

offences. The court is not required to pass a seven-year sentence if there are particular circumstances that would make this unjust.

- **Minimum of three years for third domestic burglary (s 111).** Under these provisions the court has a statutory duty to impose a custodial sentence of at least three years on a person who has been convicted of domestic burglary and who has been convicted on two previous occasions of domestic burglary unless there are particular circumstances that would make this unjust.

Section 152(2) of the CJA 2003 states that a custodial sentence must only be imposed if the offence is so serious that neither a fine nor a community sentence would be adequate punishment for it.

Section 152(3) makes clear that this does not prevent a court from passing a custodial sentence on an offender who does not consent to requirements imposed as part of a community sentence where consent is required or if he refuses to provide samples for the purposes of drug testing.

Length of discretionary custodial sentences: general provision (s 153, CJA 2003)

This section directs the court to impose the shortest term of custody that is commensurate with the seriousness of the offence. There are exceptions where the sentence is fixed by law, i.e. as in the case of an offence such as murder that carries a mandatory life sentence, and for the case of the new sentences for dangerous offenders in ss 225 to 226 (see above).

Restrictions where offender not legally represented (s 83, POCC(S)A 2000)

Under this section the court cannot impose a sentence of imprisonment on an offender who has not been legally represented at some time after being found guilty and before sentence is passed, unless representation has been offered and refused or withdrawn because of conduct or there has been failure to apply.

The pre-sentence report

Section 156 of the CJA 2003 deals with pre-sentence reports for community and custodial sentences. Where the court is considering whether to impose a discretionary custodial sentence and if so what its duration should be or whether to impose a community sentence and what restrictions to impose on the liberty of the offender as part of the sentence it must obtain a pre-sentence report (PSR). These reports are, in the case of adults, written by the probation service and are based on interviews with the offender and his or her history of offending and needs. The report contains advice as to punishment and what rehabilitative work would be likely to reduce the risk that the offender will re-offend. The court need not obtain a PSR if it thinks that it is unnecessary to do so in an individual case. Where the offender is under 18, the court must *not* decide that a PSR is unnecessary unless it has access to a report that relates to the offender. No sentence is invalid because the court did not obtain and consider a PSR even in the case of custodial and community sentences (see above).

Where an offender appeals, a PSR must be obtained unless the appeal court believes that the lower court was justified in not obtaining one. On appeal by offenders under 18, a PSR is required and the appeal court cannot decide that the lower court was justified in not obtaining a PSR or that a PSR is not necessary unless there is a previous PSR regarding the offender and the appeal court has access to it.

There are special provisions in s 157 CJA 2003 for reports on *mentally disordered offenders*. A qualified medical practitioner must be consulted to give a medical report unless a custodial

sentence is fixed by law, i.e. a mandatory life sentence for murder where the court has no choice as to sentence.

Under s 158, CJA 2003 the PSR for an adult is, as we have seen, made by an officer of the local probation board. Where the offender is under 18 the PSR may be made by a probation officer, social worker or member of a youth offending team (see p 161).

Under s 159, CJA 2003 copies of the PSR go to the offender or his legal representative and the prosecutor though the court may consider that it is not appropriate for the prosecutor to have one. Where an offender is under 17 and is not legally represented the court may give the PSR to his or her parent or guardian if present in court.

Under s 160, CJA 2003 *other reports* that are not PSRs can be given to the offender and his legal representative or as set out above to a parent or guardian and the court. These will be designed to help the court to determine the appropriate sentence and will have been written by the probation service or a youth offending team.

Pre-sentence drug testing

Section 161, CJA 2003 provides that pre-sentence drug testing is available to assist the court when considering a community sentence.

Financial circumstances

Under s 162, CJA 2003 the court can before sentence make a financial circumstances order under which the offender must report his financial circumstances to the court. There are penalties for failure to make a report or to render a false report.

Is the offence serious?

Section 143, CJA 2003 gives certain principles that the court must follow when required to determine whether an offence is serious. The court must consider:

- the offender's culpability in committing the offence and the harm (or risk of harm) caused by the offence (or intended to be caused by the offence);
- any previous convictions, if recent and relevant, should be regarded as an aggravating factor that should increase the severity of the sentence;
- the fact that the offence was committed while the offender was on bail should also be regarded as an aggravating factor.

Reduction in sentence for guilty pleas

Section 144, CJA 2003 makes provision for the reduction of sentences for *early* guilty pleas. This is designed to encourage offenders who are guilty not to take up court time and trouble victims and witnesses unnecessarily.

Increase in sentence for racial or religious aggravation

Section 145, CJA 2003 provides that the court must treat the fact that the offence was religiously or racially aggravated as increasing the seriousness of the offence and must say so in court. There is an exception in the case of racially or religiously aggravated assaults because under the Crime and Disorder Act 1998 these offences already have a racial or religious ingredient and carry special penalties for this.

Human rights concerns

Article 3 of the European Convention on Human Rights (freedom from torture or inhuman or degrading treatment) has relevance in that an exceptionally severe sentence may raise an issue under the Article. This is implicit in the judgment of the European Court of Human Rights in *Weeks v UK* (1987) 10 EHRR 293 where it was ruled that to sentence a person of 17 to life imprisonment for robbery (which is the maximum sentence) for punitive reasons would potentially raise the issue of violation of Art 3. Article 7 (protection from any retrospective effect of the criminal law) may also be raised in an appropriate case in that no heavier penalty shall be imposed than the one applicable when the offence was committed bearing in mind that there is in general no limitation of actions where prosecution for crime is concerned.

Custodial sentences: the mandatory life sentence

We have already considered the discretionary life sentence for public protection in violent or sexual offences under s 225 of the CJA 2003. The following material is concerned with the *mandatory life sentence for murder*. An offender aged 21 or over who is convicted of murder must be sentenced to imprisonment for life under s 1(1) of the Murder (Abolition of the Death Penalty) Act 1965. There is no right of appeal against this sentence.

The Home Secretary has statutory power under s 29 of the Crime (Sentences) Act 1997 to intervene and fix a tariff going beyond the recommendation of the court even to the extent of a whole life sentence. The House of Lords ruled in *R v Lichniak* [2000] UKHL 47 that the imposition of a mandatory life sentence for murder was not contrary to the Convention on Human Rights. However in *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] 4 All ER 1089 their Lordships ruled that the Home Secretary's power to intervene and set tariffs was incompatible with Art 6(1) of the Convention (right to have sentence imposed by an independent tribunal). The Home Secretary was not independent of the executive. The House of Lords declared s 29 of the 1997 Act incompatible with the Convention.

The Home Secretary accepted the judgment but introduced sentencing principles into the Criminal Justice Act 2003 as follows:

- **Whole-life terms: offender will die in jail (adults).** Multiple murderers (two or more) with a high degree of premeditation or murders of a child involving abduction or involving sexual or sadistic conduct, terrorist murder, offenders with a previous conviction for murder.
- **Sentence of 30 years (adults).** Murder of a police or prison officer in the course of duty, murder involving the use of a firearm or explosive, killing done for gain, burglary, robbery or contract killing, murder with a racial, religious or sexual motive, single sadistic or sexual murder of an adult, multiple murders not covered by the whole-life category.
- **Sentence of 15 years.** All other murders.
- **Murderers aged 10 to 17** have a 15-year starting point and **murderers aged 18 to 20** have a starting point of 15 or 30 years.

The sentences described above, other than, obviously, the whole-life sentence are *starting-point sentences* on which the judge can build to give an appropriate sentence.

Sentencing Guidelines Council

Sections 167 to 173 of the CJA 2003 set up the Council in March 2004 that produces a set of sentencing guidelines for all criminal courts and also guidelines on the allocation of cases between courts (see p 146). The guidelines will be starting points on which the court can

build to give an appropriate sentence in a particular case. Further, legal practitioners and the public will know what the starting point for a given offence is. The existing Sentencing Advisory Panel continues and will give its advice to the Council from time to time. The courts are obliged to take the Council's guidelines into account when deciding on a sentence.

The members of the Council are drawn from the police, probation and prison services, victims of crime and the legal profession and those responsible for sentencing in magistrates' courts, Crown Courts and the Court of Appeal.

Further information on the Council and the Guidelines can be accessed at www.sentencing-guidelines.gov.uk.

Reasons for sentence

Section 174 of the CJA 2003 provides for a duty upon the court to provide reasons for the sentence and explain it in ordinary language. The court must refer to relevant guidelines when giving its reasons. Section 175 expands the existing duty on the Home Secretary in s 95 of the Criminal Justice Act 1991 to *publish information* on the effectiveness of sentencing.

Community orders

Sections 177–180 of the CJA 2003 provide for community orders for offenders aged 16 or over. Previously there were various different community orders, e.g. community rehabilitation orders. The CJA 2003 creates a *single community sentence* that combines all of the requirements previously available under the different and separate community sentences.

The requirements that may be placed on a community sentence are:

- compulsory (but unpaid) work;
- participation in specified activities;
- programmes aimed at changing offending behaviour;
- prohibition from certain activities;
- curfew;
- exclusion from certain areas as specified in the order;
- residence requirements;
- mental health treatment (where the offender consents);
- drug treatment and testing (with the consent of the offender);
- alcohol treatment (if the offender consents);
- supervision, e.g. by a member of the local probation service or a member of the youth offending team;
- attendance centre requirements, i.e. attendance at a specified centre at specified times to take part in specified activities (for under 25s).

Restrictions on imposing a community sentence

Section 148 makes provision in regard to when it is appropriate to impose a community sentence. Where the offence or the history of offending is not serious enough for a community sentence a fine or conditional or absolute discharge would be appropriate. The requirements of the community order must be suitable for the offender and restrictions on liberty, as by curfew, must be in line with the seriousness of the offence.

An exception will be provided by s 151 when in force where the offence does not in itself merit a community sentence but where the offender has committed several similar offences

in the past. Under the section an offender aged 16 or over who has been fined on at least three previous occasions for similar offences may receive a community sentence even though the current offence does not in itself merit it. Of course, the previous convictions may lead the court to impose a custodial sentence if they go to the seriousness of the current offence. The section does not interfere with the courts' power in this regard.

Under s 149 where a community sentence is passed on an offender who has been remanded in custody the time on remand counts towards the length of the community sentence as does the time spent considering the appropriate form of community sentence in terms of its restrictions.

Under s 150 community sentences are not available where the sentence is fixed by law nor in respect of dangerous offenders (see ss 205 to 208 above).

Prison sentences of less than 12 months

Section 181 carries provisions to ensure that in general terms all prison sentences of less than 12 months will consist of a *short period of custody* followed by a *longer period on licence* during which time the offender must comply with requirements fixed by the court as part of the sentence. The length of the custodial period must be between two and 13 weeks and the licence period at least 26 weeks. There is provision for sentences to run consecutively where the total period of imprisonment must not exceed 15 months. The licence conditions may include electronic monitoring.

Under s 183 where the sentence is under 12 months the court may give a sentence of *intermittent custody* where the offender serves a period of time in custody and a period of time on licence. These periods are predetermined by the court when giving the sentence.

Suspended sentences

A custodial sentence can be suspended for between one and two years provided that the offence merits custody and the suspension is justified by the exceptional circumstances of the case. A suspended sentence can be combined with a fine or compensation order but not with a community sentence though a supervision order can be attached. The custodial sentence is activated by the committal of another imprisonable offence. Sections 189 to 193 of the CJA 2003 create a new form of suspended sentence as an addition to the above procedure. The court may suspend a short custodial sentence (see s 181 above) for between six months and two years on condition that the offender undertakes activities in the community. These activities are chosen by the court from the community sentence list. Commission of a further offence during the whole period of the suspended sentence will count as a breach and the court will deal with the suspended sentence when sentencing the offender for the new offence.

Deferred sentences

Here the court does *not sentence the offender*. It defers the passing of sentence on the basis of the good behaviour of the offender if the offender consents and the court believes that a

deferred sentence is in the interests of justice. If the offender commits another offence during the period of deferment the court will deal with both offences at the same time. Under sections 1–1D of the Powers of Criminal Courts (Sentencing) Act 2000 more is required of an offender on a deferred sentence. The court may impose requirements as to his conduct and he may have to complete tasks in the community as set by the court including reparation to the community. This aspect of the sentence is monitored, e.g. by the probation service (now supplied by the National Offender Management Service) with a view to a report to the court for early sentence if the report is unsatisfactory. The commission of a further offence during the deferred period activates the deferred sentence and both offences can be dealt with in terms of sentence.

Release of offenders from custody

Sections 244 to 253 of the CJA 2003 provide for the release of offenders from custody. Under this framework offenders serving sentences of 12 months or more are released automatically on licence *at the half way point of their sentence*. The licence period is subject to conditions a general one being good behaviour and specific ones such as curfew and electronic monitoring. Breach of the licence conditions may result in recall to prison. Supervision is by the probation service and that service plus the prison service will make the recall not the Parole Board as formerly. The offender may appeal against recall to the Parole Board and the Board scrutinises the decisions to recall.

Fines

The imposition of a fine is the most common penalty in the criminal courts and is in effect an order requiring the offender to pay a sum of money to the state. The fine should reflect the seriousness of the offence.

The main principle is a requirement to investigate and take into account the financial circumstances of the offender and as we have seen the court may order a statement as to the offender's financial circumstances. There are penalties for failing to provide a statement or providing a false one.

There is a standard scale of maximum fines for summary offences (see s 37(2) of the Criminal Justice Act 1982) as follows:

<i>Level</i>	<i>Amount</i>
1	£200
2	£500
3	£1,000
4	£2,500
5	£5,000

Where the offender is under 18 the fine must not exceed £1,000 (s 135, POCC(S)A 2000) and if under 14 must not exceed £250 (s 135(2)). The court may order a parent or guardian of a person under 18 to pay the offender's fine, costs or compensation to the victim (s 137, POCC(S)A 2000) and may order a statement as to the financial circumstances of the parent or guardian.

Fines: reform

The Courts Act 2003 in ss 36 and 37 deals with the problems created by the fact that for some time large numbers of fines imposed by the courts have remained uncollected. The Act provides for the Lord Chancellor to designate *finer officers* whose role will be to manage the collection and enforcement of fines. Schedule 2 of the Act specifies new powers available to the courts and fines officers to enforce payment of fines. The following are some examples:

- persons struggling to pay fines may contact the fines officer with a view to a variation of payment terms before payment is due and afterwards, in favour of the person required to pay the fine;
- on the other hand, in appropriate cases, a fine may be increased on payment default as an incentive for offenders to pay their fines promptly;
- in regard to fines for illegally parked cars that have been clamped the court will have power to order that on failure to pay the relevant vehicle be sold and the fine deducted from the selling price. This type of action may be appropriate for persistent offenders.

Absolute discharge

Section 12 of the POCC(S)A 2000 gives the court power to grant an absolute discharge. This procedure may be used in all criminal courts irrespective of the age of the offender. When used it normally reflects the trivial nature of the offence, the circumstances in which the offender came before the court or some special factors regarding the offender himself or herself.

Conditional discharge

Section 12 also applies and this procedure may be used in all criminal courts regardless of the age of the offender. There is only one condition which is that the offender does not commit any further offences for which he is convicted by a court in Great Britain, during the period of the discharge that the court has fixed. This period must not exceed three years. Where there is a relevant conviction, the court may sentence the offender for the original offence (s 13(6), POCC(S)A 2000).

Binding over to keep the peace

Section 1 of the Justices of the Peace Act 1361 gives power to bind over to be of good behaviour to magistrates, the Crown Court and the Court of Appeal. Section 115 of the Magistrates' Courts Act 1980 and the common law give the magistrates power to bind over to keep the peace or be of good behaviour. The court involved may take a recognisance in its discretion. This involves the payment of a sum of money on failure to comply. The court cannot impose a custodial sentence for failure to comply.

Binding over of a parent or guardian

Section 150 of the POCC(S)A 2000 applies and here a recognisance may be imposed on a parent or guardian of a child or young person for up to three years or until the offender has reached 18 whichever is the shorter. The recognisance comes into effect and the sum payable under it becomes payable if the parent or guardian fails to take proper care and control over the offender or ensure that he or she complies with a community sentence.

Travel restriction orders

Section 33 of the Criminal Justice and Police Act 2001 allows the court to make a travel restriction order where an offender receives a sentence for drug trafficking of four years or more. The order may be imposed for a minimum period of two years from release from custody. Surrender of a UK passport may also be ordered.

Compensation orders

Section 130 of the POCC(S)A 2000 applies and empowers a court before which a person is convicted of an offence to make a compensation order requiring the offender to pay compensation for any 'personal injury, loss or damage' resulting from the offence or any offence that is taken into consideration. A compensation order may be made in addition to any other form of sentence or as the only sentence for the offence. If a court does not make a compensation order where it has power to do so it must give reasons.

Anti-social behaviour orders

A court including a youth court may make an anti-social behaviour order (ASBO) where an offender is convicted of an offence. (See s 1C of the Crime and Disorder Act 1998, as amended by the Serious Organised Crime and Police Act 2005). The 1998 Act in this regard came into force at the end of 2002.

The court must consider that the offender has acted in a manner likely to cause harassment, alarm or distress to one or more persons not of the same household as the offender. The court must also take the view that an ASBO made on conviction is necessary to protect persons in any place in England and Wales from further anti-social acts committed by the defendant. The order is in fact a civil order but the criminal standard of proof (beyond a reasonable doubt) applies in satisfying the above criteria. Although it is a civil order there are criminal penalties if it is breached. The order may take effect immediately or be suspended, e.g. until the offender completes a custodial sentence. The order must last for a minimum of two years, although it can be discharged earlier by the court if, for example, the Director of Public Prosecutions consents. It contains only prohibitions, i.e. things the defendant must not do rather than positive requirements. The maximum period for an order is five years.

As regards penalties, if the offender does any of the things forbidden by the order, the offender is guilty of an offence triable summarily and punishable by imprisonment up to a maximum of six months or a fine up to the statutory maximum (currently £5,000) or both.

Youth crime and disorder: sentencing

In terms of the sentencing of youth offenders the following materials are relevant:

Custody of young offenders

Three forms of custodial sentence are available as set out below.

Detention during Her Majesty's Pleasure

This is restricted to cases of murder and s 90 of the POCC(S)A provides for a mandatory sentence in this form for an offender who is under 18 at the time of the offence. A person receiving this sentence will be detained at a place and under such conditions as directed or arranged by the Home Secretary (s 92(1), POCC(S)A 2000).

Detention for a specified period

Section 91 of the POCC(S)A 2000 applies and relates to persons under 18 who are convicted of serious offences listed in s 91.

An example is provided by the offence of sexual assault on a female or a male under s 3 of the Sexual Offences Act 2003 which is a triable either way offence, imprisonment following trial on indictment being for a maximum of 10 years.

Under s 91(3) the offender may be detained for such period not exceeding the maximum term of imprisonment for the offence if there is no other suitable way of dealing with the case.

Detention and training orders

Section 100 of the POCC(S)A 2000 applies. It provides for custodial sentences for offenders aged between 10 and 18. The period of such an order can be 4, 6, 8, 10, 12, 18 or 24 months. The period of detention and training is half the period of the order, the other half being a supervision and training arrangement. Supervision is by an officer of the local probation board or a social worker or a member of the youth offending team. A *youth offending team* consists of at least one of the following, namely, a probation officer, a social worker, a police officer, a person nominated by the local health authority and a person nominated by the chief education officer of the relevant local authority. These teams are set up by the Chief Constable and probation service under powers given in the Crime and Disorder Act 1998.

Under s 104(1) and (3) of the POCC(S)A 2000 failure to comply with the requirements of the supervision section of the order leads to an appearance before a youth court and the court may order detention for a period not exceeding the shorter of three months or the remainder of the term of the order or a fine not exceeding level 3 on the standard scale.

Youth community orders

Under the CJA 2003 a 'Youth Community Order' means any of the following orders.

Curfew order

As we have seen, these orders may be made in regard to an offender of any age but where the offender is on conviction under 16 the maximum period of the order is three months as opposed to six months in other cases. The order requires the offender to remain for the

period specified at a specific place usually his or her home. The period must be not less than two hours a day and not more than 12 hours a day.

Attendance centre order

These orders are available for offenders who are at least 10 years old and under 25. The order requires attendance at a specified attendance centre to take part in specified activities. An order may be made for example requiring attendance at a centre for say three hours on a number of Saturday afternoons resulting in deprivation of peak leisure time. Consent of the offender is not required.

The aggregate number of hours for which an offender may be required to attend at an attendance centre must not be less than 12 nor more than 36. A child under 14 may be ordered to attend for less than 12 hours if the court is of the opinion that 12 hours would be excessive and in any case such persons cannot be required to attend for more than 12 hours.

Supervision order

These orders may be made where the offender is under 18. In essence, they are the equivalent for children and young persons of the old probation order. The offender's consent is not required. No minimum period is specified and the maximum period is three years. Supervision is by an officer of the local authority or of the local probation service or by a member of a youth offending team. The offender may be required to live at a specified place or places and there may be a night restriction for not longer than 10 hours on any one night. Breach of the order may lead to a fine of up to £1,000 or a curfew order. The court may also revoke the supervision order and deal with the offender for the offence committed.

Action plan orders

These can be applied to offenders aged 10 to 17 inclusive. Under the provisions the offender must comply with a three-month action plan placing him or her under the supervision of an officer of the local probation board, a social worker or a member of the youth offending team. An action plan is essentially an intensive programme of work with the offender and the parents to tackle the causes of offending at an early age. The plan imposes requirements regarding the offender's whereabouts and behaviour. Youth offending teams and their membership have already been considered (see p 161).

The order cannot be made if the court proposes to impose a custodial sentence or an attendance centre order or supervision order or referral order (see below).

Reparation order

These orders require the offender to make reparation for the offence other than by the payment of compensation. They may be made in respect of an offender under the age of 18. The court may make the order along with other orders, e.g. a fine. Reparation may consist, for example, of writing a letter of apology or apologising in person or removing litter or graffiti. Reparation of up to 24 hours in all must be made within three months of the making of the order. The period of reparation is supervised, e.g., by an officer of the local probation board.

For breaching an action plan order or a reparation order or a curfew order or an attendance centre order, the penalties are a fine not exceeding £1,000. A major sanction for the court is to discharge the order and deal with the offender in regard to the offence committed.

Referral orders

This involves referral to a youth offender panel and is intended to trigger an inquiry into the reasons for the offending behaviour and to impose on the offender, who must be under 18, the principle of restorative justice. This involves making restoration to the victim and reintegration into the law-abiding community and taking responsibility for the consequences of the offending behaviour. The panel concerned with a referral draws up a programme entitled a 'youth offender contract' that gives effect to the above objectives and with which the offender must comply. A court making the order can make a parenting order to run alongside the referral order. Where the court decides to make a parenting order with a referral order, the court must obtain a report by a probation officer, or a social worker or a member of the youth offending team. The report will indicate what the requirements of the parenting order might include with reasons. If the offender is under 16, information about the family's circumstances and the likely effect of the order on those circumstances is included.

A *youth offender panel* must be distinguished from a *youth offending team*. A youth offender panel is set up under a referral order for *that particular offender*, and consists of a member of the local youth offending team and two members who are not from that team but are volunteers from the local community. In regard to referral orders, the youth offending team is responsible for providing administrative support, accommodation and other facilities required by the youth offender panel. The team also arranges for the supervision of the youth offender contract and the member of the team who is on the panel keeps records of compliance or non-compliance.

Parenting orders

A parenting order requires the parent(s) to comply for a period not exceeding 12 months with such requirements as are specified in the order and to attend for a concurrent period not exceeding three months and not more than once in any week such counselling and guidance sessions as may be specified by the responsible officer, i.e. an officer of the local probation board, or a social worker or a person appointed by the chief education officer or a member of the youth offending team. The requirements shall as far as practicable avoid conflict with the parents' religious beliefs and with their normal working times. The requirements of the order are in general terms to involve the parents in the supervision of the child with the aim of preventing a recurrence of criminality or truancy. Breach of a parenting order can result on prosecution to a fine not exceeding level 3 on the standard scale i.e. £1,000.

Restitution of property in criminal cases

Restitution orders

Restitution orders may also be made in regard to property which is the object of an offence under ss 148 and 149 of the Powers of Criminal Courts (Sentencing) Act 2000. Restitution orders may also be made in respect of an offence which the accused asks to have taken into consideration. A restitution order and a compensation order may be made in respect of the same goods if recovered in a damaged condition.

Restitution and money-laundering legislation

As part of the law relating to restitution in criminal cases note should be taken of the Proceeds of Crime Act 2002. This is the most important of the legislative measures for