

Section 132 report
(Coroners and Justice Act 2009):
Resource Impact of the Government's
proposals on Suspended Sentence Orders

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Summary

At the request of the Lord Chancellor, and under s.132 of the Coroners and Justice Act 2009, the Sentencing Council has considered the resource effects of proposed changes to Suspended Sentence Orders (SSOs) contained in the Legal Aid, Sentencing and Punishment of Offenders Bill.

This work has involved analysis of existing sentencing data, as well as qualitative interviews with Crown Court judges who currently use SSOs and will be affected by any changes introduced.

Using the findings from discussions with judges and analysis of data on current sentencing practice, two possible scenarios have been tested in relation to the resource effects of the new proposals on the prison and probation services¹.

- Scenario one: a move away from the use of immediate custodial sentences for one to two year sentences towards SSOs – this would result in savings to the Prison Service, but increased costs to the Probation Service.
- Scenario two: an increase in the length of the custodial term attached to some SSOs – this would result in increased resource pressure on the Prison Service for any SSOs breached, but an ambiguous impact on Probation Service resources.

These two scenarios represent two possible extremes in terms of the possible resource effects of the Government's proposals. They were chosen to establish the range values into which the resource effects of the proposals are likely to fall. **The true outcome is expected to be somewhere in between the extremes.**

The size of any resource effects depends on several important unknowns such as the scale of behavioural change that may occur if the proposals are implemented. Very strong assumptions therefore have had to be made, some of which were based on limited evidence.

Scenario one - the lower bound scenario - assumes that six per cent of the approximately 13,000 offenders who receive a one to two year immediate custodial sentence each year, receive SSOs instead. In this scenario it is estimated that the resource effects would be a reduction in resources required to the Prison Service of around £14 million per year and an increase in resources required by the Probation Service of around £3m a year.

Scenario two – the upper bound scenario – assumes that there would be an increase in the length of some SSOs. It is assumed that this would affect around 2,000 sentences, and that on average these orders would be lengthened by three months. In this scenario it is estimated that there would be an increase in resources required for the Prison Service of around £0.5 million a year due to longer orders being breached, and a negligible impact on the Probation Service since little change is envisaged in the community requirements attached to orders.

¹ Since the proposals relate to adult offenders only, the youth justice services are not considered.

Introduction

The Ministry of Justice's Legal Aid, Sentencing and Punishment of Offenders Bill proposes a number of changes to the Suspended Sentence Order (SSO):

- to expand the use of suspended sentence orders for custodial sentences of up to two years;
- to make community requirements discretionary; and
- to introduce the option of imposing a fine for breach.

This report is a response to the Lord Chancellor's request, under s.132 of the Coroners and Justice Act, for the Sentencing Council to prepare a report which considers the resource effects of these changes on the prison, probation and youth justice services. Since the proposals relate to adult offenders only, the youth justice services are not discussed.

It is organised as follows: first, a history and summary of the current law is presented, which outlines the current legislative provisions for the use of SSOs. Second, research and analysis that has been conducted to better understand the Government's proposals is described. The findings are then evaluated in terms of their resource implications, and the resource effects which have the potential to be most important are summarised. Finally, modelling work is then presented to provide quantitative estimates of the possible resource effects of the Government's proposals.

The annexes contain the detailed findings of the research and analysis. In addition to information about the possible resource effects of the Government's proposals, these annexes also contain information about judges' attitudes to SSOs and how they are used in practice, and a summary of some of the statistics which are available on the use of SSOs.

History and summary of the current law

A suspended sentence is a sentence of imprisonment which is not immediately served. If the offender complies with the conditions of the sentence, they will avoid custody. However, if the offender breaches the conditions of the sentence, the prison sentence may be activated.

Suspended sentences have existed as a sentencing option for judges since 1967. They were a popular sentencing option following their introduction. After undergoing a number of changes, by 2003 they were rarely used, partly because s.118(4)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A) directed that they should be used in 'exceptional circumstances' only.

The current legislative framework for suspended sentences is set out in the 2003 Criminal Justice Act, which became operational in 2005. This act overhauled provisions for suspended sentences. It requires the court to impose community requirements together with the suspended custodial sentence, where previously this was not possible². It limits the sentences eligible for suspension to custodial sentences of up to a year where previously sentences of up to two years in length were eligible³. Finally, it removes the provision that sentences should be suspended in 'exceptional circumstances' only. Suspended sentences imposed under the Act are known as Suspended Sentence Orders (SSOs).

These changes were intended to increase the number of custodial sentences which were suspended, causing downward pressure on the prison population. Annex B (page 24) presents data on how the use of suspended sentences changed when the provisions in the 2003 act became operational on 4 April 2005.

Current law and guidance

The main legislative requirements which apply under the 2003 act (as amended) are as follows:

- SSOs should only be used in cases in which the 'custody threshold' has been passed – that is, cases which are of such high severity that only a custodial sentence is appropriate.
- The court may suspend a custodial sentence which, following any reduction in sentence for a guilty plea, is between 14 days and one year in length inclusive. The 'length' of an SSO refers to the length of the custodial term which has been suspended.
- The court must impose at least one community requirement as part of the SSO.
- The 'operational period' of the suspended sentence (the period during which the suspended sentence could be activated if a breach occurs) can be up to two years.
- If an offender breaches, the custodial period should be activated, except in 'exceptional circumstances'. If the custodial period is not activated, the order must be augmented to make it more onerous.

² In some circumstances, Suspended Sentence Supervision Orders had been available previously.

³ The original wording of the Act specified that sentences of 28 -51 weeks inclusive would be eligible for suspension. This wording was revised in by the Criminal Justice Act 2003 (Sentencing) (Transitional Provisions) Order 2005 to enable sentences of between 14 days and one year inclusive to be suspended.

In 2007, the Court of Appeal ruling *R v Phipps*, offered additional guidance about what to do in cases in which a one to two year custodial sentence was warranted, but where there was good reason for the offender to be diverted away from immediate custody. This ruling suggests that the court may consider the use of a Community Order in such cases, which would be used on the understanding that if the order was breached, a lengthy custodial term may result.

Research and Analysis

To better understand the impact of the proposed changes to SSOs, the Council has conducted interviews with Crown Court judges across four circuit areas⁴.

The research had two main aims: first, to understand how SSOs are used in practice under the current regime; and second to understand the possible resource effects of the Government's proposals. Analysis of sentencing data has also been conducted to support the research.

Crown Court judges were chosen because the proposal considered most likely to have a resource effect is the extension of SSOs to sentences of one to two years, and these sentences are outside of magistrates' sentencing powers.

The findings from the research and analysis are discussed in detail in Annexes A and B. The remainder of this report uses these findings to discuss the possible resource effects of the Government's proposals on the prison and probation services.

Resource effects: key findings and scenario analysis

Definition of resource impact

The resource effects of the Government's proposals depend on the changes they cause in sentencing practice. The overall resource effect can be defined as the difference between the total resource cost of the sentences that are passed following implementation, and the total resource cost of the sentences which would have been passed in the absence of implementation.

Resource effects of proposal to extend the maximum custodial sentence which can be suspended to two years

The Government proposes to extend the maximum custodial sentence length eligible for suspension to two years, from the current maximum of one year.

This proposal will primarily affect sentencing in cases which are serious enough to warrant custodial sentences of over one year and up to two years, but where it is in the interests of justice that the offender is not sent to prison immediately. To determine the resource impact, it is therefore important to assess the size of this group.

⁴ The areas included were London, the North West, Midlands and South West

SSOs are used frequently in cases in the nought to one year custodial sentencing range. Analysis in Annex B (see figure 1) shows that, in the Crown Court, around 55 per cent of custodial sentences of nought to one year in length are suspended⁵. This suggests there may also be a significant number of cases in the one to two year sentencing range where judges wish to divert the offender away from immediate custody. Further analysis (Annex B, page 27) suggests that within the one to two year sentencing range, the mix of offence types, and the demographic characteristics of the offenders do not point to any diminished likelihood of these sentences being suspended⁶.

On the other hand, cases in the one to two year sentencing bracket will be more serious, which may affect the likelihood with which SSOs are used. In the Council's research, judges gave mixed messages about the relationship between offence severity, and whether a suspended sentence may be appropriate. Some felt that cases in the one to two year sentencing range would be of such high severity that suspension would rarely be appropriate (see Annex A, page 21). Others felt that the decision to suspend was primarily determined by the characteristics of the offender rather than the severity of the offence (see Annex A, pages 17 and 18).

Overall, it seems likely that sentences are relatively less likely to be suspended in the one to two year sentencing range than in the nought to one year range.

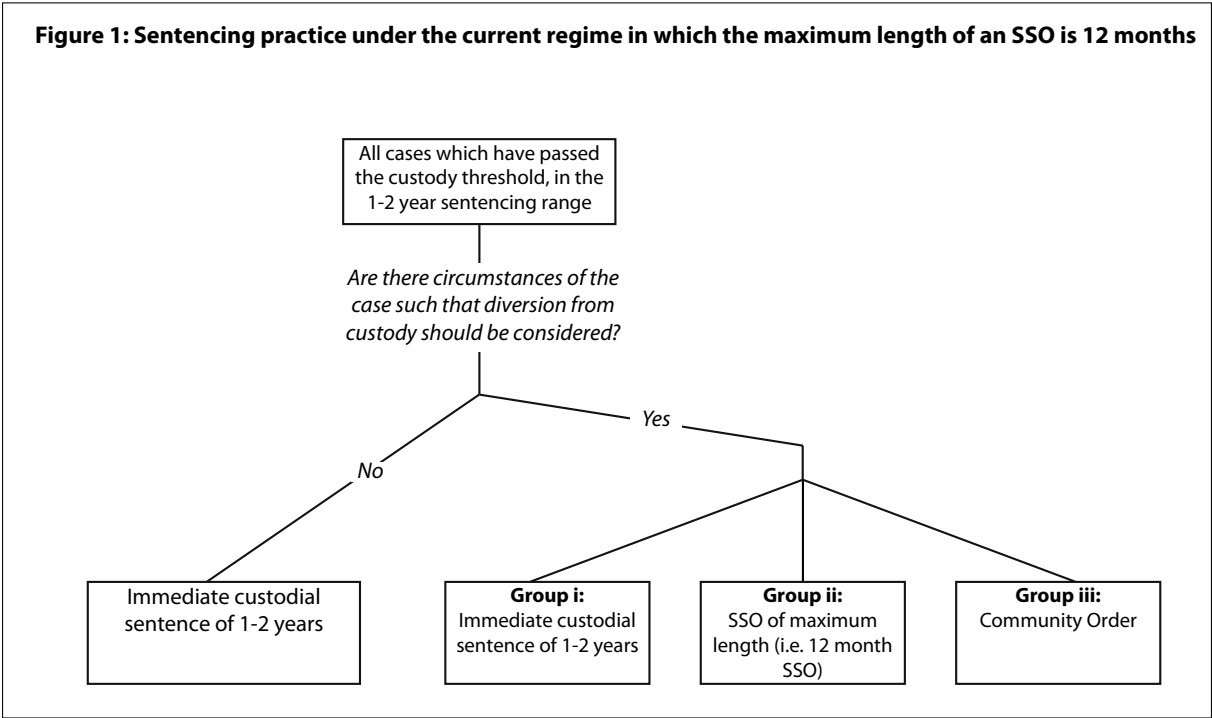
The resource effects of a switch towards the use of SSOs depend on the number of offenders affected, but also the 'counterfactual sentences' – that is, what the sentences are switching *from*. A useful way of thinking about this is to ask the question: "What do sentencers currently do when they encounter an offender who has committed an offence warranting a custodial sentence of one to two years, but where they believe it would be in the interests of justice to suspend the sentence?"

In such cases, judges are currently constrained by a one year maximum limit on the length of an SSO, so cannot impose an SSO of one to two years in length.

⁵ However, attention should be paid to the caveats noted on page 28.

⁶ This analysis could not account for differences in offence *severity* between the two groups, only the 'offence classification' – the specific offence type committed (e.g. Actual Bodily Harm).

Figure 1: Sentencing practice under the current regime in which the maximum length of an SSO is 12 months



The Council’s research points to three main outcomes in these cases (see Annex A, page 22), which are shown as groups i, ii and iii in the above diagram, and are described in more detail below.

Group i:
An immediate custodial sentence is imposed because under the current legislative provisions, the judge does not feel they have the option to divert away from custody.

Group ii:
A Suspended Sentence Order of maximum length is used – that is, the intended sentence has been shortened to a year to enable it to be suspended.

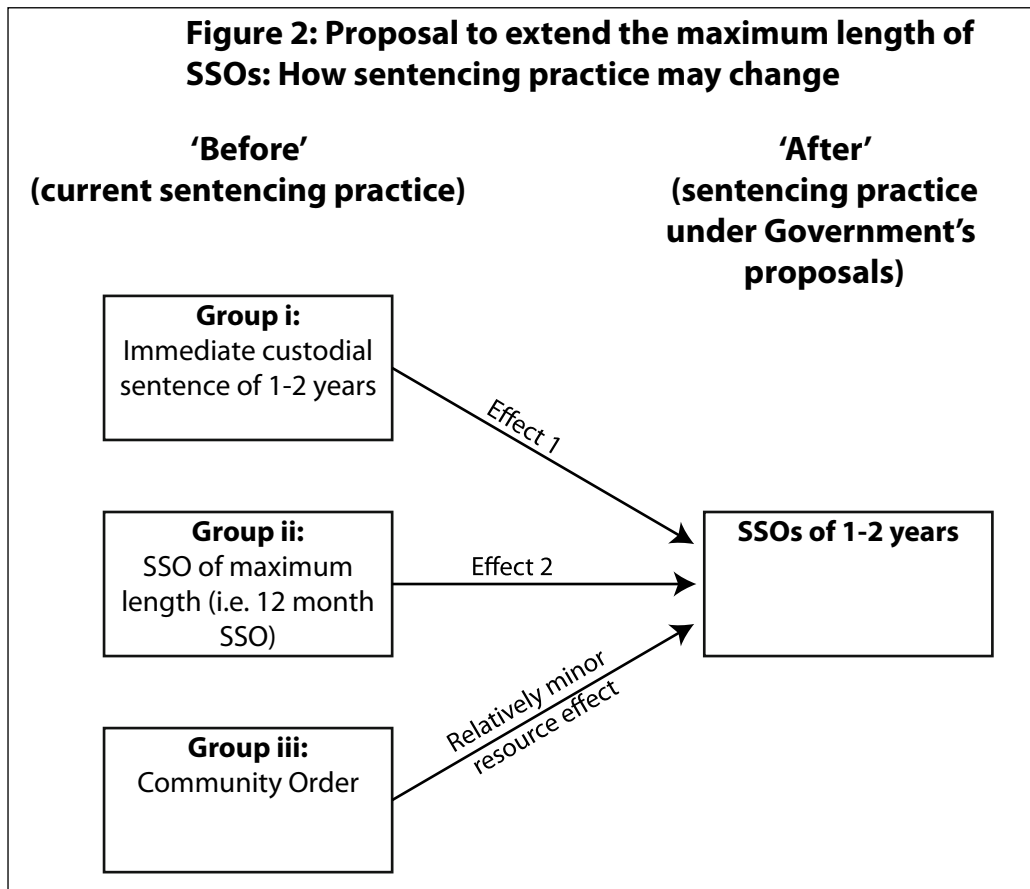
Group iii:
A Community Order is used on the understanding that custody will be imposed if the order is breached.

The relative frequency with which these three outcomes occur is not clear from the research.

If the Government’s proposals are implemented, offenders in all three groups are likely to receive SSOs of one to two years. Judges will no longer need to use immediate custody in place of an SSO (group i), nor will they need to shorten the intended custodial sentence length down to the maximum length of one year to enable them to be suspended (group ii), and most offenders who currently receive Community Orders in place of SSOs (group iii) are also likely instead to receive one to two year SSOs⁷.

This is shown in figure 2 opposite.

⁷ The research suggested there may be a small group of judges who feel that Community Orders give them more flexibility when orders are breached. It is therefore possible that some judges may continue to use Community Orders in place of SSOs.



The resource effects of these changes are now considered for each group.

Group i – immediate custodial sentences to SSOs

This group consists of offenders who currently receive immediate custodial sentences of between one to two years, but under the new proposals would be expected to receive SSOs of over one year and up to two years in length. These are cases in which under the current law the judge finds good reason to suspend the sentence, but feels unable to do so under the current legislative framework in which sentences of longer than one year cannot be suspended. This group does not include cases which warrant one to two year custodial sentences, and where

court considers that this should be served immediately, since these sentences would be unaffected by the Government's proposals.

Research with judges indicated that in some cases in the one to two year custodial sentencing bracket, judges feel compelled to use immediate custody because any other available option would appear too lenient, despite there being good reason to suspend the sentence. However, they may feel comfortable using an SSO of one to two years, if it were available (see page 21). The research also indicated that some judges are unaware of the possibility of using Community Orders in place of immediate custodial sentences where the sentence length would be above the maximum permissible to be suspended (see page 21).

In some of these cases, it seems likely that the offender would currently receive immediate custody. Finally, some judges noted that, if sentences of one to two years were to become eligible for suspension, they would be put under pressure by defence lawyers to suspend custodial sentences in this range. This could cause a further switch from immediate custodial sentences to suspended sentences (see page 21). The number of offenders who may switch to one to two year SSOs from immediate custody, is unclear. Analysis has been conducted of how sentencing practice changed when the SSO was introduced in 2005 (see page 29). There can be no direct read-across from sentencing changes in 2005 to what may happen if the Government's proposals are implemented. However, these historical changes in sentencing can be helpful in deriving general messages about the scale of changes in sentencing practice which may occur.

This analysis suggests that when the SSO was introduced in 2005, there may have been some movement away from immediate custody towards the use of the new SSO. The size of this effect was limited however, perhaps because judges were using other options in cases where they thought it was in the interests of justice that immediate custody should be avoided. For instance, there is strong evidence from the data that once SSOs became available, the use of Community Orders declined, which suggests that Community Orders were being used in place of SSOs (see figure 3 on page 28). In a similar way, if judges are already finding ways to divert offenders from custodial sentences in the one to two year range (for example groups ii and iii), then the number of offenders shifting from custody to SSOs may be relatively small.

Any changes in sentencing away from the use of immediate custody towards the use of SSOs would result in substantial resource savings for the prison service but would put upward pressure on resources for the probation service. Prison sentences of one to two years are substantially more resource intensive than average SSOs which are currently used, so overall there would be resource savings.

The research did not yield any firm messages about whether the community requirements associated with one to two year SSOs would be more or less onerous than the community requirements which are imposed alongside current SSOs, and whether they would be more or less resource intensive.

Group ii – maximum length SSOs to longer SSOs

The Council's research found that some judges, if faced with a case warranting a custodial sentence which was slightly above one year, but where they felt it was in the interests of justice to divert the offender away from immediate custody, may shorten the intended custodial term so it fitted into the range that is eligible for suspension (see page 21). This shortening of sentences would no longer be necessary under the Government's proposals. As a result, some offenders would be given a longer suspended sentence.

Sentencing data can help gauge the size of this group. Table 1 in Annex B shows that, in 2010, 4,033 offenders received SSOs of 52 weeks⁸. This represents nine per cent of all offenders receiving a custodial sentence starting in 2010 for whom data was available. However, it is not clear how many of these sentences were for offenders who had committed offences warranting one year

⁸ See the footnote on page 27 for a note on these statistics.

sentences, and how many were for offenders whose intended sentences had been shortened to one year so that they would become eligible for suspension.

The resource effects of longer SSOs are difficult to estimate. They depend on the frequency with which the custodial term of SSOs is activated, and the relationship between the length of the SSO and the length of the custodial term which is activated.

The evidence in Annex B (page 24) suggests that around nine per cent of offenders who currently receive an SSO end up in custody as a result of breaches of the conditions of their order (excluding those who are sent to prison as a result of re-offending). Whether a similar figure would apply to offenders given one to two year SSOs would depend on their propensity to breach orders relative to offenders in the nought to one year bracket, and the differing deterrent effect of a one to two year SSO.

Longer SSOs are likely to contribute to lengthier prison sentences when orders are breached, but the nature of this relationship is unclear. Other factors affect the length of the prison sentence which may be activated in a breach hearing, such as the offender's progress in fulfilling the community requirements, and how far they have got through the operational period of the order. Judges were clear that there is no fixed rule by which the sentence length is calculated and that each case was evaluated on its own merit (see page 19).

The Probation Service may also be affected because it is possible that longer SSOs may be associated with a different mix of community requirements. The research did not yield any firm findings about whether the

community requirements may change. Overall, it seems likely, that longer SSOs would lead to upward pressure on resources, especially on the Prison Service, because offenders who breach their orders would spend longer in prison. It is less obvious that the Probation Service would be affected, because the Government's proposals do not change the range of community requirements available to judges.

Group iii – Community Orders to SSOs

This group consists of offenders who currently receive Community Orders, but under the new proposals would be expected to receive SSOs of over one year and up to two years in length. These are all cases where the offence warrants a custodial sentence of one to two years, but the court has found that it is not in the interests of justice to impose an immediate custodial sentence.

The use of Community Orders in lieu of one to two year SSOs was mentioned by only some of the judges who were interviewed, a subset of whom made reference to the *R v Phipps* Court of Appeal ruling (see page 21). In these cases, the judge would make it clear in their sentencing remarks that although the sentence is a Community Order, if it were breached, a lengthy custodial term may result.

The size of this group is unclear. The analysis in Annex B (page 28) suggests judges can be flexible in their sentencing, and that prior to 2005, many judges may have been using Community Orders in place of short (up to one year) SSOs. This evidence, and the existence of the Court of Appeal ruling, suggests that this group could be quite large.

On the other hand, some of the findings suggest this group may be relatively small. First, the research suggested that in many cases judges may not be comfortable using a Community Order in place of a custodial sentence because it may be perceived by the public as excessively lenient – and this would be especially true for longer custodial sentences. Second, some judges were unaware of the practice of using Community Orders in place of longer SSOs, and so would never use this option (see pages 23 and 24). Third, in some cases judges would use an SSO of maximum length rather than a Community Order (group ii). Finally, a small number of judges expressed a preference for Community Orders over SSOs due to their greater flexibility, so it is possible that some sentences in this group may remain as Community Orders rather than switching to SSOs (see page 18).

It is unlikely that the switch of these sentences to SSOs would have a dramatic resource effect. The change is unlikely to have a dramatic effect on how the sentence would operate - the offender may receive similar community requirements, and receive a custodial sentence of a similar length if the order was breached. As a result, there is no reason to believe there would be any significant effects on the probation or the prison service.

Other possible resource effects

Two other possible resource effects of the proposal to extend the maximum custodial sentence eligible for suspension up to two years, have been identified.

First, the current process whereby some sentences intended to be of over one year are shortened to fit in the range eligible for suspension, may transpose itself to longer sentences. As such it is possible that, following the introduction of the Government's proposals, some sentences which would otherwise have been immediate custody of longer than two years may become SSOs. However, the research with judges suggested that this group may be very small since judges felt that most offenders who had committed offences warranting over two years' custody should usually go straight to prison (see page 21).

It is possible that, over and above the effects identified in groups ii and iii, there may be a general 'up-tariffing' or 'net widening' effect whereby the availability of longer SSOs could mean that judges adjust the length of some SSOs upwards. This effect is "based on the premise that introducing a new disposal between two forms of existing disposals is likely to draw in offenders from the less serious disposal"⁹. If this type of effect were present, there may be a lengthening of some existing nought to one year SSOs into one to two year SSOs.

There is limited information from the interviews about this possibility. However, the interviews suggested that when sentencing, most judges consider severity of the offence first, and whether a custodial sentence is warranted (see page 18). Only afterwards do they consider whether there may be reasons to suspend the sentence. If judges follow this procedure then, since the Government's proposals do not affect the length of custodial sentence warranted by any given offence, there would be limited scope for such a general 'up-tariffing' effect.

⁹ Blakeborough, L., Pierpoint, H., Bennett, T., Maguire, M., Pinto, C., Wreford, L and Smith, D. (2007) Conditional Cautions: An examination of the early implementation of the scheme. Research Summary 7. London: Ministry of Justice.

Resource effects of proposal to allow SSOs to be imposed with no community requirements, and to allow fines to be used in breach proceedings

The government proposes two other changes to SSOs, in addition to the extension to the length of custodial sentences eligible for suspension. These are to allow SSOs to be imposed with no community requirements, and to allow fines to be imposed for a breach of an SSO.

The most obvious resource effect of these proposals is a reduction in resources required by the Probation Service, via a reduction in the number and intensity of the community requirements associated with SSOs. It is also possible that changes in the use of community requirements could affect breach rates, with associated resource effects.

However, the findings from the interviews with judges suggested that the resource impacts may be small. Judges thought that, if the proposals were implemented, it would be rare for offenders to be given an SSO with no requirements and it would be rare to impose a fine for a breach of an SSO (see page 22).

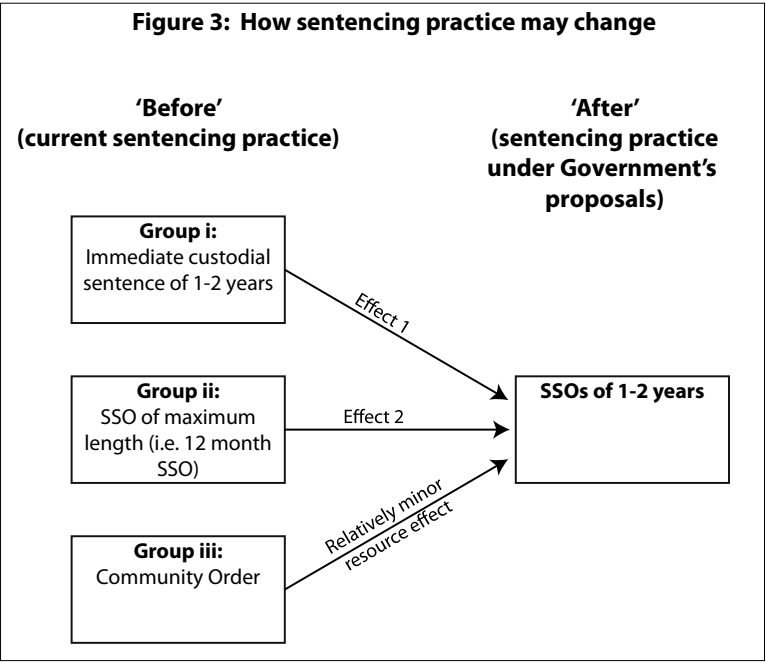
Furthermore, judges felt that even when these provisions are used, the impact on resources would be small. In cases where an SSO with no requirements may be used in future, judges would currently impose notional or very limited requirements which fulfilled the legislative duty to impose at least one community requirement, but reflected the fact they felt that community requirements would not be beneficial. These limited requirements would have little resource impact in any case, so removing them would not result in a large resource saving.

Similar arguments apply to the possible use of fines in breach hearings. Judges felt that it would be rare for fines to be used because many offenders would not have the ability to pay them (see page 22). In cases where fines were used, the resource effects may be relatively minor because they would replace augmentations to community requirements which may have had relatively minor resource effects to the Probation Service in any case.

Summary of dominant resource impacts

The above discussion describes numerous channels through which the Government's proposals may have resource impacts. Many of these effects are likely to be small.

The most dominant resource effects are expected to come from the shifts in sentencing shown in figure 3. The changes in sentencing labelled 'Effect 1' and 'Effect 2' are expected to have the greatest effects. These are summarised in more detail in the table overleaf.



Effect 1: A movement away from the use of custodial sentences in the one to two year range towards SSOs. This would cause savings to the prison service, but increased costs to the probation service.

Effect 2: An increase in the length of some SSOs which are currently one year in length. Where these orders are breached, this would cause an increase in costs to the prison service, and would have an ambiguous impact on probation service resources.

The size of these effects depend on several important unknowns such as the scale of behavioural change that may occur if the Government’s proposals are implemented, and current patterns of sentencing for offenders warranting custodial sentences of one to two years, but where it is in the interests of justice that the sentence is not immediately activated.

Scenario analysis

The findings presented above are difficult to distil into a quantitative model of the resource

effects of the Government’s proposals because of the uncertainties surrounding the likely change in sentencing practice. In particular, the two dominant resource effects identified in the previous section work in opposing directions. The overall effect is therefore ambiguous.

Two scenarios have been developed which are intended to represent two extremes of the possible resource outcomes. The actual outcome is expected to be somewhere between these two extremes. The modelling exercise which produced these estimates was relatively simple since it was recognised that any modelling would be heavily dependent on assumptions, and more intricate modelling work would not significantly improve the value of the results.

Most importantly, no attempt has been made to account for some of the complex dynamic effects of sentencing. As a result, there has been no attempt to consider how the Government’s proposals may affect breach rates, reoffending, or the deterrence effect. There has also been no attempt to model the

relationship between remand time served, and the length of the custodial sentence which is activated when offenders breach SSOs.

Since the range of estimates produced is so wide, the estimates themselves have limited value. It is felt that much of the added value of this report comes in providing a better understanding of the current use of SSOs, and summarising the channels through which the Government's proposals may affect resources.

Cost assumptions

Cost data has been provided by the Analytical Services Directorate at the Ministry of Justice. All costs are expressed in 2011/12 prices. No attempt has been made to make adjustments for possible future changes in the efficiency of the criminal justice system. It is therefore assumed that the real cost of prison and probation services remains at current levels. The costs quoted in this document refer to the resource impact per annum in the steady state (after a transition period), and exclude capital build costs and overheads.

On this basis, a year in custody is assumed to cost an average of around £30,000, including local maintenance, but excluding capital build expenditure and overheads. The average cost of community orders and SSOs is assumed to be around £2,800.

Scenario 1: Lower bound of resource effects

In this scenario, the primary resource effects come from 'Effect 1'. That is, there is a movement away from the use of immediate custodial sentences in the one to two year range towards the use of SSOs. 'Effect 2' is assumed to have negligible resource effects in this scenario.

Little evidence exists that helps quantify the number of offenders who may move from immediate custody into SSOs. Data analysis of changes in sentencing following the introduction of the new SSO in 2005 suggests that, at most, there was a shift of around nine per cent of custodial sentences of between nought to one years, to SSOs (see page 29). However, these changes occurred in response to a different policy, so there can be no direct read-across from this data on to the current proposals.

Offenders in the one to two year sentencing bracket will have committed offences of greater gravity than offenders in the nought to one year bracket, and the research with judges suggests that some would be less likely to use SSOs in cases where more serious offences had been committed (see page 21). As a result, a slightly lower shift will be envisaged in this scenario than was seen in 2005. It will be assumed that six per cent of immediate custodial sentences of length greater than one year and up to two years will shift to SSOs.

This scenario assumes that offenders breach sentences, and end up in custody at similar rates to offenders currently on SSOs.

An assumption needs to be made about the length of time that offenders spend in custody when they breach one to two year orders because time spent in custody by these offenders reduces the potential resource savings to the prison service.

This assumption is difficult to make because detailed data is not published on the length of time offenders spend in prison on breach of SSOs (see page 24), and even if it were available, adjustments would have to be made for time spent on remand. It also

requires a judgement about how much longer offenders on one to two year orders would spend in custody than offenders on nought to one year orders. It has been assumed that they spend an average of six months in custody (over and above any remand time served)¹⁰.

Finally an assumption needs to be made about the cost of SSOs that are used in place of immediate custodial sentences. It has been assumed that, due to the gravity of cases in the one to two year sentencing range, these orders tend to be more resource intensive than an average SSO. The cost model assumes that on average, they cost around £3,800 – which is £1,000 more than an average order.

Results

Under these assumptions, the Government's proposals would result in a reduction in resources required to the prison service of around £14m per year, and an increase in the resources required by the probation service of around £3m a year.

Scenario two: Upper bound of resource effects

In this scenario, the primary resource effects come from 'Effect 2'. That is, there is an increase in the length of some SSOs which are currently at the maximum length permissible under current law. 'Effect 1' is assumed to have negligible resource effects in this scenario.

Firm evidence does not exist that allows this effect to be quantified. The Council's research suggests that, at present, some sentences intended to be of longer than one year are shortened to the maximum length eligible for suspension so that an SSO can be imposed. The research suggests that this would be likely to occur only with sentences which were 'close

to' one year. These SSOs are likely to become longer if one to two year orders are available.

The research findings are not detailed enough to help quantify how much longer these SSOs may become. This scenario assumes they become longer by an average of three months.

This scenario therefore envisages a movement of offenders from one year SSOs to 15 month SSOs. This affects resources because if these longer orders are breached, the custodial terms which are activated are also likely to be longer. To quantify the resource effects, assumptions must be made about the number of offenders who receive longer SSOs, and the amount of additional time spent in custody.

Little evidence exists to help quantify the number of offenders who may receive longer SSOs. It is known that, 4,033 SSOs which commenced in 2010 were of maximum length (one year). It will be assumed that half of the offenders in this category would receive longer orders if they were available.

It is also difficult to quantify the additional amount of time spent in custody. It will be assumed that time spent in custody increases in proportion to the length of the order, meaning that a movement from a one year to a 15 month order increases custodial time served by 25 per cent. This translates into an assumption of an additional 25 days per order¹¹.

Results

Under these assumptions, the Government's proposals would result in an increase in the resources required for the prison service of around £0.5m per year, and no impact on the probation service.

¹⁰ This scenario could be modified to cause lower savings for the prison service if it were assumed that judges were significantly more likely to activate custodial sentences for offenders on one to two year orders than offenders on nought to one year orders. However, the interviews with judges did not shed any light on whether judges may have a different propensity to activate SSOs in the one to two year range than in the nought to one year range, so it has been assumed there is no difference.

¹¹ This calculation is not straightforward because when judges impose custody for a breach of an SSO, they do not always activate the full custodial term associated with the order. This means that it is not correct to assume that 15 month orders which are breached lead to three months more custodial time than one year orders. To arrive at 25 days, an assumption had to be made about the average amount of custodial time activated for one year orders.

Annex A

Research With Judges

Approach

Judges from five courts took part in this exercise, across four circuit areas: London, the North West, Midlands and South West. In total, 18 Crown Court judges took part¹² and all interviews were conducted by members of the Sentencing Council’s analysis and research team.

A semi-structured discussion guide was designed in advance of the interviews to capture issues that included:

- how judges currently use Suspended Sentence Orders (SSOs) - and in what circumstances;
- what requirements are commonly attached to SSOs;
- how judges deal with breaches of SSOs;
- views on the MoJ proposals contained within the Legal Aid, Sentencing and Punishment of Offenders Bill; and,
- thoughts on how any changes to SSOs might work in practice.

Interviews were conducted with individual judges in two of the courts and as group interviews in the remaining three courts.

Limitations of the approach

This exercise generated comments on a variety of issues. However, it should be noted that the sample of courts and judges involved in this exercise was small and the information collected is therefore not necessarily representative of all courts or judges. The discussion guide was also flexible enough to allow judges to comment on any aspect of SSOs that they thought relevant, which led to some variation between the topics covered in different interviews.

The interviews conducted were also a mix of individual and group sessions. There were pros and cons to each of these approaches: whilst in some cases it was easier to probe in depth on some issues in the individual interviews, the group sessions sometimes yielded a broader range of issues for discussion as different respondents had different views and experiences that they could relate.

Given the small sample size and the slight variations in approach, the issues raised by the judges provide an indication only of the key issues that may be relevant.

Issues raised

Current use of the Suspended Sentence Orders

All the judges interviewed used SSOs, but the degree to which they used them, or the value they placed on them, varied. Most judges thought they were a “useful” or “very useful” sentencing option – with one stating they were “*invaluable*” (interview 8). The reasons for this included that:

- SSOs can be used to mark the seriousness of the offence without having to resort to sending someone to custody immediately - one judge referred to it as the “*sword of Damocles*” (interview 7);
- the threat of prison built into SSOs is useful and sends a deterrent message to the public and offenders;
- the ability to divert some defendants from immediate custody, where there are good reasons to do this, is useful;
- for some defendants, sending them to prison was felt to be counterproductive; and,
- SSOs allow judges to deal with the uniqueness of cases.

¹² It should be noted that a small number of judges in the group session were not able to attend for the entire interview.

However, a small number of judges were less keen on SSOs and reported that they did not therefore tend to use them that often. One in particular said that he would never give an SSO for some offences that he deemed too serious (for example violence, robbery and most sexual offences) as he felt offenders would perceive they had been “let off” (interview 4) with this. Other judges interviewed as a group in one court also implied that SSOs were regarded as a more lenient option by the public and that care needed to be taken in their application to ensure that these were an effective sentence. They cited white collar fraud and felt that as these defendants, in their opinion rarely reoffend, an SSO would not be an effective punishment. Another judge said he preferred Community Orders due to the increased flexibility over the length of custody that can be given in the event of a breach and because from the defendant’s perspective, there would seem to be little difference between being given an SSO and a Community Order.

When deciding on whether or not an SSO would be appropriate, most judges said that the details of the offence were the most important consideration – that the offence must have passed the custody threshold. The characteristics of the offender were then crucial in finally deciding that an SSO was the most appropriate sentence:

“The first step is to determine the gravity of the offence – there are some cases that are so serious that only a custodial sentence can be imposed... You have to balance how serious it is and if it comes to the decision of prison, at that stage, you ask if it is possible to suspend it... are there circumstances either within the offence itself or personal to defendant that would justify me suspending this sentence in this case?” (interview 3)

“The offence must be serious enough to merit imprisonment, but there must be characteristics of the defendant that make you think there is a prospect it would be an effective sentence.” (interview 7)

Characteristics taken into consideration when passing an SSO

A number of factors relating to the defendant were cited as relevant when making the decision to pass an SSO rather than immediate custody¹³. These included situations where:

- the defendant had no previous convictions and was deemed to be of good character;
- the offending was regarded as out of character or the defendant had been coerced;
- there were visible signs that the defendant was trying to change their ways and make improvements;
- personal circumstances, such as health problems or caring responsibilities (especially if a sole parent) were an issue;
- the defendant was in employment;
- the defendant’s role in the offence could be taken into consideration if a multi-handed case;
- a guilty plea had been entered – in the discussions. This often related to the defendant displaying remorse, particularly when this was entered at an early stage; however, other judges in one group discussion also pointed out that a reduction for guilty plea might bring the sentence down sufficiently - to under one year – to allow an SSO to be considered.

Key for some seemed to be to reduce the risk of offending in the future and not set people up to fail: *“If someone has made substantial improvements since the offending – which you would destroy with an immediate sentence – you encourage them with a suspended sentence” (interview 1).*

¹³ The extent to which these factors were regarded as sufficient to warrant an SSO varied between judges. For a small number, the severity of the offence was the most important factor and could lead to immediate custody, regardless of the circumstances of the individual or case.

The strong message was that all cases were different and would involve consideration of different combinations of factors; the decision was very much made on a case-by-case basis. As one judge put it: “*we pass bespoke sentences*” (interview 1). It was regarded as a useful sentencing option to allow judges to deal with the specific, and unique, details of each case.

Requirements

Most judges who commented on requirements said that they attached more than one – these were most commonly stated as being unpaid work, curfews (with or without electronic monitoring), and supervision. Other requirements that may be used included treatment programmes (for example anger management or sexual awareness), a drug rehabilitation requirement, referral to community healthcare services for defendants with mental health problems and Exclusion Orders.

The choice and number of requirements to attach tended to reflect the nature of the offence and its seriousness (for example a curfew might be imposed when dealing with an offender committing offences at night and more requirements might be attached if this was a particularly serious offence; an exclusion order might be attached to defendants involved in assaults in a particular area of a city).

Some of the judges commented that there were times when they felt that no requirement would be needed, but they attach one in order to fulfil the legal requirements¹⁴. However, these situations were reported as being relatively few in number and in these circumstances the judges said they tended to fall back on requirements such as residence or exclusion from certain places.

Some judges did not feel the obligation to attach requirements was always necessary – where the requirements were considered entirely nugatory (for example the requirement for the defendant to reside in their own home), one said it rendered the requirements “*totally meaningless*” (interview 3).

Other judges said it would be a very rare case where they would consider no requirement was necessary. For one judge, they considered that would make the sentence “toothless” (interview 6) in both the eyes of the public and the defendant.

Breaches

All of the judges interviewed found it hard to say with any precision what level of breaches occurred for SSOs – some felt these were quite frequent, others that they were relatively infrequent, whilst others did not comment¹⁵. A lot of the judges who commented also said that those breaches that they did see tended to be in relation to the requirements imposed as part of the SSO, with those related to the commission of further offences being less frequent.

Some of the judges tended to deal with breaches of requirements in ways that often did not involve activating the custodial period – for example adding additional hours onto unpaid work requirements, extending other elements of community requirements or attaching other requirements. They gave several reasons for not necessarily imposing immediate custody in the event of a breach of a requirement:

- the defendant may have got themselves back on track between the time of the breach and appearing in court in relation to this;
- the breach could be a minor infringement

¹⁴ Examples of such instances included where a defendant was unable to undertake unpaid work because of a disability and when no suitable accredited courses were available, or when the defendant was in poor health and couldn't easily be given a requirement of supervision.

¹⁵ The reported frequency of seeing breaches was also affected by whether or not the judge “reserved” sentencing for any breach of the SSO to themselves.

or 'technical breach' for example attending supervision appointments late on two occasions;

- for those who had already been in custody on remand, sending them back to prison for a breach might not provide any additional punishment value;
- if the breach occurred very late into the operational period of the SSO, by definition, the offender has made good progress and it may therefore not be deemed appropriate to punish them by sending them to prison.

Although many of the judges dealt with breaches of requirements with alternatives to custody, some said that they were more likely to activate the suspended sentence (in other words send them to custody) if a further offence had been committed within a short period of time and if this was of a similar nature or serious. However, in some of these cases, some judges said that it may be the case that the defendant went to prison for the new offence rather than the breach of the SSO. In some cases, judges felt custody was "almost inevitable" (interview 8).

All judges said that in the event of imposing a custodial term for a breach (whether a breach of requirements or a new offence), they would modify the length of that term to reflect the progress the offender had made on their SSO. As one judge said *"It's important to give credit and be seen to give credit"* (interview 8).

Another issue was raised by a small number of judges that might affect their decision as to whether they activated the custodial term and the length of that time. This relates to the impact of crediting time spent in custody on remand (as required) when activating a custodial sentence for an SSO. These judges felt that, depending on the length of time

spent on remand, it could mean that the defendant would not actually serve any of the activated sentence in prison. For this reason, it was suggested that imposing immediate custody for breaches for some defendants may not have any *"teeth"* (interview 7).

Views on Ministry of Justice proposals

Overall, the research indicated a positive response from the judges who were interviewed to the proposed provisions, albeit their views on the extent to which they would in practice make use of them varied. For all proposals, the judges were in favour of the additional provisions; whether or not they will make regular use of them, they regarded them as useful additions that they could draw on if needed and would provided them with further flexibility to deal with the cases in front of them.

Extending SSOs to sentences of up to two years

A lot of the judges interviewed tended to feel that having the option to suspend sentences of up to two years would be useful. However, the judges were more divided on how often they would make use of this provision, if at all.

Some judges indicated that it is something they would use¹⁶ and suggested there were particular types of burglaries, assaults, frauds, drug or sex offences that might be brought within scope for a suspended sentence as a result and where the sentence would be more effectively served in the community¹⁷. However, even amongst those who may use the provision, there was also some acknowledgement that it would not be appropriate for all offences – for example some offences of violence, some drug offences and serious sex offences. The offences for which this may not be

¹⁶ The judges in one court also felt that the most useful provision would be to include extension of the operational period to three years. In doing so, they felt that some offenders would be able to access treatment programmes that were of three years duration in the community. This is not, however, included in the current MoJ proposals.

¹⁷ An example provided during the interviews included defendants who had been convicted of downloading indecent images of children and where it would be useful to send them on an offender programme.

appropriate tended to be the more serious types of offences; one judge said using an SSO for these types of cases would send “*the wrong message*” (interview 6).

Other judges felt that the provision would rarely be used in practice. One judge said that he could only recall two cases in recent years where someone’s sentence needed to be more than one year and he couldn’t suspend, but there were arguably good reasons to. He therefore did not think this would be opening the “floodgates” (interview 3) and would only be used in rare cases. Another judge said he was unlikely to suspend cases of between one and two years that were currently receiving immediate custody. Two judges (from different courts) also felt that offences attracting sentences over one year should not be suspended: “*Quite frankly, if the offence is worth more than one year, then you should be locking them up anyway*” (interview 2).

A small number of judges felt that they would rarely (or never) use this due to concerns about the use and perception of this type of sentence. Some judges who were interviewed as a group discussed the fact that the use of SSOs may lead to a public perception that this was “*letting people off*” (interview 2). They felt this would be particularly problematic, for example, if some more serious sex offences were to come into scope for an SSO by increasing the provision to two years; they also felt that judges may come under pressure from defence lawyers to suspend longer sentences which in turn might result in the use of sentences that might be perceived to be more “*lenient*”¹⁸. Consequently they said that they might use this power in unusual or exceptional circumstances only.

Although views on the likely use of this new provision in the future were somewhat

mixed, many of the judges raised the fact that if there were good reasons for not imposing a sentence of immediate custody for those above one year for cases that had passed the custody threshold, they can already effectively do this – either by instead imposing the maximum SSO period of one year (where they might have imposed a slightly longer period if they had had the option) or through a Community Order.

Most of the judges had at some point adopted the practice of giving the maximum SSO period to divert defendants from immediate custody, or were aware that this took place. Other judges sometimes imposed a Community Order in this situation rather than immediate custody for sentences over one year. They cited a Court of Appeal authority¹⁹ that approved this practice. They explained that where they took this option they would state in open court why they had done so and set out for the offender the implications of any breach by the activation of an immediate custodial term. One judge implied he invoked this fairly regularly when needed, whereas others indicated they used this only occasionally. Other judges were either not aware of this practice or felt that it should not be used.

When asked, the small number of judges that had adopted this practice at some point, felt that formally extending the option to suspend a sentence of up to two years would be more useful than imposing a Community Order in this way. In response to one judge who said the provision would not make much practical difference, another judge felt that there would be an added advantage: “*Imposing a sentence of two years is very different from saying that if you come back in front of me you get two years*” (interview 1). Another felt that bringing in this provision would provide

¹⁸ It should be noted that these comments came from the court which took an initial position that SSOs might be regarded as a more lenient sentence.

¹⁹ R V Phipps [2007] EWCA Crim 2923] states (paragraph 15) “where a judge feels able to take a merciful course and not to impose an immediate and substantial custodial sentence, which but for exceptional circumstances would have been merited, if not mandatory, it is much better to pass a community order spelling out to the offender the consequences of a breach rather than a suspended sentence artificially low in its terms, limited as it has to be, to a maximum period of 12 months, so that if there is a breach, as has happened in this case, the Court’s powers are not limited in the way that they were here.”

more “...clarity and transparency. There would be the same number of cases – just sentenced in a different way” (interview 3). Others still felt that a longer Community Order would be preferable as it would allow more flexibility when deciding on the appropriate course of action in the event of a breach and would mean that time spent on remand in custody would not necessarily have to be taken into account.

Where they commented on practices to divert defendants from immediate custody, a small number of judges went on to speculate on the implications of the new provision, if implemented. These included the potential to²⁰:

- slightly increase the length of sentences some people receive (as the maximum length of an SSO would be higher and some people are clearly currently receiving a lower maximum term to facilitate suspension of the sentence);
- a shift of some people from a Community Order to an SSO, thus meaning judges would not have to make use of the Court of Appeal judgment if they wished to avoid sending someone to immediate custody; and
- bring some sentences of over two years into the two-year SSO bracket in the same way that some sentences are currently being given at the one year maximum (although a couple of judges also acknowledged that the rate of ‘squeezing’ at this level may be less as offences become more serious the nearer you approach the two-year mark).

Removing the obligation to attach a requirement

Reflecting the judges’ comments on how they currently used requirements for SSOs, it seemed that the judges felt that use of

this provision would not be that frequent. Even some of those more in favour of this tended to feel that it should only be utilised in a small number of exceptional cases; one judge suggested that it should be specified that it can only be used in exceptional circumstances, and another that the judge should have to state why a requirement was not necessary if this was deemed to be the case. However, as with the other provisions, there was a sense that it would be useful if this was introduced, as it would give judges the flexibility to make more sensible decisions about requirements²¹.

When asked whether the type of requirements attached to one to two year sentences would be different from those below one year, the small number of judges who commented held mixed views. Some felt there would be no difference at all, others that the requirements would stay the same but would be imposed for longer, and others that there would be no difference other than extending the length of supervision.

Use of fines for breaches

Although some judges felt that providing additional options and flexibility for dealing with breaches was always useful (and therefore they would not be averse to this being introduced), they were almost in entire agreement that dealing with breaches in this way would be rare. The main reason for this was that they felt most offenders would not have the financial resources to pay these fines and that they would therefore have little use in practice. On a few occasions, judges also speculated that this may lead to offenders committing theft in order to pay the fine: “It will only have an effect if they have money. There is no point if they are on benefits – it raises the risk of committing further offences” (interview 6)

²⁰ It should be noted that the number of judges commenting on these potential implications were small in each instance.

²¹ The judges in one court also felt that use of this may be linked to Probation Service practice and questioned whether there are times when requirements are recommended solely because probation are aware of the obligation to attach these to a SSO.

Because of this, some of the judges felt that the measure would not be effective at all - views including that fines for breaches would be *“pointless” (interviews 1 and 2)*, *“a waste of time” (interview 7)* and that it would not *“hurt sufficiently” (interview 4)*. A small number of judges were however, more positive and thought that they were *“a good move” (interview 5)*, providing *“added flexibility and another tool” (interview 6)*.

Regardless of judges’ overall views, many did acknowledge that it may be an option in a small number of instances for defendants who have money or where the breach occurred as a result of a clash between the requirements of the SSO and paid work: *“If someone is working and has the money to pay a fine, it’s another way of ramming home the message that you will comply with the court’s order” (interview 3)*.

“The breach might have occurred for non-attendance of unpaid work because the offender is also trying to hold down a paid job. In this case, giving more unpaid work would be pointless but a fine would be a sensible approach” (interview 5).

Annex B

Data Analysis

The use of the current Suspended Sentence Order

Length of Suspended Sentence Orders

The following table presents statistics on the length of the custodial term associated with SSOs which were imposed in 2010:

Probation statistics for persons commencing SSOs in 2010	
Length of order	Number of commencements
Under 12 weeks	7,949
12 weeks	8,066
13-24 weeks	13,988
25-36 weeks	9,058
37-50 weeks	2,948
51 weeks	1,352
52 weeks	4,033
Length not recorded	508

Table 1 - Source: Prepared by JSAS, Ministry of Justice

Receptions into custody, and length of time served in custody for offenders who have breached an SSO

The Ministry of Justice do not publish detailed information on the number of breaches of SSOs and the consequences of these breaches. However, they do publish data on the number of receptions into custody as a result of breaches of SSOs, and the number of offenders who are in prison as a result of breaches.

These figures cover only offenders who are sent to prison as a result of a breach of the requirements of their order. They

do not include offenders who were sent to custody as a result of re-offending during the operational period of their SSO.

In 2009, 4,361 offenders were received into prison establishments as a result of a breach of an SSO. On June 30 2009, 545 offenders were in prison as a result of a breach of an SSO.

By dividing the number of offenders in prison as a result of a breach by the receptions into prison as a result of a breach over the course of a year, an estimate can be obtained of the length of time spent in custody by the average offender who has breached the requirements of their SSO. This method suggests that, on average, offenders spend roughly one and a half months in custody²².

Ministry of Justice figures also allow the estimation of the proportion of offenders receiving SSOs who end up in custody as a result of a breach of the conditions of their order (but these figures exclude those who reach custody as a result of re-offending whilst on an SSO). In 2009, 46,897 offenders commenced SSOs, and 4,361 were received into custody. This suggests around nine per cent of offenders on SSOs end up in custody (excluding those reaching custody as a result of re-offending).

Patterns in the use of SSOs

The Ministry of Justice’s court proceedings database contains information about the sentences passed in courts in England and Wales, and the characteristics of the offenders who are sentenced. This means it is possible to analyse the use of SSOs at the aggregate level, to see whether their use is linked to the demographic characteristics of

²² This estimate does not take account of any time served by offenders on remand. It is therefore a measure of the average time served in custody by these offenders over and above any time served on remand.

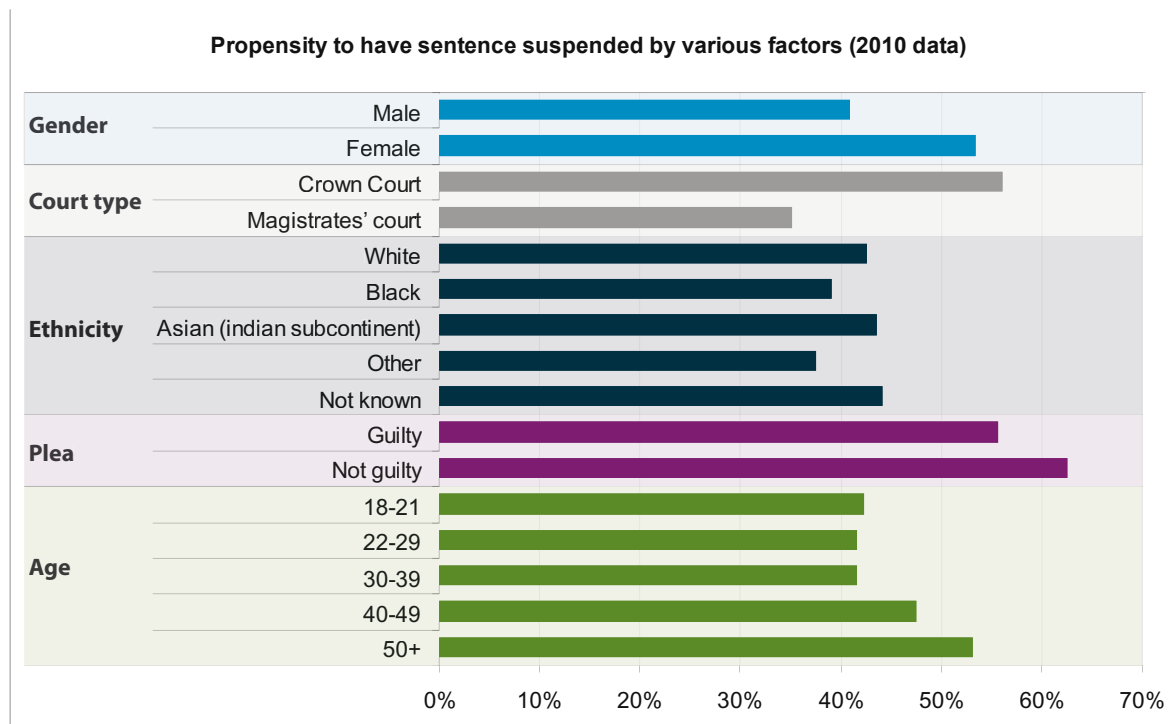
offenders, or the type of offence which they have committed.

The following section describes how the correlations identified in this section can help to inform estimates of how many sentences of one to two years in length may be suspended under the Government's proposals.

The following charts use 2010 sentencing data to explore these relationships. The proportion of eligible sentences which are suspended is measured using the formula below²³.

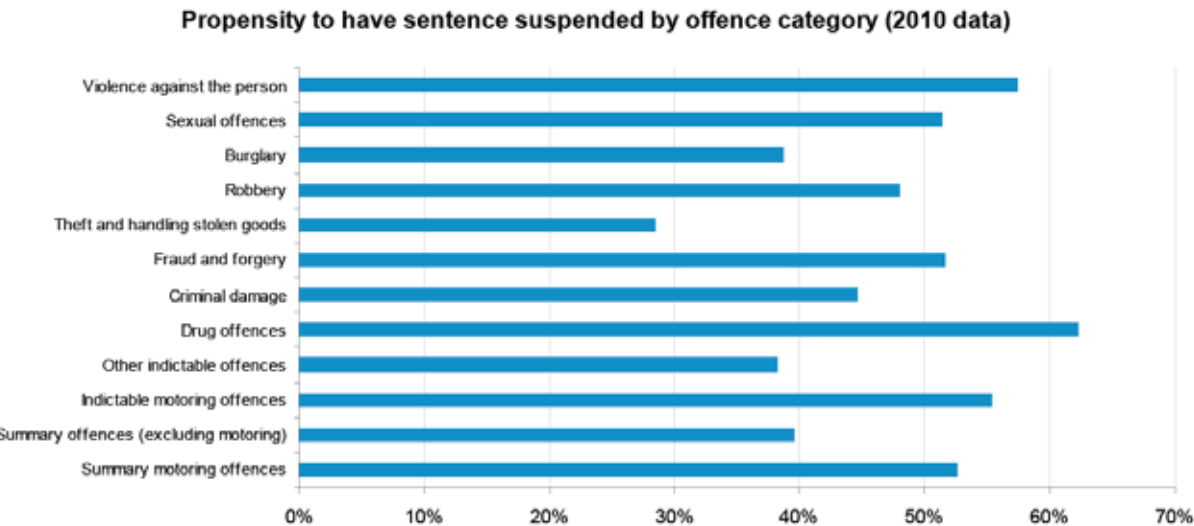
$$\text{Proportion suspended} = \frac{\text{Number of SSOs}}{\text{Number of SSOs} + \text{number of custodial sentences of up to one year}}$$

Figure 1



²³ This measure is imperfect for three reasons. First, judges may shorten some sentences intended to be of above one year so they can be suspended. This means that some sentences above the one to two year band are included in the fraction. Second, judges sometimes use community orders in place of suspended sentence orders because they offer greater flexibility. This means some sentences are missed from the fraction. Despite these difficulties, it provides a good measure for the purpose of comparing propensity to suspend amongst different demographic or offence groups.

Figure 2



The court type in which the offender was sentenced appears to be most strongly correlated with the probability of suspension. The gender of the offender, the offence for which they were being sentenced and whether the offender pleaded guilty were also found to be strongly linked with the probability of suspension. The age and ethnicity of the offender appears to be comparatively less important, although the proportion of suspensions is significantly elevated amongst defendants who are aged 40 or over.

Figures 1 and 2 show correlations only and care should be taken not to interpret them as showing causation. For example, females are more likely to have their sentences suspended than males. However, it would be a mistake to conclude that a person’s gender in itself affects the probability of suspension - there are other differences between the population of males and females who have been sentenced, such as a different offence mix, which may affect the probability of suspension²⁴.

Correlations can also be misleading. For instance, figure 1 suggests that offenders who have pleaded guilty are less likely to have their sentence suspended than offenders who have pleaded not guilty. This result is surprising: it seems unlikely that a guilty plea – which may be a sign of remorse – makes a judge intrinsically less likely to suspend a sentence. It is more likely that the group of offenders who plead not guilty have different characteristics to the group of offenders who plead guilty, and it is these differences which drive the result. For example, there may be differences in the severity of offences amongst the two groups. Whether a sentence is eligible to be suspended is based on the sentence length *post* guilty plea reductions. This means that offenders in the nought to one year custodial sentence bracket who post guilty pleas, may have committed more serious offences on average than offenders in the same bracket where no guilty plea has been entered and therefore no reduction has been applied.

²⁴ The data also does not rule out the possibility that females are intrinsically more likely to have their sentence suspended – there is simply not enough information to make a judgement.

Comparative analysis of offenders currently receiving SSOs, and offenders whose sentences will become eligible for suspension under the Government's proposals

In a limited way, the correlations identified in the previous section may be helpful in identifying the possible effects of the new provisions. These correlations can be exploited by comparing the group of offenders who are currently eligible to have their sentence suspended to the group of offenders who will become eligible under the Government's proposals. This comparison can help determine whether offenders in the one to two year sentence bracket have a greater or lesser propensity to have their sentence suspended than offenders in the nought to one year sentence bracket, based on their personal characteristics and the offence types which they have committed.

A logistic regression was used to do this analysis. The results suggest that, amongst offenders in the one to two year sentencing range, the mix of offences committed, and the offenders' characteristics mean they have a greater propensity to have their sentences suspended than offenders in the nought to one year sentence bracket.

The conclusions that can be drawn from this exercise are limited and must be treated with caution because they overlook factors such as the severity of the offence which has been committed, and various aspects of current sentencing practice such as the use of Community Orders in place of one to two year custodial sentences, and the current practice amongst some judges of shortening sentences intended to be of more than one

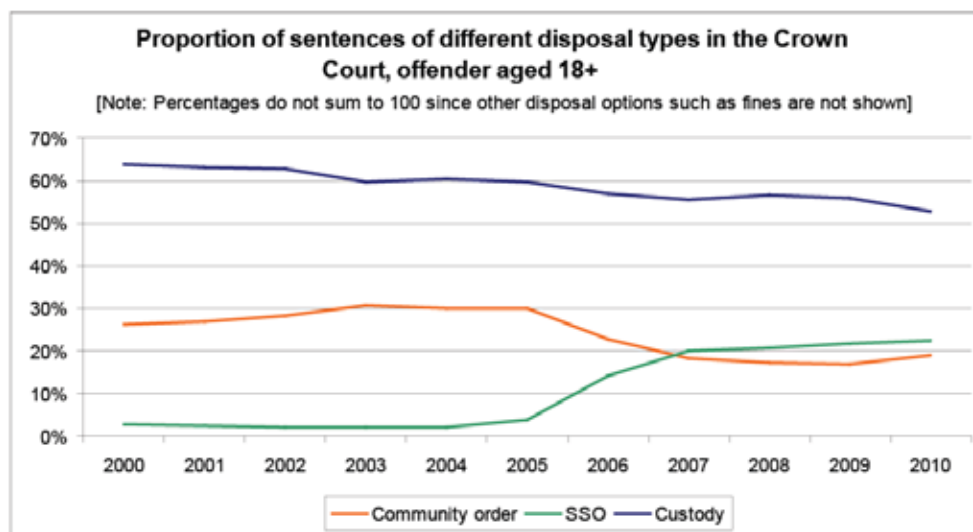
year into one year suspended sentences. Nonetheless, the results are still useful: it is valid to conclude that within the one to two year sentence band there is nothing about the observable demographic characteristics of offenders, or the offence types committed that suggests these offenders are less likely to have their sentence suspended than offenders in the nought to one year sentence band.

Lessons from the introduction of the SSO in 2005

To analyse the resource implications of the Government's proposals, it is instructive to consider how sentencing practice changed when the SSO was introduced in 2005. The changes in 2005 were very different to the changes proposed in the Bill, so there can be no direct read-across in terms of effects on sentencing. However, this analysis is useful to identify general messages about how judges react to changes in sentencing provisions.

The following chart shows how the use of the different disposal types changed when the 2003 Act was made operational in 2005.

Figure 3



Two effects are apparent. First and most strikingly, between 2005 and 2007 there was a movement away from the use of Community Orders towards the use of the SSO. Second, there may have been a smaller movement away from the use of immediate custodial sentences towards the use of SSOs.

Whilst it is difficult to know precisely why these changes occurred the findings from the Council's research with judges provides some clues. A few judges indicated that some Community Orders imposed prior to 2005 were being used in a similar way to the new SSOs – that is, an offender was given a community sentence on the understanding that if the offender did not comply with the conditions of the sentence, there was a high chance they would be sent to prison. For some sentences, the movement away from Community Orders towards the new SSOs may have therefore had little effect on how the sentences operated.

The research may also explain some of the movement away from the use of immediate custody towards the use of SSOs between 2005 and 2007. Some judges reported that they did not feel comfortable using Community Orders in place of SSOs. This would mean that, when the new SSO became available, a movement from immediate custody to SSOs would also be expected.

These explanations are plausible and it is supported by the interviews. However, without an in depth study of individual sentencing decisions in the period from 2004 to 2007, it is impossible to give a full account of the changes in sentencing during this period.

The decline in the use of custody depicted in figure 3 suggests the custody rate in the Crown Court dropped from around 60 per cent to around 55 per cent between 2005 and 2007. However, this may overstate the movement away from the use of immediate custody that occurred as a result of the introduction of the new SSO since these figures make no distinction between custodial sentences of different lengths.

Figure 4 shows the proportion of Crown Court sentences of up to one year in length as a percentage of all sentences in the Crown Court.

Figure 4

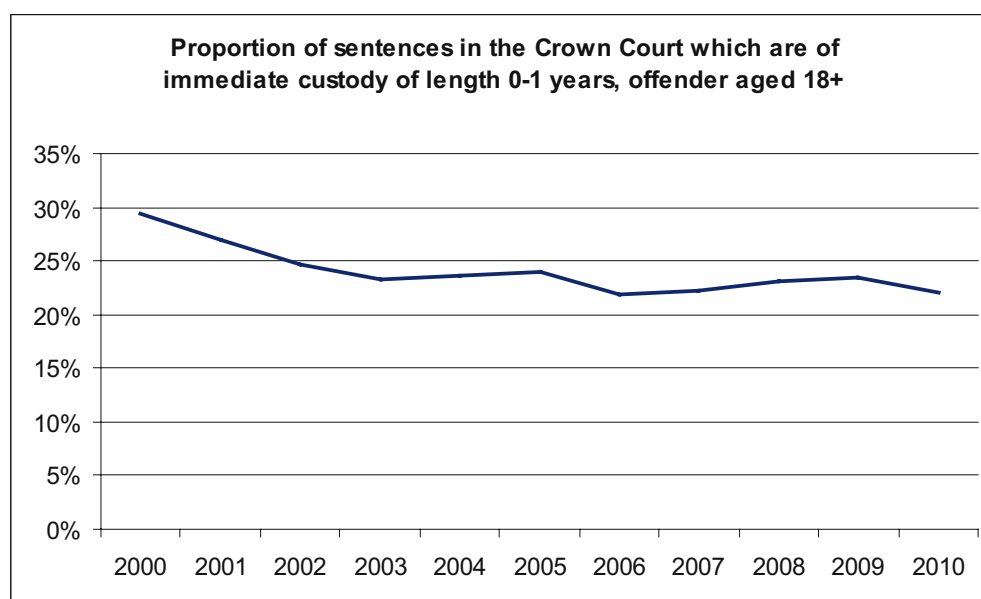


Figure 4 suggests that the five per cent fall in the custody rate between 2005 and 2007 shown in figure 3 cannot be fully attributed to a switch from immediate custodial sentences of nought to one years in length to SSOs.

Further detailed analysis of these figures suggests that the movement away from nought to one year custodial sentences towards SSOs accounted for no more than

around two per cent of all Crown Court sentences. This would equate to a movement of around 1,500 Crown Court sentences, or a nine per cent reduction in the total number of custodial sentences in the nought to one year sentence band.

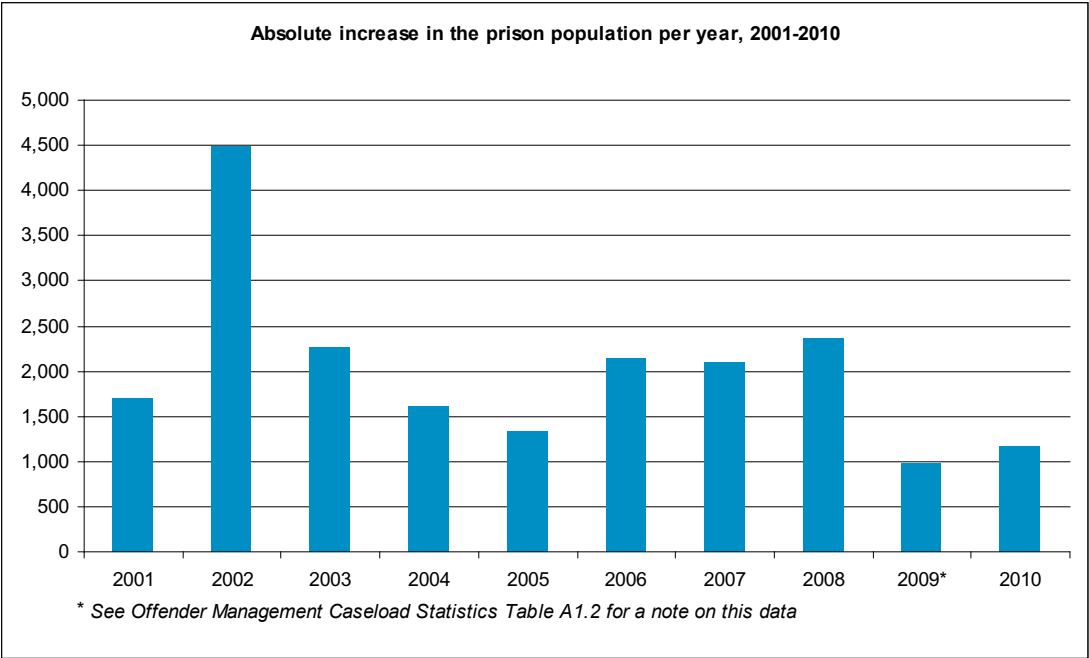
A separate source of evidence on the effect of the 2003 Act is data on the prison population. Extreme caution should be taken

with this kind of analysis because the prison population is affected by a multitude of different factors, so attributing changes to any single factor is not possible.

Figure 5 shows that the rate of increase of the prison population was higher in the years 2006 to 2008 than in the years before and after. This coincides with the introduction of SSOs in 2005 (allowing for a lag between SSOs being passed, and offenders ending up in custody as a result of a breach). This may be a coincidence, but if it is not, then it would suggest that the use of SSOs from 2005 onwards put pressure on the prison population.

A link between greater use of SSOs and heightened pressure on the prison population seems counterintuitive, but could correspond to an increased likelihood of custody for offenders who received SSOs in place of Community Orders and breached their orders. This is possible evidence against the hypothesis that the switch from the use of Community Orders towards the use of SSOs had little consequence in terms of the operation of sentences.

Figure 5



The purpose of this section is not to come to firm conclusions about the effects of the 2003 Act on sentencing practice. Rather, it is to derive messages from historical practice that may be useful in analysing what may result from the Government's current proposals.

Perhaps the most important lesson from this analysis is that it is very difficult to predict how judges' behaviour may change following a legislative change. Although a shift from Community Orders to SSOs was anticipated by some prior to implementation of the 2003 Act, at the time, the size of this shift was highly uncertain.

An important and related lesson is that the judiciary can be flexible within the legislative framework imposed upon them. Prior to the 2005 Act, in cases where judges felt the custody threshold had been passed, but there were circumstances which would make it unjust to impose immediate custody, they may have used community sentencing, backed by a warning that immediate custody would result from a breach of the conditions of the sentence.

