands of offending identified by the SGC based on the offences newly created by the Sexual Offences Act 2003. After the widest public consultation, these offences were graded into the most detailed hierarchy of seriousness by the creation of new statutory maxima. We suggest that it can be seen at a glance that any simple 'ranking' based on the Lancaster model would be crude indeed by comparison.

11.4 We suggest that it will be a Herculean task to create comprehensive sentencing guidelines, applicable to every criminal offence in this country. There is no criminal code, as there is in many states of the US; hundreds – perhaps thousands - of offences are created by hundreds of statutes, supplemented by many offences which exist only at common law. Many such offences span a huge range of culpability: of which manslaughter is the most obvious, where the permissible range extends from life imprisonment (appropriate for the offender who has committed a particularly terrible killing but has been found to be acting under diminished responsibility) to a community sentence (which may be appropriate for some types of 'mercy killing').

11.5 The best practical guide to sentencing: the sentencer's everyday reference book, Current Sentencing Practice[14], runs to four loose leaf volumes and many thousands of

[14] 2008 edition, edited by David Thomas QC.

pages. Even the less comprehensive guide[15] to basic offences runs to 1100 pages. A panel of researchers would need months to draw up a comprehensive list of criminal offences. Then a panel of experienced sentencers would need to draw up a list of the range of sentences currently passed for such offences. The definitive guidelines already issued by the SGC would be a start, but there are many offences not yet covered.

11.6 The proposed Sentencing Commission – if ever established -- would need to devise new principles to apply to this list of offences, making clear in what respects the 'new' sentences would differ from the 'old'; obviously, if they were the same there would be no point at all in changing the present system. Every guideline already issued by the SGC would have to be comprehensively reviewed to ensure compliance with the principles laid down by the Sentencing Commission. In order to command the necessary authority and respect there would be widespread consultation before each guideline was issued. All this surely would take a considerable time, even if the members of the Commission agreed on the ranking of the offences. Meanwhile the problem of steadily rising prison numbers – and the difficulty of predicting them - would continue. We observe in passing that some schemes in the US have foundered at this stage: members simply could not agree on these points.

11.7 We strongly advise against undertaking such a massive enterprise, which has so many uncertainties. We favour the present 'incremental' approach of the SGC, looking at one offence after another.

11.8 Criticism is made in the Consultation Paper that the SGC has proceeded in a piecemeal fashion and that it has not embarked upon a comprehensive and 'structured' overview of every criminal offence. It is said it has not produced a 'hierarchy' of offences. This criticism seems to us to be unfair, because that is how the SGC was set up and because the public consultation which precedes the issue of each guideline necessarily takes time. That is why the SGC has proceeded incrementally. Even so, within a year it will have produced guidelines in respect of all the priority high volume, high custody offences. It can then move on to less common and less serious offences. No doubt it will then seek to take an overview, to see whether there is a proper relationship between sentences for offences of the same or similar seriousness. That it is important to take such an overview we do not doubt; it may be – to give but one example – useful to question whether sentences for manslaughter have not become out of step with sentences for causing death for dangerous driving. We suggest, however, that there is no reason to think that a Sentencing Commission would do this any better or indeed any quicker than the SGC. We suggest that the SGC should be allowed to continue the

[15] Banks on Sentence, 3rd edition, 2008.

job with which it has so recently been entrusted by Parliament; the last thing that the system needs is another complete upheaval of the law and practice of sentencing.

12 Other factors relating to a presumptive system

12.1 We move on to other points arising from the Working Party's enthusiasm for a presumptive system which seem to us to warrant specific mention.

Plea bargaining

12.2 It is important to emphasise that, in most – if not all – the 'structured sentencing frameworks' in the USA, some flexibility is already built into their system but by the completely different route of extensive 'plea bargaining'; thus, in Minnesota, for example, fully 95% of cases are disposed of by way of a plea bargain; in North Carolina, the figure is as high as 97.5%[16]. In order to avoid a trial, plea bargaining allows the prosecution and the defence to fix the 'severity level' of the offence by negotiation; since the range of sentence appropriate to that level is so narrow, the act of fixing the severity level by plea bargaining in effect fixes the sentence; the judge is left with no role except to read the sentence from the grid. The system of plea-bargaining such as practised in the US has always been rejected in this country. It is surely not to be contemplated that sentencing in this country is to be fixed in negotiation between the prosecution (now in nearly every case the Crown Prosecution Service) and the defence.

Pleas of guilty

12.3 Subject to the few statutory exceptions which we have mentioned elsewhere, it has always been the practice in this country to give credit for early pleas of guilty. The practice in recent years, endorsed after a full consideration of the issues by the SGC[17], is to allow a one third discount for a guilty plea entered at the earliest opportunity, with reducing credit depending on when the plea is entered and the cogency of the evidence. So even without taking into account any previous convictions or any aggravating or mitigating features at all, the range in this country must provide for this one third discount for a plea.

Dangerousness

12.4 We might also mention the point - not made by the Working Group - that most 'structured sentencing frameworks' in the US do not make any specific provision for

[16] The figures are from the Consultation Paper.
[17] In their Definitive Guideline: Reduction in Sentence for a Guilty Plea (Revised 2007).

'dangerous' offenders (being offenders who present such an unacceptable risk of causing serious harm that they require indeterminate sentences). Although the implementation of the 'dangerousness' provisions of the Criminal Justice Act 2003 is now controversial, they are to be given a new lease of life by amendment in the Criminal Justice and Immigration Act 2008. Any 'structured sentencing framework' would have to make provision for – or exempt – offenders found to be dangerous. It is not altogether easy to see how this would be incorporated into the system nor how its effect would be predictable.

The appointment of experienced judges

12.5 It is perhaps worth mentioning that the judges in many states of the US (including Minnesota) are not appointed exclusively from the practising legal profession. Newly appointed judges in the U.S. are often inexperienced; for them a formulaic approach has its obvious advantages. We contrast that with the position in this country, where all the judges appointed to the bench in England and Wales, even if their practice is not in the criminal courts, have sat on criminal cases for a number of years as part time recorders; they will have received training from the Judicial Studies Board; they are already experienced in identifying and balancing the various aggravating and mitigating factors so as to sentence justly within the wide range allowed by the SGC's guidelines; they do not need the guidance from such a presumptive system.

The protection of the judges from the press

12.6 The Consultation Paper suggests that judges in systems with 'structured sentencing frameworks' welcome the protection from press criticism that legislative endorsement provides because, if they sentence within the guidelines, criticism of the resultant sentence is directed at the legislature and not at the sentencing judge. It seems to us to be entirely disingenuous to think that if a judge in this country, loyally applying the guidelines laid down by the Sentencing Commission, passed a sentence which the tabloid press considered to be inadequate, they would understand and excuse his compliance with the guidelines and blame the Sentencing Commission; our experience is to the contrary. In any event, judges should not and do not need such a form of protection from adverse media comment. Even if a structured sentencing framework would have this effect, we think that a system which attributes blame to Parliament for sentencing decisions which appear to be unjust itself risks undermining public confidence in the criminal justice system. We do not consider this to be an advantage of the proposed system.

Minnesota

12.7 The Working Group tends to favour the Minnesota system[18]. It should be borne in mind that the state of Minnesota has a population of only 5 million. There is only one metropolitan area (the Twin Cities of Minneapolis-St Paul), with a population of 3 ½ million; the rest of the state is predominantly intensively cultivated prairies. There is no reason to think that it has the same crime patterns as in our heavily populated country with 50 odd million people, with a capital city of 10 million, with many other metropolitan areas, all of which have very different demographic, social and economic conditions. Minnesota seems to us to be a questionable model for transposition to England and Wales.

Failed 'structured sentencing frameworks' in the US

12.8 Experience in the US shows that not all 'structured sentencing frameworks' have been able to deliver accurate predictions as to the prison population. The most complete failure was the scheme introduced in the US Federal Courts (referred to in passing at page 51 of the Consultation Paper). There is no agreement as to the reason for these failures. So it should not be assumed that, just because there was a Sentencing Commission which set up a 'structured sentencing framework', it would necessarily succeed; experience in the US is that many such schemes have not achieved the goals originally set and some have failed altogether.

The narrowness of the Working Group's research

12.9 Obviously, we have been unable to conduct our own researches into the systems of other jurisdictions, but we do question whether the Working Group was wise to focus only on two states in the US, both of which had 'presumptive' systems. Indeed one might question the wisdom of embracing a system which nationally (in the US) imprisons about 750 people per 100,000 of the population (which is five times the national figure in the UK (148) and nearly ten times that for the rest of Europe). Nor is it a particularly proud boast that many American states are spending more money on prisons than on tertiary education.

12.10 Nor is it clear why other jurisdictions with advisory systems were not investigated in detail. It is particularly puzzling that the Working Group did not address the work of the Sentencing Commission recently set up in New Zealand, which – after much

[18] Described by Professor Martin Wasik (formerly the Chair of the Sentencing Advisory Panel), in the April issue of the Criminal Law Review as 'the best of a bad lot'.

detailed research – chose to follow the model of our SGC, but with comprehensive guidelines dealing with all high volume offending.

There is, however, one novel feature of the New Zealand system: once the NZ Sentencing Council has finalised its guidelines, they must be laid before Parliament: the idea is not that they can be re-drafted by parliamentary debate, but that by resolution the guidelines can either be approved or be 'dis-applied', with the effect the they do not come into effect and are returned to the Council for re-consideration. The principal advantage claimed is this allows elected members of Parliament to participate in the setting of sentencing levels, which may be thought to be a matter of legitimate social concern: it would be a way of giving some form of Parliamentary 'ownership' to the advisory guidelines of the Council. This contrasts with the position here: the SGC has a statutory duty to consult widely and specifically with the Lord Chancellor, the Home Secretary and the Home Affairs Select committee (none of whom have ever objected to the guidelines in the form in which they were issued) but they are not required to seek parliamentary approval. How the NZ scheme will work out in practice is not yet clear, since only part of the NZ guidelines exist and then only in draft form. The risk must be that it will allow sentencing levels to be driven up yet further by tabloid pressure and political rhetoric. It may, therefore, be undesirable to adopt such a system until we see how it works in New Zealand.

Political pressure

12.11 There is also a general belief that guidelines tend to drive sentences yet higher, particularly when there is an active policy to ask the courts to increase sentences seen to be unduly lenient. It has been the experience in many American states that political pressures have resulted in frequent increases to the guideline sentences, with the corresponding risk that, once again, the prisons are filling up to capacity. The dangers of this occurring if such a system was imposed in this country are, we suggest, obvious.

13 Existing presumptive sentences in England and Wales

13.1 It should be remembered that there are already some presumptive sentences in force in this country. We suggest that they have tended to operate in ways which could not have been – and certainly were not – predicted. No 'structured sentencing framework' would have made any difference to the huge increase in prison numbers which has resulted from these changes and none of these increases were predicted.

Minimum terms in murder

13.2 The new sentencing structure for murder (provided for in Schedule 21 of the Criminal Justice Act 2003) is a striking case in point. The new starting points of 15 years, 30

years and a whole life tariff have had the effect of increasing – and even doubling – the minimum terms that many murderers must serve before being considered for release by the Parole Board. Many are now serving life sentences with a minimum term of 30 years, or more. This is not, in itself, objectionable and may, indeed, command widespread public support but that is not relevant to the point we seek to make. At the time when the Act was passed, there was no way of knowing how many cases of murder would fall within these higher categories (since no statistics were kept to correspond with the new aggravated categories of murder), and the impact of this change in the sentencing regime is still unclear. For example, sentences for attempted murder have risen as a result[19] and the SGC has embarked on detailed research of sentencing levels in these cases before issuing new guidelines on this very point. But not only that, the more serious offences of manslaughter and wounding with intent (where death or serious injuries are caused by shooting or in one of the other aggravated situations identified in Schedule 21) are bound to follow and become significantly higher. Even beyond that, there will be a 'ripple' effect as sentences for the worst types of all manner of offences are ratcheted up in consequence. All this has been the unforeseen and unintended consequence of fixing new minimum terms for murder.

13.3 The point we make is that the effect of these legislative changes was not predicted in advance and it can never be predicted by the use of the 'structured sentencing framework'. This reinforces the point that it is highly questionable whether such a system has the advantages of predictability which its proponents claim.

The 'dangerousness' provisions of the Criminal Justice Act 2003

13.4 The problems of the 'dangerousness' provisions of the Criminal Justice Act 2003 are now widely recognised (not least by Parliament itself which has extensively amended the provisions by the Criminal Justice and Immigration Act 2008): the list of 'specified offences' is too widely drawn; the Act triggers the presumption of dangerousness in inappropriate cases and the finding of dangerousness may be inescapable notwithstanding that the instant offence may be comparatively minor. The impact of these sentences upon the prison population was not foreseen; there are now more than 4,000 'dangerous' prisoners in the system serving indeterminate sentences for public protection, fully 5% of the overall prison population.

13.5 This is not the only problem for, even if they have served the specified minimum term, prisoners serving indeterminate sentences cannot be released until they present no danger to the public. The Parole Board will not consider prisoners for release until they

[19] See Ford [2006] 1 Cr App R (S) 36.

have attended rehabilitative courses in prison, directed to addressing their particular criminality. Because the numbers of such prisoners has greatly exceeded expectations, they must stay in prison well beyond their minimum terms simply to get on the courses. Furthermore the release rate of all prisoners serving indeterminate sentences is itself unpredictable (see below).

Firearms

13.6 Section 287 of the Criminal Justice Act 2003 lays down a minimum five year term for those in possession of prohibited firearms (and ammunition). This provision may not affect many offenders each year but the cumulative effect of a number of five year sentences will be considerable.

13.7 It is worth noting that the compliance of the courts with this sentencing requirement has been difficult to monitor because of faults and failings in the collection of statistical data from the courts. This has lead to a good deal of ill-informed criticism of sentencing judges, with corresponding damage to public confidence.

13.8 It is unexplained why Parliament did not allow for any discount on a guilty plea on such an offence, when it is allowed for other every offence, including incidentally murder.

'Three strikes' offenders

13.9 Section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000 sets a minimum of three years imprisonment for the third time domestic burglar. The numbers of 'three-strikes' domestic burglars, each of whom must now receive three years imprisonment (with a maximum 20% deduction for a timely guilty plea) will increase year by year as more and more offenders become liable to the minimum term. The definition of a qualifying triggering offence was – for no apparent reason – not made retrospective and therefore each qualifying burglary had to be committed after the commencement date (30th November 1999); in the early years this was rare, now nearly every repeat burglar will qualify, regardless of the seriousness of the offence.

13.10 'Three strikes' Class A drug dealers (see Section 110 of the Powers of Criminal Courts (Sentencing) Act 2000) are likely to be so few in numbers as to make little difference to prison numbers but many such offenders will be themselves merely addicts selling on a few wraps to fund their own addiction; even those selling to undercover police officers will seemingly qualify; for such inadequate offenders the minimum term of 7 years will be harsh indeed.

13.11 The ‘three strikes’ laws in the US are now widely discredited, largely because they attach undue weight to previous convictions, when there are many other relevant sentencing factors.

14 The other factors which impact upon prison numbers

14.1 The Consultation Paper proceeds upon the assumption that the decisions of the judges in sentencing offenders under the present system are inherently unpredictable because their discretion is more or less unfettered. It is suggested that if the sentences available to the judges were to be prescribed by statute by narrowing the range of sentences available, then – since the numbers of offenders to be sentenced can be predicted - the sentences passed would be predictable, with the result that the prison population would be predictable and the prison building programme could be tailored accordingly. We have sought to challenge some of these assumptions already. We turn now to argue that many other factors have a much greater effect on the prison population than judicial discretion in sentencing. We suggest that these other factors will tend to make predictions difficult and indeed wholly unreliable. We identify here some of these other ‘drivers’ of a rising prison population all of which will frustrate attempts accurately to predict prison numbers. None of these factors will be controlled even by the strictest adherence to the most presumptive sentencing grid; we do not see any reason to think that a Sentencing Commission will in the future be able to predict these matters any better than anyone has been able to do in the past.

Legislative changes

14.2 The judges apply the law as laid down by Parliament; many recent legislative changes have had a huge impact on sentencing, which has not been predicted and could not have been accurately predicted even if all the sentences passed had been compliant with even the most presumptive sentencing grid. We give just a few examples.

14.3 We have already dealt with legislative changes to sentencing for murder, the dangerousness provisions of the Criminal Justice Act 2003 and the introduction of minimum sentences; all have had an unpredicted impact on prison numbers. We need not repeat the point.

14.4 Many recent Acts have increased sentences for quite common offences. Thus, by way of example, the sentence for causing death by dangerous driving has in the last few years increased from 5 years, then to 10 years and now to 14 years. Although such changes may have been directed principally at the worst type of such offences, it has had the effect of increasing the sentences passed upon every type of such offence. This has

resulted in many offenders serving much longer sentences, in a way which was not predicted.

14.5 There are many similar examples, whereas the only comparable reductions in minimum terms are for burglary of commercial premises from 14 years to 10 years (we doubt if any commercial burglar in practice received more than 10 years, so this has had no effect at all) and the reduction in the maximum for simple theft from 10 to 7 years which (as the Working Group points out) has only slightly depressed the overall sentences passed for simple thefts.

14.6 Each year hundreds of new criminal offences are created by statute. Furthermore, from time to time there is a major overhaul of some category of offences; a recent example is the Sexual Offences Act 2003, which created over 60 new sexual offences, some of which mirrored existing offences under the Sexual Offences Act 1956 but some of which were new. Another striking example is provided by ASBOs, many of which end in breach proceedings, which often has the effect of criminalising – and imprisoning offenders for - conduct which would not otherwise even be a criminal offence.

14.7 Over the course of years, no doubt the effect of these new statutory offences and new sentences can be predicted by statistical projection of what has happened in the past. The point we make is that it has time and again been demonstrated that the effect of changes in the law cannot accurately be predicted at the time the change has occurred. Each year there are likely to be new initiatives (both statutory and otherwise) which will make predictions of sentencing trends entirely unreliable. We suggest that these uncertainties seriously undermine any attempt to predict the prison population. For these reasons, unless there is a halt in the pace of criminal legislation, we are completely unconvinced by the assertion that these inherently unpredictable trends can be predicted by any 'structured sentencing framework'. Prediction of prison numbers would be possible only if there was to be legislative stability, which experience suggests is unlikely ever to be achieved.

Unpredictable changes of offending patterns

14.8 The claimed advantage of a 'structured sentencing framework' is that offending is constant and predictable and, if sentencing is predictable, then the prison population is predictable. This is predicated upon offending being constant; experience shows that it is not. The most striking example in recent years is the inexorable rise of terrorist offences. The number of convictions may be numbered only in hundreds but the sentences passed are very long (often life sentences with minimum terms of 30 years and even more); the effect on the prison population will therefore be significant.

14.9 Those experienced in the criminal law can give countless examples of offences which seem to become widespread without warning. We give as an example hydroponic cannabis farming, which was once rare and in the last couple of years has become major business throughout the country, attracting hundreds of raids each year, resulting in sentences running annually into thousands of years.

14.10 The same is true of money laundering, people trafficking, immigration and passport offences, prosecutions for historic sex abuse cases, and cases where scientific advances have identified offenders years after the event; these trends in offending and detection of offending – and many others - were not predicted and could not have been predicted.

Breaches of licence

14.11 As the Working Group point out (at paragraph 2.3) in 1995 there were 150 prisoners serving sentences for breaching their licence; by 2007, this had risen to 5300. To put the same point another way: the numbers of prisoners who were recalled to prison after being released from serving determinate sentence increased from 420 in the year 2002/3 to 1,214 in the year 2006/7; over the same period the numbers of lifers recalled increased from 30 to 178[20]. This was unpredicted and could never be predicted by a 'structured sentencing framework'; it is in part the consequence of a change in executive policy to recall nearly everyone who is in breach of licence, regardless of how serious the breach.

14.12 In part this trend is the consequence of the Criminal Justice Act 2003, which requires the release of any prisoner subject to a determinate sentence who has served one half of his sentence; he remains on licence for the rest of his sentence. This means that persons who were sentenced to six years in 2005 will now be coming up for release (having served three years, being one half of their sentence); in a couple of years those who were sentenced to ten years in 2005 will be coming up for release. Very soon large numbers of discharged prisoners will be on licence for many years; since many are repeat offenders, this may be likened to a type of demographic time bomb; the prison system will be overwhelmed with prisoners who have breached their licence, notwithstanding the predictions of any 'structured sentencing framework'.

[20] From the report of the National Audit Office: Protecting the Public: the Work of the Parole Board, published March 2008.

Changes of practice within the Parole Board

14.13 Prisoners serving indeterminate sentences, or sentences of four years or more passed before the commencement of the Criminal Justice Act 2003, may only be released if the Parole Board considers that they pose no further danger to the public. But the numbers of prisoners being released are falling; this means that more offenders are spending a longer time in prison and prison numbers increase as a result. 53% of prisoners sentenced to determinate terms who applied to the Parole Board were released on licence in the year 2003/4 but by 2006/7, this had fallen to 35%; in the same period the percentage of those serving indeterminate sentences who made such applications and were released fell from 25% to 14%[21]. There are clear signs that, following a number of high profile cases where prisoners released on licence have committed notorious offences, members of the Parole Board are being more cautious in their decisions.

14.14 This is yet another factor driving up the prison population which has nothing at all to do with the judges' exercise of discretion when sentencing in the first place. This can not be predicted. No 'structured sentencing framework' will prevent this.

Breaches of court orders (including suspended sentence orders)

14.15 A similar pattern is present in those serving sentences for breach of court orders (rising from 180 in 1995 to 1,200 in 2007). The number of court orders (for example Anti-Social Behaviour Orders, Sexual Offence Prevention Orders, Restraining Orders and Football Banning Orders) is rising very fast; orders are being made that will last for as long as 5 or even 10 years; the numbers of persons breaching such orders will surely grow but the rate of growth cannot be predicted by a 'structured sentencing framework'.

14.16 Previous experience of the reconviction rate of those subject to the old 'suspended sentences' strongly suggests that those subject to the new 'suspended sentence orders' are likely to have a similarly depressing failure rate, with a consequential increase in prison numbers. This is particularly so since an offender will be in breach of the new orders not only by re-offending but also by failing to comply with the community requirement(s) which must now be attached.

[21] Also from the report of the National Audit Office: Protecting the Public: the Work of the Parole Board, published March 2008.

Changes of police operational practice

14.17 Prosecutions, convictions and the numbers of persons sentenced can be affected by changes of police operational practice. These can operate so as to divert offenders out of the prosecution process altogether, by cautioning or conditional cautioning or by imposing fixed penalties, so reducing those sentenced by the courts. This is unlikely to affect prison numbers, since surely no offence presently being dealt with by way of caution or fixed penalty would cross the custody threshold. However, other changes in police practice have the capacity to have a marked effect on the numbers of persons sent to prison. For example: a policy change to enforce a 'zero tolerance' to the possession of knives or other weapons on the street or on public transport[22] may cause the numbers of prisoners suddenly to leap. This cannot be predicted by a 'structured sentencing framework'.

15 Governance and membership of the Sentencing Commission

15.1 If, contrary to our submissions, a Sentencing Commission is to be set up, we suggest that membership should be similar to that of the SGC; certainly there must be a core of experienced sentencers (from all levels of the judiciary) and practitioners (both prosecutors and defenders).

15.2 As to governance, at this stage we merely seek to identify the difficult and delicate issues which would need to be resolved if a Sentencing Commission was to be set up: whether and to what extent there should be Parliamentary responsibility for the guidelines, the nature and extent of the links between the Commission and the Ministry of Justice, the accountability of the Commission, its resources (including funding) and its membership.

16 An alternative suggestion

16.1 Rather than subjecting the criminal justice system to yet another seismic change – wholly unnecessarily in our view – the present sophisticated approach to passing sentence which permits just, fact-sensitive results, could be developed, with suitable amendments, to give the government the equivalent level of predictability to any which is likely to be achieved by a system of 'presumptive' sentencing. Two key ingredients would produce this result. First, the distinctly inadequate recording-system for sentencing information needs to be considerably refined and expanded (having taken advice from the department's statisticians) so that it provides detailed and accurate

[22] As in the Metropolitan Police initiative Operation Blunt, being carried out day by day as we write.

statistics about individual sentences. As we have set out above (at paragraph 10), it is critically necessary for the statistics that are gathered to match the "offence" bands identified by the SGC. By way of example, as we have demonstrated in Appendix B, the SGC has carefully graded the many aspects of sexual offending into multiple sentencing bands. The data hereafter should reveal the band identified by the judge, along with the mitigating and aggravating features (and the weight attached to each) and whether the case was disposed of by way of a trial or a plea. Furthermore, subject to the resolution of the potentially competing concerns raised at paragraph 9.5, the reasons for any departure from the guidelines could be shortly recorded. Amongst other things, this would enable the SGC to determine the extent to which its guidelines are being followed. We disagree with the Working Group when they suggest that improved recording of sentencing information and data under the present system "...alone is unlikely to provide the degree of certainty required for predicting future sentencing behaviour".[23] This seems to us to be illogical, given that the Working Group envisages the first version of the Framework which is to be presented to Parliament will reflect the relatively broad bands that have been established for most types of offending within our system rather than the narrower bands that are to be found in many of the grid models. We simply do not understand why it is, by implication, suggested at paragraph 2.12 of the Consultation Paper that the present sentencing system is not well-managed. To the contrary, in our view the problem lies not in the present sentencing system itself but in the numerous legislative changes that have been made to that system, along with various other factors which we have discussed elsewhere in this response.

16.2 Second, the SGC should be further helped to fulfil its considerable task in providing guidelines for the entire criminal calendar, certainly as regards the offences that are dealt with in the Crown Court. Once this work is complete, it should be possible to predict the changes that could be made to the guidelines, either across-the-board or in particular areas, to help bring the prison population levels down to an acceptable level. If the SGC is in future permitted or obliged to consider their effect upon prison numbers, the guidelines could, over time, be amended when necessary to secure this end.

16.3 We stress, however, that amendments to the SGC's guidelines should form no more than part of an overall strategy for dealing with what currently seems to be an intractable problem: in this section we have identified a number of factors that may contribute to providing an alternative solution to the rigid, formulaic sentencing

[23] Consultation Paper, paragraph 2.12.

arrangements that are currently being contemplated. Many of the "blunt instruments" implemented in the past have added to a burgeoning prison population without, in all likelihood, producing fair or long-term remedial results: the "three strikes offences" (drug dealers and domestic burglars); minimum terms (for murder and firearms); and the 2003 Act "dangerous" provisions are undoubtedly the best examples of this. What should be avoided at all costs is the destruction of a system that enables real justice to be done in individual cases, thereafter replacing it with another "blunt instrument" that, as with its predecessors, may have deleterious consequences for individual sentences and unintended adverse effects on levels of incarceration and the work of the courts.

16.4 The Working Group have avoided any direct reference to reducing prison numbers, or at least reducing the rate at which prison numbers are increasing. They could have sought to encourage the use, in appropriate cases, of community sentencing and to recommend that steps be taken to increase public confidence in non-custodial sentences. They could have questioned whether the present 'custody threshold' is effectively restricting prison to those offenders for whom there is really no alternative to immediate imprisonment. They could have challenged the usefulness of short prison sentences (fully 9% of prisoners at any one time are serving sentences of 12 months or less). They could have welcomed the series of decisions of the CACD where they have sought to do just that[24]. They could have sought to address the problems presented by low level but persistent offenders, or by offenders who are mentally ill or merely hopelessly inadequate or addicted. They could have questioned the wisdom of inflexible decisions to recall those in breach of licences or various orders.

16.5 We suggest that the SGC should look again at the sentencing of those who are convicted of non-violent or non-sexual offences, who have caused no particular harm to any identified victim and who present no danger to the public. We also suggest that it is at least worth discussing whether the SGC might be permitted – or even required – by statute to consider the effect upon prison numbers and prison over-crowding by issuing guidelines governing the sentencing of such offenders. Such a move might have a real effect in confining sentences of imprisonment to those for whom they are really necessary, thereby making a worthwhile contribution to the reduction in the rate of the increase in prison numbers.

[24] See particularly Bibi [1980] 1 WLR 1193; Ollerenshaw [1999] 1 Cr App R (S) 65; Kefford [2002] 2 Cr App R (S) 495 and Seed [2007] EWCA Crim 254.

APPENDIX A

Severity level of offence: ROBBERY	**No previous convictions**
Professionally planned commercial robberies if firearms are used	**15 – 30 years**
Violent personal robberies (in the home or otherwise)	**13 – 16 years**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **If the victim is caused serious physical injury by use of significant force and/or use of a weapon**	**7 – 12 years**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **Involving the production of and threats related to a weapon, and/or force used which causes injury**	**2 – 7 years**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **If there is the threat or use of minimal force**	**up to 3 years**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **If the victim is caused serious physical injury by use of significant force and/or use of a weapon and if the perpetrator is a YOUNG OFFENDER**	**6 - 10 years detention**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **Involving the production of and threats related to a weapon, and/or force used which causes injury and if the perpetrator is a YOUNG OFFENDER**	**1 - 6 years detention**
1. Street robbery ("mugging"); 2. Robberies of small businesses; and 3. Unsophisticated robberies commercial robberies **If there is the threat or use of minimal force and removal of property, and if perpetrator is a YOUNG OFFENDER**	**Community order – 12 months detention and training order**

APPENDIX B

Severity level of offence: SEXUAL OFFENCES	The range
Rape: repeated rape of the same victim over a course of time or rape involving multiple victims.	13 – 19 years
Paying for the sexual services of a child: history of paying for penetrative sex with children under 18, if the victim is under 13.	13 – 19 years
Rape: accompanied by any one of the following if the victim is under 13: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	11 – 17 years
Assault by penetration: penetration of a victim under 13 with an object or body part, accompanied by: abduction or detention; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	11 – 17 years
Sexual activity with a person who has a mental disorder: penetration with any of the aggravating factors: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; offence motivated by prejudice; sustained or repeated activity.	11 – 17 years
Causing sexual activity without consent: causing penetration of a victim under 13 or someone with a mental disorder, accompanied by: abduction or detention; offender aware that he or she is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	11 – 17 years
Paying for sexual services of a child: if there is penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object, if the victim is under 13.	10 – 16 years
Rape accompanied by any one of the following if the victim is a child aged 13 or over but under 16: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	8 – 13 years
Rape: single offence of rape by a single offender if the victim is under 13.	8 – 13 years
Assault by penetration: penetration of a victim who is 13 or over but under 16 with an object or body part, accompanied by: abduction or detention; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	8 – 13 years
Causing sexual activity without consent: causing penetration of a victim 13 years or over but under 16 with an object or body part, accompanied by: abduction or detention; offender aware that he or she is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	8 – 13 years
Sexual activity with a person who has a mental disorder: single offence of penetration of/by single offender with no aggravating or mitigating factors.	8 – 13 years
Child prostitution and pornography: penetrative activity within organised commercial exploitation where the victim is under 13.	8 – 13 years
Rape accompanied by any one of the following, if the victim is 16	6 – 11 years

years or over: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	
Assault by penetration: penetration of a victim who 16 years or over with an object or body part, accompanied by: abduction or detention; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	6 – 11 years
Causing sexual activity without consent: causing penetration of a victim over 16 years, accompanied by: abduction or detention; offender aware that he or she is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice; sustained attack.	6 – 11 years
Rape: single offence of rape by a single offender if the victim is 13 or over but under 16.	6 – 11 years
Child prostitution and pornography: penetrative activity within organised commercial exploitation where the victim is 13 or over but under 16.	6 – 11 years
Child prostitution and pornography: offender's involvement is minimal and not perpetrated for gain, if the victim is under 13.	6 – 11 years
Child prostitution and pornography: non-penetrative activity. Organised commercial exploitation, if the victim is under 13.	6 -11 years
Administering a substance with intent: to rape a victim under 13 or assault by penetration.	6 – 9 years
Assault by penetration: penetration with an object if the victim under 13.	5 – 10 years
Causing sexual activity without consent: causing a single offence of penetration of/by single offender with no aggravating or mitigating factors if the victim is a child under 13 or a person with a mental disorder.	5 – 10 years
Paying for the sexual services of a child: history of paying for penetrative sex with children under 18 if the victim is over 13 but under 16.	5 – 10 years
Indecent photographs of children: offender commissioned or encouraged the production of level 4 or 5 images.	4 – 9 years
Administering a substance with intent: if the intended offence is rape or assault by penetration.	4 – 9 years
Administering a substance with intent: if the intended offence is any sexual assault other than rape or assault by penetration and the victim is under 13.	4 – 9 years
Child prostitution and pornography: non-penetrative activity. Organised commercial exploitation, if the victim is 13 or over but under 16.	4 – 9 years
Child prostitution and pornography: non-penetrative activity if the offender's involvement is minimal and not perpetrated for gain, and if the victim is under 13.	4 – 9 years
Trafficking where the involvement is at any level at any stage where the victim was coerced.	4 – 9 years
Paying for sexual services of a child if there is penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object, if the victim is over 13 but under 16.	4 – 8 years
Child prostitution and pornography: penetrative activity if	4 – 8 years

the offender's involvement is minimal and not perpetrated for gain, if the victim is 13 or over but under 16.	
Rape: single offence of rape by a single offender if the victim is 16 or over.	4 – 8 years
Assault by penetration: penetration with a body part where no physical harm is sustained and where the victim is under 13.	4 – 8 years
Assault by penetration: penetration with an object if the victim is 13 or over but under 16.	4 – 8 years
Sexual assault: contact between naked genitalia of offender and naked genitalia, face or mouth of victim who is under 13	4 – 8 years
Causing sexual activity without consent: causing a single offence of penetration of/by single offender with no aggravating or mitigating factors if the victim is 13 or over but under 16.	4 – 8 years
Causing sexual activity without consent: causing contact between naked genitalia of offender and naked genitalia of victim, or causing two or more victims to engage in such activity with each other, or causing victim to masturbate him/herself if the victim is a child under 13 or a person with a mental disorder	4 – 8 years
Familial child sex offences: penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object.	4 – 8 years
Sexual activity with a person who has a mental disorder: contact between naked genitalia of offender and naked genitalia of victim.	4 – 8 years
Paying for sexual services of a child if there is sexual touching falling short of penetration if the victim is under 13.	4 – 8 years.
Assault by penetration: penetration with a body part where no physical harm is sustained and where the victim is over 13 but under 16	3 – 7 years
Sexual activity with a child: penile penetration of the vagina, anus or mouth of a child or penetration of the vagina or anus with another body part or an object.	3 – 7 years
Familial child sex offences: contact between naked genitalia of offender and naked genitalia of victim	3 – 7 years
Sexual grooming where the intent is to commit an assault on a victim under 13 by penetration or rape	3 – 7 years
Trespass with intent to commit rape or an assault by penetration.	3 – 7 years
Administering a substance with intent to commit a sexual offence other than rape or assault by penetration.	3 – 7 years
Paying for sexual services of a child if there is sexual touching falling short of penetration if the victim is 13 but under 16.	3 – 7 years
Child prostitution and pornography: penetrative activity within organised commercial exploitation where the victim is 16 or 17.	3 – 7 years
Assault by penetration: penetration with an object if the victim is over 16.	2 – 5 years
Sexual assault: contact between naked genitalia of offender and naked genitalia, face or mouth of victim who is 13 or over.	2 – 5 years
Causing sexual activity without consent: causing a single offence of penetration of/by single offender with no aggravating or mitigating factors if the victim is 16 or over.	2 – 5 years
Causing sexual activity without consent: causing contact between naked genitalia of offender and naked genitalia of victim,	2 – 5 years

or causing two or more victims to engage in such activity with each other, or causing victim to masturbate him/herself.	
Care workers: sexual activity with a person who has a mental disorder: basic offence of sexual activity involving penetration, assuming no aggravating or mitigating factors.	2 – 5 years
Indecent photographs of children: level 4 or 5 images shown or distributed.	2 – 5 years
Paying for the sexual services of a child: history of paying for penetrative sex with children under 18, if the victim is 16 or 17.	2 – 5 years.
Child prostitution and pornography: non-penetrative activity. Organised commercial exploitation, if the victim is 16 or 17.	2 – 5 years
Child prostitution and pornography: non-penetrative activity if the offender's involvement is minimal and not perpetrated for gain, and if the victim is 13 or over but under 16.	2 – 5 years
Exploitation of prostitution if there is evidence of physical and/or mental coercion.	2 – 5 years
Assault by penetration: penetration with a body part where no physical harm is sustained and where the victim is over 16.	1 – 4 years
Causing sexual activity without consent if the victim is a child under 13 or a person with a mental disorder: Causing contact between naked genitalia of offender and another part of victim's body or causing two or more victims to engage in such activity with each other. Causing contact with naked genitalia of victim by offender using part of the body other than the genitalia or an object, or causing two or more victims to engage in such activity with each other. Causing contact between either the clothed genitalia of offender and naked genitalia of victim, between naked genitalia of offender and clothed genitalia of victim, or causing two or more victims to engage in such activity with each other.	1 – 4 years
Sexual activity in the presence of another person: consensual intercourse or other forms of consensual penetration if in the presence of a child or a person with a mental disorder.	1 – 4 years
Sexual assault: contact between naked genitalia of offender and another part of victim's body if victim is under 13. Contact with genitalia of victim by offender using part of his or her body other than the genitalia or an object is victim is under 13. Contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim if victim is under 13.	1 – 4 years
Sexual activity with a child: contact between naked genitalia of offender and naked genitalia of a child or another part of victim's body, particularly mouth or face.	1 – 4 years
Abuse of trust: penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object. (**Where the victim is 16 or 17 when the sexual relationship commenced and the relationship is only unlawful because of abuse of trust)**	1 – 4 years

Abuse of trust: sexual activity in presence of a person under 18: consensual intercourse or other forms of consensual penetration.	1 – 4 years
Sexual activity in the presence of a child or a person with a mental disorder: consensual intercourse or other forms of consensual penetration	1 – 4 years
Sexual grooming where the intent is to commit an assault on a victim over 13 but under 16 by penetration or rape.	1 – 4 years
Sexual grooming where the intent is to coerce the child who is under 13 into sexual activity.	1 – 4 years
Trespass with intent to commit a sexual offence other than rape or assault by penetration.	1 – 4 years
Indecent photographs of children: offender involved in the production of, or has traded in, material at levels 1 – 3.	1 – 4 years
Paying for sexual services of a child if there is penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object, if the victim is 16 or 17.	1 – 4 years
Child prostitution and pornography: penetrative activity if the offender's involvement is minimal and not perpetrated for gain, if the victim is 16 or 17.	1 – 4 years
Keeping a brothel for prostitution where the offender is the keeper of the brothel and has made substantial profits in the region of £5000 and upwards.	1 – 4 years
Trafficking where the involvement is at any level at any stage where there was no coercion.	1 – 4 years
Sexual activity with a person who has a mental disorder: contact between naked genitalia of offender and another part of victim's body or naked genitalia of victim by offender using part of his or her body other than the genitalia. Contact between clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim.	36 weeks – 3 years
Causing or inciting a person to watch a sexual act if the victim is a child or a person with a mental disorder: live sexual activity	12 months – 2 years
Sexual activity in the presence of another person: masturbation (of oneself or another person) if in the presence of a child or a person with a mental disorder.	12 months – 2 years
Abuse of trust: sexual activity in presence of a person under 18: masturbation of oneself or another person.	12 months – 2 years
Causing or inciting another person to watch a sexual act: causing or inciting a child or a person with a mental disorder to watch live sexual activity.	12 months – 2 years
Familial child sex offences: contact between naked genitalia of offender or victim and clothed genitalia of the victim or offender. Contact between naked genitalia of victim by another part of the offender's body or an object, or between the naked genitalia of offender and another part of victim's body.	12 months – 2 years
Abuse of trust: sexual activity with a person under 18: penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part of object	12 months – 2 years
Abuse of trust: cause a person under 18 to watch a sexual	12 months – 2 years

act: live sexual activity	
Sexual activity in the presence of a person with a mental disorder; masturbation of oneself or another person.	12 months – 2 years.
Sexual grooming where the intent is to coerce the victim who is 13 but under 16 into sexual activity.	12 months – 2 years
Paying for sexual services of a child if there is sexual touching falling short of penetration if the victim is 16 or 17.	26 weeks – 2 years
Sexual assault: contact between naked genitalia of offender and another part of victim's body if victim is over 13. Contact with genitalia of victim by offender using part of his or her body other than the genitalia or an object is victim is over 13. Contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim if victim is over 13.	26 weeks – 2 years
Causing or inciting a person to watch a sexual act if the victim is a child or a person with a mental disorder: moving or still images of people engaged in sexual activity involving penetration.	26 weeks – 2 years
Care workers: sexual activity with a person who has a mental disorder – sexual activity not involving penetration.	26 weeks – 2 years
Sexual activity in the presence of a person with a mental disorder: consensual sexual touching involving naked genitalia.	26 weeks – 2 years
Abuse of trust: sexual activity in presence of a person under 18 -consensual sexual touching involving naked genitalia.	26 weeks – 2 years
Sexual activity with a child: contact between naked genitalia of offender or victim and clothed genitalia of victim or offender or contact with naked genitalia of victim by offender using part of his or her body other than the genitalia of an object.	26 weeks – 2 years
Abuse of trust: non-penetrative sexual activity involving naked contact between offender and victim. (**Where the victim is 16 or 17 when the sexual relationship commenced and the relationship is only unlawful because of abuse of trust)**	
Causing sexual activity without consent: Causing contact between naked genitalia of offender and another part of victim's body or causing two or more victims to engage in such activity with each other. Causing contact with naked genitalia of victim by offender using part of the body other than the genitalia or an object, or causing two or more victims to engage in such activity with each other. Causing contact between either the clothed genitalia of offender and naked genitalia of victim, between naked genitalia of offender and clothed genitalia of victim, or causing two or more victims to engage in such activity with each other.	26 weeks – 2 years
Prohibited sex with an adult relative where there is evidence of long-term grooming that took place at a time when the person being groomed was under 18	26 weeks – 2 years
Voyeurism: offence with serious aggravating factors such as recording sexual activity and placing it on a web site or circulating it for commercial gain.	26 weeks – 2 years

Indecent photographs of children: possession of a large quantity of level 4 or 5 material for personal use only. Large number of level 3 images shown or distributed.	26 weeks – 2 years
Child prostitution and pornography: non-penetrative activity if the offender's involvement is minimal and not perpetrated for gain, and if the victim is 16 or 17.	26 weeks – 2 years
Exploitation of prostitution if there is no coercion or corruption, but the offender is closely involved in the offender's prostitution.	26 weeks – 2 years
Keeping a brothel for prostitution where the offender is the keeper of the brothel and is personally involved in its management.	26 weeks – 2 years
Paying for sexual services of a child if there is sexual touching falling short of penetration if the victim 16 or 17.	26 weeks – 2 years
Sexual activity with a child when committed by a person under the age of 18 when the offence involved penetration where one of more aggravating factors exists or where there is a substantial age gap between the parties.	Detention and training order 6 – 24 months.
Causing or inciting a child to engage in sexual activity when committed by a person under the age of 18 when the offence involved penetration where one of more aggravating factors exists or where there is a substantial age gap between the parties.	Detention and training order 6 – 24 months.
Engaging in sexual activity in the presence of a child when committed by a person under the age of 18 when penetration was involved where one or more aggravating factors exist.	Detention and training order 6 – 24 months.
Causing a child to watch a sexual act when committed by a person under the age of 18 where live sexual activity is involved.	Detention and training order 6 – 24 months.
Sexual activity with a child family member and inciting a child family member to engage in sexual activity when committed by a person under the age of 18 when the offence involved penetration where one of more aggravating factors exists or where there is a substantial age gap between the parties.	Detention and training order 6 – 24 months.
Sexual activity in the presence of another person: consensual sexual touching involving naked genitalia if in presence of a child or a person with a mental disorder.	26 weeks – 18 months
Sexual activity in the presence of another person: causing or inciting a child or a person with a mental disorder to watch moving or still images of people engaged in sexual activity involving penetration.	26 weeks – 12 months
Abuse of trust: causing a person under 18 to watch a sexual act: moving or still images of people engaged in sexual activity involving penetration.	26 weeks – 12 months
Causing or inciting a person to watch a sexual act if the victim is a child or a person with a mental disorder: moving or still images of people engaged in sexual activity involving penetration.	26 weeks – 12 months
Indecent photographs of children: possession of a large quantity of level 3 material for personal use. Possession of a small number of images at level 4 or 5. Large number of level 2 images shown or distributed.	4 weeks – 18 months

Small number of level 3 images shown or distributed.	
Sexual activity in the presence of a person with a mental disorder: consensual sexual touching of naked body parts but not involving naked genitalia.	4 weeks – 18 months
Sexual assault: contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia) if the victim is under 13.	4 weeks – 18 months
Causing sexual activity without consent: causing contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia) if the victim is under 13 or a person with a mental disorder.	4 weeks – 18 months
Abuse of trust: non-penetrative sexual activity. (**Where the victim is 16 or 17 when the sexual relationship commenced and the relationship is only unlawful because of abuse of trust)**	4 weeks – 18 months
Sexual activity in the presence of another person: consensual sexual touching of naked body parts but not involving naked genitalia if in the presence of a child or a person with a mental disorder.	4 weeks – 18 months
Abuse of trust: sexual activity in presence of a person under 18: consensual sexual touching of naked body parts but not involving naked genitalia.	4 weeks – 18 months
Sexual activity with a person who has a mental disorder: contact between part of offender's body (other than the genitalia) with parts of victim's body (other than the genitalia).	4 weeks – 18 months
Voyeurism: offence with aggravating factors such as recording sexual activity and showing it to others.	4 weeks – 18 months
Sexual penetration of a corpse: repeat offence and/or other aggravating features.	4 weeks – 18 months
Exposure: a repeat offender	4 weeks – 26 weeks
Indecent photographs of children: offender in possession of a large amount of material at level 2 or a small amount at level 3. Offender has shown or distributed material at level 1 or 2 on a limited scale. Offender has exchanged images at level 1 or 2 with other collectors, but with no element of financial gain.	4 weeks – 26 weeks
Abuse of trust: cause a person under 18 to watch a sexual act: moving or still images of people engaging sexual activity other than penetration.	Community order – 26 weeks
Causing or inciting a person to watch a sexual act if the victim is a child or a person with a mental disorder: moving or still images of people engaged in sexual activity other than penetration.	Community order – 26 weeks
Sexual activity in the presence of another person: causing or inciting a child or a person with a mental disorder to watch moving or still images of people engaged in sexual activity other than penetration.	Community order – 26 weeks
Sexual assault: contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia) if the victim is 13 or over.	An appropriate non-custodial sentence
Causing sexual activity without consent: causing contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)	An appropriate non-custodial sentence

Sexual activity with a child: contact between part of offender's body (other than the genitalia) with part of a child's body (other than the genitalia).	An appropriate non-custodial sentence
Familial child sex offences: contact between part of offender's body (other than the genitalia) with part of victim's body (other than the genitalia).	Appropriate non-custodial sentence
Abuse of trust: contact between clothed part of the offender's body (other than the genitalia) with clothed part of the victim's body (other than the genitalia). (**Where the victim is 16 or 17 when the sexual relationship commenced and the relationship is only unlawful because of abuse of trust)**	An appropriate non-custodial sentence
Care workers: sexual activity with a person who has a mental disorder: Naked contact between part of the offender's body with part of the victim's body.	An appropriate non-custodial sentence
Prohibited sex with an adult relative where there is evidence of grooming of one party by the other at a time when both were over the age of 18.	An appropriate non-custodial sentence
Prohibited sex with an adult relative where there is sexual penetration with no aggravating factors.	An appropriate non-custodial sentence
Sexual activity in a public lavatory for a repeat offence or with aggravating factors.	An appropriate non-custodial sentence
Indecent photographs of children: possession of a large amount of level 1 material and/or more than a small amount of level 2, and the material is for personal use and has not been distributed or shown to others.	An appropriate non-custodial sentence
Exploitation of prostitution where there is no evidence that the victim was physically coerced or corrupted, and the involvement of the offender was minimal.	An appropriate non-custodial sentence
Voyeurism: basic offence assuming no aggravating or mitigating factors e.g. the offender spies through a hole he or she has made in a changing room wall.	An appropriate non-custodial sentence
Sexual penetration of a corpse: basic offence assuming no aggravating or mitigating factors.	An appropriate non-custodial sentence
Sexual activity with a child when committed by a person under the age of 18 when the offence involved any form of non-penetrative sexual activity without aggravating factors.	An appropriate non-custodial sentence
Causing or inciting a child to engage in sexual activity when committed by a person under the age of 18 when the offence involved any form of non-penetrative sexual activity without aggravating factors.	An appropriate non-custodial sentence
Engaging in sexual activity in the presence of a child when committed by a person under the age of 18 when penetration was not involved and where there were no aggravating factors.	An appropriate non-custodial sentence
Causing a child to watch a sexual act when committed by a person under the age of 18 where moving or still images are shown of people engaged in sexual acts involving penetration.	An appropriate non-custodial sentence
Causing a child to watch a sexual act when committed by a person under the age of 18 where moving or still images are shown of people engaged in sexual acts not involving penetration.	An appropriate non-custodial sentence
Sexual activity with a child family member and inciting a child family member to engage in sexual activity when committed by a person under the age of 18 when the offence involved any sexual activity not including any aggravating factors.	An appropriate non-custodial sentence

Keeping a brothel for prostitution where the involvement of the offender is minimal.	An appropriate non-custodial sentence
Intercourse with an animal: basic offence assuming no aggravating or mitigating factors.	An appropriate non-custodial sentence
Exposure: the basic offence assuming no aggravating or mitigating factors or some offences with aggravating factors.	An appropriate non-custodial sentence
Sexual activity in a public lavatory for a basic offence assuming no aggravating or mitigating factors.	An appropriate non-custodial sentence