



Department of
Justice
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Sentencing Review Northern Ireland

A Public Consultation

Department of Justice

October 2019

Preface

Sentencing is a vital part of the justice system in Northern Ireland. It often involves complex considerations and requires a delicate balance to be struck between the rights of defendants on the one hand, and the needs and expectations of victims and the public generally on the other. This challenging task is performed by a skilled judiciary whose job is to deliver fair and appropriate sentences independently of government in every case which comes before the criminal courts.

The role of government is to provide a flexible and robust sentencing framework which is fit for purpose and within which the judiciary can exercise its judicial function effectively.

Effective and appropriate sentencing policy is fundamental to the success of the Department's mission to reduce levels of offending and deal in a firm and fair way with those who offend; a way which benefits communities and recognises the hurt that can be suffered by victims whilst assisting offenders to change their offending behaviour.

This consultation document seeks your views on sentencing policy both generally and on a range of specific areas where sentencing has raised particular challenges for the criminal justice system.

The Review team has engaged with key stakeholders, conducted extensive research into practices around the world, and listened to victims and their families in developing this paper. Its aim is to give readers some insight into what lies behind sentencing policy and practices, with its questions designed to elicit your comments on a number of key issues.

The consultation paper is inevitably lengthy, reflecting the complexity of sentencing. It can be responded to in full or in part, guided by where your interest lies.

This is the first review of sentencing policy in Northern Ireland since 2005. There have been many sentencing changes since then and understanding of the factors influencing offending behaviour has become more informed. New studies have revealed better ways of dealing with offenders than simply increasing prison sentences; ways that reduce the likelihood of further offending and directly improve outcomes for victims, offenders, their families and the wider community.

This important consultation gives you the opportunity to gain a fuller understanding of sentencing policy and the options facing it, and to help to shape future developments by contributing your views on the best way forward for sentencing in Northern Ireland.

Peter May, Permanent Secretary, Department of Justice

Introduction to Consultation Process

In June 2016 the then Justice Minister, Clare Sugden, announced a Sentencing Policy Review in Northern Ireland.¹ Having completed the Review, the Department now wishes to consult on those areas where changes to sentencing policy in Northern Ireland might be made.

This consultation is restricted to sentencing policy covering adult offenders and it does not consider the sentences handed out in individual cases, as that is a matter for the independent judiciary. The Review's Terms of Reference are found at Appendix 1.

In developing this public consultation, the Review team worked closely with a group of experts in the field of sentencing (Appendix 2), who provided regular assistance and guidance; it conducted significant desk research, considering information from many common law jurisdictions around the world; and held a series of engagement events and individual meetings with relevant voluntary organizations, statutory agencies, stakeholders, victims and victims' families, and other interested parties (Appendix 3).

Further engagement events, detailed at the end of this section, will take place during the consultation process. These will give respondents the opportunity to engage with the Review team and discuss the best way of tackling the challenges highlighted by the Review.

The Sentencing Framework in Northern Ireland

The criminal law aims to ensure that similar offending attracts similar sentencing ranges and outcomes. When a person is convicted of a crime in Northern Ireland, it is the role of the court to impose an appropriate sentence. In doing this the court must act independently, and within a sentencing framework, to:

- set the sentence within the limits allowed by legislation for the particular offence;
- consider all of the circumstances of the case and decide whether these make the offending behaviour more or less serious;
- determine whether there are any mitigating or aggravating factors which should influence the sentence; and
- have regard to any relevant sentencing guidance² and to the general levels of sentence given in similar cases.

¹ <https://www.justice-ni.gov.uk/news/justice-minister-announces-sentencing-review>

² See Chapter 3.

The Government's responsibility is to ensure that this framework is suitable to allow the courts to deliver fair and just sentences that are considered appropriate in all cases. This consultation seeks views on the following:

- principles and purposes of sentencing;
- public perception;
- sentencing guidance;
- tariff setting for murder;
- unduly lenient sentencing arrangements;
- community sentencing; and
- sentencing for:
 - hate crime;
 - attacks on frontline public services;
 - crimes against older and vulnerable people; and
 - driving offences causing death or serious injury.

A Brief Overview

The following overview of the criminal courts' structure, the scale of sentencing, the types of sentence available, and the sentencing process, is intended to provide a brief contextual backdrop to the chapters that follow.

Criminal Courts' Structure

The two criminal court tiers for prosecuting offenders in Northern Ireland are the Magistrates' Courts and the Crown Court.

The Magistrates' Courts deal with the less serious 'summary' offences, while the Crown Court deals with the more serious 'indictable' cases. Whether an offence is summary or indictable is determined by legislation. Some offences can be tried either summarily or on indictment, and generally the seriousness of the case will determine which method of trial is most appropriate.

Appeals from the Magistrates' Courts are dealt with in the County Courts. Appeals from the Crown Court go to the Northern Ireland Court of Appeal.

Levels of Convictions

Table 1 shows the volume of convictions in Northern Ireland over recent years, together with a breakdown of numbers by court tier.

Table 1: Number of convictions in Northern Ireland (2015-18)

Year	2015	2016	2017	2018
Number of convictions across all courts	24,379	22,956	23,630	24,921
Number of convictions in Crown Court	1,127	1,623	1,332	1,174
Number of convictions in Magistrates' Courts	23,252	21,333	22,298	23,747

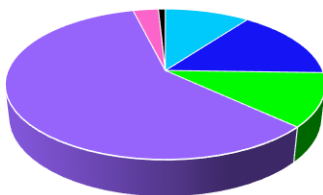
Use of Sentences

When we think of sentences we often think of prison. However, the vast majority of offences are of a less serious nature and, as can be seen from Table 1, are dealt with in the Magistrates' Courts where fines and other financial penalties are the most commonly used disposal. Other types of sentence including community sentences and suspended sentences are used in more serious cases where immediate custody is not appropriate. Only a small proportion of sentences are custodial. A detailed list of sentence types ('disposals') and their descriptors can be found at Annex A.

Chart 1 illustrates the breakdown of disposals imposed in each court tier in 2018.

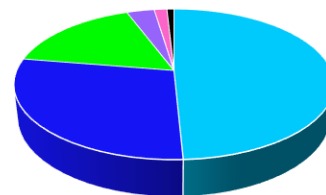
Chart 1: Disposals in Magistrates' Courts and Crown Court 2018

Magistrates' Courts 2018



- Immediate custody
- Suspended custodial
- Community sentence
- Monetary Penalty
- Discharge
- Other

Crown Court 2018



- Immediate custody
- Suspended custodial
- Community sentence
- Monetary Penalty
- Discharge
- Other

Table 2 shows recent levels of convictions by court tier and disposal.

Table 2: Use of sentence types In Northern Ireland (2015-18)

	Immediate custody	Suspended custodial	Community sentence	Monetary Penalty	Discharge	Other	Total
All Courts							
2015	3,013	3,733	3,174	13,129	1,029	301	24,379
2016	2,953	3,822	2,854	12,129	925	273	22,956
2017	2,910	3,734	2,837	13,147	808	194	23,630
2018	3,001	3,958	2,914	14,097	742	209	24,921
Magistrates' Courts							
2015	2,443	3,415	3,003	13,096	1,001	294	23,252
2016	2,212	3,333	2,542	12,080	897	269	21,333
2017	2,259	3,376	2,594	13,088	792	189	22,298
2018	2,423	3,625	2,718	14,058	724	199	23,747
Crown Court							
2015	570	318	171	33	28	7	1,127
2016	741	489	312	49	28	4	1,623
2017	651	358	243	59	16	5	1,332
2018	578	333	196	39	18	10	1,174

Custodial Sentences and Licensing

Since 2009 prison sentences for fixed periods of 12 months or more in Northern Ireland have consisted of a custodial period and a period the offender must spend on licence.³

This licence element often goes without acknowledgement, with many reports of prison sentences focusing only on the custodial part. This can lead to a lack of awareness of this important change in sentencing policy, a lack of appreciation of the true value and impact of such sentences, and a consequent negative impact on public confidence in the levels of custodial sentences imposed.

³ Criminal Justice (NI) Order 2008: <http://www.legislation.gov.uk/nisi/2008/1216/part/2/chapter/2>, commenced with saving for sentences of less than 12 months: <http://www.legislation.gov.uk/nisr/2009/120/schedule/2/made>

The licence period immediately follows the prisoner's release from custody. It is set by the court, and must be at least half of the overall sentence.⁴ This system replaced earlier arrangements whereby prisoners had normally been granted remission at the half-way point of their sentence and were then under no further supervision or control.⁵

The licence element of the sentence is designed to protect the public and prevent further offending by imposing requirements on the offender while living in the community. These may include curfew conditions or a requirement to comply with electronic monitoring.

It is important to note that compliance with such conditions is carefully monitored by the Probation Board for Northern Ireland as well as, when appropriate, PSNI and other agencies during the licence period. Offenders who fail to comply are liable to be recalled to serve the remainder of their sentence in custody. The power to recall is regularly exercised, with over 30% of all those released on licence since 2009 having been returned to prison.⁶

Sentencing Decisions

Sentencing is a complex process: Judges are trained to consider all relevant information; to take account of relevant sentencing guidance; and to be unaffected by their personal views.

In considering the appropriate sentence the Judge needs to take account of:

- the nature of the offence;
- the culpability of the offender;
- circumstances and characteristics of the offender;
- the impact on the victim and wider society;
- any pre-sentence report provided by the Probation Board, or other specific reports requested by the court; and
- any aggravating and mitigating factors, which may lead to higher or lower sentences respectively.

⁴ [This applies to 'ordinary' determinate custodial sentences. Different provisions of the Criminal Justice \(NI\) Order 2008 apply when an 'extended custodial sentence' is ordered.](#)

⁵ Remission remains available for custodial sentences of less than 12 months, and can be granted under rule 30 of the Prison and Young Offenders Centre Rules (NI) 1995: http://www.legislation.gov.uk/nisr/1995/8/pdfs/nisr_19950008_en.pdf

⁶ Sourced from Department of Justice, Public Protection Branch.

Such factors include:

- the seriousness of the effect or the intended effect of the offending; the frequency of offending and conduct that the court is dealing with; and the prevalence of the type of crime in the community;
- particular characteristics of the offender such as their youth; mental or addiction problems; vulnerability; and personal suffering as a result of crime;
- the impact that the crime has had on the victim; any Victim Impact Report prepared by an expert, for example a psychologist; and any Victim Personal Statement, made by the victim of the crime; and
- whether the defendant has pleaded guilty or not guilty. If there is an early guilty plea then the sentencing judge must normally take this into account by reducing the sentence: the maximum reduction or discount will usually be awarded for defendants who plead guilty at the earliest opportunity.

Equality Proofing

As a public authority the Department of Justice is required, under section 75 of the Northern Ireland Act 1998, to have due regard to the need to promote equality of opportunity. Public authorities are also required to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such an impact is justified. These obligations are designed to ensure that equality and good relations considerations are made central to government policy development.

The Department of Justice has considered the impact the conduct of this consultation will have on different groups. It does not believe that any specific issues will arise in relation to: religious belief; political opinion; racial group; age; marital status; sexual orientation; men and women generally; or those with or without a disability or dependents.

The Department does not consider that an Equality Impact Assessment (EQIA) is required at this point.⁷ It will take account of the evidence gathered through this consultation in developing policy proposals, which will be subject to fresh equality screening at that stage.

⁷ The equality screening document can be viewed at <https://www.justice-ni.gov.uk/publications/type/impactassessments>

Privacy Notice

Any data collected through this consultation will be subject to the protection of the General Data Protection Regulations (GDPR). Data collected in this consultation will only be used for informing the need for changes to sentencing policy in Northern Ireland.

Any information that you provide will be treated in strict confidence and will not be used to identify you. Analysis of responses will be carried out on an anonymous basis under the guidelines of the GDPR.

Anonymised comments may be used in support of policy development and may be published.

Public Engagement Events

A number of public engagement events are planned over the consultation period. These will be held on:

Date	Time and Registration Link	Location
11 November 2019	7.00pm – 8.30pm https://www.eventbrite.co.uk/e/78203953129	Waterfoot Hotel Caw Roundabout Derry/Londonderry BT47 6TB
13 November 2019	7.00pm – 8.30pm https://www.eventbrite.co.uk/e/78593797163	Fermanagh House Broadmeadow Place Enniskillen BT74 7HR
14 November 2019	7.00pm – 8.30pm https://www.eventbrite.co.uk/e/78145518349	Craigavon Civic Centre 66 Lakeview Road Craigavon BT64 1AL
4 December 2019	3.00pm – 4.30pm https://www.eventbrite.co.uk/e/78592721947 7.00pm – 8.30pm https://www.eventbrite.co.uk/e/78593953631	Clifton House North Queen Street Belfast BT15 1EQ

Please come along to any of these events to meet with the Review team and discuss any questions you may have about this consultation.

Registration for these events opens on 30 October 2019. Please register your attendance via the link for each venue.

Responding to this Consultation

The Department is seeking your views on the issues raised by this consultation and any other comments on sentencing policy that you consider relevant. You have a choice to respond to the whole consultation or just those areas that interest you.

We would be particularly pleased to hear from victims of crime, organizations representing victims, the police, criminal justice practitioners, and others who have been thorough the justice system.

A summary of the questions raised in the consultation document can be found at pages 122 to 156.

We would encourage you to respond to the consultation using the on-line facility on citizen space, accessible via: <https://consultations.nidirect.gov.uk/doj-corporate-secretariat/sentencing-review-northern-ireland>.

If you require a hard copy of this consultation document or have any other enquiries please email your request to SentencingReviewConsultation@justice-ni.x.gsi.gov.uk

or you can write to us at:

Sentencing Review Team,
Criminal Justice Policy and Legislation Division,
Department of Justice,
Massey House,
Stormont Estate,
Belfast, BT4 3SX.

The Department will publish a summary of responses to the consultation.

Duration and Closing Date

The consultation will be open for 10 weeks. The closing date is **Monday 6 January 2020**.

Alternative Formats

Copies in alternative formats can be made available on request.

If it would assist you to access the document in an alternative format or language other than English please let us know and we will do our best to assist you.

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Chapter 1: Principles and Purposes of Sentencing

- 1.1. Sentencing is critical to legitimising the rule of law and maintaining society's confidence in its justice system. It has to be effective to meet society's expectations and should be commensurate with the offence. Everyone has a perception of what sentences should be and should do, but views vary widely.
- 1.2. In Northern Ireland there is no comprehensive statement of the principles and purposes of sentencing. Instead, these are extrapolated from guideline cases; the Court of Appeal's sentencing guideline judgments;⁸ and the concept of proportionality in the use of custodial sentences which runs through the Criminal Justice (Northern Ireland) Order 2008.
- 1.3. Section 142 of the Criminal Justice Act 2003, which applies only in England and Wales, sets out a more complete legislative statement of the purposes of sentencing. It states:

'Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing:

- a) the punishment of offenders;
- b) the reduction of crime (including its reduction by deterrence);
- c) the reform and rehabilitation of offenders;
- d) the protection of the public; and
- e) the making of reparation by offenders to persons affected by their offences.'

- 1.4. The Review considers that it would be desirable to have a clear understanding of the principles and purposes of sentencing in Northern Ireland. Such an understanding would:
 - improve awareness, understanding and clarity in how sentencing decisions are reached;
 - provide a definitive benchmark of the qualities that all sentences should incorporate and reflect; and
 - ensure compliance with international obligations.

⁸ The sentencing guideline judgments are published in an online Compendium by the Judicial Studies Board at: <https://judiciaryni.uk/sentencing-guidelines-northern-ireland>

- 1.5. Our current ‘piecemeal’ approach impedes transparency and may contribute to undermining public confidence in sentencing and the justice system. Improved clarity could facilitate consistency in the sentencing process.

Principles of Sentencing

- 1.6. The judicial process recognises the unique nature of sentencing, taking account of the individual circumstances in each case to produce sentences that are just and appropriate. Recognising the importance of judicial discretion, sentencing principles reflect established expectations, law and jurisprudence, providing an inclusive framework within which sentencing decisions are made.
- 1.7. Principles are required to determine the punishment that can be justified in each case and must be capable of equal application to every sentence passed. They should remain constant to facilitate predictability and proportionality in the sentencing process, ultimately contributing to society’s confidence in the justice system.
- 1.8. Principles inform and guide the judiciary. As well as ensuring justice and fairness, they provide transparency and the rationale behind sentencing decisions. They should ensure that sentencing is not only fair but seen to be fair.
- 1.9. On examination of principles of sentencing in place nationally and internationally, a level of commonality is found in the type and nature of principles recognised in many jurisdictions.
- 1.10. Although there are overlapping features, each principle is important in its own right, reflecting a distinctive aspect of a just sentencing system. Based on these considerations the Review proposes the following principles of sentencing.

Proportionality

- 1.11. Punishment should be proportionate to the seriousness of the offence and reflect the degree of responsibility of the offender for it.
- 1.12. All jurisdictions reinforce the importance of this principle. It is also set out in the Criminal Justice (Northern Ireland) Order 2008,⁹ which highlights the importance of proportionality when considering the use of incarceration.

⁹ Criminal Justice (Northern Ireland) Order 2008, Articles 5 (2) and 7 (2): <http://www.legislation.gov.uk/nisi/2008/1216/part/2/chapter/2>

Fairness

- 1.13. The concept of fairness is difficult to define precisely, but is central to what the justice system seeks to achieve. The victim, offender, and society all desire that sentencing is fair.
- 1.14. Fairness requires sentencing to respect the rights of victims, offenders and their families. It ensures that the victim's voice is heard; seeks to take account of the personal circumstances of the offender; and provides for an appropriate balance between these factors in the determination of a sentence.
- 1.15. Fairness should ensure that all people are treated equally without discrimination, and that their treatment is human rights compliant.

Use Punishment Sparingly

- 1.16. The principle that punishment should be used sparingly reflects the increasing understanding that harsher punishment does not necessarily help to address offending behaviour. It reflects society's move towards a more rehabilitative and therapeutic approach rather than a punitive one.
- 1.17. This principle is supported by the findings of worldwide research,¹⁰ which indicates that it is not the severity of punishment that contributes to deterring offenders, rather it's the certainty of punishment.

Transparency

- 1.18. Sentencing decisions should be taken openly and with reference to standards and other principles applied by the courts. The principle of transparency promotes clarity, consistency and predictability, and assists the public to understand sentencing decisions.
- 1.19. The application of the principle, for example seen through publicly provided judgments, can help to explain how a sentence was determined, thus minimising the potential for criticism, which can arise from inaccessibility of relevant information; and it can promote fairness.

Consultation Questions:

- Q.1 Do the proposed principles provide the appropriate standards for sentencing?**

¹⁰ Wright, V. Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment. 2010. The Sentencing Project, Research and Advocacy for Reform.

- *Please provide reasons for your response.*

Q.2 Are there other principles that should be included?

- *Please identify and provide reasons for your response.*

Purposes of Sentencing

- 1.20. The purposes of sentencing can be considered to be the aims or desired outcomes which a judge is seeking to achieve in discharging the law. In determining the basis of a sentence the judge should ensure that the principles of sentencing are reflected in the sentencing decision. Depending on the specific circumstances of the offence, a sentence may have one or several purposes.
- 1.21. Across many jurisdictions the purposes of sentencing involve meeting the legitimate public desire to punish wrongdoing and to discourage the offender and other members of the public from committing similar offences in the future. In addition to securing redress and denunciation of the wrongdoing, sentencing also seeks to: address the causes of offending behaviour; provide opportunity for the offender to reform and make amends; and protect the public.
- 1.22. The Review proposes the following purposes of sentencing.

Punishment

- 1.23. Whichever option the court considers appropriate, a sentence is normally intended as some form of penalty or loss to the offender.
- 1.24. Punishment also expresses the denunciation of the offender's criminal behaviour and represents retribution for society; it makes clear society's disapproval of the offender's behaviour; and reinforces respect for the law and for each other.

Protection of the Public

- 1.25. Sentencing has an important role in protecting the public by one or more of the following: removing the offender from society, where necessary; deterring others from offending; holding the offender to account through supervision in the community; and taking actions to divert or otherwise prevent the offender from reoffending.
- 1.26. This purpose takes into account the wider needs of society.

Deterrence

1.27. Sentencing aims to deter further offending by punishment and making the consequences of criminal behaviour clear to individuals and society.

Rehabilitation

1.28. Rehabilitation can be defined as restoring a person to normal life. Its focus is on changing an offender's behaviour to prevent future offending and to reduce crime.

1.29. Rehabilitated offenders acknowledge and move away from their offending behaviour. Often this is achieved through therapeutic and practical support.

1.30. Research shows that rehabilitation is an effective way to reduce reoffending (therefore reducing the number of victims) and also assists in the reintegration of offenders into society.

Reparation

1.31. Reparation can help meet the needs of both the offender and victim, by acknowledging the harm caused and allowing an opportunity to redress the offence.

1.32. Reparation can engage restorative justice practice, providing the victim with a greater voice and opportunity for a sense of closure, while at the same time, importantly, providing offenders with the opportunity to make amends for the harm caused and to give something back.

Consultation Questions:

Q.3 *Are the proposed purposes of sentencing appropriate?*

- *Please provide reasons for your response.*

Q.4 *Are there any other purposes which should be included?*

- *Please identify and provide reasons for your response.*

Prioritising Purposes

1.33. The Review has considered whether any of the purposes of sentencing should be given more weight than the others. Following discussion during pre-consultation engagement, the view was taken that prioritisation is not appropriate, as it could unduly constrain the judiciary, possibly distorting the balance and fairness sought by the principles of sentencing.

Merits of a Single Definition

- 1.34. A single, coherent definition of the principles and purposes of sentencing would enhance sentencing policy. It would make clear the foundations upon which every sentencing decision is built and, consequently, aid the wider public's appreciation of sentences imposed by the courts.
- 1.35. Research indicates that a single definition can help society to understand variations that can arise when sentencing for broadly similar offences, and informs the public on what is taken into account.
- 1.36. Having clarity around the principles and purposes that underline sentencing can also make the process more transparent and support a consistent approach. This, in turn, can improve understanding of the fairness and appropriateness of sentences.
- 1.37. In summary, a clear articulation of the principles and purposes of sentencing should:
 - improve awareness, understanding and clarity in how sentencing decisions are reached;
 - facilitate consistency and predictability in the sentencing process; and
 - reinforce public confidence regarding sentencing and the justice system.

Maintaining the Principles and Purposes of Sentencing

- 1.38. A statement of the principles and purposes of sentencing could be set out in legislation or embedded in a justice policy. The Review is conscious that policies can change quickly and that policy language can be subject to gradual evolution, with the potential to undermine the clarity which is sought.
- 1.39. In contrast, statutory definitions are generally more accessible, certain and enduring. Placing a statement of purposes and principles in legislation would ensure that the statement has maximum impact and is subject to the rigor provided for through the legislative process.

Consultation Question:

Q.5 Should a definition of the principles and purposes of sentencing be created in legislation?

- ***Please provide reasons for your response.***

Chapter 2: Public Perceptions of Sentencing

- 2.1. Public confidence in the justice system is key to maintaining the legitimacy and the effective functioning of law and order: People with low confidence in the system may be less willing to report crime; more reluctant to support the criminal justice system as witnesses or by serving as jurors; and more likely to offend.
- 2.2. An effective sentencing policy is likely to increase public confidence in the justice system more widely.
- 2.3. Recent findings from the Northern Ireland Crime Survey indicate that 44% of respondents were confident that the criminal justice system is effective,¹¹ while 30% of respondents thought that a major cause of crime was sentencing being too lenient.¹² The survey also found that 60% of respondents believed that crime was on the rise, whereas, separate research showed this not to be the case.¹³
- 2.4. Northern Ireland is not alone in this regard. Surveys in England and Wales, Scotland, and Australia report similar findings.
- 2.5. Within the last decade neighbouring jurisdictions have tried to tackle this issue of public confidence by becoming 'tougher on crime' through more stringent sentences.¹⁴ However, such approaches appear to have made no discernible difference to public confidence or to levels of reoffending.
- 2.6. In Northern Ireland, Members of the Legislative Assembly (MLAs) have sought to introduce new laws providing higher maximum sentences for different categories of victim. In addition, through this Review process, some representative groups and victims have lobbied for 'tougher sentencing' for certain offences.
- 2.7. For many, prison is synonymous with sentencing and perceived to be an effective deterrent. However, it is rare for offenders to consider the likely sentence at the moment of offending.

¹¹ Perceptions of Policing and Justice: Finding from the 2017/18 Northern Ireland Crime Survey. 2019. Research and Statistics Bulletin May 2019. Department of Justice. Page 8.

¹² Perceptions of Crime: Finding from the 2017/18 Northern Ireland Crime Survey. 2019. Research and Statistics Bulletin 3/2019. Department of Justice. Page 12.

¹³ *Ibid.* Page 3

¹⁴ Breaking the Cycle: Government Response. Ministry of Justice Command Paper 8070. 2011. Scotland's Choice. Report of the Scottish Prisons Commission. 2008.

- 2.8. Research indicates that the risk of being caught, rather than the severity of a sentence has the greater deterrent effect,¹⁵ and that the fear of custody is significantly diminished for those who have already experienced prison.¹⁶
- 2.9. A key objective of any sentence should be to reduce the likelihood of reoffending. Therefore, it is important that sentences are individually tailored to achieve that outcome for each offender, whilst remaining proportionate and relevant to the offence.
- 2.10. Northern Ireland court data indicates that sentences do align with the current law and sentencing guidance. While the Director of Public Prosecutions may refer certain sentences to the Court of Appeal for reconsideration,¹⁷ this is a rare occurrence and few are found to be unduly lenient.
- 2.11. Table 3 sets out, for the years 2015-18 in Northern Ireland, the total convictions across all courts; total convictions in the Crown Court; and the number of referrals to the Court of Appeal of sentences considered unduly lenient.

Table 3: Northern Ireland Court Convictions (2015-18)

Year	2015	2016	2017	2018
Number of convictions across all courts	24,379	22,956	23,630	24,921
Number of convictions in Crown Court	1,127	1,623	1,332	1,174
Number of referrals to Court of Appeal	8	3	7	6

- 2.12. A belief that sentencing is too lenient, combined with an overestimation of levels of offending, has serious implications for levels of public confidence in the criminal justice system.

¹⁵ Wright, V. Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment. 2010. The Sentencing Project, Research and Advocacy for Reform.

¹⁶ Nagin D,S. Cullen F,T. Johnson C,L. 'Imprisonment and Reoffending,' Crime and Justice: A Review of Research, vol. 38, ed. Michael Tonry, Chicago: University of Chicago Press, 2009: 115-200.

¹⁷ See Chapter 5.

Factors that Influence Public Opinion

- 2.13. Although the evidence indicates considered use of sentence types across the court tiers, some people still think sentencing to be deficient in some ways and that it is not meeting their expectations.
- 2.14. Research^{18 19} indicates that perceived levels of crime and the seriousness of crime influence perceptions of leniency in sentencing, which is then held to blame for high offending rates. Consequently people's confidence in the justice system can be undermined and reduced.
- 2.15. Research²⁰ and feedback from the Review's stakeholder engagement events suggests that much of the public's perception and lack of confidence is based on:
- an incomplete awareness and understanding of sentencing, often leading to the belief that sentencing is too lenient. The Review found that this applies particularly in relation to the licence element of custodial sentences;²¹ and
 - a limited appreciation of the nature and prevalence of crime, believing that serious crime is on the rise when the evidence would indicate otherwise.
- 2.16. People may learn about the criminal justice system through personal experience, or that of family or friends. However, the majority of people have little direct knowledge of the justice system and rely on information from the media in forming their views.

The Media

- 2.17. The media has an important role in shaping public perceptions. It provides a mechanism for scrutinising and challenging government policy and gives the public a voice on matters of interest. Perhaps most importantly, the media keeps society apprised of a wide range of developments, locally, nationally and internationally.
- 2.18. The Crime Survey for England and Wales noted:

¹⁸ Berry M, Philo G, Tiripelli G, Docherty S & Macpherson C. 2012. Media coverage and public understanding of sentencing policy in relation to crimes against children. *Criminology & Criminal Justice* 12(5) 567-591. University of Nottingham.

¹⁹ Northern Ireland Crime Survey 2011/12 & 2012/13: Perceptions of Policing, Justice and Organised Crime. 2014. Research and Statistics Bulletin 7/2014. Department of Justice. Page 14.

²⁰ Gelb K. Public Opinion About Sentencing. 2014. *Encyclopaedia of Criminology & Criminal Justice* (section on sentencing). Published by Springer pp 4154.

²¹ An explanation of licences is provided in the introductory part of this consultation paper.

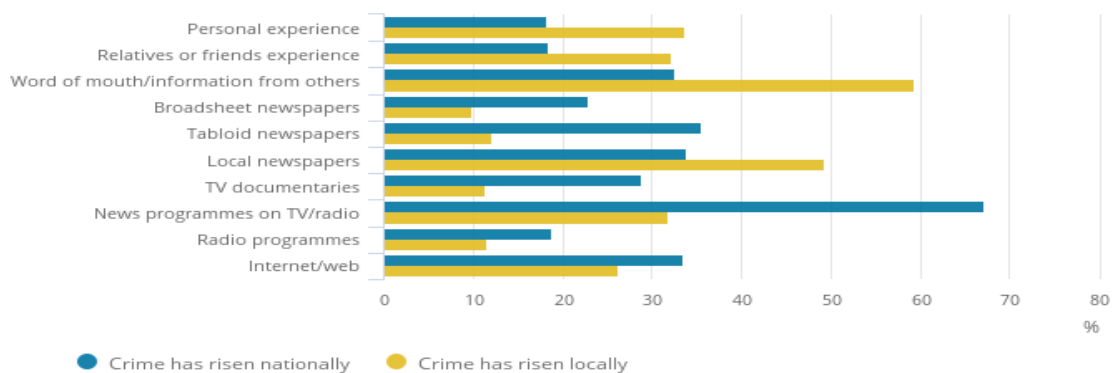
‘When people formed opinions about crime in their local area, they were more reliant on their own experiences or the experiences of people in their communities. However, when people formed perceptions of crime across the whole country their main source of information is the media.’²²

2.19. Chart 2 illustrates the significant impact the media can have on public opinion.

Chart 2: Chart from England and Wales Crime Survey

Figure 3: Percentage of adults who thought crime had been rising either locally or nationally by the sources they felt had informed their opinions

England and Wales, year ending March 2016



Source: Crime Survey for England and Wales, Office for National Statistics

2.20. The PSNI publishes online crime information which may help to better inform the public by allowing individuals to learn about the levels of crime in any given location across Northern Ireland.

2.21. The media helps to bring this information to the public’s attention, but often devotes intense attention to serious or violent crime, with a small number of very high profile cases accounting for a significant proportion of reporting. This can lead to a misconception that serious crime is typical and prevalent.

2.22. Media reports on serious crimes are often provided in summary, highlighting selected detail. Such reports may reflect moral condemnation but, at times, miss important information on the sentence itself or the sentencer’s rationale. This can lead to misunderstandings of how a sentence was derived and unwarranted perceptions of undue leniency.

²² CSEW 2016: Chapter on ‘How do perceptions of local and national crime differ’.

2.23. It is important that justice organisations work closely with the media to promote understanding of the complexities of justice and thus ensure that accurate information on crime can be communicated to the public.

Understanding Sentencing

2.24. The Department of Justice, justice agencies and the independent Northern Ireland Statistics and Research Agency provide published information on key issues such as: levels of crime; reoffending levels; the outcomes of court cases; and related matters.

2.25. However, due to its complexity, the information can be difficult to convey in a meaningful way and it is not always produced in the most user friendly manner.

2.26. The Review considers that the justice system should seek to provide sentencing information in terms that are easier to understand by the wider community, providing definitions in plain English and avoiding legal jargon.

2.27. Some new approaches can be learned from England, Wales and Scotland, where much has been done in recent years to inform and educate the public on sentencing. This has included providing information on sentencing guidelines, explaining judicial and court procedures, and setting out terms and phrases in easily understood words, to ensure that people have a better understanding of court and sentencing matters.

Outreach and Communication Plans

2.28. The Department aims to increase understanding and improve perceptions of sentencing by working with its justice partners to develop, enhance and refine publicly available information on sentencing.

2.29. A communications plan, promoting a strategic approach to improving this information could support the development of material:

- providing printed and digital information through justice agencies and websites/social media;
- publishing judgments or summaries and giving explanations of factors behind sentences to offenders, victims and the press;
- promoting awareness of sentencing guidelines (used by the judiciary) to help inform expectations and provide a clearer understanding of how sentences are determined with regard to specific offence types; and

- developing, improving and promoting materials designed to inform and educate the wider public on justice matters, with a particular focus on sentencing. For example:
 - A ‘jargon buster’, to set out simple definitions and explanations of justice and sentencing terminology and language;
 - ‘You Be the Judge’ type videos, to provide insight and explanation behind court processes and procedures, and the necessary consideration to be taken into account in determining sentences;
 - ‘Sentences Explained’, to set out what different sentences are, for example: what are the main community orders; what is a life sentence and how does it operate; how are licence conditions managed;²³ and
 - Publishing crime data in accessible language and, where possible, explaining trends and what justice is doing to address specific crime types.

2.30. Northern Ireland’s relatively small size may be of benefit in this regard, allowing information to be widely shared through its strong network of local media and close-knit communities.

2.31. The Review considers that public surveys can also be used to raise awareness. Surveys are the most common way of measuring public opinion on sentencing. Most tend to be limited in size, cover broad policy areas, and use one or two questions on specific subjects. As a result, their value in ascertaining perceptions of sentencing can be limited.

2.32. Helping to address this anomaly, experts now recommend moving away from ‘mass public opinion’ surveys to ‘informed public judgment’. Under this approach survey respondents are provided with information before being asked questions; with the desired outcome of receiving better informed opinions rather than *ad hoc* responses.

2.33. In light of this, the Northern Ireland Crime Survey, working with the Review team, has recently re-designed the sentencing aspects of the Survey to provide respondents with relevant information.

²³ <https://www.nidirect.gov.uk/information-and-services/crime-justice-and-law/sentencing-prison-and-probation>
<https://www.pbni.org.uk/about-us/legislation/changes-sentencing/>

Working with the Media

- 2.34. Ensuring that the public is well informed on justice matters is a key objective for the Department of Justice. The media are crucial to keeping our society informed of issues of public concern, ensuring that information is potentially available to everyone. The Department's concern is that reporting on justice matters, and in particular sentencing, is done in a manner that conveys the necessary facts and context to provide a balanced portrayal of the relevant information.
- 2.35. The Review considers that the Department and justice agencies should continue to foster effective engagement and strong working relationships with the media, to ensure that the necessary information about sentencing is shared with the public.

Promoting Education and Information

- 2.36. Informing and educating the wider public on issues such as: court processes; sentencing practices; and the management of offenders is vital to improving public understanding of the justice system.
- 2.37. The Review considers that outreach provisions for schools and community organisations, informing young people and the community generally of how the justice system works, how offenders are managed, and the potential implications of offending behaviour would help achieve this aim.

Consultation Question:

Q.6 Are there other methods of communicating with the public, not identified in this chapter that would help to improve knowledge and perceptions of sentencing matters?

Please identify and provide reasons for your response.

Victims' Perceptions

- 2.38. Victims should be treated with particular respect and sensitivity. As the group most directly affected by crime they rightly expect offenders to be held accountable for their actions. The Review's engagement with victims of crime and wider stakeholders confirmed the importance of ensuring that victims' needs are taken into account within the sentencing process.
- 2.39. Victims' perceptions of sentencing can rely heavily on their experience of the justice system. Therefore it is important that the system responds to their needs in a positive way. Seeking to make good the hurt suffered by the

victim, their family and the community is an important element of effective sentencing policy.

2.40. During pre-consultation engagement many victims and their representatives made clear the importance of recording the impact of the offender's actions. Legislation already makes provision for the submission of voluntary 'victim personal statements' to the courts,^[1] which provides that:

- the Public Prosecution Service for Northern Ireland is to afford victims the opportunity to make a statement;
- statements must be served on the offender a reasonable time before sentence is passed; and
- statements are to be considered by the court.

2.41. The Review understands that victims can feel overwhelmed by being suddenly immersed in the unfamiliar criminal justice system; and that while they are dealing with sometimes extreme trauma they may not absorb all the information the system generates. In some cases victims could not remember having victim personal statements explained to them and felt they had no voice in the proceedings; in other cases, where a statement was made, victims wanted to be sure their views had been considered by the courts, and that the offender had been made aware of the content.

2.42. The Department has previously considered whether victim personal statements should be read out in court. This was not taken forward for a number of reasons, but particularly as it was considered not always to be in the best interests of victims and their families.

Consultation question:

Q.7 Can any steps be taken to improve the provision of a victim personal statement to the court and its use?

- ***Please identify and provide reasons for your response.***

2.43. Likewise, community impact statements can be submitted to the court in respect of critical incidents that have a significant impact on community confidence. Prepared by community representatives, they explain the effect the offending has had on the community, and can make an important contribution to court considerations. This is particularly so in 'victimless' crimes. Such statements are intended to ensure that the wider impact of

^[1] <http://www.legislation.gov.uk/nisr/2016/431/contents/made>

offences is recognised and taken into account, although their uptake has been minimal.

Consultation question:

Q.8 Can any steps be taken to improve the awareness or use of community impact statements?

- ***Please identify and provide reasons for your response.***

Chapter 3: Sentencing Guidance

- 3.1. In our system of justice, responsibility for the legislative framework for sentencing lies with Government but it is independent judges who decide individual sentences.
- 3.2. This is often a complex task, requiring judges to balance multiple factors to meet the need for individualised justice. These include details such as: the particular circumstances of the offence; the offender's life and prior conduct; and the harm caused to victims and to the broader community.
- 3.3. While discretion in sentencing is essential to judicial independence, sentencing guidance has been developed to assist judges by providing a structure for applying that discretion. It can also improve transparency and a consistency of approach when judging offences of similar magnitude.
- 3.4. This guidance, which takes different forms across jurisdictions, includes sentencing statutes, guideline judgments, sentencing guidelines and sentencing information systems. There are also differing sources ranging from elected legislative bodies, Appeal Courts and sentencing advisory or guideline organisations.
- 3.5. The Review considered a variety of guidance models to assess whether current arrangements for Northern Ireland can benefit from sentencing guidance arrangements operating elsewhere.

Role of Sentencing Guidance

- 3.6. The Northern Ireland Court of Appeal has stated that:

“Consistency in the sentencing process is an important aspect of fairness. Fairness also requires that the particular circumstances of individual cases are taken into account in determining the appropriate outcome.”

From time to time there can be a tension in seeking to satisfy these requirements.²⁴

- 3.7. While there is limited research into consistency in sentencing,²⁵ it is important for public confidence that the process used by judges is perceived as being fair and transparent, and does not appear to treat people differently without good reason.

²⁴ R v McCaughey and Smyth[2014] NICA 61

²⁵ Pina Sanchez J, 'Consistency in Sentencing: A Research Perspective' (2016) Sentencing News Issue 3, 9-11 notes 'To date, only a handful of academic studies have sought to explore the concept of consistency and how it has been affected by the issue of definitive guidelines.'

- 3.8. The role of sentencing guidance, identified by Tata,²⁶ is to help the sentencing process achieve:
- legal equality including the promotion of genuine consistency in sentencing (which does not equate with uniformity of outcome);
 - greater predictability in sentencing patterns (linked to potential efficiency gains in prison planning);
 - transparency in policy and sentencing;²⁷
 - the promotion of public confidence in sentencing; and
 - moderation or change in penal direction.²⁸
- 3.9. In Northern Ireland guidance is primarily provided through a combination of guideline judgments issuing from the Northern Ireland Court of Appeal and sentencing guidance issued by the Lord Chief Justice's Sentencing Group²⁹ (the Sentencing Group). The work of the Sentencing Group is detailed later in this chapter.

Guideline Judgments

- 3.10. Guideline judgments are normally delivered by higher level courts, such as the Northern Ireland Court of Appeal. Any judgment has the potential to become a guideline judgment. Whereas a sentencing judgment normally only determines the outcome of the case in question, a guideline judgment also provides guidance to the lower courts and indicates the appropriate approach to take in similar cases.

²⁶ Cyrus Tata (2013) 'The Struggle for Sentencing Reform: will the English Guidelines model spread?' in A, Ashworth and J Roberts (eds) *Sentencing Guidelines: exploring the English model* Oxford University Press pp233-253.

²⁷ In England and Wales as Crown Court had been under no obligation to publish sentencing remarks in each case, guidelines were considered a way of improving transparency and accountability of sentencing decisions – Mandeep K Dhali, 'Sentencing Guidelines in England and Wales: Missed Opportunities?' (2013) 76 (1) *Law and Contemporary Problems* 289, 290.

²⁸ Joshua B Fischman and Max M Schanzenbach 'Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums' (2012) 9(4) *Journal of Empirical Legal Studies* 729, 729-764.

²⁹ The bi-annual reports of 2012, 2014 and 2016 describe the functions of the Sentencing Group as including 'advising the Lord Chief Justice as to topics for his 'Programme of Action on Sentencing'; production and advising on review of sentencing guidelines for the Magistrates' Courts in Northern Ireland; identifying and advising the Judicial Studies Board as to suitability of NI Court of Appeal judgments for inclusion on the Judicial Studies Board Sentencing Guidelines and Guidance website and liaising with the Judicial Studies Board as to the training of the judiciary on sentencing practice and the dissemination of sentencing guidelines.

- 3.11. The lower courts are not required to follow the guidance provided by guideline judgments.³⁰
- 3.12. The Northern Ireland Court of Appeal has clearly stated that guidance to sentencers is “*not prescriptive...not a strait jacket.*”³¹ However, guideline judgments are highly influential, representing, as they do, the views of the most senior and experienced judiciary, using their legal knowledge of statute and case law to inform and establish a clear precedent.
- 3.13. The issue of guideline judgments was described in the report establishing the Sentencing Group as ‘an important function of the Court’, either ‘because it is a new offence or where trends in society or new statistical evidence suggest that previous guidance is no longer appropriate or requires adjustment’.³²

Northern Ireland

- 3.14. In some jurisdictions, legislation empowers the relevant Courts to provide guideline judgments. The powers can allow the Courts to identify and issue such judgments as the need arises, and can allow the judgments to deal with specific offences or categories of offence or wider sentencing issues.
- 3.15. This is not the case in Northern Ireland where judgments considered suitable for publication as guideline judgments are identified by the Sentencing Group.
- 3.16. The judgments are then placed on the judiciary-ni website,³³ and are listed under a specific offence heading; under a specific sentencing issue, such as discount for a guilty plea; or under multiple headings.

Other Jurisdictions

- 3.17. In England and Wales the Court of Appeal’s role in issuing guideline judgments has been largely superseded by the statutory creation of the Sentencing Council for England and Wales (referred to as the Sentencing Council)³⁴ and its predecessors.³⁵

³⁰ Any view expressed by the appellate court which is not related to the strict facts of the case is not binding on the lower courts as such guidance is classified as ‘obiter dicta’. The Latin term ‘obiter dicta’ means ‘things said by the way’. It is generally used in law to refer to incidental remarks, observations, or opinions articulated by a judge or supplementary opinions by a judge that are not essential to the actual decision as they are not binding on a lower court.

³¹ The Queen v Conrad T Doole [2010] NICA 11; paragraph 5-7;

<https://www.judiciary-ni.gov.uk/sites/judiciary/files/decisions/R%20v%20Doole%20%28Conrad%20Trafford%29%20%282010%20NICA%2011%29.pdf>

³² ‘Monitoring and developing sentencing guidance in Northern Ireland’, A report to the Lord Chief Justice from the Sentencing Working Group 23 June 2010, page 6, paragraph 3.1.

³³ <https://www.judiciary-ni.gov.uk/>

³⁴ Coroners and Justice Act 2009, Part 4, <http://www.legislation.gov.uk/ukpga/2009/25/part/4>

- 3.18. The main roles of the Sentencing Council are dealt with in more detail at paragraphs 3.48 to 3.50, but include the issuing and monitoring of sentencing guidelines.³⁶
- 3.19. The Court of Appeal is empowered to propose to the Sentencing Council offences or categories of offence which it considers require new or revised guidelines while retaining power to provide guidance in a sentencing judgment.³⁷
- 3.20. In Scotland legislation expressly empowers the relevant Appeal Courts to give or review a guideline judgment.³⁸ Only a few judgments have been issued under these powers.³⁹
- 3.21. The Scottish Sentencing Council, established in 2015,⁴⁰ now has responsibility for issuing sentencing guidelines. It is anticipated that new guidelines will gradually fulfil the need for sentencing guidance from the Scottish appellate Courts. Further detail of the role and duties of the Scottish Sentencing Council are found at paragraphs 3.52 to 3.54.
- 3.22. Ireland, like Northern Ireland, relies solely on its Court of Appeal to provide sentencing guidance for the lower courts. Ireland has no statutory definition or requirements for guideline judgments. Instead, a series of judgements in April 2018⁴¹ acknowledged the senior Appeal Courts' important role in offering general sentencing guidance, and placed an express obligation on prosecutors to draw judicial attention to sentencing practice.
- 3.23. Legislation was recently passed to establish a sentencing guidelines mechanism for Ireland (further detailed at paragraphs 3.40, 3.41 and 3.55).⁴²

³⁵ The legislation which created the Sentencing Council for England and Wales also abolished the predecessor organisations, the Sentencing Guidelines Council and Sentencing Advisory Panel.

³⁶ Coroners and Justice Act 2009, Part 4, <http://www.legislation.gov.uk/ukpga/2009/25/part/4>

³⁷ Coroners and Justice Act 2009; section 124 (3) to (8).

³⁸ Criminal Procedure (Scotland) Act 1995; sections 118 (7) High Court and 189 (7) Sheriff Appeal Court.

³⁹ There have been five guideline judgments from the High Court and one from the Sheriff Appeal Court. The current 6 guideline judgments are available on the Scottish Sentencing Council (SSC) website together with a selected list of other useful sentencing cases.

⁴⁰ Criminal Justice and Licensing (Scotland) Act 2010, Part 1:
<https://www.legislation.gov.uk/asp/2010/13/part/1>

⁴¹ <https://www.irishtimes.com/news/crime-and-law/appeal-judges-set-down-sentencing-guidelines-for-burglary-and-robbery-1.3479375>

⁴² Judicial Council Act 2019, section 7 (2) (h);
<https://data.oireachtas.ie/ie/oireachtas/act/2019/33/eng/enacted/a3319.pdf>

- 3.24. Guideline judgments also feature in a number of Australian states⁴³ where legislative provisions set out who⁴⁴ can apply for a guideline judgment,⁴⁵ their content and what is expressly prohibited in them.⁴⁶ The legislation may require the Court to ‘have regard to the need to promote consistency of approach in sentencing and the need to promote public confidence’⁴⁷ when considering whether to issue or review a guideline judgement.
- 3.25. The relevant Appeal Court may not always have discretion as to which parties may participate when issuing a guideline judgment. In Victoria, for example, the Victoria Sentencing Council⁴⁸ monitors and conducts research on sentencing issues which can be provided to judiciary, policy makers and the public. The organisation gives a written view to the Court of Appeal on the need to give, or review, a guideline judgment.
- 3.26. The Court of Appeal is required “to have regard to any view the Council expresses”.⁴⁹ It is also obliged to allow the prosecuting authority and the legal aid authority to make representations before issuing a guideline judgment. Similar provisions exist in some but not all Australian states.
- 3.27. While both sentencing councils within United Kingdom can publish information and conduct research on sentencing matters, research will not be specific to any particular case, nor are the courts required to allow them participation before the issue of a guideline judgment.

Consultation Questions:

Q.9 Should the power and remit of the Northern Ireland Court of Appeal to issue a guideline judgment be established in legislation?

- *Please provide reasons for your response.*

Q.10 If yes to Q.9, should legislation require the Northern Ireland Court of Appeal to consider relevant information on sentencing before issuing a guideline judgment?

- *Please provide reasons for your response.*

⁴³ Victoria (Vic), New South Wales (NSW), Western Australia (WA), South Australia (SA).

⁴⁴ Statutes often provide guideline judgments may be made after an application from a party to the appeal, or by the court on its own initiative.

⁴⁵ Sentencing Act 1991 (Vic) Part 2AA, as inserted by Sentencing (Amendment) Act 2003 (Vic) Part 2; Crimes (Sentencing Procedure) Act 1999 (NSW).

⁴⁶ In Victoria statute expressly prohibits making guideline judgments in relation to appropriate level or range of sentences for a particular offence or class of offences.

⁴⁷ Queensland - Penalties and Sentencing Act (1992) (Qld) as amended in 2010, section 15 AH,; Sentencing Act 1991 (Vic) Part 2AA, section 6 AE (a) and (b).

⁴⁸ <https://www.sentencingcouncil.vic.gov.au/>; <https://www.sentencingcouncil.lawlink.nsw.gov.au/>

⁴⁹ Sentencing Act 1991 (Vic) section 6AD (a) and 6AE (c).

Sentencing Guidelines

- 3.28. Sentencing guidelines⁵⁰ are generally created and published by an organisation established for that specific purpose. They may be provided for in legislation or may be produced under non-legislative arrangements.
- 3.29. Some researchers argue that there are two critical elements required for sentencing guidelines to be effective.⁵¹ One is that guidelines need to be sufficiently detailed and prescriptive to actually provide guidance for courts at sentencing.
- 3.30. The second is a 'statutory requirement for sentencers to follow the guidelines – or provide reasons why this is not desirable'.⁵² In this regard, United States based research demonstrated that when guidelines are purely advisory rather than presumptively binding on courts, sentencing practices generally remained unaffected.⁵³

Northern Ireland

- 3.31. In Northern Ireland, the Sentencing Group was established in 2010 to 'monitor and consider the provision of guidance for sentencers'. This included, specifically, the issue of guidelines to the Magistrates' Courts, the first of which issued in 2011.⁵⁴
- 3.32. The guidelines are not legally binding but are a relevant consideration for the judge when sentencing adult offenders. As well as applying in the Magistrates' Courts, they apply for appeals against sentence from that jurisdiction or when the Crown Court is sentencing an offender for a (lesser) summary offence along with more serious offences that are required to be dealt with in that Court.

⁵⁰ The working definition utilised for sentencing guidelines is a document issued by an organisation whose main function is to assist judges in the sentencing exercise with a view to promoting consistency in sentencing and increasing public confidence in the criminal justice system. Sentencing guidelines may provide judges with starting points for sentences where the circumstances of the case differ, or identify a range of sentences that may be appropriate depending on the seriousness of that offence. They may also set out the aggravating or mitigating factors to be taken into account in particular cases.

⁵¹ Julian V Roberts, 'Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions' (2012) 23 (4) Criminal Law Forum 319.

⁵² Julian V. Roberts; 'Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions' (2012) 23 (4) Criminal Law Forum 319; 339-340.

⁵³ Julian V. Roberts; 'Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions' (2012) 23 (4) Criminal Law Forum 319; 340.

⁵⁴ The guidelines are for the most significant categories of volume offending within that jurisdiction. They can be found on the judiciary-ni website; <https://judiciaryni.uk/magistrates-courts-sentencing-guidelines>

Other Jurisdictions

3.33. Different statutory requirements for the application of the sentencing guidelines have been created, applied or replaced within the UK. They are summarised in Table 4.

Table 4: Statutory Requirements for the Application of Sentencing Guidelines

Jurisdiction	Statutory Duty	Exception
Scotland (since 2015)	The court must <u>have regard to</u> relevant guidelines	Unless the court considers and states the reasons for departing from the guideline.
England and Wales, before the Sentencing Council was established	The court must <u>have regard to</u> relevant guidelines	The court could depart from them so long as the reasons for departure were explained in court
England and Wales, since 2010 when Sentencing Council was established	The court must <u>follow</u> relevant guidelines	Unless the court is satisfied that it would be contrary to the interests of justice to do so

3.34. While the current statutory duty to ‘follow’ sentencing guidelines may seem more restrictive than the duty to ‘have regard’, a certain flexibility or discretion remains available to the judge. Statute provides that the judge is permitted not to follow the guideline if it ‘would not be in the interests of justice’. When applying this exception the court will set out its reasons.

3.35. The Court of Appeal in England and Wales expressed support for this flexibility when it recently advised that sentencing guidelines are not to be applied mechanistically or construed as a statute.⁵⁵

3.36. The change in England and Wales from a requirement to ‘have regard’ to the guidelines to having to ‘follow’ them reflected criticism that having regard had led to ambiguity about how the sentencing guidelines were to be applied. This ambiguity was reflected in conflicting Court of Appeal (Criminal Division) decisions as to whether they were to be applied⁵⁶ barring unusual circumstances; or they were “*guidelines no more no less*”.⁵⁷

⁵⁵ R v Tata Steel UK Ltd [2017] EWCA Crim 704; paragraph 47.

⁵⁶ R v Last and others [2005] EWCA Crim 106; paragraph 16.

⁵⁷ R v Peters and others [2005] EWCA Crim 605; paragraph 3.

- 3.37. The Scottish approach could be viewed as similar in substance to the duty initially applied in England and Wales. Whether the Scottish experience will replicate similar concerns addressed by the Court of Appeal in England and Wales remains to be seen, given the duty has yet to be tested in that jurisdiction.
- 3.38. While the current approach in England and Wales may be perceived as being somewhat stricter than the Scottish one, it is more transparent as to the expectation placed upon the judiciary, and at the same time remains in line with the view expressed by the Northern Ireland Court of Appeal that *“excessively prescriptive guidelines, whether imposed by the Court or by any statutory body, would frustrate the sentencer’s duty to decide the case before him or her justly on the merits”*.⁵⁸
- 3.39. One result of the statutory obligation on the judiciary to follow guidelines in England and Wales is that both defendant and prosecutor are permitted to appeal a sentence on the ground that the court has failed to adhere to the sentencing guideline without good reason.⁵⁹
- 3.40. In Ireland, the Judicial Council Act 2019⁶⁰ has, for the first time, made provision for a Council whose functions will include the adoption and publication of sentencing guidelines produced by a Sentencing Guidelines and Information Committee.
- 3.41. The Act provides for the courts to ‘have regard’ to the sentencing guidelines, unless satisfied that it would be contrary to the interests of justice to do so. In such a case the court will be required to give its reasons.⁶¹
- 3.42. In 2007 legislation made provision in New Zealand⁶² for judges ‘to sentence in a manner consistent’ with a sentencing guideline, provided it was not contrary to the interests of justice. The legislation was never commenced and was repealed in 2017.
- 3.43. A common feature across many of the jurisdictions examined by the Review was the existence of a statutory duty requiring some form of compliance with sentencing guidelines.

⁵⁸ R v Conrad T Doole [2010] NICA 11; paragraph 6.

⁵⁹ The test for appealing was and remains that the sentence was manifestly inadequate or manifestly excessive, in other words unjust and disproportionate; see R v AO [2016] EWCA Crim B4.

⁶⁰ <https://www.oireachtas.ie/en/bills/bill/2017/70/>

⁶¹ Judicial Council Act 2019, section 92.

⁶² Criminal Justice Reform Act 2007.

3.44. Recent research would suggest that it is beneficial to have such a duty, and that sentencing guidelines have not proved detrimental to the individualisation of sentences.⁶³

Consultation Questions:

Q.11 Should a statutory duty be placed on relevant sentencing judges requiring them to:

(i) have regard to sentencing guidelines; or

(ii) follow sentencing guidelines?

- *Please indicate preferred option and provide reasons for your response.*

Q.12 Should sentencing judges have power to depart from sentencing guidelines:

(i) in the interests of justice; or

(ii) having provided reasons for that departure?

- *Please indicate preferred option and provide reasons for your response.*

Sentencing Guideline Organisations

3.45. As previously indicated, sentencing guidelines generally issue from a body or organisation tasked with producing them.

3.46. In Northern Ireland the non-statutory Sentencing Group's objectives include: promoting public confidence in sentencing; providing greater transparency in sentencing practice; enhancing community engagement in sentencing issues; and promoting consistency in sentencing for similar offences in similar circumstances, while remaining proportionate to the geographical area and value for money.⁶⁴

3.47. The Group's functions include issuing guidelines to the Magistrates' Courts as well as publishing the guideline judgments of the Court of Appeal. Its Magistrates' Courts Sentencing Guidelines are produced by a judicial-only sub-committee⁶⁵ which consults with the District Judges (Magistrates' Courts).

3.48. The duties of the Sentencing Council for England and Wales (Sentencing Council) are set out in the Coroners and Justice Act 2009. In preparing

⁶³ Julian Roberts, Jose Pina-Sanchez and Ian Marder; Individualisation at Sentencing: The Effects of Guidelines and 'Preferred' Numbers (2018) 2 Criminal Law Review 123.

⁶⁴ Sentencing Group's Programme of Action on Sentencing.

⁶⁵ Chaired by the Presiding District Judge (Magistrates' Courts).

sentencing guidelines, the Council is required to consult with specified bodies and such other persons as it considers appropriate. It must have regard to sentences imposed in England and Wales and the need to promote consistency and public confidence in sentencing. The Council must monitor the operation and impact of any guidelines⁶⁶ when creating or revising guidelines; the impact of sentencing decisions on victims; and the cost and relative effectiveness of different sentence types.⁶⁷

- 3.49. The Council is also required to promote awareness of sentencing practice and other sentencing matters. In discharging its duties the Council actively seeks to engage public opinion in its work and has stated its aims as: to promote a clear, fair and consistent approach to sentencing, primarily by issuing guidelines; to produce analysis and research on sentencing; and to work to improve public confidence in sentencing.
- 3.50. A recent review of the Sentencing Council identified the benefit such an organisation can achieve where research on current sentencing practice as well as the impact of guidance is embedded into its methodology.
- 3.51. This was illustrated by the Council's recent response to concerns that the courts were failing to impose suspended sentences in accordance with the relevant guideline.⁶⁸ The Council engaged extensively to ensure the guideline was embedded into protocol, and action was taken by the Council Chairman to caution sentencers against the use of suspended sentences "as a *more severe form of community order*".⁶⁹
- 3.52. The Scottish Sentencing Council, established in 2015 under the Criminal Justice and Licensing (Scotland) Act 2010, issued its first guideline in 2018.⁷⁰ Its guidelines must be approved by the senior judiciary before they can take effect. The guidelines can be approved in whole or in part, and with or without modifications.
- 3.53. Similar to the Sentencing Council, the Scottish Council's statutory objectives⁷¹ include: promoting consistency in sentencing practice; assisting the development of sentencing policy; and promoting a greater awareness and understanding of sentencing.

⁶⁶ Coroners and Justice Act 2009; s 128
<https://www.legislation.gov.uk/ukpga/2009/25/section/128>

⁶⁷ Coroners and Justice Act 2009; s 120 (11) <http://www.legislation.gov.uk/ukpga/2009/25/section/120>

⁶⁸ Sentencing Council England and Wales; Guideline 'Imposition of Community and Custodial Sentences', 2016.

⁶⁹ Andrew Ashworth and Nicola Padfield; 'Reviewing the Sentencing Council' Criminal Law Review 2018, 8, 609-611.

⁷⁰ Principles and Purposes of Sentencing Guideline.

⁷¹ <http://www.legislation.gov.uk/asp/2010/13/part/1>

- 3.54. Its guidelines must be accompanied by an assessment of the likely costs and benefits of implementation and the likely effect of the guidelines on the criminal justice system generally.⁷²
- 3.55. The role of the new Irish Sentencing Guidelines and Information Committee will primarily be to: prepare and monitor the operation of sentencing guidelines; and to collate and disseminate sentencing information.⁷³
- 3.56. Several Australian States have created sentencing advisory organisations⁷⁴ providing advice to governments, the courts and the community on sentencing issues.⁷⁵
- 3.57. The purposes of the proposed sentencing guideline council for New Zealand⁷⁶ included: the promotion of consistency in sentencing practice and transparency in sentencing policy; informing and educating the public about sentencing with a view to the promotion of public confidence in the criminal justice system; and informing parliament and policy makers about sentencing, penal resources and reform options.

Consistency, Transparency and Public Confidence

- 3.58. Each of the approaches to sentencing guidance or guideline bodies examined claim similar aims of improving consistency, transparency and public confidence in sentencing practice while enhancing community engagement in sentencing issues.

Consistency

- 3.59. The Sentencing Group identifies Court of Appeal guideline judgments, judicial training,⁷⁷ statistics on sentencing, the referral of unduly lenient sentences within legislative remit of the Director of Public Prosecutions and information from other jurisdictions (notably England and Wales)⁷⁸ as the tools to enhance consistency in sentencing.

⁷² This requirement for the Scottish Sentencing Council is similar to the obligation placed on the Sentencing Council for England and Wales.

⁷³ Judicial Council Act 2019, section 23.

⁷⁴ Four states – New South Wales (2003), Victoria (2004), Tasmania (2010) and South Australia (2012). Queensland created an advisory body in 2010 but abolished it in 2012.

⁷⁵ The Victoria Sentencing Advisory Council functions include providing statistical information on sentencing, including information on current sentencing practices, conducting research and disseminating information on sentencing matters, consulting on sentencing matters, advising the Attorney-General on sentencing issues and providing the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

⁷⁶ Criminal Justice Reform Act 2007, repealed.

⁷⁷ Judicial training is provided through Judicial Studies Board publications and events.

⁷⁸ 'Monitoring and developing sentencing guidance in Northern Ireland', A report to the Lord Chief Justice from the Sentencing Working Group 23 June 2010; p3.

- 3.60. The role of guidelines in England and Wales has been described as defining *“a common approach to sentencing, leaving the eventual outcome to the discretion of the judge based on the facts and circumstances of the case before him/her. Judges are also obliged to give reasons when departing from the guideline”*.⁷⁹
- 3.61. Measuring consistency of approach, as opposed to outcome, is not easy.⁸⁰ The main challenge comes from the distinguishing variables of each case that the sentencing judge must take account of when sentencing, which are not identified in current sentencing data.
- 3.62. Recent research conducted in England and Wales on custodial sentences for assault, burglary and robbery identified that apparent inconsistency in sentences could be related to nine common aggravating and mitigating factors specified in the relevant guideline.⁸¹
- 3.63. The ability to assess or measure the consideration by the judiciary of such factors would facilitate a more informed appraisal of consistency in the application of a sentencing guideline or guideline judgments.
- 3.64. While the collation of such data may have cost implications, it can facilitate evidence based research to inform the judiciary and the wider public on the workings of the courts and consistency of approach to sentencing decisions.

Transparency

- 3.65. The Sentencing Council and Scottish Sentencing Council use designated websites to provide information about their work and on how they discharge their duties. Both Councils place minutes of their meetings on their websites. Consultation publications, reviews of the application of guidelines and related research are also published.
- 3.66. The Sentencing Council recently placed an independent evaluation on the discharge of its statutory functions on its website as well as its response to the recommendations for future areas of work. The Scottish Sentencing Council places heavy emphasis on the importance of research on its website, including a link to a postgraduate programme utilised as a research resource.

⁷⁹ Sir Brian Leveson PC, Former President of Queen’s Bench Division at The Paramoor Lecture, 24th October 2013; ‘Achieving consistency in sentencing’.

⁸⁰ J Pina Sanchez “Defining and measuring consistency in Sentencing”, in Robert J (Ed) Explaining Sentencing Practice in England and Wales.

⁸¹ Pina- Sanchez J and Linacre R (2013) ‘Sentence Consistency in England and Wales Evidence from the Crown Court Sentencing Survey’, British Journal of Criminology, 40 (4), 731-748; ; Pina- Sanchez J and Linacre R (2014) ‘Refining the measurement of Consistency in Sentencing; A Methodological Review’, International Journal of Law, Crime and Justice, 44, 68-87; Jose Pina-Sanchez, ‘Consistency in Sentencing: A Research Perspective’ (2016), Sentencing News, Issue 3, page 10-11.

- 3.67. Both Councils also ensure ongoing consultations and relevant research developments in sentencing are promoted on other media tools such as Twitter.
- 3.68. The Lord Chief Justice has identified the work of the Sentencing Group as well as the judiciary-ni website⁸² as part of the approach adopted to achieve transparency about how sentencing is approached in this jurisdiction.⁸³
- 3.69. It was not possible to identify or source Irish guideline judgments on the Irish courts website, the Supreme Court of Ireland website or the website of the Irish Prosecution Service.

Public Confidence

- 3.70. Guideline bodies can assist in the promotion of public confidence. They can act as official ‘think-tanks’ to develop policy or commission research to inform both official and general public understanding on sentencing matters requiring careful consideration.
- 3.71. Crucially, the guidelines are kept under review. Once a guideline is operational the focus moves to assess whether it works as expected. While the longevity of a guideline once issued can vary, there will be consultation or research to assess its application within 6 to 12 months of it coming into force.
- 3.72. Public confidence is recognised as an important factor. In maintaining this a former Chairman of the Sentencing Council described the focus of the Council as to “*review, revise and improve*”⁸⁴ its work. In this regard the Council highlights instances where suggestions for improvement received in consultation responses have been adopted on merit.

Training and Education

- 3.73. Public confidence in sentencing can be improved by the visible provision of judicial training and education of the public. Training for judiciary is organised through independent organisations, with the relevant body in Northern Ireland being the Judicial Studies Board Northern Ireland.
- 3.74. The communication of training needs is a two-way process between sentencers and the Board. The Sentencing Group liaises with the Judicial

⁸² The website currently provides information concerning the judiciary and signposts the latest guideline judgments as well as the work of the Sentencing Group.

⁸³ http://www.niassembly.gov.uk/globalassets/Documents/Official-Reports/Justice/2012-2013/130502_BriefingfromtheLordChiefJustice.pdf

⁸⁴ Lord Justice Treacy; Criminal Law Review Conference 3 December 2015.

Studies Board on the training of the judiciary on sentencing practice and the dissemination of sentencing guidelines.

- 3.75. The establishment in Northern Ireland of the judiciary-ni website is one of the steps taken to enhance community understanding and confidence in sentencing.⁸⁵ Outreach activities by the Sentencing Group, to increase the knowledge and understanding of the public on how the sentencing task of the courts is discharged, also contribute to building public confidence.
- 3.76. The UK Sentencing Councils' websites use animated videos to inform and educate the public about the sentencing process. These include videos about sentencing on YouTube; an interactive task 'You be the Judge'; a 'myth buster'; and a council blog, hosting internal and guest posts.
- 3.77. The Sentencing Council also provides training and educational materials to promote understanding of sentencing among victims, witnesses, young people and the wider public.
- 3.78. In Northern Ireland there is scope to further develop existing websites to include interactive content. Links to material on the websites of the more recently created sentencing councils and advisory bodies would also be beneficial.

Membership of Sentencing Guidance Mechanisms

- 3.79. In 2013 the inclusion of community representatives in the Sentencing Group membership was identified as a means of "*increasing public confidence*" and providing a "*helpful external perspective on sentencing issues*".⁸⁶
- 3.80. The Sentencing Group is chaired by a senior judicial member.⁸⁷ Its membership, initially confined to representatives of all tiers of sentencing judiciary, now includes lay members consisting of academics from the two locally based universities and a victims' representative. Practitioners of criminal law or those engaged within specified criminal justice organisations are excluded.
- 3.81. The Sentencing Council has a majority of judicial members,⁸⁸ as will the Irish Committee,⁸⁹ while the Scottish Sentencing Council has equal numbers of

⁸⁵ http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes/http://www.niassembly.gov.uk/globalassets/Documents/Official-Reports/Justice/2013-2014/140604_LordChiefJusticeandNIJAC.pdf

⁸⁶ http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes/http://www.niassembly.gov.uk/globalassets/Documents/Official-Reports/Justice/2013-2014/140604_LordChiefJusticeandNIJAC.pdf

⁸⁷ A Lord Justice of Appeal.

⁸⁸ Sentencing Council for England and Wales has 8 from a judicial background, and six non-judicial members, all with an equal role.

judicial and non-judicial members.⁹⁰ Various tiers of judiciary are involved in the Councils while the non-judicial members are from a mixture of criminal justice and non-legal backgrounds.

- 3.82. A judicial majority in membership has been seen as a key factor for the Sentencing Council for England and Wales in ensuring the Council's independence so that it is non-political and doesn't encroach on a function of the government or parliament.⁹¹ Others have argued that the equal membership model in Scotland (which had also been proposed for the New Zealand model), gives the community a greater say in sentencing.⁹²
- 3.83. In Australia the focus is on achieving a mixture of members to reflect broad experience in community issues affecting the courts or operation of the criminal justice system. Members include: experienced defence/prosecution lawyers; academic members; members of a victim of crime support or advocacy group or persons with knowledge of issues facing victims; and members of the police force of senior rank or who are actively engaged in criminal law enforcement duties.⁹³

Consultation Questions:

Q.13 Is there sufficient transparency in sentencing within Northern Ireland?

- ***Please provide reasons for your response.***

Q.14 Should a sentencing guidance mechanism be established that builds on the current arrangements, namely, guideline judgments and the work of the Sentencing Group?

- ***Please provide reasons for your response.***

Q. 15 If yes to Q.14, should the mechanism be created in legislation?

- ***Please provide reasons for your response.***

Q. 16 If yes to Q.15, should the legislative purposes include the promotion of consistency of approach and public confidence in sentencing?

- ***Please provide reasons for your response.***

⁸⁹ Judicial Council Act 2019, section 24.

⁹⁰ Scottish Sentencing Council has 12 members consisting of 6 judicial and six non-judicial members.

⁹¹ Julian Roberts; 'Structured Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions', (2012) Criminal Law Forum 319; page 343

⁹² Warren Young and Andrea King, 'The origins and Evolution of Sentencing Guidelines: A comparison of England and Wales and New Zealand' in Andrew Ashworth and Julian V Roberts (eds), Sentencing Guidelines: Exploring the English Model (2013), 213-214,

⁹³ Sentencing Act 1991 (Vic), Part 9 section 108F; Crimes (Sentencing Proceedings) Act 1999 (NSW) section 1001 (2).

Q.17 Should any mechanism established in Northern Ireland for providing sentencing guidance carry out the following ancillary functions:

- (i) analysis and research on sentencing;**
- (ii) research on the impact of any guidelines or guidance judgments issued;**
- (iii) outreach to the community to improve understanding of the sentencing process;**
- (iv) other?**

- **Please indicate options that you agree with and comment as appropriate.**

Q.18 Should Northern Ireland criminal justice agencies, such as the Public Prosecution Service, Police or Probation Board be included in or excluded from a sentencing guidance mechanism for Northern Ireland?

- **Please provide details of which bodies should be included or excluded and reasons for your response.**

Q.19 Should prospective non-judicial members of a sentencing guidance mechanism compete for selection based on their expertise, knowledge and skills relevant to sentencing and criminal justice?

- **Please provide reasons for your response.**

Chapter 4: Tariff Setting for Murder

- 4.1. In Northern Ireland, the Judge has no option but to impose a life sentence once an offender is convicted of murder. The Judge must then decide on the minimum amount of time the offender must remain in prison before being considered for release on life-long licence.
- 4.2. This minimum period of custody is referred to as the tariff, the term adopted throughout this consultation. It should be noted that there is no fixed tariff for murder in legislation in Northern Ireland or in the rest of the UK.
- 4.3. No release date is given for a life sentence prisoner. The tariff establishes the minimum amount of time the offender must be held in prison before being considered for release by the Parole Commissioners for Northern Ireland. There is no guarantee the offender will be released once the tariff set by the judge has passed. A life sentence prisoner remains in custody unless or until they can demonstrate to the satisfaction of independent Parole Commissioners that they can be released safely into the community.
- 4.4. Parole Commissioners make decisions on release based on reports from those working with offenders while in custody. Commissioners describe their task as releasing the offender where risk to public is minimal but refusing release where there is doubt on that risk.⁹⁴
- 4.5. Life sentence prisoners who are released are subject to licence conditions which will remain in place for the rest of their lives. Licence conditions are set to manage and reduce any risk of reoffending⁹⁵ and may be added, varied or cancelled in consultation with the Parole Commission for Northern Ireland.
- 4.6. Any breach of licence conditions assessed by the Commissioners to have significantly increased the risk to the public leaves the offender vulnerable to being returned to prison (recall). An offender recalled to prison will remain in custody until the Commissioners are satisfied of their suitability for re-release into the community.
- 4.7. Public and political concerns expressed on the sentences imposed for the killing of a serving police officer in 2012 (reviewed by the Northern Ireland

⁹⁴<http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/november-2013/parole-commissioners-for-northern-ireland-role-and-responsibilities/>

⁹⁵ The conditions are related to any factors identified as playing a role in the offender's risk of reoffending. Conditions regularly include curfew, ban on alcohol with monitoring for compliance, restricted use of drugs to those prescribed, geographical bans where relevant to victim or potential victims (sex offenders), attendance of any identified relevant rehabilitative courses, supervision by Probation or multi agency group, restriction of association with named persons or groups.

Court of Appeal in 2014) resulted in a ministerial commitment to conduct this review of the law on the determination of tariffs for mandatory life sentences.

- 4.8. This is the type of issue which might be considered by a Sentencing Council in other parts of the UK (see Chapter 3).
- 4.9. The Review has looked into the position in neighbouring jurisdictions⁹⁶ and further afield⁹⁷ reflecting the contrasting legislation referred to during an earlier Assembly debate.⁹⁸ While the United Kingdom has been observed as having the highest rate of life sentencing in Europe, the question of abolishing mandatory life sentences for murder is not part of this Review.
- 4.10. The Review is considering whether:
- the process for determining tariffs should remain unchanged; or
 - there is benefit to introducing, in legislation, a more regulated approach to tariff setting than currently exists; and, if so,
 - the potential content of any legislation.

Types of Tariffs and Application

- 4.11. The introduction of the tariff⁹⁹ accompanied the abolition of the death penalty for murder.¹⁰⁰ In the United Kingdom judges determine the tariff by following relevant legislation and sentencing guidance. Elsewhere, legislation can set a fixed tariff which the judge must impose, with no or very limited power to vary this.

UK Approach

- 4.12. Across the United Kingdom, the judge conducts a detailed sentencing exercise to determine the appropriate tariff. The judge will identify a starting point in terms of years of imprisonment for the calculation of the tariff by referring to sentencing guidance.
- 4.13. Such guidance is generally provided either in earlier cases determined by a Court of Appeal¹⁰¹ or in legislation.¹⁰² The judge sets the tariff by increasing or decreasing the number of years to take account of aggravating or mitigating

⁹⁶ England and Wales, Scotland and Republic of Ireland.

⁹⁷ Canada and Australia.

⁹⁸ <https://www.theyworkforyou.com/ni/?id=2012-06-11.11.1>

⁹⁹ A 'tariff' is the minimum period which in the court's view should elapse before the offender may be considered for release on licence.

¹⁰⁰ The death penalty was abolished in England, Scotland and Wales by the Murder (Abolition of Death Penalty) Act 1965, followed in Northern Ireland, in July 1973, by the Northern Ireland (Emergency Provisions) Act 1973.

¹⁰¹ Northern Ireland and Scotland

¹⁰² England and Wales

factors¹⁰³ which relate to either the offence or the offender in the particular case.

4.14. This flexibility is to ensure that the tariff reflects the circumstances of the individual offender and the offending conduct.

Other Jurisdictions

4.15. Legislation in jurisdictions like Ireland and Canada provides a set tariff for certain types of murders. In Ireland there is a 40 year tariff for the murder of members of the police, armed forces, and politicians amongst others. In Canada 25 years must be imposed where murder is premeditated, planned or involves the killing of a police officer.¹⁰⁴ The judge does not have any discretion to change these periods.

4.16. In Canada remission is not available; whereas in Ireland standard remission applies so that a person ordered to serve a tariff of 40 years can serve 30 years.¹⁰⁵

4.17. Set tariffs are also found in Australia. In at least one State a range of set tariffs exist, ranging from twenty years for single murders to thirty years for multiple murders.¹⁰⁶ Other States have tariffs ranging from 10,¹⁰⁷ to 20¹⁰⁸ to 25¹⁰⁹ years for murder.

4.18. Most Australian States also allow judicial discretion to impose a shorter tariff, restricted to exceptional circumstances, and a longer tariff can also be imposed. The Australian system lays emphasis on sentencing judges individualising justice.¹¹⁰

4.19. The Northern Ireland Assembly has not signalled a strong demand for tariffs to be set in legislation.¹¹¹ Periodic public concerns over sentencing for

¹⁰³ Aggravating factors include planned or premeditated murder, use of weapons, concealment of crime or having relevant previous convictions or failure to respond to earlier sentences. Mitigating factors are few and generally other than lack of intent to kill or premeditation, they relate to offender's age, plea or sorrow for offending.

¹⁰⁴ Canada sets the fixed tariff of 25 years for what is termed First Degree Murder- Criminal Code of Canada, section 745; <http://www.criminal-code.ca/criminal-code-of-canada-section-745-sentence-of-life-imprisonment/index.html>

¹⁰⁵ Criminal Justice Act 1990, section 5 (2).

¹⁰⁶ Queensland

¹⁰⁷ In Western Australia, the court must set a standard non-parole period of 10 years where the offender has been sentenced to life imprisonment for murder.

¹⁰⁸ In South Australia, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder.

¹⁰⁹ Northern Territory, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder, or 25 years where certain factors are present in the case.

¹¹⁰ Law Library of Congress Australia; Sentencing Guidelines

¹¹¹ Northern Ireland Assembly Debate 29th November 2011

<http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2011/111129.pdf>

particular offences or individual cases usually arise from a perception of leniency or inconsistencies in specific sentencing decisions. Another reported concern is that sentencing is perceived to be overly preoccupied with mitigating factors concerning the offender.

- 4.20. Any sentence must be just, proportionate and accord with relevant legislative schemes and the broader principles of common law. Judicial discretion is an essential element of the sentencing process. The Review considers that statutory set tariffs would unduly fetter judicial discretion, making judges less able to take account of the individual circumstances in complex cases. Consequently, a more detailed consideration of this option has been excluded from this consultation.

Northern Ireland Legal Framework

- 4.21. In Northern Ireland legislation requires the judge to set a tariff 'to satisfy the requirements of retribution and deterrence'.¹¹² In setting the tariff, the judge is guided by specific case law issued by the Northern Ireland Court of Appeal,¹¹³ which incorporates the 2002 Practice Statement issued by Lord Chief Justice Woolf.¹¹⁴
- 4.22. This sets out a number of starting points for the calculation of the tariff and the circumstances in which they apply. In summary the 'normal' starting point for a life sentence tariff is 12 years for an adult. There is a 'higher' starting point of 15 to 16 years for 'exceptionally high culpability or a particularly vulnerable victim'. Examples of such include professional or contract killings, politically motivated killing, a victim providing public service, a child or multiple murders.
- 4.23. The Practice Statement describes factors which, if present, will tend to aggravate or mitigate the duration of the final tariff.¹¹⁵ The normal or higher starting points move up or down in response to aggravating or mitigating factors.¹¹⁶
- 4.24. There is also a category of 'very serious' murders, which can result in a tariff of up to 30 years.¹¹⁷ Those include multiple murders or a murder which includes a number of the factors mentioned as falling within the higher starting point range.

¹¹² Life Sentences (Northern Ireland) Order 2001, Article 5 (2):
<http://www.legislation.gov.uk/nisi/2001/2564/article/5>

¹¹³ R v McCandless, Johnston, Johnston, Anderson and Scott [2004] NICA 1.

¹¹⁴ Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415.

¹¹⁵ Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415, paragraphs 10 to 19.

¹¹⁶ Aggravating factors include planned or premeditated murder, use of weapons, concealment of crime or having relevant previous convictions or failure to respond to earlier sentences. Mitigating factors are few and generally other than lack of intent to kill or premeditation, they relate to offender's age, plea or sorrow for offending.

¹¹⁷ Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415, paragraph 18.

Whole Life Tariffs

- 4.25. The only time a tariff will not be set by the judge is where the offence is considered particularly serious.¹¹⁸ 'Particularly serious' murder is not defined in the legislation but the court may order that no tariff is specified when sentencing for such an offence. Instead the offender is ordered to be subject to a 'whole life tariff'.
- 4.26. This means the offender can be detained for the remainder of his or her natural life. Instances of a whole life tariff are rare. Only one has ever been imposed by a Crown Court Judge in Northern Ireland and, on appeal, this was changed to a 35 year tariff.¹¹⁹
- 4.27. In that case, the Northern Ireland Court of Appeal endorsed the view of the England and Wales Court of Appeal¹²⁰ that the imposition of a whole life tariff should be confined to those instances where *"the facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life"*.¹²¹

Setting the Tariff

- 4.28. Guidance has been given to judges by the Northern Ireland Court of Appeal on how to approach the task of setting the tariff.¹²² It is not a mechanical exercise but rather an avenue to reach a conclusion appropriate in all the circumstances of the case:
- First the appropriate starting point is selected;
 - next the aggravating and mitigating factors should be identified and applied;
 - the third step is to check no 'double counting' of any relevant factors;
 - the final stage, and most importantly where the aggravating factors result in the tariff equalling or exceeding the higher starting point, is for judges to consider whether the figure reached properly represents the tariff for which that offender should be detained. This should allow for variations between offenders.

¹¹⁸ Life Sentences (Northern Ireland) Order 2001, Article 5(3):

<http://www.legislation.gov.uk/nisi/2001/2564/part/III/crossheading/determination-of-tariffs>

¹¹⁹ R v Hamilton [2008] NICA 27; <https://judiciaryni.uk/judicial-decisions/2008-nica-27>

¹²⁰ Lord Phillips CJ in R v Jones and others [2005] EWCA Crim 3115

¹²¹ R v Hamilton [2008] NICA 27; paragraph 38, <https://judiciaryni.uk/judicial-decisions/2008-nica-27>

¹²² R v PJ Morin [2011] NICA 24.

4.29. Guidance has also been provided by the Northern Ireland Court of Appeal where a guilty plea is made to murder.¹²³ The Court considered it inappropriate to be too prescriptive in guidance, but recommended that the judge should carefully set out the factors which justify any discount of greater than one-sixth for a plea in a murder case.

Approach in Scotland, England and Wales

Scotland

4.30. Scottish legislation similarly requires the judge to give a life sentence for murder and to set a tariff to ‘satisfy the requirements of retribution and deterrence’.¹²⁴ However, there is no legislative provision for a whole life tariff.

4.31. The leading guideline case of the Scottish Court of Appeal¹²⁵ reinforces the legislation,¹²⁶ confirming that the tariff may be any period of years and months even if it is likely that the period will exceed the remainder of the prisoner’s life.

4.32. To date, the longest tariff given in Scotland is 37 years. The same case rejected the suggestion that the norm in most murder cases would be a 12 years starting point.¹²⁷

4.33. The Scottish Court of Appeal considered a starting point of 16 years generally appropriate where the offender was armed with a sharp weapon;¹²⁸ or where the victim was a child. In a case where a police officer was acting in the course of his or her duty or where a firearm was used the tariff should be approximately 20 years;¹²⁹ and multiple murders by terrorists could warrant a tariff of more than 30 years. In relation to a guilty plea, the Scottish Court of Appeal ruled murder was a special case and “*the maximum discount should be about one-sixth, with a maximum of five years*”.

¹²³ R v William and James Henry Turner [2017] NICA 52; In summary very few cases are capable of attracting a discount close to one-third. Each case must be considered on its own facts but a not guilty plea at the first arraignment is unlikely to receive a discount for a plea on re-arraignment greater than one-sixth. A discount for a plea in excess of 5 years would be wholly exceptional even in the case of a substantial tariff.

¹²⁴ Prisoners and Criminal Proceedings (Scotland) Act 1993, sections 2 (1) and 2 (2): <http://www.legislation.gov.uk/ukpga/1993/9/section/2>

¹²⁵ HM Advocate v Boyle and Others [2009] HCJAC 89; <https://www.scottishsentencingcouncil.org.uk/about-sentencing/hm-advocate-v-boyle-and-others-opinion/>

¹²⁶ Prisoners and Criminal Proceedings (Scotland) Act 1993, section 2 (3A): <http://www.legislation.gov.uk/ukpga/1993/9/section/2>

¹²⁷ HM Advocate v Boyle and Others [2009] HCJAC 89, paragraph 14.

¹²⁸ HM Advocate v Boyle and Others [2009] HCJAC 89, paragraph 17.

¹²⁹ Boyle and Walker v HM Advocate 2002 SCCR 1036.

England and Wales

- 4.34. England and Wales introduced a range of statutory starting points which vary depending on the age of the offender and the circumstances of the murder.¹³⁰ These starting points have been applied by judges for offenders convicted of murder since the 18 December 2003. The legislation replaced the 2002 Practice Statement which still applies in Northern Ireland. The normal statutory starting point for an adult is 15 years.¹³¹
- 4.35. Higher statutory starting points apply where the murder falls within one of three categories of seriousness,¹³² ranging from 25 years, where a knife or weapon is involved; to 30 years for murders such as killing a police officer or the use of a firearm.
- 4.36. Once the correct statutory starting point is identified, the judge takes account of any aggravating or mitigating factors, which are set out in the legislation.¹³³ Unless the case warrants a whole life order, the judge will reduce the tariff to take account of a guilty plea. The final tariff is expected to take into account all the factors of the case and can be of any length, either above or below the statutory starting point.
- 4.37. The whole life order¹³⁴ equates to the Northern Ireland whole life tariff, but applies only to adults over 21 when a specific category of murder is committed. The murders within this category include: premeditated murders with multiple victims; those where there is evidence of sexual or sadistic motivation; where the offender has previously murdered; or murders to advance a political or ideology cause. Offenders aged between 18 and 20 years for those murders will have a starting point of 30 years.
- 4.38. Table 5 summarises the position existing in the United Kingdom.

¹³⁰ Criminal Justice Act 2003, section 269 Schedule 21: <http://www.legislation.gov.uk/ukpga/2003/44/contents>

¹³¹ For an offender under 18 the starting point is 12 years.

¹³² The categories are 'exceptionally high', 'particularly high' and 'where knife or other weapon used in the murder'.

¹³³ Criminal Justice Act 2003 sections 145 and 126 and Schedule 21 paragraphs 10 and 11, <http://www.legislation.gov.uk/ukpga/2003/44/contents>

¹³⁴ Criminal Justice Act 2003 Schedule 21, paragraph 4: <http://www.legislation.gov.uk/ukpga/2003/44/schedule/21>

Table 5: Tariff Starting Points or Outcomes Established in UK Case Law or Legislation

Tariff/Start Point	Northern Ireland	Scotland	England and Wales
Whole Life	Rare – and only if no doubt offender must be kept in prison for the rest of his or her life	Not Available	For offender aged 21 +: premeditated multiple murder; victim abducted; adult/child sexual or sadistic motivation; for political religious or ideological cause, or has previously murdered
30 years	Not available unless it is in 15/16 year starting point and has multiple aggravating factors	Multiple murders	Whole Life category for offender aged 18 to 20; murder of police or prison officer on duty or 2+ persons; use of firearm/ explosive;; involving sexual or sadistic conduct; aggravated by race, religion, sexual orientation, disability transgender identity.
25 years			Offender aged 18 + who took knife or other weapon taken to scene to commit an offence and used it when committing the murder
20 years	Murder with firearm but not directly involved in the shooting. ¹³⁵	victim child, police officer on duty or where a firearm was used	
15/16 years Starting Point	Exceptionally high culpability, victim particularly vulnerable, professional killing (planned); political motive or motivated by victim's religion or sexual orientation. ¹³⁶	General starting point where offender armed with sharp weapon	Default starting point if not covered by higher starting points
12 years Starting Point	Default starting point if not covered by higher starting point		

¹³⁵ R v Peter Greer [2017] NICA 4

<https://judiciaryni.uk/sites/judiciary/files/decisions/R%20v%20Greer%20%5B2017%5D%20NICA%204.pdf>

¹³⁶ Other factors taking a murder into the higher starting point in Northern Ireland include where: the victim was providing a public service; the victim was a child; the murder was racially aggravated; there was evidence of sadism or sexual motive; multiple murders.

Analysis

- 4.39. It is clear from Table 5 that the starting points in Northern Ireland and Scotland are fairly similar. The main difference from England and Wales arises from the fact that starting points are set out in legislation, potentially making the tariff process more transparent. However, some academics are concerned about the interrelationship between the various categories. They question including multiple victim murders (with no additional aggravating factors¹³⁷) in the same category as murder of a single police officer.¹³⁸
- 4.40. Others comment that it is difficult to understand why a murder perpetrated for an ideological cause points to a whole life order unlike the murder of two or more people. A possible inconsistency of approach may also be reflected in cases decided by the England and Wales Court of Appeal, particularly as to when a whole life order or a 30 year plus tariff is appropriate.¹³⁹
- 4.41. Recent England and Wales statistics indicate that of the 7,088 life sentenced prisoners over half (52%) had a tariff of 10-20 years, a quarter had over 20 years and one in five (20%) had 10 years or less.¹⁴⁰
- 4.42. It is reported the average tariff imposed for murder in England and Wales has risen from 12.5 years in 2003 to 21.3 years in 2016.¹⁴¹ This increase has been identified as driven by the legislation introduced in 2003.¹⁴²
- 4.43. This is not dissimilar to the mix of tariffs set by judges when sentencing for murder in Northern Ireland. In the last six years 48 offenders in Northern Ireland have been convicted of murder. However, this small number of cases means that figures for average tariffs imposed should be taken as indicative and are not statistically robust; the low volume of cases means a small number of sentences or even an individual case could skew any analysis.
- 4.44. In Northern Ireland, over the period 2013 to 2018, 19.6% (9) offenders received a tariff of less than 10 years, 78.3% (36) received a sentence of 10 -

¹³⁷ Criminal Justice Act 2003, Schedule 21 paragraph 5 (2): <http://www.legislation.gov.uk/ukpga/2003/44/schedule/21>

¹³⁸ B. Mitchell, 'Multiple-victim Murder, Multiple Murders and Schedule 21 to the Criminal Justice Act 2003', (2011) 75 (2) *Journal of Criminal Law* 122.

¹³⁹ *R v Bieber* [2009] 1 WLR 223; *R v Muhammadi* [2014] EWCA Crim 817; *R v Heggarty* [2014] EWCA Crim 2531.

¹⁴⁰ Ministry of Justice (2018) *Offender management statistics quarterly: April to June 2018*, London: Ministry of Justice.

¹⁴¹ Ministry of Justice (2014) *Freedom of Information request 89346*, London: Ministry of Justice and House of Lords written question HL2315, 6 November 2017 and Criminal Justice Act 2003, sections 224–226: <http://www.legislation.gov.uk/ukpga/2003/44/part/12/chapter/5/crossheading/life-sentences>

¹⁴² Dirk van Zyl Smit and Catherine Appleton, 'Life Imprisonment: A Global Human Rights Analysis' Harvard University Press highlighted in Prison Reform Trust's Bromley Briefing Prison Factfile Autumn 2018, pages 6-7.

20 years and 2.1% (1) received a sentence of over 20 years. More noteworthy perhaps is that 39.1% (18) received a tariff of 15 to 20 years.¹⁴³

4.45. Table 6 provides a summary of Northern Ireland disposals between 2013 and 2018.

Table 6: Northern Ireland Convictions (Defendant Based) at Court for Murder

Year	Cases	Average tariff (years)	Range of tariff years
2013	13	15	8 - 21
2014	7	10.6	4 - 16
2015	5	13.2	10 - 18
2016	8	14.4	9 - 17
2017	6	13.6	9 - 16
2018	9	12.1	3 - 20

4.46. The Northern Ireland Court of Appeal in 2004 expressed the view that the *“levels laid down in the Practice Statement have been adopted for many years in this jurisdiction and continue to be appropriate for our society”*.¹⁴⁴

4.47. In the 2014 case mentioned above, the Court considered that the guidance required no modification and stated that the statutory starting points introduced in 2003 for England and Wales, were likely to be of limited value in Northern Ireland where the type of murder for which the sentence was being imposed was sufficiently covered by the Practice Statement.¹⁴⁵

4.48. Against that background, legislation would be required if the current Northern Ireland starting points were to change.

Consultation Questions:

Q.20 Do the starting points currently operated in Northern Ireland adequately reflect your concerns and the culpability of the offender?

- **Please provide reasons for your response.**

Q.21 Should starting points be recorded in statute or continue to rely on case guidance from the Northern Ireland Court of Appeal?

¹⁴³ Two out of the 48 received Hospital Orders so these are excluded from the analysis.

¹⁴⁴ R v McCandless and others [2004] NICA paragraph 10.

¹⁴⁵ R v Wooton and McConville, [2014] NICA 69 paragraph 20.

- *Please provide reasons for your response.*

Q.22 Should legislation introduce different starting points for Northern Ireland than currently apply?

- *Please provide reasons for your response.*

Q.23 If yes to Q.22, should the lowest starting point be:

(i) 12 years;

(ii) 15 years; or

(iii) 16 years?

- *Please provide reasons for your response.*

Tariff Setting for Specific Victims or Murders

- 4.49. The Assembly debate following sentencing for the murder of a police officer in 2012 focused mainly on police victims. In England and Wales the murder of a police officer carries a statutory starting point of 30 years with potential to be increased upwards or downwards by the judge in accordance with case law.
- 4.50. The sentencing guidance in Northern Ireland indicates that 25 to 30 years can be the appropriate tariff for death of a police officer, prison officer or soldiers. This is because judges recognise the obligations and risks which those occupations carry for the benefit of the community.
- 4.51. The Northern Ireland Court of Appeal has indicated that no material distinction is required for deterrence between prison and police officers.¹⁴⁶
- 4.52. Amongst the jurisdictions reviewed many provide a statutory starting point or set tariff for certain types of murder or victims. While this Review has discounted any proposal to introduce statutory set tariffs, it may be useful to reflect on those found in other jurisdictions in any consideration of possible statutory starting points.
- 4.53. Earlier reference was made to the range of tariffs provided in Canada, Ireland and Australia for multiple murders or the murders of a police officer or child.
- 4.54. The range of statutory set tariffs for murders of police officers or a child generally run from 20 years,¹⁴⁷ to 25 years,¹⁴⁸ to 30 years¹⁴⁹ or above.¹⁵⁰ For

¹⁴⁶ Expressed view of Northern Ireland Court of Appeal in R v Wooton and McConville [2014] NICA 69, paragraphs 23-24.

¹⁴⁷ Scotland, South Australia, Northern Territory.

¹⁴⁸ Northern Ireland (if not directly involved in shooting), Canada Queensland, New South Wales.

multiple murders, the range runs from 30 years¹⁵¹ to a whole life tariff.¹⁵² These align with some of the identified starting points or tariffs established in case law by the Northern Ireland Court of Appeal and its Scottish equivalent.

- 4.55. Tariff setting is a complex process in which the judge must consider many factors to determine the just and appropriate sentence for the offender. The Review seeks views on statutory starting points for specific victims or types of murder.

Consultation Questions:

Q.24 Should legislation introduce a range of statutory starting points for categories of victims or murders?

- *Please provide reasons for your response.*

Q.25 Should any legislation to introduce a specific statutory starting point for certain murders occurring in Northern Ireland include:

- (i) *multiple murders;*
 - (ii) *murder of public servants like police and prison officers who are exposed to risk by the nature of their employment;*
 - (iii) *child murders?*
- *Please indicate the preferred starting point for any category selected: 20, 25 or 30 years, and provide reasons for your response.*

Q.26 Are there any other categories of victims not listed at Q.25 which should be included?

- *Please specify the category or categories of victim and indicate the preferred starting point: 20, 25, or 30 years and provide reasons for your response.*

Q.27 Should any category of victim listed at Q.25 be excluded?

- *Please indicate the category or categories of victim and provide reasons for your response.*

¹⁴⁹ While legislation was passed in Westminster in 2015 to give effect to a British government commitment, that compulsory whole life sentences would be introduced in England and Wales for criminals convicted of killing a police officer, the legislative provision has never been commenced.

¹⁵⁰ England and Wales, Republic of Ireland and New South Wales.

¹⁵¹ Northern Ireland, Scotland and Queensland.

¹⁵² England and Wales.

Retention of Whole Life Tariffs or Longer Tariff Starting Points

- 4.56. A whole life tariff sentence has been described as a particularly draconian feature of life imprisonment in England and Wales, and in Northern Ireland.¹⁵³
- 4.57. Since the introduction of the whole life tariff the courts have emphasized that such sentences should be reserved for the few exceptionally serious or rare offenders who require to be kept in prison for life.¹⁵⁴
- 4.58. This has been the case in Northern Ireland. As highlighted earlier in this chapter, the single such order made in Northern Ireland was changed on appeal to a tariff of 35 years.
- 4.59. A criticism of whole life tariffs is that they can undermine the relevance of rehabilitation¹⁵⁵ to an offender. The only prospect of release arises under domestic legislation either where there are exceptional circumstances justifying release on compassionate grounds¹⁵⁶ (England and Wales) or where release is directed as being appropriate (Northern Ireland).¹⁵⁷ A discretionary power is vested in a Minister, in both jurisdictions, to permit release in such cases.
- 4.60. The fact that release from a whole life tariff in the United Kingdom rests with a Minister is an exception to the general rule (following a number of ECtHR decisions¹⁵⁸) that decisions on release of offenders should be made by an independent and impartial body.
- 4.61. In conducting the review, the Minister will be guided by case law to focus on significant changes in the life prisoner and their progress towards rehabilitation¹⁵⁹ to determine whether detention can be justified on legitimate penological grounds.¹⁶⁰

¹⁵³ Prison Reform Trust Autumn 2018 Factfile.

¹⁵⁴ R v Oakes and others [2012] EWCA Crim 2435; [2013] QB 979; para 29.

¹⁵⁵ Andrew Ashworth, 'R v Newell (Lee William): Commentary' [2014] Criminal Law Review 471, 473.

¹⁵⁶ Crime (Sentences) Act 1997, section 30: <http://www.legislation.gov.uk/ukpga/1997/43/section/30>

¹⁵⁷ Life Sentences (NI) Order 2001, Article 5 (4) and 5 (5):

<http://www.legislation.gov.uk/ukpga/1997/43/section/30>

¹⁵⁸ The European Court for Human Rights decisions culminated in *Stafford v UK* 2002-IV; 35 EHRR 32.

¹⁵⁹ *Vintner and others v UK* [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645.

¹⁶⁰ R v Newell, R v McLoughlin [2014] EWCA Crim 188; *Vintner v UK* [GC] [2013] ECHR 645, paras 108 and 109; legitimate penological grounds 'include punishment, deterrence, public protection and rehabilitation'.

4.62. The imposition in principle of a whole life tariff is supported by case law from the domestic courts¹⁶¹ and European Court of Human Rights (ECtHR) where, in summary the Court has expressed the view that:

“the mere fact that a prisoner has already served a long term of imprisonment does not weaken the State’s positive obligation to protect the public,” and that *“no Convention¹⁶² issue could arise if a life prisoner continues to pose a danger to society”*.¹⁶³

4.63. When a life sentence is imposed for murder, the ECtHR requires there to be both a prospect of release for the prisoner and a possibility of review of their sentence by an independent body.¹⁶⁴ The grounds for review include punishment, deterrence, public protection and rehabilitation. The balance between them may shift in the course of a sentence.¹⁶⁵

4.64. The ECtHR position is not static. Commentators observe that recent decisions seem to leave behind some of the earlier case law. In 2011, the European Court of Human Rights declared inadmissible challenges to life sentences which allowed no eligibility for parole before 40 years.¹⁶⁶ Yet in October 2016 and 2017 the court made findings that making a prisoner wait 40 years before they could be considered for clemency for the first time was too long.¹⁶⁷

4.65. A number of challenges to UK legislation from offenders sentenced to whole life tariffs in England were decided, from 2013 to 2017, by the ECtHR.

4.66. In 2013 the ECtHR was concerned that sentenced offenders should have a review which considered significant changes in the prisoner and whether continued detention was justified on legitimate penological grounds.¹⁶⁸ The ECtHR was not satisfied that domestic legislation complied with the Convention.

4.67. Clarification was provided by the England and Wales Court of Appeal, in 2014, on the legal requirements applying to the exercise of the ministerial discretion. This clarification was referred to by the ECtHR, in 2017, when it

¹⁶¹ R v Secretary of State for the Home Department, ex parte Hindley [1998] 2 WLR 505, On Appeal at House of Lords [2000] Q.B. 152; R v Oakes and others [2012] EWCA Crim 2435.

¹⁶² Article 3 of the European Convention on Human Rights (ECHR) prevents a prisoner being subjected to torture, inhumane or degrading treatment while detained by the state.

¹⁶³ Vinter and others v UK [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645, paras 87, 108 and 131.

¹⁶⁴ Vinter and others v UK [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645, paras 119 to 121.

¹⁶⁵ Hutchinson v UK [GC] No 57592/08, [2017] ECHR 65, para 42.

¹⁶⁶ Kafkaris V Cyprus (Application No 9644/09) Admissibility decision June 2011

¹⁶⁷ TP and AT v Hungary (37871/14 and 73986/14) and Matiosaitis v Lithuania [2017] ECHR 471 (23 May 2017).

¹⁶⁸ Vintner and others v UK [GC] [2013] ECHR 645

concluded that the domestic legislation, if fleshed out in practice or through legal challenge, could satisfy the Convention requirements: While a prisoner must know from the outset what they must do in order to be considered for release,¹⁶⁹ the domestic legislation met the need for objective, pre-established criteria of which the prisoner had knowledge at the time of sentencing. Most academics identify this 2017 decision¹⁷⁰ as being out of alignment with earlier decisions¹⁷¹ in this area of law.¹⁷²

- 4.68. Questions have also arisen concerning potential for inequality between defendants where there is a disparity of age between offenders and a whole life tariff is imposed.¹⁷³ It is clear a whole life tariff for a relatively elderly defendant could be substantially less than for a much younger co-defendant.
- 4.69. Both the Northern Ireland Court of Appeal and England and Wales Court of Appeal have endorsed the view that the imposition of a whole life tariff should be confined to those instances where *“the facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life”*.¹⁷⁴
- 4.70. The whole life tariff has been little utilised within Northern Ireland. No equivalent provision exists in Scottish law and attempts to introduce such a provision have been resisted.¹⁷⁵
- 4.71. Against this background and the concerns expressed where there is a disparity of age between offenders, the Review seeks views on retaining the option of a whole life tariff or, alternatively, the introduction of lengthy tariff periods for specific categories of murder.
- 4.72. The Review considers that a specific tariff, even a lengthy one (in excess of 30 years) while not an exact indication of time to be spent in prison, could provide an alternative to the whole life tariff. Such an approach would permit the tariff to be compared against other tariffs imposed for murder. This could provide a clearer reflection of the relative severity of each crime.

¹⁶⁹ Hutchinson v UK [GC] No 57592/08, [2017] ECHR 65, paragraph 44.

¹⁷⁰ Hutchinson v UK [GC] No 57592/08, [2017] ECHR 65

¹⁷¹ See Matisaitis V Lithuania [2017] ECHR 471 (23 May 2017) and Murray V Netherlands [GC] [2016] ECHR 408 (26 April 2016)

¹⁷² D Van Zyl Smit, P Weatherby and S Creighton; ‘Whole Life Sentences and the Tide of European Human Rights jurisprudence’(2014) 14 HRLR 59; Steve Foster, ‘Review and Release of Whole Life Sentences: The Final Word from the Grand Chamber’, Issue 6, (2017) 181 JPN 92.

¹⁷³ R v Secretary of State for the Home Department, ex parte Hindley [1998] 2 WLR 505; [2000] Q.B. 152.

¹⁷⁴ R v Jones and others [2005] EWCA Crim 3115.

¹⁷⁵<http://www.scottishconservatives.com/2017/02/time-for-whole-life-sentences-to-bring-justice-for-murder-victims/> ; <http://www.scottishconservatives.com/2013/05/new-life-sentences-for-police-killers-puts-more-pressure-on-snp-to-toughen-law-in-scotland/>

Consultation Question:

Q.28 Should existing whole life tariff provisions be:

- (i) retained;**
 - (ii) replaced with a tariff period of 30 years; or**
 - (iii) replaced with a tariff period greater than 30 years?**
- **Please provide reasons for your response.**

Chapter 5: Unduly Lenient Sentences

- 5.1. A person convicted of an offence in a Magistrates' Court or the Crown Court has the right to appeal against conviction, sentence or both. In Northern Ireland, appeals from the Magistrates' Courts are heard in the County Courts. Appeals from the Crown Court are heard in the Northern Ireland Court of Appeal. This Court of Appeal also hears appeals from the Magistrates' Courts where there is a recognised need for clarification on specific points of law.
- 5.2. The prosecutor has no right of appeal except in certain cases tried in the Crown Court when the Director of Public Prosecutions for Northern Ireland (DPP) considers that the sentence is unduly lenient. In such cases he can refer the case to the Court of Appeal for reconsideration of sentence.

Meaning of Unduly Lenient

- 5.3. The Criminal Justice Act 1988 (the 1988 Act)¹⁷⁶ provides that undue leniency occurs if it appears to the DPP that the judge in a case erred in law as to his powers of sentencing or failed to impose certain mandatory sentences as required by law.
- 5.4. The DPP can only seek leave of the Court of Appeal to have a sentence reconsidered which he considers to be *unduly* lenient. This does not cover sentences which may *appear* lenient, or necessarily those which the victim or the public perceive as being not long enough to reflect the severity or impact of the crime.
- 5.5. The meaning of 'unduly lenient' was considered in a judgment of the Court of Appeal in England and Wales in Attorney General's Reference (No.4 of 1989) which stated:

"It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gave rise to – merely because in the opinion of the court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

"In that connection, regard must of course be had to reported cases and in particular to guidance givenin guideline cases."

¹⁷⁶ Criminal Justice Act 1988, Part IV: <http://www.legislation.gov.uk/ukpga/1988/33/part/IV>

5.6. This approach has been adopted in Northern Ireland and has been re-stated in sentencing guidance and a number of subsequent judgments of unduly lenient references to the Northern Ireland Court of Appeal. There has been little significant dispute or public debate as to how the courts define what is unduly lenient, and the interpretation of the legislation has not been subject to any degree of challenge.

The Unduly Lenient Sentencing Scheme

5.7. The DPP's current power to refer a case to the Court of Appeal on the grounds of undue leniency applies to sentences imposed in the Crown Court for:

- offences that are triable only on indictment, i.e. those which can only be dealt with in the Crown Court; and
- certain 'hybrid' offences (cases which are triable either on indictment in the Crown Court or by summary trial in the Magistrates' Courts), as specified by order of the Department of Justice.¹⁷⁷

5.8. Anyone can ask the DPP to review a sentence - victims, their families, or members of the public. Requests for referral are firstly considered by the Public Prosecution Service. Where it appears that the sentence may fall within the unduly lenient category, it is then sent to an independent senior lawyer for views. Cases which merit full consideration are then sent to the DPP who has access to transcripts and recordings from the Crown Court hearing. Where the DPP considers that the sentence is unduly lenient, it must be referred to the Northern Ireland Court of Appeal within 28 days of its imposition.

5.9. Where leave is granted, the Court has wide discretion in deciding what to do but will not intervene unless the sentence is *significantly* below the sentence that the judge should have passed. If the Court concludes that the sentence was unduly lenient, it may increase the sentence or, in exceptional circumstances, it may decide not to interfere with the sentence.

5.10. Where the Court concludes that the sentence was appropriate, it will dismiss the appeal.

5.11. The reasons given in favour of a referral scheme¹⁷⁸ are that unduly lenient sentences:

¹⁷⁷ Criminal Justice Act 1988, section 35: <http://www.legislation.gov.uk/ukpga/1988/33/section/35>

¹⁷⁸ Smith and Hogan's Criminal Law, 14th Edition, Oxford University Press 2015.

- blunt the deterrent effect of the criminal law;
 - cause outrage to victims;
 - demoralise the police;
 - cause injustice to those who were appropriately sentenced;
 - undermine public confidence in the administration of justice and the authority of the courts;
 - may cause public danger; and
 - hinder the development of a rational sentencing policy by the Court of Appeal.
- 5.12. The main argument against is that the process offends against the principle of double jeopardy (meaning a person should not be tried for the same offence more than once). The Northern Ireland Court of Appeal accepts that double jeopardy can arise in unduly lenient sentencing referrals, and may make allowance in the revised sentence when appropriate. Recent guidance was provided by the Court in the DPP’s Reference (No.5 of 2018).¹⁷⁹
- 5.13. Since first introduced, there has been a piecemeal and reactive approach to extension of the provisions to particular hybrid offences. The rationale behind the intermittent additions has generally been as a response to public and political pressure for change.
- 5.14. The addition of animal cruelty offences in 2016 was in response to public outrage at a number of sentences handed down for such offences.
- 5.15. The Fresh Start Panel Report on the Disbandment of Paramilitary Groups, published in May 2016, recommended that offences linked to para-militarism and organised crime should be brought within scope of the unduly lenient sentence (ULS) provisions.

¹⁷⁹<https://judiciaryni.uk/sites/judiciary/files/decisions/R%20v%20Loughlin%20%28Michael%29%20%28DPP%20Reference%20No%205%202018%29.pdf>] The principle has more relevance where the impact of the application could return an offender to custody either because the initial sentence has been served or the offender is participating in a pre-release scheme. The Court however did ‘not accept double jeopardy operates to reduce the appropriate sentence where an offender is serving a substantial custodial sentence and the only issue is whether it should be increased’. [Director of Public Prosecutions Reference (No 5 of 2018) Queen v Michael Loughlin [2019] NICA 10, paragraph 35]

- 5.16. The Department gave this issue priority and, following public consultation,¹⁸⁰ over 100 relevant hybrid offences were added to the list of those that can be referred.¹⁸¹
- 5.17. These most recent additions mean that sentences for some 66% of cases heard in the Crown Court will now be capable of referral.
- 5.18. These additions also led to another significant change: Previously, only hybrid offences with maximum penalties in the higher range were included as referable offences. Now, some offences with a maximum penalty of two years and under are capable of referral on the grounds of undue leniency.
- 5.19. There is a lack of consistency in this approach. If the current provisions are based on a fundamental principle of providing an opportunity for the Court to address a marked error in sentencing, then it is difficult to see why that opportunity should be limited by the nature of the offence. The crux of the issue is to ensure that all sentences fall within accepted sentencing guidance and are not unduly lenient.
- 5.20. The current provisions do not reflect this objective, based as they are on specific offences rather than the wider concept of addressing significant errors in sentencing.

Approach in Other Jurisdictions

England and Wales

- 5.21. The law on unduly lenient sentencing is essentially the same in England and Wales as that in Northern Ireland. The 1988 Act applies in both jurisdictions and, until recently, the same was true for the list of hybrid offences. However, since the devolution of justice powers in 2010, a number of additions have been made to the Northern Ireland list of specified offences that have not been replicated in England and Wales.

Scotland

- 5.22. For Scotland, provisions allowing appeals against an unduly lenient sentence are contained in the Criminal Procedure (Scotland) Act 1995¹⁸² (the 1995 Act). Section 108 provides for the Lord Advocate – in effect the Scottish equivalent of the Director of Public Prosecutions – to bring proceedings where a

¹⁸⁰<https://www.northernireland.gov.uk/sites/default/files/publications/newnigov/The%20Fresh%20Start%20Panel%20report%20on%20the%20disbandment%20of%20paramilitary%20groups.pdf>

¹⁸¹ <http://www.legislation.gov.uk/nisr/2019/131/article/2/made>

¹⁸² <http://www.legislation.gov.uk/ukpga/1995/46/contents>

conviction on indictment is involved. In Scotland there is no requirement for leave of the Court to lodge an appeal.

5.23. Section 175 of the 1995 Act makes provision for the prosecution to appeal in summary proceedings specified in a statutory Order.

5.24. The Prosecutor's Right of Appeal in Summary Proceedings (Scotland) Order 1996¹⁸³ allows for appeal where:

- a sentence has been passed; or
- an order deferring sentence is made; or
- the person is admonished or discharged absolutely.

5.25. This means that any sentence imposed in Scotland is capable of referral where it is considered unduly lenient by the Lord Advocate.

Ireland

5.26. The law on unduly lenient sentencing in Ireland is provided by the Criminal Justice Act 1993.¹⁸⁴ The Act provides a power for the Director of Public Prosecutions to apply to the Court of Criminal Appeal if he/she considers a sentence in any case tried on indictment to be unduly lenient.

5.27. There is no requirement for the DPP to seek leave of the Court to make the application.

Options

5.28. Any change should address the concerns that unduly lenient sentencing impacts on public confidence in the justice system, and provide a consistent and strategic, but proportionate, approach to the review of unduly lenient sentences.

Option A: All Crown Court and Magistrates' Courts sentences are made referable

5.29. Under this option, all sentences passed in both court tiers in Northern Ireland would be within the scope of the ULS provisions, representing a significant change to the scope and policy of the ULS arrangements.

¹⁸³ <http://www.legislation.gov.uk/uksi/1996/2548/contents/made>

¹⁸⁴ <http://www.irishstatutebook.ie/eli/1993/act/6/enacted/en/html>

5.30. While this approach would treat all criminal convictions in the same way, regardless of the level of seriousness, the Review considers that it would represent a disproportionate response to concerns about unduly lenient sentencing. In Magistrates' Courts, with maximum available sentences normally restricted to 6 months' imprisonment, and 50% remission being available for custodial sentences of less than 12 months, there is little scope for a sentence to be unduly lenient.

5.31. In addition:

- cases heard in the Magistrates' Courts seldom receive political or community focus;
- the facility for the DPP to challenge sentences for the least serious offences has the potential to undermine confidence in sentencing;
- in the majority of cases, information on how the sentence was decided would not be available. As the Magistrates' Courts are not courts of record, no record is made of the factors taken into account by the Judge at the time of sentencing; and
- given the volume of cases processed in the Magistrates' Courts, and the operational changes that would be required, this option could incur significant additional costs and would not represent value for money.

5.32. In light of these considerations the Review has discounted this as a viable option.

Option B: All Crown Court sentences are made referable

5.33. The Crown Court can hear any of the following categories of offence:

- offences which may be tried on indictment only (always tried in the Crown Court, subject to limited exceptions);¹⁸⁵
- hybrid offences – these offences can be heard in the Crown Court or in the Magistrates' Courts. When heard in the Crown Court they carry a higher maximum sentence than when they are tried in the Magistrates' Courts.¹⁸⁶ Where they are tried is decided by the PPS based on the seriousness of the offence. The more serious offences are heard in the Crown Court.

¹⁸⁵ Maximum sentences for indictable only offences are typically 2 years' imprisonment or more.

¹⁸⁶ Maximum sentences for hybrid offences are typically 6 months imprisonment when tried summarily, and 2 years when tried on indictment.

- certain summary only cases which have a maximum penalty of more than 6 months' imprisonment, in which the defendant may elect for jury trial (in the Crown Court), as specified in Article 29 of the Magistrates' Courts (Northern Ireland) Order 1981.¹⁸⁷
- 5.34. As outlined above, the ULS arrangements are currently restricted to sentences for cases which can be tried only on indictment and specified hybrid cases.
- 5.35. Accepting that extending this coverage further would generate some minimal increase in workload for the PPS and Court of Appeal, the case for excluding or distinguishing the remainder of sentences given in the Crown Court is difficult to sustain.
- 5.36. The Review considers that this represents the minimum change that should be made to the scope of the ULS provisions.
- 5.37. Based on the number of requests made to the DPP over recent years, and of those, the number which result in referrals to the Court of Appeal, it is projected that such a change would represent an average per year of:
- 49 cases for initial consideration by the PPS (currently 34);
 - 25 cases for consideration by the DPP (currently 19);
 - 10 cases considered by the Court of Appeal (currently 7).

Analysis

- 5.38. This option would:
- provide for a logical and strategic approach, in particular removing current inconsistencies around hybrid offences;
 - lessen the potential for negative impact on public confidence in sentencing because an unduly lenient sentence for a serious offence cannot be referred; and
 - eliminate the need for any future addition to the list by statutory Order.
- 5.39. However, it would not address the inconsistency of approach across the two sentencing tiers, leaving:

¹⁸⁷ <http://www.legislation.gov.uk/nisi/1981/1675/article/29>

- indictable offences tried in the Magistrates' Courts (see below); and
- summary offences carrying a maximum sentence in excess of 6 months tried in the Magistrates' Courts outside the scheme.

5.40. This option would also mean the sentence in any case where the defendant elected for jury trial could be referred. This would not be the case if they accepted trial in the Magistrates' Court.

Option C: All Crown Court sentences and sentences for offences with a maximum penalty of 12 months or more when tried in a Magistrates' Court are made referable

5.41. It is possible for certain indictable offences of a less serious nature to be tried in the Magistrates' Courts, if the defendant consents.¹⁸⁸ In such cases the Magistrates' Courts may impose sentences of up to 12 months' imprisonment.

5.42. There is also a number of summary offences for which the maximum penalty is between 6 months' and 2 years' imprisonment.

5.43. The Review considers it disproportionate to include any sentence for an offence with a potential maximum sentence of less than 12 months' imprisonment. Accordingly, this option considers the inclusion within the ULS arrangements of all Crown Court sentences and sentences for offences where a maximum of 12 months' imprisonment or more could be imposed in a Magistrates' Court. Offences such as assault occasioning actual bodily harm; wounding; threats to kill; burglary; and certain theft offences, many of which will have a direct victim, would be included.

5.44. On average, there are 3,674 convictions per year in the Magistrates' Courts for offences carrying a maximum penalty 12 months or more. While the majority of these do not raise any concerns, those receiving non-custodial sentences are most likely to lead to adverse community and media comment.

5.45. This option would have a higher impact on the work of the PPS and the courts than Option B, but we estimate that the additional volume would be minimal. Given the level of maximum sentence available, and the ability of PPS to direct prosecution to the appropriate court, very few sentences imposed in the Magistrates' Courts would be considered significantly outside the range of sentences which the court could consider appropriate.

¹⁸⁸ Magistrates' Courts (NI) Order 1981, Article 45: <http://www.legislation.gov.uk/nisi/1981/1675/part/V/crossheading/summary-trial-of-indictable-offences>

- 5.46. To be consistent with the current appeal structure, this option assumes that any referrals from the Magistrates' Courts would be made to the County Courts. It is estimated that including these sentences would provide, on average per year, an additional:
- 64 cases for initial consideration by the PPS;
 - 33 cases for consideration by the DPP; and
 - 13 cases referred to County Courts for review.
- 5.47. Combined with the projection under Option B, this would represent a total average per year, of:
- 116 cases for initial consideration by the PPS (currently 34);
 - 62 cases for consideration by the DPP (currently 19);
 - 13 cases referred to the County Courts for review (currently none);
 - and
 - 10 cases considered by the Court of Appeal (currently 7).
- 5.48. This option limits DPP referrals to the County Courts to those cases where there might be greater potential for perceptions of undue leniency and would:
- lessen the potential for negative impact on public confidence if sentences for the most serious offences tried in the Magistrates' Courts were capable of review on grounds of undue leniency;
 - provide a more consistent approach by bringing all sentences for offences with maximum penalties of 12 months or more within scope; and
 - represents a proportionate response to concerns about sentencing, limiting cases capable of review to more serious offences.
- 5.49. Against this:
- it would change the nature of the Magistrates' Courts, requiring them to become courts of record for the more serious cases;
 - it introduces a new area of business to the County Courts; and
 - it would represent a significant increase on current referral figures.

Analysis

- 5.50. There is a strong case for all Crown Court sentences being referable to the Court of Appeal if considered unduly lenient. The primary driver for this change is the argument that consistency and fairness in the ULS provisions must be based on the appropriateness of the sentence and not the particular offence committed.
- 5.51. The additional inclusion of the more serious offences heard in the Magistrates' Courts (Option C) may also provide a proportionate response to anomalies in current arrangements. With a maximum penalty of 12 months or more, it would seem appropriate that the DPP should have the ability to ask for a review in those cases where the sentence is considered unduly lenient. However the wider consequences for the Magistrates' Courts and County Courts, as outlined above, need to be considered.

Consultation Question:

Q.29 Should the Director of Public Prosecutions have the power to refer:

(i) all sentences imposed in the Crown Court (including those imposed where the defendant elected for jury trial - Option B); or

(ii) all sentences imposed in the Crown Court and sentences for offences with a maximum penalty of 12 months' imprisonment or more when tried in a Magistrates' Court (Option C)?

- *Please select your preferred option and provide reasons for your response.*

Public Awareness

- 5.52. Many of the challenges brought in the press and media, in relation to a perception of lenient sentencing in a particular case, do not recognise that for a sentence to be unduly lenient, it must be outside the range of sentences which the judge could reasonably consider appropriate.
- 5.53. A judge may appear to be lenient in his approach to a particular case because of mitigating factors which lend weight to a decision to sentence at the lower end of the range of sentences. Such a decision is not evidence of undue leniency, but reflects a carefully balanced sentencing decision which takes into account the particular factors of an individual case.
- 5.54. The provisions were introduced to ensure that, on the specific occasion where a court did step outside the boundaries of accepted sentencing guidelines, the prosecution could rightly bring this to the attention of a higher court.

- 5.55. The public challenge often comes from a lack of appreciation of the individual factors in a case and a misunderstanding of the term ‘undue leniency’, which then leads to unrealistic expectations. These can have negative consequences for victims and their families when their application for referral is turned down.
- 5.56. The Public Prosecution Service (PPS) leaflet entitled ‘Unduly Lenient Sentences at the Crown Court’ provides important information about the provisions and how to make an application for referral. It also describes when a sentence is unduly lenient, who can make a request for review and how the review process works.
- 5.57. There is merit in increasing the availability and direct accessibility of information to the victim and their family at the point of sentencing. Where a victim or family is concerned about a perceived leniency in a sentence, the prosecutor could offer prompt advice on whether it could be seen as outside the appropriate sentencing range and fall within the criteria of undue leniency, which is required by the legislation.
- 5.58. This could be formalised within the PPS information guide as the first step to be taken in the application process.

Consultation Question:

Q.30 We would welcome your views on the provision of information and advice, at court, about unduly lenient sentencing, to better inform victims and their families on whether or not to pursue an unduly lenient sentence referral.

- ***Please provide any views and reasons for your response.***

Chapter 6: Community Sentencing

- 6.1. The Review has considered the use of community disposals, their adequacy in meeting the complex needs of offenders while reducing reoffending, and their role in increasing public confidence in the justice system.
- 6.2. Community sentences provide a range of significant and robust sanctions for those who have offended. They are not soft options. The Criminal Justice (Northern Ireland) Order 1996 requires that where a decision is made to impose a community order the offence must be serious enough to warrant such a sentence. As with other sentences, judges take account of the culpability of the offender, the seriousness of the offence, and degree of harm caused before deciding to impose a community order.
- 6.3. The main community sentences for adult offenders are:
- Community service orders,¹⁸⁹ which make reparation to the community by the offender undertaking socially useful unpaid work. Community service has a restorative effect in that the unpaid work is undertaken in communities where the individual has offended.
 - Probation orders,¹⁹⁰ which require the offender to submit to the supervision of a probation officer, and can include rehabilitative programmes of work and restrictions on movement, such as curfews. They aim to secure the rehabilitation of the offender, to protect the public from harm, and prevent further offences.
 - Combination orders,¹⁹¹ which are a mix of both community service and probation supervision. They are imposed on offenders who the courts consider should make reparation to the community, but also require probation supervision to reduce their future risk of offending.
- 6.4. Community sentences can involve: offenders undertaking up to 240 hours of unpaid work; the completion of interventions and programmes designed to challenge and change offending behaviours; being subject to regular supervision; and adherence to restrictions while in the community.
- 6.5. Community sentences are imposed in almost equal numbers to immediate custodial sentences across the Magistrates' Courts, and represent a significant proportion of sentences imposed by the Crown Court. See Table 7.

¹⁸⁹ Criminal Justice (NI) Order 1996, Articles 13 and 14:

<http://www.legislation.gov.uk/nisi/1996/3160/part/II/crossheading/community-service-orders>

¹⁹⁰ Criminal Justice (NI) Order 1996, Articles 10-12

<http://www.legislation.gov.uk/nisi/1996/3160/part/II/crossheading/probation>

¹⁹¹ Criminal Justice (NI) Order 1996, Article 15, <http://www.legislation.gov.uk/nisi/1996/3160/article/15>

Table 7: Percentage of Convictions by Main Sentence Type (2018)¹⁹²

Court Type	Imprisonment	Suspended Custodial	Community	Fines
Crown Court	49.6%	28.3%	16.8%	2.9%
Magistrates' Court	10.2%	15.3%	11.4%	59.3%
All Courts	12.0%	15.9%	11.7%	56.6%

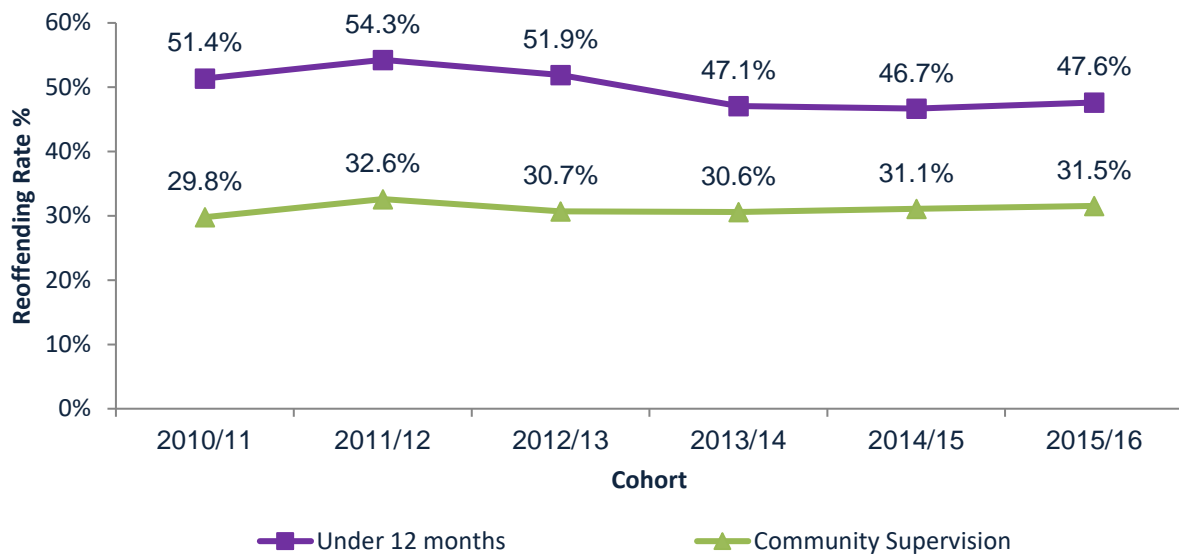
Effectiveness of Community Sentences

- 6.6. As well as holding offenders to account for their actions and restricting their liberty, community sentences can deliver all the purposes of sentencing. They are used where there is minimal risk to public safety and often incorporate forms of rehabilitative activities and therapeutic interventions. They address factors that contribute to offending behaviour and may include reparative elements, such as unpaid work.
- 6.7. Academic, statistical, and government studies recognise community sentences as an effective means of reducing reoffending. This is a key objective of sentencing. Local and international¹⁹³ evidence shows that reoffending by people subject to community sentences is generally lower than that of those completing a custodial sentence, particularly for short term custodial sentences of less than one year.
- 6.8. Chart 3 compares the reoffending rates within one year for those receiving community sentences and short term custodial sentences over the period 2010/11 to 2015/16.

¹⁹² Data from tables 6a & 6c. Court Prosecutions, Convictions and Out of Court Disposals Statistics for Northern Ireland, 2016. Research and Statistics Bulletin 16/2017. Department of Justice 2017.

¹⁹³ The Effectiveness of Probation Supervision towards Reducing Reoffending. Manchester Metropolitan University, 2018. Analysis of research into the effect of probation supervision reducing reoffending included 13 studies originating in the USA, UK, Canada and Australia.

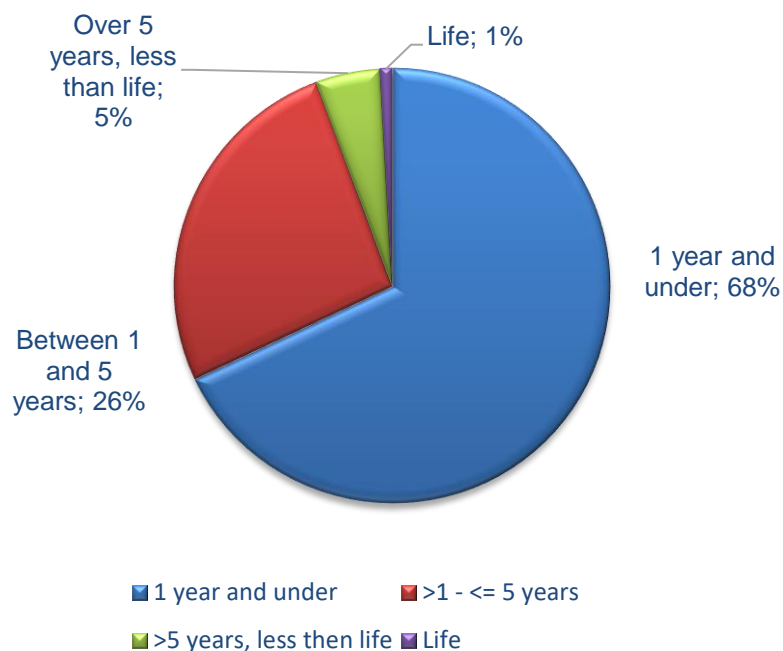
Chart 3: Reoffending Rates for Community Sentences and Those Released From Short Term Custodial Sentences.



- 6.9. In those cases where either a custodial or a community sentence may be appropriate the question is: which sentence is more effective in providing both necessary punishment and opportunity for successful rehabilitation?
- 6.10. Over the course of this Review we spoke with many victims. A strong recurrent message was the desire that others should not suffer as they had. We found that victims' preference is often not that the offender should be punished more harshly, but that they should not re-offend.
- 6.11. Rehabilitation aims to reduce reoffending and provide long term and sustained positive outcomes for individuals and wider society by identifying and tackling the factors that lead individuals to offend. This can be achieved through probation supervision of the offender; behavioural change programmes; and support systems designed to tackle issues particular to individuals and assist them to desist from future offending.
- 6.12. Rehabilitation also recognises the importance of social support arrangements, such as positive relationships with family and friends, and community acceptance. These factors can contribute to effective integration into society, which is essential to facilitating and sustaining an offender's capacity to avoid future offending.
- 6.13. The Northern Ireland Executive values the merits of a rehabilitative approach to managing offenders. Rehabilitative policy plays a significant role in both community and custodial sentences.

- 6.14. Dame Anne Owers' review of the Prison Service¹⁹⁴ led to the introduction of rehabilitation in the custodial environment. To support the transition and reintegration of offenders back into the community the Probation Board for Northern Ireland and other service providers now start rehabilitative work with offenders while they are in prison.
- 6.15. Key to the success of such reforms is having sufficient time to work with the offender to understand the reasons for their offending, and develop and deliver tailored programmes that can help them to address their behaviours.
- 6.16. In Northern Ireland a significant number of prison sentences are for 1 year or less. In 2017/18¹⁹⁵ such sentences accounted for 68% of prison receptions (see Chart 4), almost half of which fall into the category of 'greater than 3 months and less than or equal to 6 months'. When taking account of the licence element for sentences of over one year, the percentage of offenders in short term custody rises to 79%.

Chart 4: Immediate Custody Receptions by Sentence Length (2017/18)



- 6.17. Short term prison sentences are a form of punishment that can provide offenders with 'space and time' to come to terms with their behaviour, and allow the community the short-term benefits of the offender being removed from society for a period. However, they do not afford enough opportunity for meaningful rehabilitation work to be completed.

¹⁹⁴ https://cain.ulster.ac.uk/issues/prison/docs/2011-10-24_Owers.pdf

¹⁹⁵ The Northern Ireland Prison Population 2017/18. Research and Statistical Bulletin 26/2018. Department of Justice. September 2018.

6.18. Higher reoffending rates are associated with short sentences, with offenders often experiencing multiple short-term prison sentences. Table 8 shows rates of reoffending within one year of release from prison for 2015/16 by length of custodial sentences, and illustrates the significant level of reoffending for those receiving short term sentences.

Table 8: Reoffending Rates for Various Length Custodial Sentences (2015/16)

Custodial Sentence Length	Total Sentences	Number Reoffending within one year of release	Reoffending Rate
Less than 12 months*	991	472	47.6%
<i>Up to 3 months</i>	<i>288</i>	<i>152</i>	<i>52.8%</i>
12 months to 3 years	328	67	20.4%
Over 3 years	83	10	12.0%
Total	1402	549	39.2%

*Less than 12 months includes those up to 3 months

6.19. A number of factors militate against the use of short term prison sentences:

- they do not allow sufficient time to undertake rehabilitative behavioural change programmes designed to address offending behaviours;
- they do not facilitate fully addressing serious addiction issues or mental health problems within the custodial environment;
- they can result in the loss of personal relationships, employment and accommodation, all of which are factors that increase the risk of reoffending and carry significant societal and financial costs;
- offenders exposed to other offenders can make the wrong associations and be channelled into further offending on release from prison;¹⁹⁶ and
- the deterrent effect of prison often diminishes for those who have been imprisoned.

¹⁹⁶ Reducing Reoffending: The 'What Works' Debate. House of Commons Research Paper 12/71. 2012.

- 6.20. In contrast, community based sanctions can provide a proportionate and effective means of delivering the purposes of sentencing, providing the courts with sentencing options that can, in appropriate cases:
- deliver fair and just punishment;
 - provide necessary rehabilitation, reparation, and restoration; and
 - protect the public.
- 6.21. Their proven success in changing offenders' behaviour whilst maintaining family, work, social and community linkages, demonstrates that community sentences can provide a viable and effective alternative to imprisonment.

Consultation Question:

Q.31 Should greater use of community sentences be made by the courts as an alternative to short prison sentences?

- ***Please provide reasons for your response.***

Strategic Direction

- 6.22. The Northern Ireland Executive's support for a longer term approach to reducing offending and reducing the number of victims of crime is set out in its Strategic Framework for Reducing Offending.¹⁹⁷ The Strategy is based on the belief that all individuals have the capacity to change.
- 6.23. Success is improved where offenders receive timely and effective support and interventions that: challenge behaviours; enable change; and provide them with hope and the opportunity for positive personal development. The Strategy focuses on the greater use of rehabilitation and desistance approaches, the components of which are intrinsic to community sentencing.
- 6.24. The Northern Ireland Justice Committee's report 'Justice in the 21st Century', acknowledged the advantages that community sanctions can provide, highlighting the importance of: collaboration; early intervention; the application of restorative justice models; and problem-solving approaches to achieve the aims of protecting the public, supporting victims and rehabilitating offenders.
- 6.25. These approaches all seek to tackle the root causes of offending at the earliest opportunity, and use community based solutions to maximise opportunities for rehabilitation.

¹⁹⁷ Strategic Framework for Reducing Offending: Towards a Safer Society. 2013. Department of Justice.

- 6.26. The findings of the report resonated with the work of the Department, and are picked up and supported by the draft Programme for Government so that sentencing can contribute to the ultimate aim where ‘We have a safe community where we respect the law, and each other.’¹⁹⁸
- 6.27. The Department of Justice and the main justice agencies continue to work towards the development of community sentences based on rehabilitation, focusing on problem solving justice interventions and restorative justice models.

Improving Community Sanctions

- 6.28. Recent justice work has placed greater emphasis on understanding the factors that can lead people into offending, or reoffending; and developing problem solving justice approaches to address the root causes of offending.
- 6.29. The Review considers that more can be done to enhance existing sentencing provisions and develop new options aimed at further reducing reoffending while at the same time providing solutions which better meet the needs of victims.

Restorative/Reparative Justice

- 6.30. Restorative justice focusses on the rehabilitation of offenders through reconciliation with victims and the community at large. Restorative approaches have been deployed for some time (particularly in the field of youth justice), and their use in the justice system continues to grow.
- 6.31. Restorative justice requires the voluntary participation by both offender and victim. Where both parties agree to participate in a structured restorative process the outcomes have been found to be helpful.
- 6.32. Restorative justice can:
- help to resolve conflict and repair the harm caused;
 - allow victims to express their views on the hurt caused;
 - provide meaningful closure for the victim and wider family;
 - provide an opportunity for the offender to understand the real impact of their actions and to express their remorse; and

¹⁹⁸ Draft Programme for Government, Outcome 7

- allow offenders to make amends in a tangible way to victims, family members and the wider community.
- 6.33. Reparative activities require offenders to address the hurt or damage that they have caused. Other jurisdictions in the United Kingdom have introduced ‘payback’, ensuring that reparative activities are undertaken as part of a community sentence (similar in effect to community service orders), and seen by communities and victims, helping to secure the sense that justice has been served.
- 6.34. This has worked well in Scotland, where changes to legislation resulted in payback orders, involving unpaid work in the community and placing reparation at the centre of community sanctions.
- 6.35. Communities gain a sense of involvement by identifying potential areas for reparative activity.¹⁹⁹ The activity undertaken by offenders after completion of payback orders is publicised, allowing the merits of these orders to be seen by society, further engaging community support.
- 6.36. Greater use of such restorative justice practices would enhance and improve the impact of community sentences in Northern Ireland, providing victims with an opportunity to be involved and secure better closure.

Consultation Questions:

Q.32 Should all community orders include a restorative or reparative element?

- ***Please provide reasons for your response.***

Q.33 Should the public be made aware of the benefits achieved through unpaid work and reparative activities as a result of community sentences?

- ***Please provide reasons for your response.***

Problem Solving Justice

- 6.37. Problem Solving Justice focuses on the root causes of offending behaviour. It draws on therapeutic and other interventions to target those on the cusp of justice and addresses the factors which are skewing their behaviour towards offending, such as family issues, addiction and other health conditions.

¹⁹⁹ In Northern Ireland the Probation Board has a page available on its website where individuals or groups can suggest projects which may benefit from community service.

- 6.38. The approach is built on community sanctions, and importantly, is delivered in the community where services and support are accessible. With problem solving justice, offenders are provided with the opportunity to address their offending behaviour through probation supervision and a range of programmes and interventions. The courts then take into account the outcomes of their engagement and progress when passing sentence.
- 6.39. This approach involves securing and building on the collaborative delivery of activities across a number of areas that complement the work of justice agencies.
- 6.40. Problem Solving Justice recognises that a number of social and health issues can lead to offending behaviour. For example, services to address offenders' poor mental health, low educational attainment, housing difficulties and addiction issues can help to stabilise vulnerable offenders in the community and help them to make better life-choices. By working collaboratively across government, the likelihood of individuals being drawn back into offending behaviour can be reduced.
- 6.41. The positive outcomes obtained through the use of problem-solving courts, along with a focus on rehabilitation and the delivery of appropriate support services in the community, can improve community safety and promote the effective rehabilitation of offenders.
- 6.42. The Review recognises the value of rehabilitative programmes being delivered by agencies not traditionally linked to justice to support the delivery of community based sanctions. Access to such programmes could enable the courts to impose sentences that include provisions delivered by outside agencies, co-ordinated by the Probation Board to ensure compliance and monitor their impact.

Consultation Question:

Q.34 Is there value in non-justice agencies becoming involved in the delivery of programmes for use in community sanctions?

- ***Please provide reasons for your response.***

Enhanced Combination Orders

- 6.43. In 2015, the Lord Chief Justice, recognising the merits and value of community sentences, asked the Probation Board to develop a more demanding community sentence as an alternative to short prison sentences. The Lord Chief Justice made clear a number of important principles on which the sentence should be built, saying:

“I am also keen to see more alternatives to short sentences for the adult offending population, so as to allow the relevant agencies to manage risk and facilitate rehabilitation in the community, as opposed to having offenders spend their time less productively in a prison setting. Such community alternatives...should make it easier for the underlying causes of the offending behaviour to be addressed through tailored programmes of support. Maintaining public confidence will also be important, and I think that this can best be achieved through continuous judicial oversight.”

- 6.44. In response, the Probation Board developed the new enhanced combination orders (ECO). These orders focus on offender compliance; rehabilitation; reparation; restorative practice; and desistance. The main difference from other community disposals is the inclusion of intensive supervision and psychological assessment. Where non-compliance occurs, offenders are managed through enforcement action which can result in them being returned to court.
- 6.45. The ECO has been piloted since 2015. The initial evaluation published in December 2017, and follow-up evaluation in 2019,²⁰⁰ indicate that the initiative is effective as an alternative to custody and is a robust community sentence. A more recent University of Ulster assessment confirmed ECOs’ overall effectiveness.
- 6.46. The reports found that by November 2018, 295 people had been made subject to an ECO, and the number of custodial sentences of 12 months or less given by courts involved in the pilot had decreased by 20.7% between 2015 and 2017. There were also positive findings in relation to mental health/addictions interventions, and as regards outcomes for families and children of ECO participants. The economic assessment completed by the University of Ulster found an expected net benefit of up to £8.3 million per year in the event of roll out. By June 2019 the number receiving an ECO had risen to 410.²⁰¹
- 6.47. In light of this, the Department of Justice intends to roll out the ECO as an alternative to short custodial sentences. Given the intense multi-agency approach managed through probation supervision, this sentencing option can safely deal with offenders, while promoting their rehabilitation in a way tailored to their specific needs, where the community setting can be of greatest impact.

²⁰⁰ https://www.pbni.org.uk/wp-content/uploads/2019/06/2019-ECO-Evaluation_Final-Report.pdf

²⁰¹ <https://www.pbni.org.uk/wp-content/uploads/2019/08/PBNI-Corporate-Planning-2020-2023-Consultation-document.pdf>

Consultation Question:

Q.35 Should the enhanced community order be implemented as an alternative to short prison sentences of up to 12 months?

- *Please provide reasons for your response.*

Increased Judicial Involvement

- 6.48. The three main adult community orders deliver a range of sentencing options designed to address a range of offences, reflect the culpability of the offender, and provide a sentence that is considered appropriate, proportionate and fair. These sentencing options work well and provide positive outcomes when measured by reoffending rates.
- 6.49. However, research and engagement events have flagged a number of potential areas where improvements might be made. These include promoting public awareness of community sentencing and its impact, such as unpaid community work; undertaking research to further determine the impact of sentencing patterns; and continuing to identify and apply best practice, improving justice interventions on an individual level.
- 6.50. Discussions with Scottish justice professionals and judiciary indicated that continuing contact between the sentencing judge and offenders as they worked through community sentences led to more positive responses from the offenders and better outcomes.
- 6.51. Increased judicial engagement in Northern Ireland, for example in developing problem solving approaches, has led to new initiatives to assist offenders in changing their attitudes and behaviours.

Consultation Question:

Q.36 Would additional judicial involvement during community sentences benefit such orders and promote greater likelihood of change by the offender?

- *Please provide reasons for your response.*

New Options

- 6.52. Taking into account the purposes and principles of sentencing discussed in Chapter 1, a number of new options which build on the key components of community sanctions can be considered. These are set out below.

Enhanced Conditional Discharge

- 6.53. A conditional discharge imposes no punishment. It can be given on condition that the offender does not commit another crime within a pre-set timeframe (not exceeding three years). Such a sentence may be given where, on the basis of the evidence, the court considers it to be in the best interest of the offender and not contrary to the public interest.
- 6.54. A conditional discharge is used in many jurisdictions. However, in Canada²⁰² a conditional discharge also includes a probationary element as part of the conditions. This approach provides a further option to the courts, recognising the benefits associated with the use of rehabilitative and therapeutic programmes, and being able to provide some recompense for the offender's actions.
- 6.55. An option to add a probation or restorative justice element to the existing conditional discharge would enhance the range of sentencing options for the courts in Northern Ireland. Such a change would ensure the offender understands that they have been found guilty while assisting them in addressing the factors that caused them to offend, to avoid further offences.

Consultation Question:

Q.37 Should a conditional discharge sentence have the option to include community sanctions, administered by the Probation Board for Northern Ireland and/or a restorative justice element?

- ***Please provide reasons for your response.***

Structured Deferred Sentence

- 6.56. A sentence can be deferred for up to 12 months,²⁰³ where the court considers that the offender can change their behaviour. In essence, after conviction, the court can postpone its sentencing decision to allow time for the offender to demonstrate better behaviour.
- 6.57. In Scotland the courts can apply a 'structured deferred sentence' for less serious offences. This involves the postponement of final sentence on the basis that the offender undertakes a structured intervention supervised by the

²⁰² <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-730-20030101.html>

²⁰³ Criminal Justice (NI) Order 1996, Article 3 (as amended by Justice Act (NI) 2011, section 53): <http://www.legislation.gov.uk/nisi/1996/3160/article/3>

probation service. After this the courts will consider the progress made by the offender before passing sentence.

- 6.58. This option allows the offender an opportunity to evaluate their actions; change attitudes and behaviours; secure support to address causal factors; provide evidence that they are not likely to reoffend; and potentially obtain a lesser sentence after the deferral period.
- 6.59. The main issue with deferred sentencing approaches is the time necessary to bring about the change in behaviours and demonstrate that change is substantiated. Views from judiciary and the Probation Board for Northern Ireland, supported by the experience of operating a pilot Substance Misuse Court in Belfast during 2018-19, would suggest a minimum period of 12 months is required for this process.
- 6.60. The Review proposes structured deferred sentences as an immediate way of providing proportionate punishment while helping to rehabilitate offenders. This approach would enable offenders who wish to confront their offending behaviour to make redress and prove that they have changed in a positive way.

Consultation Question:

Q.38 Would a 'structured deferred sentence' be a useful new sentencing option?

- ***Please provide reasons for your response.***

Supervised Suspended Sentence Order

- 6.61. A suspended sentence is a custodial sentence which may only take effect if the offender commits a further imprisonable offence within the time set by the court.
- 6.62. To make suspended sentences more impactful the Criminal Justice Act 2003 replaced the existing suspended sentence in England and Wales with a new 'supervised suspended sentence' order.
- 6.63. This is a custodial sentence that has been suspended on condition that the offender will not reoffend during the suspended sentence period, but also imposes additional requirements set by the court. Should the offender breach the order the court must activate the suspended sentence, unless there are strong reasons for not doing so.
- 6.64. The requirements that can be placed on the offender during the suspended period, include: unpaid work; supervision; undertaking therapeutic

interventions and programmes; restrictions on liberty and residence; and prohibited activities.

- 6.65. The requirements are administered through the probation service and involve interventions that are considered key to challenging attitudes and behaviours that can lead to better longer term outcomes when considered against 'ordinary' suspended sentences or short term custodial sentences.
- 6.66. This type of sentence holds the offender to account for the period of the suspended sentence ensuring that they refrain from further offending, whilst requiring them to undertake community based sanctions, which are more likely to bring about longer term positive change. This provides the offender with an opportunity to redress their offending behaviour and demonstrate to the courts and society that they have changed.
- 6.67. The Review considers that a similar suspended sentence order would be a useful addition to sentencing options in Northern Ireland.

Consultation Question:

Q.39 Would a 'supervised suspended sentence' be a useful new sentencing option?

- ***Please provide reasons for your response.***

Adult Diversionary Sentence

- 6.68. Community sanctions can provide an effective means of addressing offending behaviour, particularly for those who commit a minor crime, or those who offend unthinkingly. However, formal criminal records can have a negative long-term impact on offenders, directly impacting on securing work; accommodation; and future financial security.
- 6.69. The Review proposes the development of a community-based intervention for those offences which merit more than a formal caution administered by the police but are not serious enough to warrant the consequences of a full prosecution. Such an approach might be used for minor first-time offences considered out of character for the offender, and would not result in a criminal record.
- 6.70. These would be seen as diversionary solutions for adults, designed to keep them out of the criminal justice system, and providing them the chance to change their behaviour without the long-term stigma and restrictions associated with a criminal record.

Consultation Question:

Q.40 Would a diversionary type community intervention be appropriate for minor first time offences for adults?

- ***Please provide reasons for your response.***

Chapter 7: Hate Crime

- 7.1. Hate crimes are offences motivated by hostility towards a victim's race, religion, sexual orientation or disability. When a hate crime comes before a court, the judge can increase the sentence to reflect that motivation. However, there are concerns that this power is under-used.
- 7.2. In 2013 the Northern Ireland Human Rights Commission reported that, between April 2007 and January 2012, Northern Ireland Courts and Tribunals Service statistics recorded only 5 cases where racially motivated crimes received enhanced sentences.²⁰⁴ In response to the Department's 2015 consultation on the unduly lenient sentencing scheme²⁰⁵ the Commission again raised this issue; suggesting extending the scheme to offences which have been pursued as aggravated would address the under-utilisation of the power to give an enhanced sentence.
- 7.3. This chapter outlines the current hate crime sentencing arrangements; considers the effectiveness of the changes that have been made within the criminal justice system to ensure the recognition of hate crime and that it is dealt with appropriately; and seeks views on the need for any further refinement.

A Crime 'Aggravated by Hostility'

- 7.4. There is no single offence of 'hate crime' in Northern Ireland. It is an umbrella term used to describe a number of specific hate offences as well as any other offence which has been 'aggravated by hostility'.
- 7.5. In this context an offence is 'aggravated by hostility' where:
 - the offender demonstrates hostility based on the victim's membership or presumed membership of a racial group, a religious group or a sexual orientation group, or his disability or presumed disability; or
 - the offence is motivated by hostility towards any of those groups.

²⁰⁴ NIHRC Report: Racist Hate Crime – Human Rights and the Criminal Justice System in Northern Ireland 2013, page 13. PPSNI expressed concern that these statistics do not accurately reflect the number of enhanced sentences.

http://www.nihrc.org/uploads/publications/103141_NIHRC_Racist_Hate_Crime_4_Combined_%282%29.pdf

²⁰⁵ Details of the scheme can be found at chapter 5.

- 7.6. These elements of the crime can be difficult to prove, but where they are proven, Northern Ireland courts are required to state in open court that the offence was so aggravated.²⁰⁶
- 7.7. Courts are not empowered to impose a sentence which exceeds the maximum permitted for the particular offence. However, in taking aggravation into account, they may give a higher sentence than they would have done otherwise. It is this power that the Human Rights Commission considered as being under-utilised.
- 7.8. The Northern Ireland Magistrates' Courts Sentencing Guidelines²⁰⁷ remind judges of their duties in relation to sentencing for hate crime, citing aggravation by hostility in the list of possible aggravating factors. The guidelines also note the requirement to state that the offence was so aggravated, if this is the court's finding.
- 7.9. In addition, following the publication of the Human Rights Commission report, the Lord Chief Justice's Sentencing Group asked the Judicial Studies Board to draw sentencers' attention to the importance of ensuring that all potential hate crimes are properly identified, to allow this to be taken into account in sentencing where the crime is found to have been motivated by hatred.²⁰⁸

Hate Crime in Other Jurisdictions

- 7.10. In Scotland,²⁰⁹ England and Wales, as in Northern Ireland, the courts are required to treat hostility based on specified characteristics of the victim²¹⁰ as an aggravating factor and to state in open court that the offence was so aggravated.²¹¹ There are also some additional requirements in those jurisdictions which do not apply in Northern Ireland.

²⁰⁶ Criminal Justice (No.2) (NI) Order 2004, Article 2:

<http://www.legislation.gov.uk/nisi/2004/1991/article/2>

²⁰⁷ <https://judiciaryni.uk/sentencing-guidelines-magistrates-court>

²⁰⁸ <https://judiciaryni.uk/sentencing-guidelines-northern-ireland>

²⁰⁹ The terminology in the Scottish legislation refers to the offender evincing malice or ill will, rather than demonstrating hostility. Review of this wording was under consideration at the time of publication of this consultation: <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/5/>

²¹⁰ Those already set out for Northern Ireland and transgender characteristics.

²¹¹ England and Wales - Criminal Justice Act 2003, ss.145-6

<http://www.legislation.gov.uk/ukpga/2003/44/part/12/chapter/1/crossheading/matters-to-be-taken-into-account-in-sentencing>

Scotland – Crime and Disorder Act 1998, section 96; Criminal Justice (Scotland) Act 2003, section 74; Offences (Aggravation by Prejudice) (Scotland) Act 2009:

<http://www.legislation.gov.uk/ukpga/1998/37/part/IV/chapter/II/crossheading/racial-aggravation>

<http://www.legislation.gov.uk/asp/2003/7/section/74>

<http://www.legislation.gov.uk/asp/2009/8/contents>

England and Wales

7.11. Sentencing guidelines in England and Wales are more prescriptive than their Northern Ireland equivalents, stating that:

- the court should first decide on the appropriate sentence without the element of 'hate' aggravation, but including any other aggravating or mitigating features;
- the sentence should then be enhanced to take account of the 'hate' aggravation;
- the enhancement may be an increase in the same type of sentence, or it may be enough to move to a more serious type of sentence;
- the judge must say publicly that the offence was aggravated; and
- the judge should say publicly what the appropriate sentence would have been without the 'hate' aggravation.²¹²

7.12. Legislation in England and Wales has also made provision for certain 'statutory aggravated offences'.²¹³ These offences are separate from, and carry higher maximum penalties than, the equivalent non-aggravated offences.

Scotland

7.13. In Scotland there are presently no relevant sentencing guidelines. However, the statutory duties placed on the courts are more detailed than elsewhere in the UK.

7.14. In addition to treating hostility as an aggravating factor and stating that the offence was so aggravated, the courts must also:

- record the conviction in a way that shows that the offence was aggravated; and
- state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference.

²¹² Guidelines reflect the judgment in R-v-Kelly and Donnelly [2001] 2 Cr App R (S) 73 CA
<https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/hate-crime/3-approach-to-sentencing/>

²¹³ <http://www.legislation.gov.uk/ukpga/1998/37/part/II> – racially or religiously aggravated assault, criminal damage, public order offences and harassment.

7.15. Like England and Wales, Scotland also has a statutory aggravated offence of racially aggravated harassment.²¹⁴

Scottish Review of Hate Crime Legislation

7.16. The 2017/18 Independent Review of Hate Crime Legislation in Scotland²¹⁵ noted a number of issues with the existing arrangements, including particular difficulties with the requirements placed on courts to record and specify the difference in sentence due to aggravation.

7.17. Reasons for poor compliance included:

- an absence of guidance on the appropriate amount by which to increase the sentence;
- the sentence is often adjusted to take account of other aggravating or mitigating factors;
- there is a limited amount of time to deal with each case;
- determining a sentence is ultimately a matter of judgment; and
- an overly mathematical approach is not helpful.

7.18. The Review identified strong support for recording that a sentence was aggravated for the following key reasons:

- the requirement enhances the transparency of the justice system;
- it shows that hate crime is taken seriously;
- it would increase confidence in the justice system;
- it would encourage reporting;
- it is important to ensure that records are kept so that the offending appears on the offender's criminal record; and
- good records allow for monitoring the impact of legislation and the maintenance of statistics. This can inform the development of effective policy and practice.

7.19. Views were mixed regarding the requirement to state the amount of the aggravation: Some suggested that announcing the increase in sentence

²¹⁴ <http://www.legislation.gov.uk/ukpga/1995/39/section/50A>

²¹⁵ https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/user_uploads/final-paper-1.pdf

might have a deterrent effect on further offending. However others, including, importantly, those who operate the system, felt that sentencing is already a complex process and that separating the sentence and aggravation is artificial and not necessarily helpful. It could lead to misunderstanding or disappointment, particularly where the aggravation was considered to be of a low level.

- 7.20. Recognizing that requirements must be practical and workable, the Review recommended²¹⁶ that, where a statutory aggravation is proved, the court should be required to include this in the record of conviction. The requirement to state the difference in sentence to reflect any aggravation was considered over-complicated and not to serve a clear purpose.
- 7.21. While a sentencer could still include any details considered relevant, this should not be required in legislation. Therefore, there should no longer be a requirement to state the extent to which the sentence imposed is different from that which would have been imposed in the absence of aggravation.
- 7.22. The Scottish Government consulted publicly on the Review recommendations early in 2019. The outcomes of that consultation have not yet been published.

Ireland

- 7.23. In Ireland there is no express requirement to factor motivation by hostility into sentencing decisions. New legislation, mirroring the Scottish model, has been proposed to address this gap,²¹⁷ although, at the time of writing there was no indication of when this might become law.

Facts and Figures

- 7.24. Statistical data for Northern Ireland between 2015 and 2018, compiled by the Public Prosecution Service for Northern Ireland,²¹⁸ shows a downward trend in the number of cases where the prosecution considered offences aggravated by hostility to have occurred.
- 7.25. The number of court prosecutions brought over the 3 years, where aggravation by hostility was highlighted to the court, has fallen from 251 to 170 to 142 (the majority being for racially aggravated offences), currently representing less than 1% of all prosecutions.

²¹⁶ <http://www.gov.scot/Publications/2018/05/2988>

²¹⁷ Criminal Justice (Aggravation by Prejudice) Bill; <https://www.oireachtas.ie/en/bills/bill/2016/75/>

²¹⁸ Public Prosecution Service NI Statistical Bulletin: Cases Involving Hate Crime 2017/18 <https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Stats%20and%20Research/Statistical%20Bulletin%20on%20Cases%20Involving%20Hate%20Crime%202017-18.pdf>

- 7.26. In contrast to the Human Rights Commission's earlier findings, that only 5 racially aggravated crimes received enhanced sentences between 2007 and 2012. The Public Prosecution Service for Northern Ireland's figures show 52 defendants, prosecuted in the Magistrates' Courts in 2017/18, were recorded as receiving an enhanced sentence on the ground that aggravation had been established.²¹⁹
- 7.27. In the Crown Court for the same period one defendant was recorded as having received an enhanced sentence. Public Prosecution Service figures for the previous two years showed a total of 134 enhanced sentences in the Magistrates' Courts, and a further 3 in the Crown Court.
- 7.28. While these figures are not broken down for each category of hate crime, they nonetheless illustrate an improvement on the earlier records found by the Human Rights Commission.
- 7.29. However, for the year 2017/18, in England and Wales, where guidelines require the court to say what the appropriate sentence would have been without the aggravation, 56.7% of hate crime prosecutions received enhanced sentences, a significantly higher proportion than that recorded in Northern Ireland.²²⁰

Developments in Northern Ireland

- 7.30. Concerns that hate crimes may not be identified as such were highlighted in a Criminal Justice Inspection Northern Ireland report in 2007.²²¹ This resulted in new arrangements within PSNI, the Public Prosecution Service and the Courts' Service, aimed at ensuring that any case involving hate crime is highlighted as such throughout the prosecution process, and flagged to the court as being motivated by hostility.²²² This work also included new administrative processes designed to improve the recording of sentences which have been enhanced where hostility is proven.

²¹⁹ PPSNI Figures show the numbers of prosecution decisions. These may differ from the numbers convicted due to time lapse between prosecution and sentencing and those cases where no conviction was made. The numbers where aggravation was recorded are low in comparison to those prosecuted or otherwise convicted. This may be due in part to a lack of requirement to record, but also reflects the difficulty the prosecution faces in proving to the criminal standard that the offence was aggravated by hostility.

²²⁰ <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf>
14,151 hate crime prosecutions resulted in 11962 convictions, of which 8029 received enhanced sentences.

²²¹ <http://www.cjini.org/getattachment/0272e50a-2218-482a-87e0-66a243a27900/Hate-Crime-Report-January-2007.aspx>

²²² <https://www.psnipolice.uk/globalassets/advice--information/our-publications/policies-and-service-procedures/hate-crime-170518.pdf>

<https://www.ppsni.gov.uk/SiteDocuments/PPSNI%20HATE.pdf> (in particular para. 4.5-9).

- 7.31. A further development has been the 2016 introduction of victim personal statements which, where made, must be considered by the courts in their sentencing deliberations.²²³ While not aimed specifically at hate crimes, the submission of a victim personal statement may serve to highlight any element of hatred, helping to ensure that this is not overlooked in the sentencing decision. In addition, the Probation Board is currently working to enable probation officers to access statements taken from the victim during the investigation process to ensure that victim issues are adequately addressed in pre-sentence reports.
- 7.32. The wider issue of how the criminal justice system deals with hate crime was the subject of a further Criminal Justice Inspection report entitled 'Hate Crime - An inspection of the Criminal Justice System's response to Hate Crime in Northern Ireland', published in December 2017.²²⁴ One of the Report's recommendations was that the Department of Justice should, as soon as possible, conduct a review of the existing legislative response to hate crime.
- 7.33. In response, an independent judge-led review commenced in May 2019 with a view to considering and making recommendations on the effectiveness of the legislation, including:
- whether the current enhanced sentence approach is the most appropriate to take, and to determine if there is an evidential basis to support the introduction of statutory aggravated offences; and
 - whether new categories of hate crime should be created for characteristics such as gender and any other characteristics which are not currently covered.²²⁵
- 7.34. The Criminal Justice Inspection report also touched on the issue of court recording of instances of enhanced sentencing. It recognised that this had improved, but commented that there remained a risk that recording could be missed in busy courts.²²⁶

Analysis

- 7.35. Statistics from the Public Prosecution Service show a significant increase in the number of hate crime convictions receiving an enhanced sentence. This improvement has come about as a result of administrative adjustments made within the investigation, prosecution and courts' systems to ensure courts are

²²³ The Justice Act (NI) 2015: <http://www.legislation.gov.uk/nia/2015/9/contents> and The Victim Statement Regulations (NI) 2016: <http://www.legislation.gov.uk/nisr/2016/431/contents/made>

²²⁴ <http://www.cjini.org/getattachment/a48b8a89-f32f-4b02-bd3c-8f77989630eb/report.aspx>

²²⁵ The Review is ongoing at the time of publication of this consultation.

²²⁶ CJINI report at para.2.33.

made aware of offences motivated by hostility and to improve the recording of enhanced sentences. The recent introduction of victim personal statements has provided a further opportunity to focus courts' attention on hostility motivation as part of the sentencing exercise.

- 7.36. In its 2017 report, the Criminal Justice Inspection recognised the progress that has been made; however, it also noted concerns that there was still a risk that recording could be missed.
- 7.37. Across the rest of the UK and Ireland a requirement for the court to state the extent to which the sentence was enhanced exists in statute; in sentencing guidelines; or is proposed. Such a requirement did not enjoy universal support in the Scottish hate crime legislation Review for the reasons outlined above.
- 7.38. The further requirement to record that a crime was aggravated by hostility, which currently exists in Scotland and is proposed in Ireland, was strongly supported in that Review.
- 7.39. While administrative improvements have been made in Northern Ireland, a reliable picture of the courts' use of increased sentencing powers would be essential in identifying whether such powers are currently under-utilised, as was previously submitted by the Human Rights Commission. Additional statutory requirements would help to ensure that aggravation by hostility is taken fully into account in all cases, and, importantly, that this would be seen to be so.
- 7.40. In considering possible options for Northern Ireland, the Review noted the provisions of the Domestic Abuse Bill (currently before Parliament) which proposes that, where domestic abuse has been aggravated by reason of involving a child, the court must:
- state on conviction that the offence is so aggravated;
 - record the conviction in a way that shows that the offence is so aggravated;
 - in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence; and
 - in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.
- 7.41. This model differs from those examined above in its treatment of how the courts should explain the effect of any aggravation. Requiring the court to

explain how the sentence is affected, rather than requiring it to state the amount by which the sentence has been adjusted, avoids the concerns voiced in the Scottish Review. At the same time it ensures that the court makes public that it has factored any such aggravation into the sentence calculation.

- 7.42. A similar approach for hate crime would allow the system to recognise offences aggravated by hostility, bringing with it a number of benefits. In particular, this could inform rehabilitative work with such offenders. Programmes such as Probation Board's 'Accepting Differences' and NIACRO's 'Get Real', both of which aim to address hostility motivated behaviour and reduce or prevent repeat offending, could be better targeted and utilised as a result.
- 7.43. When combined with the PSNI and Public Prosecution Service's processes to ensure that hostility is brought to the courts' attention, such an approach would address concerns raised by the Criminal Justice Inspection and the Human Rights Commission; ensuring that in every case aggravation was considered, publicly acknowledged and, where appropriate, recorded.
- 7.44. Further benefits, similarly identified in the Scottish Review, would include:
- increasing confidence in the justice system by improving parties' and the wider public's understanding that such motivations to offend are taken seriously;
 - potentially enhancing the deterrent effect of sentencing, further helping to protect the public;
 - in the longer term, recording could also assist policy makers to target strategies to address hate crime appropriately; and
 - promoting consistency of approach across the statute book in Northern Ireland.

Review of Sentences

- 7.45. The Human Rights Commission and the former Northern Ireland Commission for Ethnic Minorities both made representation to extend the unduly lenient sentencing (ULS) referral provisions to racial hate crime.
- 7.46. The power of the Director of Public Prosecutions to refer a sentence to the Northern Ireland Court of Appeal on the grounds of undue leniency is intended to address the most serious cases where a sentence is significantly lower than would be expected. The Department has recently extended the ULS scheme to cover a large number of additional offences tried in the Crown

Court, including assault, burglary, theft, criminal damage and stirring up hatred or fear.²²⁷ This extension should capture the majority of hate crimes tried in the Crown Court.

- 7.47. Those changes to the scheme, together with any further changes taken forward as a result of Chapter 5 and this chapter should strengthen the justice system's response to hate crime. In addition the current independent, judge-led, review into hate crime laws in Northern Ireland will provide a further opportunity to refine hate crime legislation.

Consultation Questions:

Q.41 When a hate crime has been identified during the prosecution process, should prosecutors be under a duty to flag this to the court?

- Please provide reasons for your response.*

Q.42 When dealing with a hate crime, should the courts be required to record the fact that aggravation due to hostility has been considered in the sentencing decision?

- Please provide reasons for your response.*

Q.43 When dealing with a hate crime, should the courts be required to explain how the fact that the offence is aggravated due to hostility has affected the sentence?

- Please provide reasons for your response.*

Q.44 Should any other changes be made to ensure appropriate sentencing for hate crimes?

- Please provide details and reasons for your response.*

²²⁷ <https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/uls-consultation-aug-18.pdf>

Chapter 8: Attacks on Frontline Public Services

- 8.1. There is a prevalent view that sentencing for attacks on people providing frontline public services, particularly in hospitals, does not reflect the gravity of the offence nor act as a sufficient deterrent.
- 8.2. Specific offences already exist for assaults committed on some categories of public servant. This chapter seeks views on the adequacy of the current law and whether legislation for attacks on further categories of public servant should be introduced.

Current Position in Northern Ireland

- 8.3. Most sentencing provisions for assault offences in Northern Ireland are found in the Offences Against the Person Act 1861 (the 1861 Act). They range from the least severe, known as common assault; to assault occasioning actual bodily harm; grievous bodily harm; and wounding or causing grievous bodily harm with intent, the most serious. They apply regardless of the occupation of the victim.
- 8.4. The nature and severity of the injury sustained as a result of the assault determines the offence charged and the court for trial. Sentencing ranges from a maximum of 6 months' imprisonment, when dealt with in a Magistrates' Court, or 2 years, when dealt with in the Crown Court, for common assault to a possible life sentence for the offence of wounding or causing grievous bodily harm with intent.²²⁸ A summary of the offences and sentencing provisions is attached at Appendix 4.
- 8.5. In addition, Northern Ireland legislation makes specific provision for offences of:
 - assault on police;²²⁹
 - assault upon fire and rescue personnel;²³⁰ and
 - assault on ambulance workers.²³¹

²²⁸ Sentencing for all of the offences discussed in this chapter may also consist of a financial penalty, either instead of or in addition to a period of imprisonment.

²²⁹ <http://www.legislation.gov.uk/ukpga/1998/32/section/66> Section 66(1) Police (Northern Ireland) Act 1998. It is an offence to assault, resist, obstruct or impede a constable in the execution of his duty.

²³⁰ Fire and Rescue Services (NI) Order 2006, Article 57:

<http://www.legislation.gov.uk/nisi/2006/1254/article/57> It is an offence to assault, resist, obstruct or impede a fire and rescue officer in the execution of his duty

²³¹ Justice Act (Northern Ireland) 2016, section 54:

<http://www.legislation.gov.uk/nia/2016/21/section/54> It is an offence to assault an ambulance worker in the execution of the worker's duty

- 8.6. These offences may be tried either in a Magistrates' Court, with a maximum sentence of 6 months' imprisonment, or in the Crown Court, where they attract a sentence of up to 2 years. They are designed to deal with assaults resulting in a low level of injury, on a par with the offence of common assault, and to give special recognition to the victims attacked because of their public service role. Where a more serious offence occurs, charges will be brought under the appropriate provision of the 1861 Act.
- 8.7. The offences of assault on a police officer and assault on fire and rescue personnel originally had higher maximum sentences than those available for common assault. This is no longer the case, due to changes made to the 1861 Act.²³²
- 8.8. The most recently created offence – assault on ambulance workers – emerged from the Northern Ireland Assembly following an attempt to introduce an offence to recognise all 'emergency workers'.²³³ A subsequent Private Members Bill to introduce an offence against hospital workers fell with the collapse of the Assembly in 2017.
- 8.9. While attacks on other public service providers continue to be widely reported, to date these workers are afforded no special legislative provision.²³⁴ Such workers include: Accident and Emergency staff; nurses; probation staff; social workers; prison officers;²³⁵ and teachers.

Sentencing Guidelines

- 8.10. Magistrates' Courts sentencing guidelines set out starting points for sentence calculation and sentencing ranges for the summary offence of common assault.²³⁶
- 8.11. There are 3 bands of seriousness, with starting points of:
- community sentence;

²³² Criminal Justice (No.2) (NI) Order 2004, Article 4:

<http://www.legislation.gov.uk/nisi/2004/1991/article/4>, which increased the maximum available sentence for common assault in the Crown Court to 2 years' imprisonment; Justice Act (NI) 2011, section 51: <http://www.legislation.gov.uk/nia/2011/24/section/51> which increased the maximum available sentence for common assault in the Magistrates' Courts to 6 months.

²³³ <http://www.niassembly.gov.uk/globalassets/documents/justice-2011-2016/moe/justice-no.2-sessions/17-nov-15-lord-morrow.pdf>

²³⁴ Offences of assault on immigration officers and HMRC officers exist in UK-wide legislation.

²³⁵ Section 8 of the Prison Act (Northern Ireland) 1953 makes provision for prison officers to have the same powers, authority, protections and privileges as a constable. Equivalent provision is made for England and Wales in s.8 of the Prison Act 1952. This does not create a specific offence of assault against a prison officer, but implies that such an assault should be treated in the same way as an assault on a police officer.

²³⁶ Appendix 5 shows the sentencing guidelines for the offences of common assault; AOABH; and inflicting GBH when charged in a Magistrates' Court.

- 2 months' imprisonment; and
- 4 months' imprisonment.

8.12. The guidelines also specifically address the aggravating effect of attacks on public servants:

'where the victim was engaged in providing a service to the public [the court] shall use a starting point higher than that prescribed' and 'it may impose a sentence outside the [guideline] sentencing range'.

8.13. The seriousness with which the courts take this kind of offending was illustrated in a reported Crown Court judgment in February 2019, where the Recorder of Belfast warned that those who attack medics or other healthcare professionals in their line of duty can expect to be sent to prison.²³⁷

8.14. Other aggravating factors that may be relevant include:

- the offence was committed in the victim's workplace; or
- the offence took place in an isolated area.

8.15. The Magistrates' Courts guideline for the specific offence of assault on the police provides the same starting points and sentencing ranges as the guideline for common assault.²³⁸

Facts and Figures

8.16. Of the 3 occupation-specific offences detailed above, assault on police officers is the most often prosecuted, with the vast majority of prosecutions proceeding in the Magistrates' Courts, as detailed in Table 9.

²³⁷ News Letter at p.11, 27. 02. 19.

²³⁸ See Appendix 5.

Table 9: Prosecutions and Convictions at Courts for the Offence ‘Assault on Police’ (2012-18)²³⁹

Year	Prosecutions		Convictions	
	Crown Court	Magistrates’ Courts	Crown Court	Magistrates’ Courts
2012	55	2,014	48	1,687
2013	56	1,748	45	1,457
2014	50	1,461	41	1,235
2015	37	1,450	29	1,237
2016	51	1,335	45	1,134
2017	41	1,302	35	1,133
2018	33	1,272	31	1128

8.17. In the period between 2012 and 2018, 67 defendants received the maximum sentence of 6 months’ imprisonment in the Magistrates’ Courts. In the Crown Court one defendant received the maximum 2 years immediate custodial sentence.

8.18. In the Magistrates’ Courts over the period the most frequently used disposal for this offence was the suspended sentence. Immediate custody and community sentences followed closely. However, in 2018, of the 1128 convictions in the Magistrates’ Courts, 318 resulted in an immediate custodial sentence; 295 suspended sentences were imposed; and 299 received a community sentence.

8.19. In the Crown Court immediate custody is most frequently used: 20 of the 31 convictions in 2018 resulted in an immediate custodial sentence; 4 received a suspended sentence; and 7 community sentences were imposed.

8.20. Between its creation in 2016 and the end of 2018 there were 21 convictions for the offence of assault on an ambulance worker, all in the Magistrates’ Courts. Of these, 17 resulted in an immediate custodial sentence, none of which were for the maximum of 6 months. Suspended sentences were imposed in a further 7 cases, while 13 cases resulted in a community sentence and 1 in a discharge.

²³⁹ There will be other cases dealt with by way of out of court diversion which are not included here. These figures only relate to cases dealt with at court.

8.21. There are no records of prosecutions for assault on fire and rescue personnel in the past 5 years. While there have been media reports of attacks on fire and rescue personnel, it may be that no injury was sustained or that the circumstances surrounding the attacks warranted prosecution for one of the more serious assault or public disorder offences.

Approach in Other Jurisdictions

England and Wales

8.22. In England and Wales common assault can only be tried in the Magistrates' Courts with a maximum sentence of 6 months' imprisonment.²⁴⁰ The following offences also apply, with maximum sentences of 6 months' imprisonment:

- assault on on-duty police officers;²⁴¹
- assault on persons designated with police powers under Police Reform Act 2002; and
- assault on prison and secure training centre custody officers.^{242 243}

8.23. In addition, the Assault on Emergency Workers (Offences) Act 2018²⁴⁴ makes provision for trial in the Magistrates' Courts and the Crown Court, for offences of common assault and battery on:

- Police officers;
- NCA officers;
- Prison officers;
- Custody officers;
- Fire service personnel;
- Search and rescue services; and
- Providers of NHS health services, or those in support of same (including ambulance staff).

²⁴⁰ Criminal Justice Act 1988, section 39: <http://www.legislation.gov.uk/ukpga/1988/33/section/39>

²⁴¹ Police Act 1996, section 89: <http://www.legislation.gov.uk/ukpga/1996/16/section/89>

²⁴² Criminal Justice Act 1991, s.90: <http://www.legislation.gov.uk/ukpga/1991/53/section/90> and Criminal Justice and Public Order Act 1994, section 13: <http://www.legislation.gov.uk/ukpga/1994/33/section/13>

²⁴³ Other specific offences of assaulting traffic officers (Traffic Management Act 2004, section 10) and HMRC officers (Commissioners for Revenue and Customs Act 2005) carry a maximum 51 week sentence, while an assault on an officer of the county court has a maximum sentence of 3 months (County Courts Act 1984, section 14).

²⁴⁴ <http://researchbriefings.files.parliament.uk/documents/CBP-8113/CBP-8113.pdf>
<http://www.legislation.gov.uk/ukpga/2018/23/contents/enacted>

- 8.24. At present the maximum sentence available in the Magistrates' Courts for an offence under that Act is 6 months' imprisonment.²⁴⁵ The maximum sentence following trial in the Crown Court is 12 months' imprisonment.
- 8.25. The Act also makes the victim's status as an emergency worker a statutory aggravating factor, increasing the seriousness of the offence when an offender is charged with any of the listed offences.²⁴⁶ Additionally, the aggravation must be acknowledged in open court, thus clearly distinguishing such cases from those where the victim is not an emergency worker.
- 8.26. The Sentencing Council's guidelines on common assault and seriousness provide that an offence committed against a public servant is an aggravating factor²⁴⁷ indicating 'a more than usually serious degree of harm'.²⁴⁸
- 8.27. The Crown Prosecution Service guidance reinforces this message, saying: 'Any assault that is committed on public servants and emergency workers must be treated seriously'. It goes on: 'Sentencing practice indicates that custody is the appropriate starting point for a person who assaults a public servant.'²⁴⁹

Scotland

- 8.28. Assault and serious assault in Scotland are common law offences. The maximum sentence is life imprisonment (as with all common law offences in Scotland). There is no statutory equivalent to the 1861 Act. However, there are offences of assaulting:
- Police²⁵⁰
 - Fire fighters;
 - Ambulance workers;

²⁴⁵ Assaults on Emergency Workers (Offences) Act 2018, section 1(4):

<http://www.legislation.gov.uk/ukpga/2018/23/enacted> This maximum will increase to 12 months along with the general increase in the sentencing jurisdiction of the Magistrates' Courts as provided for under section 154 of the Criminal Justice Act 2003;

<http://www.legislation.gov.uk/ukpga/2003/44/section/154>

²⁴⁶ See section 2: <http://www.legislation.gov.uk/ukpga/2018/23/section/2/enacted>; These include the most commonly charged violence against the person offences.

²⁴⁷<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-religiously-aggravated-common-assault/>

²⁴⁸ Sentencing Guidelines Council, Overarching principle – seriousness: Definitive guideline, p7.

²⁴⁹<https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard#a20>

²⁵⁰ Police and Fire Reform (Scotland) Act 2012, section 90:

<http://www.legislation.gov.uk/asp/2012/8/section/90> further specific offence of assault on police.

- Registered medical practitioners;
- Registered nurses;
- Registered midwives ;
- Prison officers;
- Members of HM Coastguard;
- Crew members of vessels operated by the Royal National Lifeboat Institution or other water rescue services;
- Social workers; and
- Mental healthcare workers.²⁵¹

8.29. These offences are summary only, and carry a maximum penalty of 12 months' imprisonment.

Ireland

8.30. Ireland has a range of general assault offences which largely equate to those under the 1861 Act. It also has a specific offence for assault or obstruction of:

- Doctors;
- Dentists;
- Psychiatrists;
- Nurses;
- Midwives;
- Pharmacists;
- Health and social care professionals and others providing medical services at or in a hospital;
- Members of the Garda Síochána;
- Prison Officers;
- Members of Defence Forces;
- Ambulance Forces;
- Fire brigade personnel.²⁵²

²⁵¹ Emergency Workers (Scotland) Act 2005: <http://www.legislation.gov.uk/asp/2005/2/contents>

²⁵² [Criminal Justice \(Public Order\) Act 1994](#), section 19 as amended by Criminal Justice Act 2006, section 185: <http://www.irishstatutebook.ie/eli/2006/act/26/section/185/enacted/en/html#sec185>

8.31. The offence may be tried in a Magistrates' Court with a maximum penalty of 12 months' imprisonment; or in the Crown Court with a maximum penalty of 7 years.

Analysis

8.32. The table at Appendix 6 gives a simplified overview of the 3 Northern Ireland specific assault offences and the emergency worker provisions which exist across the UK and Ireland.

8.33. In Scotland and Ireland the maximum sentence is 12 months' imprisonment²⁵³ when tried in a Magistrates' Court. In Northern Ireland and England and Wales the current maximum penalty in that court is 6 months.

8.34. Provision for sentencing in the Crown Court is less consistent, with a maximum of 12 months' imprisonment for offences against emergency workers in England and Wales; 7 years in Ireland; and no provision for Crown Court trial of the equivalent offences in Scotland. The maximum sentence for the Northern Ireland offences is 2 years' imprisonment.

8.35. While there is no data recording the motivation for attacks on public servants, discussions with the Probation Board for Northern Ireland would support the assumption that often these can be drink or drugs related, or at times linked with domestic violence.

8.36. Where such causes are recognised, a problem-solving approach may help to rehabilitate offenders and reduce further offending. Typically this involves the offender engaging with therapeutic support aimed at addressing the underlying factors behind the offending. If this is successful a lower sentence will generally be given.

8.37. Notwithstanding these new approaches, a robust sentencing framework which appropriately addresses different types of offending, must remain in place.

Options

8.38. The Review identified a number of possible options for going forward.

²⁵³ The England and Wales provision is restricted to 6 months until section 154 of the Criminal Justice Act 2003 is commenced.

Option A: No change

- 8.39. As noted earlier, there is no general offence of assault on an emergency worker/public servant in Northern Ireland. Instead 3 offences specific to the occupation of the victim exist, each with a maximum custodial penalty of 6 months when tried in a Magistrates' Court and 2 years when tried in the Crown Court.
- 8.40. An anomaly arises where, with the amendments made to the 1861 Act, the maximum sentence for assault on a police officer, fire fighter or ambulance worker is now set at the same level as that for common assault (which applies regardless of the victim's occupation).
- 8.41. The Magistrates' Courts sentencing guideline for the offence of common assault requires the court to treat the fact that the victim was a person providing a public service as an aggravating factor. There is no information on how often this is applied or its impact on sentencing decisions.
- 8.42. The sentencing guideline for the offence of assault on a police officer specifies the same starting points and range of sentencing as for the offence of common assault. The fact that the victim was a police officer is an element of the offence, and not treated as an aggravating factor. Perversely, therefore, applying the guidelines, a person convicted of assault under the 1861 Act where the victim was a public servant could receive a higher sentence than a person convicted of a similar assault on police.
- 8.43. This appears to be contrary to the intention of the legislature, which sought to give additional protection to police (and by extension to fire and rescue workers and ambulance workers).
- 8.44. Adopting the 'no change' option would give no further protection to emergency workers who have already been specially recognised. It would prevent additional public servants being recognised as deserving special protection and perpetuate the existence of lower maximum penalties in the Magistrates' Courts in Northern Ireland, as compared with Scotland and Ireland.

Option B: Higher penalties

- 8.45. The creation of specific offences underlined the view that those who put themselves at risk of harm in the course of their duties as a public servant should be given additional protection.
- 8.46. The higher maximum sentences for assaulting a police officer or a fire and rescue officer were intended as a strong deterrent and to show that such offending is taken seriously. The loss of a distinction between the maximum sentences for common assault and for those offences has undermined that intention.
- 8.47. Available statistics show that Magistrates' Courts have availed of their full sentencing powers and awarded the maximum sentence for the offence of assault on police on numerous occasions. This might suggest that the courts would welcome higher sentencing powers.
- 8.48. Increasing the maximum sentence available in the Magistrates' Courts for offences of assaulting a public servant would reinstate the original intention that these offences should be capable of being punished more severely than other common assaults. It would also allow the courts additional flexibility in sentencing for these offences. This would be an exceptional measure to underline the seriousness of these offences, as the general sentencing jurisdiction of the Magistrates' Courts in Northern Ireland is limited to 6 months' imprisonment.
- 8.49. If such an increase were to be made, it is considered that 12 months would seem to be an appropriate level, in that it would double the current maximum and would bring consistency with Scotland and Ireland for the maximum sentence in the Magistrates' Courts for this type of offence.
- 8.50. Any increase would also necessitate a review of the current Magistrates' Courts guideline for the offence of assaulting police.
- 8.51. Consideration has also been given to an increase in the maximum sentences available in the Crown Court. Two factors would suggest that this is unnecessary. Firstly, the lack of consistency in the provision for Crown Court trial across the UK and the variations in permitted sentences do not indicate a strong preference for any one approach. Secondly, the fact that only one person in Northern Ireland received the maximum sentence of 2 years' imprisonment in the period from 2012-2018 supports the view that the Court does not have particular concerns regarding the current sentencing limit.

Option C: Additional categories of public servant

- 8.52. Changes to the sentencing arrangements for the existing offences would strengthen the argument for reviewing the categories of public worker receiving statutory protection.
- 8.53. Following the creation of the offence of assault on ambulance workers there was an intention to give consideration to the further categories of workers to whom special provision should be extended. The introduction of the Assault on Emergency Workers (Offences) Act 2018 in England and Wales has left Northern Ireland as the only jurisdiction in the United Kingdom and Ireland without specific legislation for attacks on a wider range of emergency workers.
- 8.54. The Review therefore wishes to identify the categories of public servants who particularly require extra protection. This should not extend to all categories of public servant who come into contact with the public, but to those who have to put themselves in harm's way. Sentencing guidelines requiring assault on public servants to be treated as an aggravating factor will remain in place. New legislation should recognise and protect only those workers who are particularly vulnerable.
- 8.55. Front-line hospital and other healthcare workers have been specifically identified, being particularly at risk of assault. During pre-consultation engagement compelling representations were also made on behalf of prison officers and social workers who often face extremely volatile situations in the course of their duties.
- 8.56. The explicit inclusion of these public servants in any new provision would align the protections available in Northern Ireland with those available elsewhere in the United Kingdom and Ireland.

Option D: A statutory aggravating factor?

- 8.57. Specific offences have been created to deal with the most commonly committed low level assaults, and make special provision only for assaults on specified workers. The existence of specific offences allows records to be kept showing the prevalence of this type of offending and the sentences given.
- 8.58. Where those specific offences do not apply (i.e. for the more serious assaults under the 1861 Act), sentencing guidance provides some extra recognition and protection by requiring the courts to treat the fact that the victim of assault was a public servant as an aggravating factor.

- 8.59. A difficulty with this approach is the lack of visibility of its application. There is no mechanism for recording when a court aggravates a sentence on the basis of the victim's occupation, nor any requirement for the court to publicly pronounce that a higher sentence has been given than would otherwise apply.
- 8.60. It is not therefore possible to know how prevalent such offending is; to monitor it; to reflect this type of offending on an offender's record; to assess the need to target resources to resolve the problem, if one exists; or to be able to point to higher sentences.
- 8.61. Creating a statutory aggravating factor, for assault offences where the victim is a specified public servant, could address these issues. In addition, the adoption of similar requirements to those suggested for hate crime in Chapter 7 would, in turn, reflect the proposed approach of the Domestic Abuse Bill, ensuring that any aggravation was publicly stated and recorded by the court; and that the court would be required to state how the sentence was affected.
- 8.62. Such a change would demonstrate a consistent approach being taken generally in relation to vulnerable victims.

Consultation Questions:

Q.45 Is the current range of offences and penalties combined with sentencing guidelines adequate to deal with assaults on those providing frontline public services in Northern Ireland (Option A)?

- *Please provide reasons for your response.*

Q.46 Should the maximum penalty on summary conviction for attacks on specified public workers be increased to 12 months' imprisonment (Option B)?

- *Please provide reasons for your response.*

Q.47 If yes to Q.46 should any increased sentence for specified public workers be extended to include those involved in the provision of front-line healthcare in hospitals, prison officers, social workers and others providing direct care in the community (Option C)?

- *Please indicate any occupation an increased sentence should apply and provide reasons for your response.*

Q.48 In other assault offences, should the fact that the victim was a specified category of public servant be made a statutory aggravating factor (Option D)?

- *Please provide reasons for your response.*

Q.49 *If yes to Q.48, should there be an obligation to state publicly that aggravation occurred; and record both that fact and the impact the fact had on the sentence imposed?*

- *Please provide reasons for your response.*

Chapter 9: Crimes against Older and Vulnerable People

- 9.1. In June 2015 the Northern Ireland Assembly debated draft legislation which would have introduced minimum sentences for certain violent crimes against people aged 65 or over. This proposal arose from a long-standing perception that current sentences are neither a sufficient punishment nor an adequate deterrent to those who commit crimes against older people.
- 9.2. The legislation was not passed, but calls for 'tougher sentences' continue to be made, particularly following media reports of crimes against older and other vulnerable people.
- 9.3. Such calls are not unique to Northern Ireland but resonate across the UK and Ireland, with the Older People's Commissioner for Wales as well as groups such as Amnesty International and Action on Elder Abuse all contributing to the debate.

Scale of Offending and Sentencing

- 9.4. Available information on sentencing for crimes against older and other vulnerable groups in Northern Ireland is limited. PSNI records and publishes certain victim details, including age, in relation to reported crime,²⁵⁴ but similar information is not routinely kept by the courts. Consequently, the public can access facts about the level of crime committed against older people, but information on more general vulnerability and sentencing is restricted to personal experience, word of mouth and media reports.
- 9.5. In relation to the age of victims, Table 10 indicates the overall scale of reported crime, the volume of reports where the victim was aged 65 and over and shows the total numbers of cases completed at court, between 2015 and 2018.

²⁵⁴ <https://www.psni.police.uk/inside-psni/Statistics/police-recorded-crime-statistics/>

Table 10: Offences Against Victims Aged 65+ (2015-18)

Year	Reported crime	Reported crime victim aged 65+	% of reports with victim aged 65+	Total cases completed at court
2015/16	73,507	5,006	6.8	28,033
2016/17	68,365	4,573	6.6	28,702
2017/18	66,781	4,562	6.8	28,073

- 9.6. Assuming the age of the victim does not significantly impact on this correlation, it is reasonable to conclude that the number of reports of crime against older and other vulnerable people far exceeds the number of convictions for such crimes. Unfortunately, without more detailed information, it is not possible to establish the actual number of convictions, or the impact of the victim’s age or other vulnerability on sentencing.
- 9.7. The absence of such information makes it difficult to either support or dispel the perception that sentencing for this type of crime is too lenient. However, an understanding of the sentencing framework within which the courts operate may help assess whether the current system makes adequate provision for appropriate sentencing for crimes against elderly and/or vulnerable people.

Sentencing Framework

- 9.8. There is no specific offence of crime against older and/or vulnerable people in the United Kingdom or Ireland. Instead, in line with sentencing guidance, the judge is generally required to treat the fact that the victim was an older or otherwise vulnerable person as an aggravating factor.
- 9.9. Guidance issued by the Northern Ireland Court of Appeal advises sentencers that the deliberate targeting of vulnerable victims is considered an aggravating factor, and that the starting point for the sentence calculation should increase accordingly depending on the age, vulnerability, or infirmity of the victim.²⁵⁵ A similar approach is also taken in England and Wales, with judgments of the Court of Appeal in that jurisdiction confirming: “*Such vulnerable people have to be protected, and this court will do everything it can to provide that protection*”.²⁵⁶

²⁵⁵ R-v-Cambridge [2015] NICA 4.

²⁵⁶ R-v-Marcus 2004 1 Cr App R (S) 258.

- 9.10. This guidance is reflected in sentencing guidelines issued for the Magistrates' Courts in both Northern Ireland and England and Wales, which also recognise the vulnerability of victims (including age) as an aggravating factor.²⁵⁷
- 9.11. Sentencing guidance is discussed in detail in Chapter 3. In summary, the guidance is intended to assist the courts in their deliberations. It does not have the mandatory effect of legislation, but the courts operate on the basis that guidance will be followed, taking account of the circumstances of the case.
- 9.12. Normally any decision not to follow the guidance is explained by the sentencing judge who is a skilled decision maker, familiar with the sentencing guidance and the expectation placed on them. In the most serious offences, a sentence which appears not to have taken an aggravating factor sufficiently into account may be subject to referral to the Court of Appeal, if the total sentence imposed is considered to be unduly lenient. However, referrals are rare, with only 24 having been made between 2015 and 2018.

Recent Developments

- 9.13. Political concerns about sentencing for crimes against older people in Ireland and Northern Ireland were reflected in efforts made in 2011 in the Northern Ireland Assembly²⁵⁸ and again in 2015 in both in the Dáil and the Assembly to introduce legislation.
- 9.14. In Northern Ireland the more recent proposal was for a minimum sentence of 7 years' imprisonment for offences resulting in the death or serious injury of a person aged 65 or over, unless there were exceptional reasons for not doing so. In Ireland a minimum sentence of 3 years for causing serious harm or threatening to kill or cause serious harm to anyone aged over 65 was proposed.
- 9.15. While there was recognition in both jurisdictions that the law should protect older people and express society's intolerance of crime against them, neither of these reforms was passed. The Assembly debate recorded concerns about restricting judicial discretion by the imposition of mandatory minimum sentences and the arbitrariness of choosing 65 as the relevant age.²⁵⁹ The

²⁵⁷ <https://judiciaryni.uk/sentencing-guidelines-magistrates-court>
<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/seriousness/>

²⁵⁸ Hansard, NI Assembly, 29 November 2011, Volume 69, No 4 at para 215-228.

²⁵⁹ <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/06/22&docID=239027#1396466>

legislation in the Dáil remained live, but had not yet progressed beyond Second Stage at the time of publication of this consultation.²⁶⁰

- 9.16. In Scotland, a recommendation of the Independent Review of Hate Crime that a new statutory aggravation should be introduced, where hostility based on a victim's age is proved, is being considered.
- 9.17. The current independent judge-led review of hate crime legislation in Northern Ireland is considering whether adding age to the protected characteristics relating to hate crime is appropriate.
- 9.18. The Scottish Review noted that offending against older people, which may be opportunistic or planned, can be motivated by victims' vulnerability or perceived vulnerability. It recommended that the Scottish Government should consider the introduction, outside of the hate crime scheme, of a general aggravation covering exploitation and vulnerability.²⁶¹

Defining Older and Vulnerable People

- 9.19. Before considering options for change the Review considers it important to clarify the category or categories of victims requiring extra protection. The debate to date has focussed on older people, but this excludes other vulnerable people and it has proved difficult to define what is meant by 'older people'.
- 9.20. A number of different ages have already been selected for different purposes: the Commissioner for Older People Act (Northern Ireland) 2011 provides that, for the purposes of the Act, an older person is a person aged 60 or over, or in certain circumstances a person aged 50 or over. The Office of the Commissioner for Older People NI, reflecting demographic age projections, also refers to the 'older old', being those aged 85 plus.
- 9.21. During the 2015 Assembly debate the proposal to set an arbitrary age in legislation was rejected. It was argued that no chosen age would capture all the victims who should be protected. A number of exceptions and a complicated description of the victim could be needed, risking making the new offence meaningless.
- 9.22. The circumstances of the offender as well as potential evidential difficulties around their knowledge of victims' age were recognised: it could be difficult

²⁶⁰ <https://www.oireachtas.ie/en/bills/bill/2018/83/>

²⁶¹ <https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/>

to rebut a claim by the offender that they did not know, or could not reasonably be expected to know the exact age of the victim.

- 9.23. The question of an appropriate age was discussed with the Pensioners Parliament Northern Ireland during pre-consultation engagement. The message strongly expressed to the Review team was that there is no consistent correlation between age and vulnerability, and the real issue is a victim's vulnerability.
- 9.24. Vulnerability is a broad concept, but has recently been addressed in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Within that Act, a 'vulnerable adult' is defined as 'a person aged 18 or over whose ability to protect himself or herself from violence, abuse or exploitation is significantly impaired through physical or mental disability or illness, old age, addiction to alcohol or drugs or for any other reason'.²⁶²
- 9.25. A consistent understanding of vulnerability across Northern Ireland legislation would be helpful and a similar definition might be used in relation to any new legislation emanating from this Review.

Consultation Questions:

Q.50 *Reflecting our stakeholders' views, should any new legislation deal with 'vulnerable' people, whether by age or other personal circumstances, as opposed to simply 'older' people?*

- *Please provide reasons for your response.*

Q.51 *If yes to Q.50, should a definition like the one found in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 be used?*

- *Please provide reasons for your response.*

Options

- 9.26. The Review is interested to hear the public's views on what changes, if any, should be made in Northern Ireland. Possible options, including: making no change to current arrangements; the introduction of age or vulnerability as a statutory aggravating factor; and the creation of a new offence, refining the proposals previously considered in the Northern Ireland Assembly.

²⁶² section 25: <http://www.legislation.gov.uk/nia/2015/2/section/25>

Option A: No change

- 9.27. The use of judicial discretion and the application of sentencing guidance have been outlined above. This approach is common in all of our neighbouring jurisdictions. The sentencing judge takes account of all relevant circumstances to arrive at an appropriate determination.
- 9.28. Its flexibility avoids the need to strictly define the characteristics of the victims it seeks to protect, which might be required of a legislative solution. However, it lacks the visibility that legislation can provide; and it is difficult to assess its effectiveness in the absence of recorded court data on the vulnerability of victims, whether by age or other factors.

Option B: Statutory aggravating factors

- 9.29. The introduction of a statutory aggravating factor would have the effect of requiring the court to recognise and have regard to the aggravating factor when deciding on the appropriate sentence in each case. As regards offences against vulnerable people there are two possible approaches:
- motivation by opportunism, based on a perception or belief that the victim is vulnerable (due to age or other factors) could be treated as an aggravating factor; or
 - the simple fact that the victim was a vulnerable person itself could be so treated.
- 9.30. Each of these approaches has its drawbacks: proving that the perceptions or beliefs of a person motivated their offending behaviour is inherently difficult, and could lead to low success rates in the application of any such aggravation; while treating the simple fact that a victim was vulnerable as an aggravating factor would be unjust in those cases where the victim's characteristics were entirely irrelevant to the commission of the offence.
- 9.31. Either approach would result in provisions with some similarities to existing hate crime legislation. For the same reasons as were outlined in the earlier chapters, any new provision in legislation should be accompanied by a requirement for the court to record the fact that the sentence had been aggravated, and explain how the sentence had been affected.
- 9.32. Where such a duty existed, the court would be entitled to explain why it considered it necessary to increase, or not to increase, a sentence.
- 9.33. The new provisions would apply to all offence types, including those abuse offences that have been identified as being of particular concern by Action on

Elder Abuse, dealing with: being targeted by scammers; neglect; abuse of Powers of Attorney; physical abuse; and psychological intimidation.

Option C: A new offence

- 9.34. During the Assembly debates, a minimum sentence for offences causing serious injury or death to older people was proposed. Members were generally not supportive of minimum sentences. This was largely in recognition of the impact this would have on the exercise of expertise of the independent judiciary in delivering sentences appropriate to the circumstances in each case.
- 9.35. Historically, it is recognised that mandatory sentences curtail judicial discretion, and minimum sentences have been used very sparingly in Northern Ireland. The risk that such sentences can lead to injustice, particularly in exceptional cases, has ruled out proposing a new offence with a minimum sentence.
- 9.36. As seen in the previous chapter, distinct offences of assaulting particular categories of victim already exist. In line with the options discussed in that chapter, an option may be to provide for a new offence of assault on older/vulnerable people, with higher maximum sentences than currently exist for the offence of common assault.
- 9.37. Such an approach could address concerns that sentencing for such assaults is too lenient, and underline the seriousness with which society regards this type of offending, as well as providing a mechanism for identifying and recording patterns of offending.
- 9.38. The creation of a new specific offence of assault on a vulnerable person (by virtue of their age or other factors) could be a single solution. Alternatively, this could be combined with the introduction of statutory aggravating factors for other assault offences, similar to the option considered in the previous chapter (which deals with attacks on public servants).

Consultation Questions:

Q.52 *Are current guideline judgments and sentencing guidelines sufficient for sentencing purposes as they stand as regards crimes against older/vulnerable victims (Option A)?*

- *Please provide reasons for your response.*

Q.53 *Should either of the following be a statutory aggravating factor (Option B):*

(i) the vulnerability of a person (by virtue of their age or other factors); or

(ii) motivation on the basis of the victim's perceived vulnerability (by virtue of their age or other factors)?

- *Please provide reasons for your response.*

Q.54 *Should a new offence of assault on a vulnerable person (by virtue of their age or other factors) be created (Option C)?*

- *Please provide reasons for your response.*

Chapter 10: Driving Offences Causing Death or Serious Injury

- 10.1. Sentencing for serious road traffic offences presents a challenge to the court. Unlike most serious criminal offences it is not necessary to prove criminal intent on the part of the defendant. Instead the defendant's culpability is mainly determined by their standard of driving and factors influencing it.
- 10.2. A sentence ordered by the court for serious driving offences will comprise a custody and a licence period. A mandatory period of disqualification from driving should also be included. This chapter considers whether:
- the maximum sentence 14 years in prison should be increased for the following offences:
 - causing death or serious injury by dangerous driving;
 - causing death or serious injury by careless driving whilst under the influence of alcohol or drugs; and
 - causing death or serious injury by careless driving and failing to provide a specimen of breath or urine;
 - the same maximum sentence should apply when death or serious injury is caused;
 - the maximum sentence should be increased from the current 2 years in prison for the offence of causing death or serious injury by driving whilst disqualified; and
 - the current mandatory minimum disqualification periods and their application remain appropriate.
- 10.3. The Review is covering dangerous driving in response to calls for the maximum sentence for causing death by dangerous driving²⁶³ to be increased.
- 10.4. Drivers may kill or seriously injure others through circumstances ranging from a minor error of judgment or loss of attention, to serious errors of judgment, to deliberately dangerous driving. Table 11 provides a summary of the current Northern Ireland offences and penalties included in this consultation.

²⁶³ Dangerous driving is to drive well below the standard of a careful or competent driver.

Table 11: Summary of Driving Offences and Penalties Being Considered By The Review

Offence of causing death or grievous bodily injury by	Current maximum penalty	Consequential sanctions available to the Court
Dangerous driving	14 years and unlimited fine	Obligatory disqualification – 2 years minimum and extended retest
Careless driving while under the influence of drink and drugs	14 years and unlimited fine	Obligatory disqualification – 2 years minimum and extended retest
Careless driving and refusing to provide a specimen of breath/urine/ blood without reasonable excuse	14 years and unlimited fine	Obligatory disqualification – 2 years minimum and extended retest
Driving while disqualified	2 years and unlimited fine	Obligatory disqualification of 1 year

Driving Offences Causing Death

- 10.5. Across the UK, the maximum sentence for causing death by dangerous driving²⁶⁴ or causing death by careless driving while (a) under the influence of alcohol or drugs or (b) failing to provide a specimen is 14 years.²⁶⁵
- 10.6. The maximum sentence is the same as that provided for offences like blackmail, certain serious sexual offences with a child and criminal damage intended to damage or destroy property.²⁶⁶
- 10.7. These offences can only be dealt with in the Crown Court²⁶⁷ and judges sentencing in Northern Ireland take account of the relevant guideline cases provided by the Northern Ireland Court of Appeal.

²⁶⁴ Road Traffic (Northern Ireland) Order 1995, Article 9; Road Traffic Offenders (NI) Order, Schedule 1: <http://www.legislation.gov.uk/nisi/1996/1320/schedule/1>; Road Traffic Act 1988, section 1

²⁶⁵ Road Traffic (Northern Ireland) Order 1995, Article 14; Road Traffic Offenders (NI) Order, Schedule 1: <http://www.legislation.gov.uk/nisi/1996/1320/schedule/1>; Road Traffic Act 1988, section 3A.

²⁶⁶ The review is not concerned with incidents of driving where the vehicle was intentionally used as a weapon to kill or commit grievous bodily harm as in those circumstances a charge of murder may be considered. Equally outside the review is driving off road where the killing was not intended as the statutory offences do not apply but manslaughter may be considered.

²⁶⁷ Adults who commit these offences are tried only in the Crown Court. Where the offender is a youth these offences can be tried in the Youth Court, which is a specific designated Magistrates' Court.

- 10.8. Guideline cases assist judges on the “*proper approach to the actual appeal before taking account of the factors and range of sentence appropriate to the appeal itself*”.²⁶⁸
- 10.9. The most recent guideline case for dangerous driving causing death²⁶⁹ was handed down in January 2017. The Northern Ireland Court of Appeal reaffirmed the guidance, provided in 2007²⁷⁰ detailing four levels of culpability and the range of custodial sentences applied by the Court of Appeal for England and Wales²⁷¹ continued to apply for Northern Ireland.²⁷² The four ‘tiers of culpability’ are set out in Table 12 alongside the relevant range of sentence of imprisonment.
- 10.10. While the magnitude of harm (i.e. the number of people killed or seriously injured) is relevant, the primary consideration must be the culpability²⁷³ of the offender, assessed by reference to the offender’s driving.

Table 12 – Northern Ireland Court of Appeal Guidance on Culpability and Sentencing

Tiers of Culpability	Period of Imprisonment
Cases with no aggravating circumstances ²⁷⁴	12 months - 2 years
Cases with intermediate culpability	2 - 4 1/2 years
Cases with higher culpability ²⁷⁵	4 1/2 - 7 years
Cases with most serious culpability ²⁷⁶	7 - 14 years

²⁶⁸ The Queen v Conrad T Doole [2010] NICA 11 paragraph 5; <https://www.judiciary-ni.gov.uk/sites/judiciary/files/decisions/R%20v%20Doole%20%28Conrad%20Trafford%29%20%282010%20NICA%2011%29.pdf>

²⁶⁹ DPP reference R v David Lee Stewart [2017] NICA 1.

²⁷⁰ R v McCartney [2007] NICA 41; In this case the Northern Ireland Court of Appeal referred to the revision of the range of sentencing undertaken by the EWCA in R v Richardson and others [2006] EWCA Crim 3186 at paragraph 19.

²⁷¹ R v Richardson and others [2006] EWCA Crim 3186.

²⁷² The approach was expressed in R v Cooksley [2003] EWCA Crim 996.

²⁷³ For sentencing purposes the seriousness of an offence is determined by two main parameters; the culpability of the offender and the harm caused or risked being caused by the offence. Culpability is the term used to reflect the mentality of the offender when committing the offence - in other words the extent to which the offender intended, was reckless, had knowledge of the risk of harm or was negligent to the harm caused by their involvement in a particular offence. The worse the harm intended, the greater the seriousness.

²⁷⁴ Cases across the United Kingdom have identified a number of aggravating and mitigating factors. The courts have stated they were ‘not to be regarded as an exhaustive statement of the factors’ and significance of factors can differ. In 2007, the offence of ‘taking and driving away’ was added to the list of aggravating factors by the Northern Ireland Court of Appeal, see R v McCartney [2007] NICA 41; R v Maloney [1996] 1 CAR (S) 221.

²⁷⁵ The cases of higher culpability are reflected by the presence of two or more aggravating factors.

²⁷⁶ The cases of the most serious culpability have three or more aggravating factors or an exceptionally bad example of a single factor.

10.11. Normally a custodial sentence will be imposed although it should be for no longer than necessary. Exceptional mitigating circumstances are required to avoid a custodial sentence. This is to deliver a clear message on the consequences for drivers who fail to maintain proper standards of driving and to deter other drivers from similar behaviour.

10.12. Statutory guidelines in England and Wales on these serious driving offences were issued in 2008.²⁷⁷ Table 13 reflects the current England and Wales sentencing guideline for causing death by dangerous driving. These closely align to the current guidelines operating in Northern Ireland.

Table 13 - Statutory Guidelines in England and Wales for Dangerous Driving

Nature of Offence	Starting point (custody)	Sentencing range (custody)
Level 1 The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others	8 years	7–14 years
Level 2 ²⁷⁸ Driving that created a substantial risk of danger	5 years	4–7 years
Level 3 Driving that created a significant risk of danger [Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving]	3 years	2–5 years

10.13. Following a consultation in 2017 on driving offences causing death or serious injury and related sentences in England and Wales²⁷⁹ more changes in sentencing there are expected.

10.14. The Government has signalled its intention to bring forward legislation for these serious driving offences in England and Wales, once parliamentary time

²⁷⁷https://www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf

²⁷⁸ There is a different table provided for the 2 indictable only careless driving causing death offences with the most serious levels reflecting greater levels of drink or drugs above the legal minimum and increased deficit in driving displayed. The lowest starting range runs from 26 weeks to 4 years with the highest level matching the dangerous driving range of 7 to 14 years.

²⁷⁹ Ministry of Justice, Cmnd 9381, 'Driving offences and penalties relating to causing death or serious injury'; December 2016; <https://www.gov.uk/government/consultations/driving-offences-and-penalties-relating-to-causing-death-or-serious-injury>

allows, to increase the current 14 year maximum sentence to imprisonment for life.²⁸⁰

Facts and Figures

- 10.15. In Northern Ireland between 2013 and 2018 18 defendants were found guilty of the offence of causing death by dangerous driving. All were given immediate custodial sentences. The average sentence²⁸¹ was 61 months with sentences ranging from 54 months in custody with a further 54 months on licence to 5 months custody with further 10 months on licence. There was a 7.3% decrease in the average sentence length in 2018 as compared with cases disposed in 2013.
- 10.16. An additional three offenders were convicted of causing death by driving carelessly while unfit through alcohol or drugs and a further 3 were convicted of driving carelessly and failing to provide a specimen. All 6 received an immediate custodial sentences. The average sentence for the offence causing death by driving carelessly while unfit through alcohol or drugs was 4 years (custody and licence). Sentences ranged from 18 months custody with a further 18 months on licence to 30 months in custody with a further 30 months on licence.
- 10.17. The range of sentences was lower for the driving carelessly and failing to provide a specimen offence with sentences ranging from 6 months custody and 6 months licence to 9 months custody and 9 months on licence.
- 10.18. Overall the average sentences imposed for these offences are not dissimilar to statistics published for equivalent offences in the England and Wales consultation.²⁸²

Options

10.19. The following options for Northern Ireland were considered by the Review.

Option A: Increase sentence maximum to life imprisonment

10.20. Increasing the maximum sentence to life imprisonment for the three serious driving offences resulting in death or grievous bodily injury, would mirror the

²⁸⁰ Road Traffic Act 1998, section 3A also includes offences of causing death while driving careless and being required to provide a specimen and without reasonable excuse for failing to do so.

²⁸¹ Sentence is used to reflect the totality of the custody and licence period ordered by the court to be served by the offender.

²⁸² Ministry of Justice, Cmnd 9381, 'Driving offences and penalties relating to causing death or serious injury'; December 2016; <https://www.gov.uk/government/consultations/driving-offences-and-penalties-relating-to-causing-death-or-serious-injury>

maximum sentence available currently for offences such as manslaughter, rape, shooting or wounding with intent to commit grievous bodily harm.

- 10.21. Drivers can already face a charge of manslaughter where there is something to set the case apart²⁸³ from cases where a specific offence such as causing death by dangerous driving could be proved. It is well established that simply driving dangerously does not amount to an unlawful act for the purpose of unlawful act manslaughter.²⁸⁴
- 10.22. The statutory offence simply requires evidence that the driving was dangerous and that driving caused the death of another person. It could appear inconsistent to place the maximum sentence for these driving offences at the same level as manslaughter.
- 10.23. The courts in fatal driving cases often record that the distress and impact on the deceased's family is a matter that the courts can and should take into account. Equally courts repeatedly stress that human life cannot be restored, nor its loss be measured by the length of a prison sentence.
- 10.24. The introduction of a discretionary life sentence as a potential maximum sentence introduces an additional sentencing process known as determining the tariff. As discussed in chapter 4, a tariff is the minimum custodial period the defendant will serve before being eligible for consideration for release from a life sentence.²⁸⁵
- 10.25. A current Northern Ireland Court of Appeal guideline case requires that a discretionary life sentence should only be imposed where the offence is "*an extremely grave offence and secondly it is likely that there will be further offending of a grave character*".²⁸⁶
- 10.26. Increasing a maximum sentence to life does not guarantee an increase in the custody or licence element of a sentence.
- 10.27. The main aim of a sentence will continue, as present, to reflect the level of blame or culpability of the driver, determined by an independent judge in light of the circumstances of the individual case.

²⁸³ This will normally be evidence to show a very high risk of death, making the case one of the utmost gravity.

²⁸⁴ *Andrews v DPP* [1937] A.C. 576.

²⁸⁵ Life sentenced prisoners who are released are subject to licence conditions. Licence conditions can remain in place for the rest of their lives unless the Parole Board agrees to vary the conditions. They remain in place for a minimum period before the Parole Board can be asked to consider removal by an offender. Licence conditions can be added, varied or cancelled when the Parole Board considers that change is appropriate to manage and reduce the risk of reoffending. Reoffending leaves an offender at risk to recall to prison.

²⁸⁶ *R v Alan McDonald* [2016] NICA 21, para 33.

Option B: Increase maximum to a higher fixed number of years

- 10.28. The legislative changes made in 2004, when the maximum penalty was last increased for these offences from 10 to 14 years, resulted in the pre-existing ranges of sentence being revised by relevant Courts of Appeal.²⁸⁷
- 10.29. Table 12 reflects the upward adjustments made by the Northern Ireland Court of Appeal to each of the four tiers of culpability.
- 10.30. In option A, a discretionary life sentence would involve a further hearing for the sentencing judge to determine the appropriate tariff. In contrast, Option B, by increasing the maximum penalty to a higher fixed number of years, provides immediate transparency and certainty regarding the expected sentence.
- 10.31. The Review considered the question of the appropriate level for an increased fixed term in years. Most serious offences either carry a maximum of Life or fourteen years imprisonment. There is one category of offence which carries a maximum of 30 years. It concerns war crimes and related offences other than the offence of murder.²⁸⁸
- 10.32. Maximum penalties are generally required to reflect those covering other offences of similar seriousness on the statute books. This is to ensure a consistency of penalty. When considering what might be an appropriate comparison in seriousness, the Review looked at the starting points for murder and adopting the approach of increasing the current maximum by a similar percentage to the 2004 changes,²⁸⁹ which results in a maximum sentence of around twenty years.
- 10.33. The Northern Ireland statistics provided for serious driving offences indicate that the courts appear to impose a lesser sentence for the third category – causing death driving carelessly and failing to provide a specimen. The Review seeks your view on whether the current equivalence should be maintained.

Consultation Questions:

Q.55 Does the existing maximum sentence of 14 years for each of our 3 offences provide the court with sufficient powers to reflect the most serious culpability of that offending behaviour?

- ***Please provide reasons for your response.***

²⁸⁷ R v R McCartney [2007] NICA 41; R v Richardson and others [2006] EWCA 3186.

²⁸⁸ International Criminal Court Act 2001; s.51 or s.52 which concern the offence of genocide, crimes against humanity, war crimes and related offences other than one involving murder; 30 years

²⁸⁹ The maximum sentence was increased by 40% when it increased from 10 years to 14 years.

Q.56 *If no to Q.55, should the variation be for:*

- (i) an increased fixed period of 20 years; or*
- (ii) a maximum sentence equivalent to that for the offence of manslaughter and other serious violent offences, namely a discretionary life sentence?*

- Please indicate the preferred option and provide reasons for your response.*

Q.57 *Should a distinction in maximum sentence be made between any of the 3 offences:*

- (i) causing death by dangerous driving;*
- (ii) causing death by careless driving while under the influence of drink or drugs; or*
- (iii) causing death by careless driving and failing to provide a specimen?*

- Please identify where any distinction should be made and provide reasons for your response.*

Driving Offences Causing Grievous Bodily Injury (GBI)

10.34. The maximum penalty provided in Northern Ireland legislation is the same (14 years) whether the unlawful driving causes death or grievous bodily injury.²⁹⁰ In contrast the maximum penalty in Scotland, England and Wales for the offence of causing serious injury by dangerous driving²⁹¹ is 5 years' imprisonment. In Ireland the maximum penalty is 10 years,²⁹² the same as that for causing death by dangerous driving.

10.35. Grievous bodily injury is not defined in our legislation but serious injury is defined for England and Wales. It means physical injury amounting to

²⁹⁰ Grievous bodily injury is not defined in the relevant Northern Ireland road traffic legislation but in practice must amount to 'really serious harm' caused to the victim.

²⁹¹ Road Traffic Act 1988, section 1A: <http://www.legislation.gov.uk/ukpga/1988/52/section/1A>

²⁹² Dangerous driving causing death or serious bodily harm contrary to section 53 of the Road Traffic Act 1961, as amended by section 4 of the Road Traffic (No. 2) Act 2011 carries a maximum of 10 years imprisonment or a fine not exceeding € 20,000 or both.

grievous bodily harm. In Scotland it is defined as severe physical injury.²⁹³ There is little real difference in practice as the injury caused to a victim must amount to 'really serious harm'.

10.36. The Northern Ireland offence of causing grievous bodily injury by careless driving while under the influence of drink or drugs or failing to provide a specimen has no equivalent in Scotland, England and Wales or Ireland.

10.37. Following a 2017 consultation, a proposal to introduce an offence of causing serious injury by careless driving for England and Wales arose. It would carry a possible maximum sentence of 3 years. A new offence will only be created when the Government drafts the necessary legislation and finds parliamentary time to enact it.

Facts and Figures

10.38. Northern Ireland statistics for 2013 to 2018 indicate that there are considerably more convictions for causing serious injury by dangerous driving or careless driving while (a) under the influence of alcohol or drugs or (b) failing to provide a specimen than for the offences causing death.²⁹⁴

10.39. Of the 94 cases in which there was a conviction for any of these grievous bodily injury offences, a suspended sentence was imposed in 34 (36.2%) cases. The suspended sentences imposed ranged from 6 months suspended for 2 years to 30 months suspended for 2 years.

10.40. The average sentence²⁹⁵ imposed for all grievous bodily injury offences was 41 months. The range of sentences ran from 8 months with no licence period to 7 years custody with a further licence period of 5 years.

10.41. There were fewer than 5 cases where an immediate custodial sentence was handed down for the careless driving offence causing grievous bodily injury and failing to provide a specimen. However, over the period suspended sentences were the most common disposal for this offence.²⁹⁶

²⁹³ Ministry of Justice, Cmnd 9381, 'Driving offences and penalties relating to causing death or serious injury'; December 2016; page 9, <https://www.gov.uk/government/consultations/driving-offences-and-penalties-relating-to-causing-death-or-serious-injury>

²⁹⁴ Between the years 2013 to 2017 there were 74 convictions in total (61 GBI by dangerous, 7 by GBI careless with excess alcohol, 1 GBI careless while unfit drugs and 5 GBI careless and failing to permit a specimen).

²⁹⁵ Sentence is used to reflect the totality of the custody and licence period ordered by the court to be served by the offender.

²⁹⁶ All sentences imposed ranged from 9 months to 2 years custody/licence suspended for periods ranging from 2 to 3 years

Analysis

- 10.42. The current maximum sentence available in Northern Ireland for causing grievous bodily injury by dangerous driving exceeds the maximum available in the rest of the United Kingdom.
- 10.43. Northern Ireland's current maximum of 14 years exceed by 9 years the equivalent GB maximum for dangerous driving causing serious injury²⁹⁷ and exceeds by 4 years the maximum for that offence in Ireland. Northern Ireland is the only region in the British Isles with the offence of causing serious injury by careless driving while under the influence of alcohol or drugs.
- 10.44. The Northern Ireland Court of Appeal does not consider a distinction should be drawn between those cases in which grievous bodily injury is sustained and those cases in which death is caused.²⁹⁸ The offence is aimed at really bad driving and the Northern Ireland Court of Appeal considers culpability of that driving can rarely be judged simply by regarding the fact that serious injury rather than death is the consequence.²⁹⁹
- 10.45. The courts are clear that the penalty ought not to be substantially reduced because the consequence was injury and not death.³⁰⁰
- 10.46. At pre-consultation stakeholder engagement events the view was expressed that the maximum penalty for causing grievous bodily injury from dangerous driving should not be increased. It was considered any increase could be disproportionate to the harm or level of culpability in contrast to offenders who deliberately cause serious injury to persons through planned or deliberate assaults.
- 10.47. Another view expressed was that dangerous driving or driving under the influence of alcohol or drugs is a decision made by a person either before they enter the vehicle or while already driving.
- 10.48. The earlier sentencing change in 2004 was described as a measured response to public outrage as well as recognising that such offences include *“serious acts of recklessness—so serious that those involved must have known that their actions, just before or during the offence, were likely to kill. Those people need to be dealt with most severely...especially for those*

²⁹⁷ GB currently carries a maximum sentence of 5 years for offence of dangerous driving causing serious injury.

²⁹⁸ R v James John Stewart Caswell [2011] NICA 71, paragraph 13.

²⁹⁹ R v Sloan [1998] NI 58.

³⁰⁰ Attorney General's Reference (No's 2, 6, 7 and 8 of 2003) [2003] NICA 28

people who kill under the influence of drink or drugs, or who drive at ludicrous speeds".³⁰¹

Consultation Questions:

Q.58 *If the maximum sentence for causing death by dangerous driving is increased, should parity be maintained by similarly increasing the sentence for causing grievous bodily injury by dangerous driving?*

- *Please provide reasons for your response.*

Q.59 *If the maximum sentence for causing death by careless driving while (i) under the influence of drink or drugs or (ii) failing to provide a specimen is increased, should the sentence for the equivalent careless driving offences which cause grievous bodily injury also be increased?*

- *Please provide reasons for your response.*

Causing Death When Driving While Disqualified

10.49. The current Northern Ireland maximum sentence for the offence of causing death or grievous bodily injury by driving when disqualified is 2 years. This is the same maximum penalty as for the offence of driving while disqualified, and applies whether the offence is tried in the Crown Court or the Magistrates' Court.³⁰²

10.50. In GB, since changes made in 2015,³⁰³ the maximum sentence for causing death when driving while disqualified is 10 years,³⁰⁴ while the maximum for causing serious injury is 4 years.³⁰⁵ There is no equivalent offence for disqualified drivers in Ireland.

³⁰¹ Hansard House of Commons, 23/May/2003; <https://hansard.parliament.uk/Commons/2003-05-20/debates/441fffa9-7447-4451-a584-abe20a3bae15/DeterminationOfMinimumTermInRelationToMandatoryLifeSentence>

³⁰² Road Traffic (NI) Order 1995, Article 12B: <http://www.legislation.gov.uk/nisi/1995/2994/contents>; Road Traffic Offenders (NI) Order 1996, Schedule 1 details summary and indictable maximum penalties: <http://www.legislation.gov.uk/nisi/1996/1320/schedule/1>

³⁰³ The maximum sentence for causing death driving while disqualified was increased from 2 years to 10 years (Criminal Justice and Courts Act 2015, section 29); the same section 29 also created a maximum sentence for causing serious injury driving while disqualified of 4 years when tried in the Crown Court and 12 months when tried in the Magistrates Court.

³⁰⁴ Road Traffic Offenders Act 1988, section 3ZC increased the 2 year maximum sentence to 10 years.

³⁰⁵ Road Traffic Offenders Act 1988, section 3ZD introduced a 4 year maximum where the offence was tried in the Crown Court; the maximum is 12 months when tried in the Magistrates' Court.

Facts and Figures

10.51. During the period 2013 to 2018 there were 16 cases with a conviction for at least one offence of causing death or grievous bodily injury by an uninsured, disqualified or unlicensed driver. Fewer than 5 of these cases included a conviction for the offence of causing death or grievous bodily injury by driving while disqualified.

10.52. At least one of those convictions accompanied a more serious charge, causing grievous bodily injury by driving dangerously. While a disqualification from driving for a period of 10 years was imposed on this defendant it has been excluded as it may have been influenced by the more serious related charge.

10.53. The average sentence imposed was 37 months, ranging from a custodial period of 4 months with no licence period, to 36 months custody with a further licence period of 36 months. The average driving disqualification imposed was 48 months.

Analysis

10.54. The low numbers may be due to a United Kingdom Supreme Court decision³⁰⁶ which provided a narrower interpretation of the circumstances in which a charge for this offence would be appropriate.³⁰⁷

10.55. The Supreme Court stated that the wording of this offence essentially required at least some act or omission in the control of the car, which involves some element of fault, and which contributes in a more than minimal way to the death although not necessarily the principal cause of the death.

10.56. When introducing the increased maximum penalty of 10 years in GB, it was acknowledged that the wording of the offence would remain subject to that interpretation of the offence.³⁰⁸ The case was made that:

- treating disqualified drivers differently from other illegal drivers is justified as they have been banned from driving following previous misdemeanours and are blatantly defying the will of the court by continuing to drive;³⁰⁹
- longer prison sentences could mean that British roads are safer because fewer disqualified drivers are driving on them; and

³⁰⁶ R v Hughes UKSC [2013] 56.

³⁰⁷ Roadpeace 'Sentencing Guide for Bereaved Families' June 2017 page 14.

³⁰⁸ R v Hughes UKSC [2013] 56.

³⁰⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/322186/fact-sheet-driving-while-disqualified.pdf

- increasing the maximum penalty for this offence might provide families of victims with a greater sense that justice has been done and increase public confidence in the justice system.³¹⁰

10.57. Most recent convictions for this offence in Northern Ireland, were accompanied by more serious driving offences such as causing grievous bodily injury or causing death while driving dangerously.

10.58. The Supreme Court decision requires the defendant's driving to have some link to the collision, even if less than what would be required in an inconsiderate driving/due care case.

10.59. At the same time the principle of totality³¹¹ of a sentence will apply when the court is sentencing for this offence with other offences. The impact of increasing the current sentencing maximum may be diminished when the totality principle is applied, so the main focus for this consultation concerns the maximum sentence available when the only offence before a court is causing death by driving while disqualified.

10.60. The sentencing court will be required to determine a just and proportionate sentence, reflecting the culpability of the defendant's driving (which doesn't meet the threshold of careless driving) as well as a clear breach of a court imposed order (disqualification).

Consultation Questions:

Q.60 Is an increase to the maximum sentence of 2 years warranted for causing death or grievous bodily injury when driving while disqualified?

- ***Please provide reasons for your response.***

Q.61 If yes to Q.60, should the increased maximum sentence for causing death when driving while disqualified be:

- (i) 4 years;***
- (ii) 10 years;***

³¹⁰ Ministry of Justice Impact Assessment IA No: MoJ020/2014 ;

<https://www.parliament.uk/documents/impact-assessments/IA14-11C.pdf>

³¹¹ The principle of totality in practice means that all courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. In discharging this task the sentencing court must consider first whether the totality principle requires concurrent sentences to be longer than a single sentence for a single offence. Equally it is not a task to be completed for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

(iii) other?

- Please provide reasons for your response.

Q.62 If yes to Q.60, should the increased maximum sentence for causing grievous bodily injury when driving while disqualified be:

(i) 4 years;

(ii) 10 years;

(iii) other?

- Please provide reasons for your response.

Obligatory Disqualifications

10.61. In Northern Ireland a court sentencing a person convicted of the offences carrying the 14 year maximum will be obliged to disqualify the offender for a minimum period of at least 2 years. The obligatory disqualification period of 2 years is increased to a minimum of 3 years where a second or further conviction for that or a similar offence occurs within a 10 year period.

10.62. There is judicial discretion on whether to apply the obligatory minimum disqualification³¹² where there are exceptional circumstances. The offender will also be required to sit an extended retest for the return of their licence. The law on disqualification in Northern Ireland is exactly the same as in the rest of the United Kingdom.³¹³

10.63. During pre-consultation stakeholder engagement events the case was made to the Review for longer minimum periods of disqualification for those offenders convicted of the 14 year maximum offences, especially repeat offenders.

10.64. England and Wales recently sought public views on whether a longer minimum period of disqualification should be imposed where persons caused death while driving unlawfully. No specific increased minimum periods were proposed. A majority³¹⁴ supported longer minimum periods of disqualification but without agreement on the increased length.

³¹² Where the court does not impose the obligatory disqualification it is obliged to endorse between 3 to 11 penalty points on the driver's licence.

³¹³ Obligatory period of at least 2 years under Road Traffic Offenders Act 1988 section 34(4), unless the offender is a repeat offender within a 10 year period: then the obligatory disqualification period increases to at least 3 years under s 34 (3): <http://www.legislation.gov.uk/ukpga/1988/53/section/34>

³¹⁴ 84% of the responses received supported increase in minimum periods of disqualification.

10.65. The government announced that it would not change the current disqualification periods until evidence on the effectiveness of disqualification and retesting requirements was obtained.³¹⁵

10.66. In Ireland the minimum period of disqualification for driving dangerously causing death or serious injury is 4 years for a first offence. Disqualification increases to 6 years for a second or subsequent offence.³¹⁶ Disqualification is mandatory but the courts have the same power as in the United Kingdom to dis-apply the mandatory disqualification if the court is satisfied of a 'special reason'.

Facts and Figures

10.67. Statistics for 2013 to 2018 show the Northern Ireland average disqualification period for the 18 convictions for causing death by dangerous driving was 98 months. Disqualifications ranged from 3 years to 15 years.

10.68. The average disqualification period for the three convictions for the offence of causing death while driving carelessly and under the influence of alcohol or drugs was 60 months. Disqualifications ranged from 5 to 6 years.

10.69. The range of disqualification for the three causing death by driving careless and failing to provide a specimen convictions imposed ranged from 2 to 5 years. Overall, for the 24 convictions on these offences the average driving disqualification imposed was 87.5 months.

10.70. In the same period, the average disqualification period for causing GBI by driving dangerously, or driving carelessly under (a) the influence of alcohol or drugs or (b) failing to provide a specimen was 40 months. Disqualification periods ranged from 6 months to life.

Analysis

10.71. The law sets out minimum periods of disqualification. As can be seen from the figures above the courts can, and do, impose longer periods. The Northern Ireland Court of Appeal stated that the purpose of disqualification is, so far as is possible, to protect the public and that involves an evaluation of the future risk posed by the offender.

³¹⁵ Ministry of Justice, Cmnd 9518, 'Response to the consultation on driving offences and penalties relating to causing death or serious injury'; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/651882/consultation-response-on-driving-offences-print.pdf

³¹⁶ Road Traffic Act 1961, section 26 (4) as amended.

- 10.72. The sentencing judge assesses this in the circumstances of each case, whether or not the disqualification represents an appropriate punishment for the offence.³¹⁷
- 10.73. Legislation exists for a court when imposing a custodial term, to extend the driving disqualification to take account of the period spent in custody.³¹⁸ This power is designed to ensure a driving ban does not end, or the length diminish significantly, whilst the offender is in custody. This has not been commenced in law.
- 10.74. In both United Kingdom and Ireland, unless disqualification is for a period of 2 years or less, applications for early restoration of a driving licence can be made when at least half of the disqualified period is completed.³¹⁹ Applications for early restoration are often linked with offenders having offers of employment, which can benefit their rehabilitation. The Review would be reluctant to place unnecessary barriers to the rehabilitation of offenders. However, the risks posed to members of society, particularly by offenders who repeatedly drive dangerously or under the influence of alcohol or drugs, must be addressed.
- 10.75. Ireland places some restrictions on the court's powers to reduce the disqualification period initially imposed. No application can be made if there has been a disqualification within the previous 10 years,³²⁰ and the earlier disqualification was for more than 2 years. A disqualification cannot be reduced below 2/3rds of the period ordered³²¹ or 2 years whichever is the greater.

Consultation Questions:

Q.63 Do the current minimum periods of disqualification (2 years or 3 years for a repeat offender) remain appropriate for the causing death or serious injury driving offences which carry a maximum of 14 years imprisonment?

- **Please provide reasons for your response.**

³¹⁷ R v Patricia McKeown [2016] NICA 24; paragraph 29
<https://judiciaryni.uk/sites/judiciary/files/decisions/R%20v%20McKeown%20%28Patricia%29%20%282016%20NICA%2024%29.pdf>

³¹⁸ Coroners and Justice Act 2009, section 137 and Schedule 16: (not yet commenced),
<http://www.legislation.gov.uk/ukpga/2009/25/contents>

³¹⁹ Road Traffic Offenders (Northern Ireland) Order 1996, Article 47 (3):
<http://www.legislation.gov.uk/nisi/1996/1320/article/47> ; Road Traffic Offenders Act 1988, section 42.

³²⁰ Road Traffic Act 1961, s.29 (1) as amended.

³²¹ Road Traffic Act 1961, s.29 (4) (b) as amended.

Q.64 *If no to Q.63, should the minimum period of disqualification of 2 years be increased to:*

(i) 3 years;

(ii) 4 years;

(iii) other?

- Please indicate preferred increase, and provide reasons for your response.*

Q.65 *Should the current mandatory minimum disqualification for repeat offenders in a 10 year period be doubled from 3 years to 6 years minimum?*

- Please provide reasons for your response.*

Q.66 *Should the power of the courts to reduce the disqualification period be limited, as in Ireland, so that it is not reduced below 2/3rds of the period or the mandatory minimum for the offence whichever is the greater?*

- Please provide reasons for your response.*

Q.67 *Should a repeat offender for these 14 year maximum offences, or the offence of driving while disqualified, be prohibited from applying to remove any disqualification until the minimum period required to be imposed on a first time offender for that offence has expired?*

- Please provide reasons for your response.*

Q.68 *Should any driving disqualification take account of the custodial component of a sentence?*

- Please provide reasons for your response.*

Summary of Consultation Questions

We would encourage you to respond to the consultation using the on-line facility on citizen space, accessible via: <https://consultations.nidirect.gov.uk/doj-corporate-secretariat/sentencing-review-northern-ireland>.

Chapter 1: Principles and Purposes of Sentencing

Q.1 Do the proposed principles provide the appropriate standards for sentencing?

Yes		No		No View	
Please provide reasons for your response.					

Q.2 Are there other principles that should be included?

Yes		No		No View	
Please identify and provide reasons for your response.					

Q.3 Are the proposed purposes of sentencing appropriate?

Yes		No		No View	
Please provide reasons for your response.					

Q.4 Are there any other purposes which should be included?

Yes		No		No View	
Please identify and provide reasons for your response.					

Q.5 Should a definition of the principles and purposes of sentencing be created in legislation?

Yes		No		No View	
Please provide reasons for your response					

Chapter 2: Public Perceptions of Sentencing

Q.6 Are there other methods of communicating with the public, not identified in this chapter, that would help to improve knowledge and perceptions of sentencing matters?

Yes		No		No View	
Please identify and provide reasons for your response.					

Q.7 Can any steps be taken to improve the provision of a victim personal statement to the court and its use?

Yes		No		No View	
Please identify and provide reasons for your response.					

Q.8 Can any steps be taken to improve the awareness or use of community impact statements?

Yes		No		No View	
Please identify and provide reasons for your response.					

Chapter 3: Sentencing Guidance

Q.9 Should the power and remit of the Northern Ireland Court of Appeal to issue a guideline judgment be established in legislation?

Yes		No		No View	
Please provide reasons for your response.					

Q.10 If yes to Q.9, should legislation require the Northern Ireland Court of Appeal to consider relevant information on sentencing before issuing a guideline judgment?

Yes		No		No View	
Please provide reasons for your response.					

Q.11 Should a statutory duty be placed on relevant sentencing judges requiring them to:

have regard to sentencing guidelines	
follow sentencing guidelines	
No View	
Please indicate preferred option and provide reasons for your response.	

Q.12 Should sentencing judges have power to depart from sentencing guidelines:

in the interests of justice	
having provided reasons for that departure	
No View	
Please indicate preferred option and provide reasons for your response	

Q.13 Is there sufficient transparency in sentencing within Northern Ireland?

Yes		No		No View	
Please provide reasons for your response.					

Q.14 Should a sentencing guidance mechanism be established that builds on the current arrangements, namely, guideline judgments and the work of the Sentencing Group?

Yes		No		No View	
Please provide reasons for your response.					

Q. 15 If yes to Q.14, should the mechanism be created in legislation?

Yes		No		No View	
Please provide reasons for your response					

Q. 16 If yes to Q.15, should the legislative purposes include the promotion of consistency of approach and public confidence in sentencing?

Yes		No		No View	
Please provide reasons for your response.					

Q.17 Should any mechanism established in Northern Ireland for providing sentencing guidance carry out the following ancillary functions:

Analysis and research on sentencing			
research on the impact of any guidelines or guidance judgments issued			
Outreach to the community to improve understanding of the sentencing process			
Other		No View	
Please indicate options that you agree with and comment as appropriate.			

Q.18 Should Northern Ireland criminal justice agencies, such as the Public Prosecution Service, Police or Probation Board be included in or excluded from a sentencing guidance mechanism for Northern Ireland?

Yes		No		No View	
Please provide details of which bodies should be included or excluded and reasons for your response.					

Q.19 Should prospective non-judicial members of a sentencing guidance mechanism compete for selection based on their expertise, knowledge and skills relevant to sentencing and criminal justice?

Yes		No		No View	
Please provide reasons for your response.					

Chapter 4: Tariff Setting for Murder

Q.20 Do the starting points currently operated in Northern Ireland adequately reflect your concerns and the culpability of the offender?

Yes		No		No View	
Please provide reasons for your response.					

Q.21 Should starting points be recorded in statute or continue to rely on case guidance from the Northern Ireland Court of Appeal?

Yes		No		No View	
Please provide reasons for your response					

Q.22 Should legislation introduce different starting points for Northern Ireland than currently apply?

Yes		No		No View	
Please provide reasons for your response.					

Q.23 If yes to Q.22, should the lowest starting point be:

12 years		15 years		16 years		No View	
Please provide reasons for your response.							

Q.24 Should legislation introduce a range of statutory starting points for categories of victims or murders?

Yes		No		No View	
Please provide reasons for your response.					

Q.25 Should any legislation to introduce a specific statutory starting point for certain murders occurring in Northern Ireland include:

Multiple Murders				Murder of public servants like police and prison officers who are exposed to risk by nature of their employment				Child murders			
20 years	25 years	30 years	No View	20 years	25 years	30 years	No View	20 years	25 years	30 years	No View
Please indicate the preferred starting point for any category selected: 20, 25 or 30 years, and provide reasons for your response.											

Q.26 Are there any other categories of victims not listed at Q.25 which should be included?

Yes		No		No View	
<p>Please specify the category or categories of victim and indicate preferred starting point: 20, 25 or 30 years and provide reasons for your response.</p>					

Q.27 Should any category of victim listed at Q.25 be excluded?

Yes		No		No View	
<p>Please indicate the category or categories of victim and provide reasons for your response.</p>					

Q.28 Should existing whole life tariff provisions be:

Retained	
Replaced with a tariff period of 30 years	
Replaced with a tariff period greater than 30 years	
No View	
Please provide reasons for your response.	

Chapter 5: Unduly Lenient Sentences

Q.29 Should the Director of Public Prosecutions have the power to refer:

All sentences imposed in the Crown Court (including those imposed where the defendant elected for jury trial - Option B)	
All sentences imposed in the Crown Court and sentences for offences with a maximum penalty of 12 months' imprisonment or more when tried in a Magistrates' Court (Option C)	
No View	
Please select your preferred option and provide reasons for your response.	

Q.30 We would welcome your views on the provision of information and advice, at court, about unduly lenient sentencing, to better inform victims and their families on whether or not to pursue an unduly lenient sentence referral.

Please provide any views and reasons for your response.

Chapter 6: Community Sentencing

Q.31 Should greater use of community sentences be made by the courts as an alternative to short prison sentences?

Yes		No		No View	
Please provide reasons for your response.					

Q.32 Should all community orders include a restorative or reparative element?

Yes		No		No View	
Please provide reasons for your response.					

Q.33 Should the public be made aware of the benefits achieved through unpaid work and reparative activities as a result of community sentences?

Yes		No		No View	
Please provide reasons for your response.					

Q.34 Is there value in non-justice agencies becoming involved in the delivery of programmes for use in community sanctions?

Yes		No		No View	
Please provide reasons for your response.					

Q.35 Should the enhanced community order be implemented as an alternative to short prison sentences of up to 12 months?

Yes		No		No View	
Please provide reasons for your response.					

Q.36 Would additional judicial involvement during community sentences benefit such orders and promote greater likelihood of change by the offender?

Yes		No		No View	
Please provide reasons for your response.					

Q.37 Should a conditional discharge sentence have the option to include community sanctions, administered by the Probation Board for Northern Ireland and/or a restorative justice element?

Yes		No		No View	
Please provide reasons for your response.					

Q.38 Would a 'structured deferred sentence' be a useful new sentencing option?

Yes		No		No View	
Please provide reasons for your response.					

Q.39 Would a 'supervised suspended sentence' be a useful new sentencing option?

Yes		No		No View	
Please provide reasons for your response.					

Q.40 Would a diversionary type community intervention be appropriate for minor first time offences for adults?

Yes		No		No View	
Please provide reasons for your response.					

Chapter 7: Hate Crime

Q.41 When a hate crime has been identified during the prosecution process, should prosecutors be under a duty to flag this to the court?

Yes		No		No View	
Please provide reasons for your response.					

Q.42 When dealing with a hate crime, should the courts be required to record the fact that aggravation due to hostility has been considered in the sentencing decision?

Yes		No		No View	
Please provide reasons for your response.					

Q.43 When dealing with a hate crime, should the courts be required to explain how the fact that the offence is aggravated due to hostility has affected the sentence?

Yes		No		No View	
Please provide reasons for your response.					

Q.44 Should any other changes be made to ensure appropriate sentencing for hate crimes?

Yes		No		No View	
Please provide details and reasons for your response.					

Chapter 8: Attacks on Frontline Public Services

Q.45 Is the current range of offences and penalties combined with sentencing guidelines adequate to deal with assaults on those providing frontline public services in Northern Ireland (Option A)?

Yes		No		No View	
Please provide reasons for your response.					

Q.46 Should the maximum penalty on summary conviction for attacks on specified public workers be increased to 12 months' imprisonment (Option B)?

Yes		No		No View	
Please provide reasons for your response.					

Q.47 If yes to Q.46, should any increased sentence for specified public workers be extended to include those involved in the provision of front-line healthcare in hospitals, prison officers, social workers and others providing direct care in the community (Option C)?

Yes		No		No View	
Please indicate any occupation an increased sentence should apply and provide reasons for your response.					

Q.48 In other assault offences, should the fact that the victim was a specified category of public servant be made a statutory aggravating factor (Option D)?

Yes		No		No View	
Please provide reasons for your response.					

Q.49 If yes to Q.48, should there be an obligation to state publicly that aggravation occurred; and record both that fact and the impact the fact had on the sentence imposed?

Yes		No		No View	
Please provide reasons for your response.					

Chapter 9: Crimes against Older and Vulnerable People

Q.50 Reflecting our stakeholders' views, should any new legislation deal with 'vulnerable' people, whether by age or other personal circumstances, as opposed to simply 'older' people?

Yes		No		No View	
Please provide reasons for your response.					

Q.51 If yes to Q.50, should a definition like the one found in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 be used?

Yes		No		No View	
Please provide reasons for your response.					

Q.52 Are current guideline judgments and sentencing guidelines sufficient for sentencing purposes as they stand as regards crimes against older/vulnerable victims (Option A)?

Yes		No		No View	
Please provide reasons for your response.					

Q.53 Should either of the following be a statutory aggravating factor (Option B):

The vulnerability of a person (by virtue of their age or other factors)			Motivation on the basis of the victim's perceived vulnerability (by virtue of their age or other factors)?		
Yes	No	No View	Yes	No	No View
If yes, please tell us which and provide reasons for your response.					

Q.54 Should a new offence of assault on a vulnerable person (by virtue of their age or other factors) be created (Option C)?

Yes		No		No View	
Please provide reasons for your response.					

Chapter 10: Driving Offences Causing Death or Serious Injury

Q.55 Does the existing maximum sentence of 14 years for each of our 3 offences provide the court with sufficient powers to reflect the most serious culpability of that offending behaviour?

Yes		No		No View	
Please provide reasons for your response.					

Q.56 If no to Q.55, should the variation be for:

An increased fixed period of 20 years			A maximum sentence equivalent to that for the offence of manslaughter and other serious violent offences, namely a discretionary life sentence?		
Yes	No	No View	Yes	No	No View
Please indicate the preferred option and provide reasons for your response					

Q.57 Should a distinction in maximum sentence be made between any of the 3 offences:

Causing death by dangerous driving			Causing death by careless driving while under the influence of drink or drugs			Causing death by careless driving and failing to provide a specimen		
Yes	No	No View	Yes	No	No View	Yes	No	No View
Please identify where any distinction should be made and provide reasons for your response.								

Q.58 If the maximum sentence for causing death by dangerous driving is increased, should parity be maintained by similarly increasing the sentence for causing grievous bodily injury by dangerous driving?

Yes		No		No View	
Please provide reasons for your response.					

Q.59 If the maximum sentence for causing death by careless driving while (i) under the influence of drink or drugs or (ii) failing to provide a specimen is increased, should the sentence for the equivalent careless driving offences which cause grievous bodily injury also be increased?

Yes		No		No View	
Please provide reasons for your response.					

Q.60 Is an increase to the maximum sentence of 2 years warranted for causing death or grievous bodily injury when driving while disqualified?

Yes		No		No View	
Please provide reasons for your response.					

Q.61 If yes to Q.60, should the increased maximum sentence for causing death when driving while disqualified be:

4 years		10 years		Other		No View	
Please provide reasons for your response.							

Q.62 If yes to Q.60, should the increased maximum sentence for causing grievous bodily injury when driving while disqualified be:

4 years		10 years		Other		No View	
Please provide reasons for your response.							

Q.63 Do the current minimum periods of disqualification (2 years or 3 years for a repeat offender) remain appropriate for the causing death or serious injury driving offences which carry a maximum of 14 years imprisonment?

Yes		No		No View	
Please provide reasons for your response.					

Q.64 If no to Q.63, should the minimum period of disqualification of 2 years be increased to:

3 years		4 years		Other		No View	
Please indicate preferred increase and provide reasons for your response.							

Q.65 Should the current mandatory minimum disqualification for repeat offenders in a 10 year period be doubled from 3 years to 6 years minimum?

Yes		No		No View	
Please provide reasons for your response.					

Q.66 Should the power of the courts to reduce the disqualification period be limited, as in Ireland, so that it is not reduced below 2/3rds of the period or the mandatory minimum for the offence whichever is the greater?

Yes		No		No View	
Please provide reasons for your response.					

Q.67 Should a repeat offender for these 14 year maximum offences, or the offence of driving while disqualified, be prohibited from applying to remove any disqualification until the minimum period required to be imposed on a first time offender for that offence has expired?

Yes		No		No View	
Please provide reasons for your response.					

Q.68 Should any driving disqualification take account of the custodial component of a sentence?

Yes		No		No View	
Please provide reasons for your response.					

Sentencing Policy Review: Terms of Reference

Introduction

The justice system has clearly defined roles in dealing with the investigation and prosecution of crime and also in the sentencing of those convicted of offences. It is the role of Government to determine the legislative framework for sentencing and to ensure that there is a sufficient range of sentencing disposals available to enable the judiciary, which is wholly independent of Government, to pass the most appropriate sentence in individual cases.

It is the responsibility of government to keep the sentencing framework under review. This is a transparent process, encompassing the legislation establishing offences and penalties, subject to public consultation and scrutinised and debated by elected representatives in the Legislative Assembly.

Determining the appropriate sentence in individual cases, within that legislative framework, is the responsibility of the independent judiciary, taking into account all relevant considerations, including: the nature of the offence; the history of the offender; any aggravating or mitigating factors; considerations of public protection; and the impact of the crime on the victim.

The courts deal with a large volume of criminal cases each year. In 2014, cases involving 27,898 adult defendants were disposed of in the Magistrates' Courts; 2,045 in the Crown Court. Very few of these cases are considered newsworthy or come to the attention of the public. Media coverage understandably focuses on high profile, or particularly emotive cases, and it is against this background that perceptions of sentencing, and public confidence in it, are formed.

Background to the Review

Over the past few years some issues have been a focus of media and public concern, with a consequent negative impact on confidence in sentencing. These issues include:

Unduly Lenient Sentences

A number of cases have featured prominently in the media where there are concerns, both at community level and in the political arena, at the perceived leniency of the sentences handed down by the courts. There is a process by which sentences for serious crimes which are considered unduly lenient by the Director of Public Prosecutions (DPP) can be referred to the Court of Appeal for review. However, in the cases which featured in the media, the sentences could not be referred for reconsideration – only specified offences are referable and these particular cases involved offences which were not listed. This had a subsequent

negative impact on public confidence in sentencing which led to calls for the extension of the unduly lenient appeal provisions to include a wider range of offences.

In response, in February 2015 the Department issued a consultation on the Law on Unduly Lenient Sentences.³²² Interim proposals from that consultation recommended that a number of specific offences of particular and immediate concern should be added to the list of referable offences. These have been legislated for in the Justice Act (Northern Ireland) 2016. However, there is also a view that we need to consider, within the broader remit of sentencing policy, whether more fundamental change to the unduly lenient regime is appropriate or necessary to further enhance confidence in sentencing.

Particular Categories of Crime

Crimes against older and vulnerable people

In June 2015, the previous Assembly debated draft legislation to introduce minimum sentences for crimes against those aged 65 and over. The proposal was introduced against a long-standing perception that the sentences being handed down in the courts are not a sufficient punishment for those convicted of such crimes, nor a sufficient deterrent to those who might commit such crime in the future.

Causing death by dangerous driving

The appropriateness of the maximum penalty available for this offence has been raised as an issue of concern following recent cases.

Hate Crime

Sentencing for hate crime was raised as an issue of concern during the consultation on the Law on Unduly Lenient Sentences.

Offences against those providing a public service

There is a prevalent view that the level of sentencing for attacks against those providing a frontline public service, particularly in hospitals, does not reflect the gravity of the offence nor act as a sufficient deterrent.

Life Sentence Tariffs

Following the sentencing in 2012 of two people convicted of the murder of Constable Stephen Carroll, political and wider public concerns reflected a view that the tariffs handed down in that case were inadequate. In response to these concerns a commitment was made to review the law on the determination of tariffs where the mandatory life sentence for murder has been imposed. This commitment was made

³²² <http://www.dojni.gov.uk/index/public-consultations/archive-consultations/the-law-on-unduly-lenient-sentences-a-consultation-paper-february-2015.pdf>

subject to the outcome of the Court of Appeal's review of the tariffs imposed in that case. In its judgment, the Court of Appeal upheld the sentencing guidance used by the courts in the determination of tariffs. The Court also increased the tariff imposed on one of the accused while leaving the tariff in the case of the other unchanged.

Community Sentences

In the previous mandate, the then Justice Committee issued a report titled 'Justice in the 21st Century', which considered innovative approaches for the Criminal Justice System in Northern Ireland. It concluded that the underlying problems and root causes of offending behaviour must be tackled if reoffending rates are to be addressed.

In the context of the draft Programme for Government, the review will consider the effectiveness of community disposals in meeting the complex needs of offenders and providing for reduced reoffending.

Sentencing Policy Review

The fundamental issue in all these cases is that the sentences imposed should be appropriate, fair, consistent and effective and that the sentencing process should be transparent and understood. A lack of information about sentencing practice means that views are often formed without any real knowledge of the factors or processes involved.

In the lead up to the devolution of responsibility for justice, the Hillsborough Agreement (February 2010) recognised the importance of public confidence in sentencing by the inclusion of a commitment to consider the establishment of a Sentencing Guidelines Council for Northern Ireland. To meet this commitment, in October 2010 the Department issued a consultation paper which considered options for a sentencing guidelines mechanism and concluded that an effective mechanism should:

- promote public confidence in sentencing;
- provide greater transparency in the sentencing practice;
- enhance community engagement in sentencing issues; and
- promote consistency in sentencing for similar offences committed in similar circumstances.

Decisions on the way forward were influenced by two main factors: a separate judicial initiative, unique to Northern Ireland; and concerns, reflected in the consultation responses, about whether establishing a new sentencing guidelines mechanism would represent good value for money.

A separate judicial development saw the Lord Chief Justice (LCJ) initiate a Programme of Action on Sentencing, which contained a number of measures to ensure consistent and fair sentences. These included: the establishment of a judicial Sentencing Group to oversee the development of sentencing guidelines for the Magistrates' Courts and the Crown Court; and public consultation on offences for which guidelines should be developed.

In 2012, it was announced that the LCJ's initiative would form the basis of a sentencing guidelines mechanism for Northern Ireland, with the addition of enhanced community engagement to include lay members on the Sentencing Group. There was also a commitment to review the mechanism within two years. The current Review will meet this commitment and will provide an opportunity to carry out a comprehensive and strategic review of sentencing policy.

Purpose of the Review

The purpose of the Review is to:

- consider the extent to which current sentencing arrangements meet the objectives of an effective sentencing guidelines mechanism;
- consider the appropriateness and effectiveness of the current legislative framework governing:
 - the referral of sentences for review on the grounds of undue leniency;
 - sentencing for particular categories of crime including: crimes against older and vulnerable people; offences causing death, including by dangerous driving; offences against those providing frontline public service; and hate crime.
 - the determination of tariffs following the imposition of a life sentence for murder;
- consider possible alternative approaches to securing public confidence in sentencing; and
- where appropriate, make recommendations for reform.

Where the review suggests that changes to the current sentencing arrangements are appropriate, the proposals will be subject to public consultation.

Sentence Review Core Reference Group

Chair:	Brian Grzymek	Deputy Director, (Criminal Justice Policy and Legislation Division)
Members:	Louise Cooper	Deputy Director, DoJ (Reducing Offending Directorate)
	Geraldine Hanna	Chief Executive Officer, Victim Support Northern Ireland
	Prof. John Jackson	University of Nottingham
	Olwen Lyner	Chief Executive Officer, Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)
	Dr. Geraldine O'Hare	Acting Director of Rehabilitation, Probation Board Northern Ireland
	David Smith Q.C.	Retired County Court Judge
	Prof. Cyrus Tata	University of Strathclyde

Stakeholders Pre Consultation Engagement *

Academics	NI Retail Consortium
Action on Elder Abuse NI	NIACRO
Age Sector Platform	NICRE
CJINI	NIVCA
Commission for Victims and Survivors	NIPS
Commissioner for Older people	PBNI
Core Reference Group	PCSP members
Cornerstone Off Road Motorcycle Academy	Police Federation
CVSNI	Prison Healthcare
Dept. of Infrastructure	PSNI
Dept. of Justice	PSNI Road Safety
Extern	Public Prosecution Service
Families of Victims	Restorative Justice Forum
Law Society of Northern Ireland	Service Users
MENCAP	Support after Murder and Manslaughter NI (SAMM)
MLA	Ulster Farmers Union
NI Courts and Tribunals Service	Victim Support NI
NI Human Rights Commission	Young Solicitors Association

*Stakeholder Engagement comprised a mix of workshops and individual meetings

Offences Against the Person Act 1861 – Summary of Assault Offences

The Offences Against the Person Act 1861 makes provision in Northern Ireland for, *inter alia*, the following general assault offences:

- Assault or battery (common assault) (section 42) – summary offence with a sentence of up to 6 months imprisonment and/or level 3 fine (£1000);
- Common assault (section 47) – indictable offence with a sentence of up to two years imprisonment and/or an unlimited fine;
- Assault occasioning actual bodily harm (section 47) – indictable offence with a maximum penalty of 7 years and/or an unlimited fine*;
- Wounding or causing grievous bodily harm (section 20) – indictable offence with a maximum penalty of 7 years and/or an unlimited fine*;
- Wounding or causing grievous bodily harm (GBH) with intent to cause GBH or to resist apprehension (section 18) – indictable offence with a maximum penalty of life imprisonment and/or an unlimited fine.

*The indictable offences under sections 47 and 20 may also be tried summarily, with the consent of the prosecutor and defendant (Articles 45 and 46 Magistrates' Courts (NI) Order 1981). The maximum penalty then is 12 months and/or a fine not exceeding the statutory maximum (£5,000).

s.42 (Common Assault) (maximum 6 months)		
Nature of Offence	Starting Point	Sentencing Range
Assault where no injury is caused or where injury is minor and non-permanent (e.g. bruising)	Community Order* +Compensation Order	Fine to Community Order** +Compensation Order
Assault resulting in more serious injury but not amounting to actual bodily harm	2 months Custody* + Compensation Order	Community Order to 6 months Custody + Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	4 month Custody* +Compensation Order	Community Order to 6 month Custody + Compensation Order

s.47 Assault Occasioning Actual Bodily Harm (Summary maximum 12 months)		
Nature of Offence	Starting Point	Sentencing Range
Assault resulting in relatively minor injury but amounting to actual bodily harm	3 months Custody* + Compensation Order	Community Order to 6 months Custody** + Compensation Order
Assault resulting in relatively serious injury OR Assault involving the use of a weapon	4 months Custody* + Compensation Order	Community Order to 9 months Custody** +Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	6 months Custody* + Compensation Order	Community Order to 12 months Custody + Compensation Order

s.20 Inflicting Grievous Bodily Harm (Summary maximum 12 months)		
Nature of Offence	Starting Point	Sentencing Range
Non-premeditated brief assault	4 months Custody* + Compensation Order	Community Order to 8 months Custody** +Compensation Order
Premeditated assault OR Sustained assault OR Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	8 months Custody* + Compensation Order	4 - 12 months Custody + Compensation Order

Police (NI) Order 1998, s.66(2) (Summary maximum 6 months)		
Nature of Offence	Starting Point	Sentencing Range
Assault where no injury is caused or where injury is minor and non-permanent (e.g. bruising)	Community Order + Compensation Order	Fine to Community Order +Compensation Order
Assault resulting in more serious injury but not amounting to actual bodily harm	2 months Custody +Compensation Order	Community Order to 6 months Custody + Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	4 month Custody + Compensation Order	Community Order to 6 month Custody + Compensation Order

General Assault Offences				
	Northern Ireland	England and Wales	Scotland	Ireland
Common assault and battery	6 months/ 2 years	6 months	Life (common law)	6 months
Assault occasioning actual bodily harm	7 years	7 years	Life (serious assault) (common law)	12 months/5 years
Assault with intent	n/a	n/a	n/a	5 years
Wounding or causing grievous bodily harm	7 years	7 years	Life (serious assault) (common law)	Life
Wounding or causing grievous bodily harm with intent	life	life	Life (serious assault) (common law)	Life

Overview of Occupation-specific Assault Offences

Occupation Specific Assault Offences				
	Northern Ireland	England and Wales	Scotland	Ireland
Assault on immigration officers	6 months	6 months		
Assault on HRMC	6 months	51 weeks		N/A
Assault on traffic officers		51 weeks		
Assault on officer of the county court		3 months		
Assault on prison and secure training centre custody officers		6 months		
Assaulting or impeding a constable in the execution of his duties	6 months/2 years	6 months	12 months	
Assaulting or impeding a fire and rescue officer in the execution of his duties	6 months/2 years			
Assaulting an ambulance worker	6 months/2 years			
Assault on emergency workers. Includes		6*/12 months/statutory aggravating factor Inc: police, NCA officers, prison officers, custody officers, fire service personnel, search and rescue services and providers of NHS health services, or services in support of same (including ambulance staff).	12 months Inc: constables, fire-fighters, ambulance workers, registered medical practitioners, registered nurses and registered midwives); prison officers, members of HM Coastguard, and crew members of vessels operated by the Royal National Lifeboat Institution or other water rescue services; social workers and mental healthcare workers); a person who is assisting someone	12 months/7 years Inc: a person providing medical services at or in a hospital; a person assisting such a person; Garda Siochana; Prison Officers; Defence Forces; Ambulance personnel; and Fire brigade personnel. Inc. Doctors, dentists, psychiatrists, nurses, midwives, pharmacists, health and social care professionals or other

			<p>acting in one of the capacities set out in sections 1 or 2 Registered medical practitioner, nurse, midwife or ambulance worker while in a hospital or on land adjacent to a hospital.</p>	<p>persons in the provision of treatment and care for persons at or in a hospital, or Persons acting under direction of those persons</p>
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*6 months until s.154 of the Criminal Justice Act 2003 commences

Adult Sentencing Options in Northern Ireland

DEFERRAL, DISCHARGES AND BINDING OVER		
1.	Absolute Discharge	The offender is released unconditionally as a penalty is not seen as appropriate.
2.	Conditional Discharge	No penalty is imposed on condition that no other offence is committed within a specified period, which can be up to 3 years. If there is a further offence the offender may be sentenced for the original offence.
3.	Binding Over	A recognisance, usually termed 'binding over' is an undertaking whereby a person agrees, for example, to be of good behaviour. In the event of a breach of that undertaking the offender must pay a sum to the Court. Sureties (guarantors) may also be sought who will likewise enter into a bond for a certain sum, for the performance of obligations by the offender.
4.	Deferred Sentencing	Sentencing can be deferred for up to 6 months to allow improvement in behaviour or restitution to be made, after which the sentence is passed.
FINANCIAL PENALTIES		
5.	Fine	Fines are unlimited in value in the Crown Court, or subject to a maximum (set in legislation) in the Magistrates' Courts. They can be imposed alone or alongside other sentences. The court must enquire into the financial circumstances of the offender. Time is normally allowed to pay and there can be imprisonment in the default of payment.
6.	Offender Levy	<p>An offender levy is a sum of money that offenders have to pay when they are given certain sentences at court, or when offered particular fixed penalties by the police, as an alternative to prosecution.</p> <p>The money collected is distributed into a dedicated Victims of Crime Fund that is used to provide services for victims and witnesses of crime.</p>

7.	Costs	Offenders can be ordered to pay the prosecution costs of their case.
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COMMUNITY SENTENCES

8.	Probation Order	<p>This involves a restriction of the offender’s liberty and requires his/her consent. The order will last for between 6 months and 3 years, and may include additional requirements to help address offending behaviour, such as:</p> <ul style="list-style-type: none"> ▪ attending an alcohol or drug rehabilitation programme; ▪ attending a Day Centre; and/or ▪ receiving any other medical treatment or counselling.
9.	Community Service Order	<p>Consists of unpaid work in the community. The offender must consent to the order being made and must be deemed suitable by the Probation Board. An Order can be for between 40 hours and 240 hours and must be completed within a year.</p>
10.	Combination Order	<p>Is a combination of community service and probation supervision. The community service part of the Order can last between 40 hours and 100 hours and the supervisory part between 12 months and 3 years.</p>

CUSTODIAL (PRISON) SENTENCES

11.	Suspended sentence of imprisonment	<p>A sentence of imprisonment for 2 years or less may be suspended for a specified period meaning the offender is not imprisoned, unless he/she commits another imprisonable offence (during the period of suspension).</p>
12.	Determinate Custodial Sentence of less than 12 months	<p>Is used where legislation provides for a sentence of less than 12 months, or the court considers a custodial sentence of less than 12 months to be appropriate. Prison Rules provide for the offender to be released on remission of up to one half of the sentence for good conduct. This is the only type of sentence that attracts remission.</p>

13.	Determinate Custodial Sentence of 12 months or more	<p>These sentences include a custodial period and a further period to be spent on licence, as specified by the court to protect the public and prevent further offending. The licence term may include curfew requirements or electronic monitoring. The custody element of the sentence cannot be greater than half of the overall sentence.</p> <p>During the licence period an offender is liable to recall to custody if they breach their licence conditions. If recalled, an offender may have to serve the rest of their sentence in custody.</p>
14.	Extended Custodial Sentence (ECS)	<p>Is a public protection sentence which can be imposed when an offender has committed certain violent or sexual offences (listed in the Criminal Justice (NI) Order 2008). The court must be of the opinion that the offender is likely to commit further similar offences in the future.</p> <p>The sentence comprises the appropriate custodial term (at least 12 months) and an additional period of release under licence conditions (the extension period). The court will set a fixed period of custody proportionate for the offence and will then add the extension period to this. The total sentence cannot exceed the maximum sentence permitted in law for the offence. The offender may be considered for release after serving at least 50% of the custodial period and may be released to serve the remainder of the sentence supervised on licence in the community provided any risk to the public does not require continued detention.</p>
15.	Indeterminate Custodial Sentence (ICS)	<p>An ICS is a public protection sentence for specified serious sexual or violent offences where the court believes that the offender is likely to commit similar offences in the future.</p> <p>No release date is given for an ICS. Offenders serving an ICS will be given a ‘tariff’ date which is the earliest date that they may become eligible for consideration for release by the Parole Commissioners for Northern Ireland. The tariff is a minimum of 2 years.</p> <p>An ICS can be imposed where the offence carries a maximum penalty of Life imprisonment but the court does not consider the risk of further similar offences requires a life sentence to be imposed to protect the public.</p> <p>The court must consider whether an ECS is appropriate. , If the court deems that an ECS would not be adequate for the purposes</p>

		<p>of protecting the public, it can impose an ICS for that offence.</p> <p>An ICS prisoner will remain in custody until they have demonstrated to the satisfaction of the Parole Commissioners that they can be released safely into the community.</p>
16.	Life Sentence	<p>These are mandatory for murder and discretionary for a number of other offences like manslaughter and rape where they are the maximum sentence available. A minimum period of imprisonment (the 'tariff') is set by the court after which release on licence is with the approval of the Life Sentence Review Commissioners who consider the issue of risk. Prisoners released are on licence and subject to recall to prison for life.</p>
ANCILLARY ORDERS		
17.	Electronic Monitoring	<p>Offenders are fitted with an electronic monitoring device (tag) that continuously monitors that the individual remains at an approved address during a curfew period.</p>
18.	Anti-Social Behavior Order (ASBO)	<p>Used to order anyone aged 10 or over from harassing or causing alarm or distress to other people who are not part of their household. If they breach the terms of the order they can be fined, receive a community sentence, or may even face up to five years in prison.</p>
19.	Forfeiture Order	<p>Used to deprive offenders of their rights in any property used in the commission of any offence.</p>
20.	Financial Reporting Order	<p>Made in conjunction with sentences for fraud or criminal lifestyle offences where there is a risk of similar offending. Requires the offender to make periodic reports of their finances.</p>
21.	Confiscation Order	<p>Requires the proceeds of crime to be confiscated from the offender.</p>
22.	Compensation Order	<p>Requires the offender to pay compensation for any personal injury, loss or damage resulting from a particular offence.</p>
23.	Restitution Order	<p>Requires the offender to restore stolen goods to their owner or to pay a sum that is equal to the value of the goods.</p>
24.	General Prevention	<p>Used where a corporation is convicted of corporate manslaughter. To require the improvement of safety and/or to publicise its</p>

	Order	breach.
25.	Serious Crime Prevention Order (SCPO)	Used to protect the public by preventing, disrupting or restricting the involvement of the offender in serious crime in NI. The SCPO may contain prohibitions, restrictions or requirements and terms, such as place of residence, travel, financial etc. and lasts for a specified period up to 5 years.
DEPORTATION		
26.	Deportation Order	May be used for non-UK/British citizens who are over the age of 17 and convicted of an imprisonable offence.
27.	Automatic Deportation	Is used for non-UK/British citizens who are over the age of 17 and convicted of specified serious offences or sentenced to at least 12 months imprisonment for any offence.
SEX OFFENDERS		
28.	Sexual Offences Prevention Orders	Used for offenders who are convicted of specified sex and violent crimes to protect the public or particular members of the public from serious sexual harm. These orders prohibit the offender from doing anything described in the order for a fixed period of time (not less than 5 years) or until further order.
29.	Foreign Travel Orders	Used when police believe it necessary to prevent an offender convicted of certain sex offences from travelling abroad. The order may last for a fixed period and is intended to protect children generally or any child from serious sexual harm by the offender
30.	Risk of Sexual Harm Orders (RSHO)	Used to protect children in Northern Ireland from certain sex offenders. The Order prohibits the offender from doing anything described in the order for a specified period (not less than 2 years) or until further order.
31.	Disqualification from working with children	Used for offenders convicted of specified serious offences against children. The order disqualifies the offender from working with children.
32.	Special Provisions for Sex Offenders	Supervision while released on licence – used for sex offenders who have been released on licence with conditions attached. The court may require the offender to be supervised from the date of

		release until the date the full sentence would have ended.
MENTALLY III/DISORDERED OFFENDERS		
33.	Hospital Order	<p>Commits an offender for admission to hospital, if the court is satisfied on the evidence of two medical practitioners that the offender is suffering from a defined mental illness or severe mental impairment which warrants detention in a hospital for medical treatment.</p> <p>A hospital order with restriction order may also be made for a person charged with an offence before the Crown Court who is found unfit to plead the charge or not guilty by reason of insanity.</p>
ROAD TRAFFIC OFFENCES		
34.	Disqualification and Suspension of Licences	Used where a motor vehicle was used in the commission of specified serious offences.
35.	Penalty Points or Disqualification	Used where a person is convicted of certain motoring offences.
36.	Extended Driving Test	Can be ordered before a disqualified driver can be entitled to drive again. Often used where the person was convicted of dangerous driving offences or other offences involving mandatory disqualification.
TERRORIST OFFENCES		
37.	Notification and Foreign Travel Restriction Orders	Used for offenders convicted of specified terrorist offences. The offender is automatically subject to a requirement to notify the police of their address details and may the court may also impose a foreign travel restriction order.