

CENTRE FOR CRIME
AND JUSTICE STUDIES

The community order and the suspended sentence order

*The views and
attitudes of sentencers*

George Mair, Noel Cross and Stuart Taylor

The community order and the suspended sentence order: the views and attitudes of sentencers

George Mair, Noel Cross and Stuart Taylor

Acknowledgements

We would like to thank Sir Igor Judge, President of the Queen's Bench, for granting permission to approach sentencers for interview, and his staff for facilitating contact with the courts. We are, of course, grateful to all of the sentencers who gave time to be interviewed or to participate in focus groups; without their thoughts about the Community Order and the Suspended Sentence Order this report would not exist.

We also wish to thank Mike Hough and Stephen Stanley for their helpful comments on an early draft of this report. Staff at the Centre for Crime and Justice Studies have been supportive in all sorts of ways. And we are particularly grateful to Enver Solomon for all his help.

Finally, we gratefully acknowledge the generous financial support of the Esmée Fairbairn Foundation without which this report would not have been possible.

About the authors

George Mair is E Rex Makin Professor of Criminal Justice, and Noel Cross and Stuart Taylor are lecturers in Criminal Justice in the School of Law, Liverpool John Moores University.

Published by:
Centre for Crime and Justice Studies
King's College London
Strand
WC2R 2LS
Tel: 020 7848 1688
Fax: 020 7848 1689
www.crimeandjustice.org.uk

The Centre for Crime and Justice Studies at King's College London is an independent charity that informs and educates about all aspects of crime and criminal justice. We provide information, produce research and carry out policy analysis to encourage and facilitate an understanding of the complex nature of issues concerning crime.

Registered Charity No. 251588
A Company Limited by Guarantee
Registered in England No. 496821
© Centre for Crime and Justice Studies, June 2008
ISBN: 978-1-906003-09-8

Contents

Introduction 7

1. Training and implementation 11

2. The Community Order 15

Use of the Community Order 15

Community Order requirements 17

Enforcement and breach 18

The Community Order in relation to its predecessors and as an alternative to custody 20

Good and bad points of the Community Order 22

3. The Suspended Sentence Order (SSO) 23

Use of the SSO 23

SSO requirements 25

Enforcement and breach 26

The SSO as an alternative to custody 27

Good and bad points of the SSO 28

4. General issues 31

Review power 31

Comparing the Community Order and the SSO 32

Changes in probation practice 34

Ministry of Justice policy proposals 35

Conclusions 39

Appendix 43

References 45



Introduction

On 4 April 2005 two new sentences for adults aged 18 and above became available to the courts in England and Wales: the Community Order and the Suspended Sentence Order (SSO). Both sentences are intended to narrow the custody/community divide, and therefore are important factors for the development of the National Offender Management Service (NOMS). Both are also intended to offer more robust, demanding and credible alternatives to short custodial sentences, thereby contributing to reductions in the prison population which, at 16 May 2008, stood at 82,682.¹ Both should be served in the community and both have the same number of requirements available.

Essentially, the Community Order is a restructuring of what were the available community sentences – the Community Rehabilitation Order (CRO), the Community Punishment Order (CPO), the Community Punishment and Rehabilitation Order (CPRO), the Drug Treatment and Testing Order (DTTO), the Curfew Order and the Attendance Centre Order – and the various conditions that could be attached to the CRO and the CPRO. The SSO, on the other hand, can be seen as an attempt to revive the old-style suspended sentence by adding conditions to it.

Use of the orders

The most up-to-date information regarding use of the two new orders covers the July to September 2007 period (Ministry of Justice, 2008a) when, with regard to the Community Order:

- 33,032 orders commenced
- Of these, 49 per cent had one requirement, 35 per cent had two
- The average number of requirements for the Community Order was 1.7
- 35 per cent of requirements made were for supervision, while 33 per cent were for unpaid work

The Community Order replaced all existing community sentences for adults. It consists of one or more of 12 possible requirements and may last for as short a time as 12 hours or for as long as three years. If the order is breached, the court can amend the order by making it more onerous, or it can revoke and resentence, which may mean custody, even where the original offence was not punishable by imprisonment.

The Suspended Sentence Order (SSO) is a custodial sentence and should only be used where the court is minded to pass a custodial sentence of less than 12 months. However, it is made up of the same requirements as the Community Order, so, in the absence of breach, it is served wholly in the community. It consists of an 'operational period' (the time for which the custodial sentence is suspended) and a 'supervision period' (the time during which any requirements take effect). Both may be between six months and two years, and the 'supervision period' cannot be longer than the 'operational period', although it may be shorter. If a SSO is breached, the court must activate the suspended sentence unless there are strong reasons for not doing so; if such reasons are found, the court can impose more onerous requirements or lengthen the supervision period.

1. HM Prison Service Population Bulletin, 16 May 2008, available at: www.hmprisonservice.gov.uk/resourcecentre/publications/documents/index.asp?cat=85

- Six requirements were rarely used: alcohol treatment, residence, mental health treatment, exclusion, prohibited activity and attendance centre together accounted for only 3 per cent of all requirements
- 56 per cent of Community Orders terminated successfully.

For the SSO the figures show that:

- 11,565 orders commenced
- Of these, 36 per cent had one requirement, 43 per cent had two
- The average number of requirements for the SSO was 1.9
- 40 per cent of requirements made were for supervision, while 24 per cent were for unpaid work
- Six requirements were rarely used: alcohol treatment, residence, mental health treatment, exclusion, prohibited activity and attendance centre together accounted for 4 per cent of all requirements
- 51 per cent of SSOs terminated successfully.

During the third quarter of 2008, just over 2,000 old-style community sentences commenced, which suggests that these will have disappeared from the system completely very soon.

About the project

This report is part of the Community Sentences project run by the Centre for Crime and Justice Studies and funded by the Esmée Fairbairn Foundation.² The original aim was to examine the use and impact of the Community Order, but it quickly became clear that the SSO was proving increasingly popular with sentencers and was likely to have a significant impact upon the courts, Probation Service and offenders. The project accordingly extended its remit to include the SSO.

The first report, *The Use and Impact of the Community Order and the Suspended Sentence Order* (Mair, Cross and Taylor, 2007), analysed official data on the use of the two orders and reported on the results of six focus groups carried out with probation staff in the North West. The main findings of that study included:

- The Community Order showed little signs of innovation, so it seemed to mirror the old-style community penalties in terms of its requirements.
- The SSO was more popular than had been anticipated and tended to have more requirements than the Community Order.
- Unpaid work was increasingly popular as a requirement.
- Half of the 12 available requirements were hardly ever used and some were not universally available.
- There were wide variations between probation areas in the use of requirements.
- Breach rates – especially for SSOs – seemed to be a cause for concern.
- Probation staff were anxious about what they considered to be the overuse of SSOs.

The new orders were introduced in April 2005 and the research was carried out during 2006, so it is possible that the trends we identified may be associated with the early days of the new sentences. The research has continued during 2007 and will be completed by the end of 2008, so a more definitive account will be possible in the planned final report of the project.

2. Four reports have already been published: *The Use and Impact of the Community Order and the Suspended Sentence Order* (Mair, Cross and Taylor, 2007); *The Use of the Community Order and the Suspended Sentence Order for Young Adult Offenders* (Stanley, 2007); *Community Sentences Digest* (Solomon and Rutherford, 2007); *The Use of the Community Order and the Suspended Sentence Order for Women* (Patel and Stanley, 2008). All are available at www.crimeandjustice.org.uk.

The 12 requirements of the Community Order and Suspended Sentence Order

- Unpaid work (40–300 hours)
- Supervision (up to 36 months; 24 months maximum for SSO)
- Accredited programme (length to be expressed as the number of sessions; must be combined with a supervision requirement)
- Drug rehabilitation (6–36 months; 24 months maximum for SSO; offender's consent is required)
- Alcohol treatment (6–36 months; 24 months maximum for SSO; offender's consent is required)
- Mental health treatment (up to 36 months; 24 months maximum for SSO; offender's consent is required)
- Residence (up to 36 months; 24 months maximum for SSO)
- Specified activity (up to 60 days)
- Prohibited activity (up to 36 months; 24 months maximum for SSO)
- Exclusion (up to 24 months)
- Curfew (up to 6 months and for between 2–12 hours in any one day; if a stand-alone curfew order is made, there is no probation involvement)
- Attendance centre (12–36 hours with a maximum of 3 hours per attendance)

Aims of this report

This report focuses on the views and attitudes of sentencers about how the two new orders are being used. This phase of the project was always planned to explore sentencers' views, as it is they who ultimately make decisions about what sentences to pass on offenders. The ways in which they perceive Community Orders and SSOs will provide insights and explanations for how they are used in practice.

Methodology

Sir Igor Judge, President of the Queen's Bench Division and Head of Criminal Justice, was approached in order to seek permission to contact sentencers. This was agreed, with the office of the senior presiding judge for England and Wales helpfully alerting potential respondents to the project. Sentencers in eight probation areas were approached to participate in interviews. The areas were chosen to reflect different usage of the new orders: two were areas where – in comparison with other areas – three or more requirements were most likely to be used for Community Orders; three were areas where three or more requirements were least likely to be used; and three were areas which appeared to be average in their use of requirements. Six Crown Court judges and seven district judges were interviewed face-to-face, while ten focus groups were carried out with magistrates. The interviews were recorded and transcribed; each of them took around 45 minutes. Focus groups lasted for between 90 and 120 minutes, and consisted of an average of five magistrates; in all, 52 magistrates and one clerk to the justices took part in the focus groups. Interviews and focus groups took place during the second half of 2007, so that the new orders had been running for at least two years when information was collected (the schedule of questions is given in the Appendix).



Overview of the report

The next chapter of the report discusses the training and implementation process that accompanied the new order. Chapter 3 covers the Community Order and how it is being used in practice, while Chapter 4 discusses the SSO. Chapter 5 looks at a variety of issues relevant to both orders: the power to review them; how they compare; whether they have had any impact on probation practice; and sentencers' views about two proposed policy changes that would impact upon the orders. Finally, Chapter 6 pulls together the main conclusions of the study and makes some recommendations.

Training and implementation

The beginning of a new initiative is always a potentially problematic time as an idea that has existed on paper moves into the hard reality of practice. It is during this implementation period that a variety of issues may emerge for the first time: the idea may be found to be flawed; the resources devoted to the initiative may be found to be inadequate; the individuals concerned may be found to be lacking in the appropriate knowledge; the market that was assumed to be present may not exist. With regard to the introduction of new court sentences, it is rare for these to be trialled prior to implementation as legislation would be required. Traditionally, sentencers have tended to be fairly compliant about taking on new sentences, although it is worth noting that magistrates were not especially happy about what they considered to be the radical changes introduced by the Criminal Justice Act 1991 (Mair and May, 1995).³ Ian Loader (2007) has calculated that since the election of the Labour government in 1997 there have been 53 Acts dealing with crime and criminal justice, ten more than the number passed in the previous 100 years. It is not surprising, then, that there is anecdotal evidence that sentencers are increasingly tired of what they perceive as constant tinkering with their powers. In this context, it would not be surprising if sentencers were to note problems with the implementation of the Community Order and the SSO.

On the whole, however, there was very little evidence that sentencers felt unprepared for the new orders: one judge was unhappy that the changes had come ‘fairly quickly with so many other things coming’ (CCJ13) and a handful of magistrates mentioned that they had not felt very well prepared for the SSO.⁴ Indeed, on the contrary, most seemed to feel that they had been reasonably well prepared, partly because there had not been a great deal of change to prepare for, as this part of the Act was not particularly complicated:

‘Quite well prepared, because really a lot of things were just simply being renamed, and in essence most of the requirements were already there.’
(DJ02)

Serious implementation problems were noticeably absent. The most commonly identified problems related to the SSO, although it is worth pointing out that lack of knowledge of the SSO and failing to use it properly were always laid at someone else’s door:

‘There was uncertainty at the beginning as to whether or not... if you imposed a SSO you were obliged to impose one or more community requirements, because the legislation wasn’t expressed as clearly as it might be, and anecdotally, some judges were passing SSOs without including requirements.’
(CCJ12)

‘There are some magistrates locally who don’t understand the threshold for using SSOs, and use them for cases that haven’t crossed the custody threshold... Some overload the SSO with requirements to make up for not sending them to custody.’
(M17)

‘I think the biggest problem, which I’m afraid is still a problem with one or two local DJs, is that they don’t understand that you have to make a requirement when you make a SSO.’
(CCJ10)

3. The 1991 Criminal Justice Act introduced – among other things – unit fines and the Combination Order (later the Community Punishment and Rehabilitation Order). Overall, it adopted a ‘just deserts’ approach to sentencing which led to some complaints by sentencers, and key aspects of the Act were amended by the Criminal Justice Act 1993.

4. Quotes numbered DJ1–DJ7 are from interviews with district judges; those numbered CCJ8–CCJ13 are from interviews with Crown Court judges; and those numbered M14–M23 are from focus groups with magistrates.

Other implementation problems that were mentioned seemed to be confined to specific courts or individual respondents, for example:

- Confusion about who would be monitoring the exclusion requirement before realising that it would not be available
- The legislation not being as clear as it might have been
- The time lag between training and legislation.

The training that sentencers had received about the new orders was, to a considerable degree, responsible for these positive responses about preparation and what was agreed to be a relatively unproblematic implementation process. Most respondents considered that their training had been appropriate, with several judges and district judges specifically mentioning courses organised by the Judicial Studies Board. Indeed, sentencer training was, on a couple of occasions, compared positively with what other agencies had received:

‘Maybe the barristers who appeared before us were less competent than we were in many ways, because they obviously weren’t privy to the training that judges had.’
(CCJ11)

‘The initial problems that I encountered were that the Probation Service didn’t seem up to speed. They were very uncertain about a number of areas, particularly in the transitional period between the old orders and the new ones, and how new orders related to old orders.’
(DJ05)

The few negative comments about training focused upon there being too much of it, although, in contrast, several magistrates thought they had not received enough training for the SSO. The need for training to be made compulsory was also mentioned by a handful of magistrates. Interestingly, one district judge claimed to have had no training whatsoever:

‘I didn’t have any training. It was just self-training. I mean, I just went through the stuff and I did my internal training for my staff here, and it was more of a discussion as to what we could achieve because, although we’d got 12 options, it was patently clear right at the outset that we hadn’t really... we haven’t got the ability to actually utilise some of them. But I had no training, no.’
(DJ04)

Training fatigue as a result of what was perceived to be constant change to no real purpose was particularly noted by some of the magistrates:

‘Magistrates are tired of change and sceptical of the amount of training that has to be done.’
(M16)

‘Sometimes there’s a feeling of pointlessness because things change so quickly.’
(M19)

In our earlier report on this project (Mair, Cross and Taylor, 2007), we suggested that the presence of what we referred to as a dual sentencing framework (where for some time after the introduction of the new orders in April 2005 the old-style sentences were still being used for offences which had been committed prior to that date) might lead to problems. Accordingly, we explored this matter with our respondents and all acknowledged that there had been such problems. These were seen, for the most part, as minor and not insurmountable difficulties that would fade as the old sentences fell into disuse over time:

'No, whenever you sentenced you had to look at the date of the offence and see which structure you were under... One particular problem was when there were a number of offences being sentenced together straddling the dates, or when there was a conspiracy or an ongoing offence covering the period. And I know it was causing problems for the prison authorities because which regime you sentence under depended upon the licence provisions.'

(CCJ11)

'There were [problems,] particularly with crossover cases where you've got obviously pre- and post-April offences. But, I mean, there was the guidance that we had that we should try and use the appropriate system for the most serious offences, which I suppose is absolutely sensible. But there were just a few cases where really you were, as a sentencer, in great difficulty, knowing where you might have had a serious matter in each of two sets of offences and wondering which was the most appropriate one to utilise... And I was uncomfortable as well with the prospect of dealing with your new offences, giving the Community Order with the various sorts of components, and then saying, "No separate penalty for the earlier stuff", which is what we were being advised to do.'

(DJ04)

But, certainly as far as magistrates were concerned, with the assistance of legal advisers, any problems could be overcome.

Finally, it is worth noting that several respondents commented that the new orders were not available in the youth court or for those under the age of 18 and that this was something that they did have to bear in mind.⁵

Overall, then, a number of relatively minor teething problems were mentioned as part of the implementation process, and this should come as no surprise. The issue that attracted most problems was the SSO where preparation was seen as lacking, leading to inappropriate use.

5. The Criminal Justice and Immigration Bill 2008 includes provision for a Youth Rehabilitation Order. This will be a generic community sentence for offenders under the age of 18 with 16 possible requirements. Implementation is expected in late 2009 or early 2010.



The Community Order

The focus of the research project as a whole is an examination of the use and impact of the Community Order and the SSO. With regard to the Community Order and the SSO, our interviews and focus groups with sentencers were designed to explore sentencers' views about the orders and to complement our earlier focus groups with probation officers (a group we plan to revisit in the third phase of the work). Given the scope of the Community Order, is it especially useful for particular kinds of offenders? And, having noted in the first report that there were 'some male/female variations in the use of requirements that require further study' (Mair, Cross and Taylor, 2007:31), is it used differently for men and women? Further, and again from the data analysed in the first report, it is clear that, for various reasons, all of the requirements theoretically available for the Community Order are not being used. Indeed, only around half of the 12 requirements are used regularly (Mair, Cross and Taylor, 2007:20–21).

One issue that was considered to be a potential problem was that enforcement of the Community Order would lead to increasing use of imprisonment for those deemed to have breached the conditions of their order. Previously, sentencers had a range of options available when dealing with breach of a community penalty: no action, a warning, a fine. For the Community Order these options are no longer possible and, along with a much more rigorous policy regarding breach on the part of probation officers, custody appeared to be a more likely option than before. As one of the objectives of the order was to provide an alternative to custody – always a controversial matter for a community penalty⁶ – if this was indeed proving to be the case, then the imposition of custody following breach would be even more likely. In this chapter we discuss the sentencers' responses to such issues.

Use of the Community Order

Generally, sentencers seemed to be happy with the Community Order. They felt that it had proved to be useful since its introduction, that, on the whole, it was used fairly wisely and rather like the previous community sentences only with greater flexibility, that it was an effective mix of punishment and rehabilitation, and that it had been used more confidently as time had passed. Some judges and a few magistrates noted that the order could be used for more serious offences than the old-style community sentences:

'It's gone upmarket slightly in the sense that there may be cases where two years ago we would have passed a prison sentence, where you can now just about get yourself a Community Order because it's got so many angles and teeth.'
(CCJ09)

'This is a much better and more focused way of passing community sentences.'
(CCJ10)

'We are dealing with more serious offences with Community Orders. Custody is appropriate in many cases, but because of the prison regime and edicts from the Court of Appeal, we are restricted.'
(M23)

6. For example, it is difficult, as far as public perceptions are concerned, for community penalties to compete with custody – certainly as far as restriction of liberty is concerned. It is also difficult politically for a government to label a community penalty formally as an alternative to custody as this immediately suggests that dangerous offenders who should be in prison will be dealt with in the community. And, of course, it implies that community penalties have no identity in their own right.

All respondents mentioned the range of requirements that were available for the order. This was a key factor in the way the Community Order could be used for a wide range of offenders and offences, as long as they did not cross the custody threshold. As one respondent put it, the order could be used for 'all offenders who have not yet had a custodial sentence and whose offending is not so horrendous that only a custodial sentence could be justified' (DJ05). More specifically, acquisitive crime, some white collar crime, young adult offenders with an unstructured lifestyle, first-time offenders who had committed quite serious offences and vulnerable individuals were all mentioned as appropriate for the Community Order. Those whose offences were drug and alcohol related were also noted as being suitable for the order. The versatility of the order and its ability to be shaped to suit a variety of offences and offenders is reflected clearly in this list. Indeed, almost any offence could be considered for a Community Order as it was the seriousness of the offence that mattered:

'The nature of the offence – theft, sexual, violence or whatever – isn't a significant feature; the gravity of the offence is crucial.'
(CCJ12)

Sentencers were in no doubt that the Community Order was highly appropriate for female offenders. Indeed, they agreed that it was equally suitable for men and women. A few respondents thought that the order was even more suited to women because of their 'different needs and different roles in life' (DJ01):

'... with a female, the problem you so often have is that the female offender either has the care of a number of young children... or she is actually vulnerable in one way or another.'
(CCJ10)

'There will be cases that cross the custody threshold and you can claw it back on the basis that here is a woman who has young children to look after, and the interests of the children is a legitimate sentencing consideration.'
(CCJ12)

Virtually all sentencers claimed that they used the Community Order essentially in the same way for men and women as '[t]he nature of the offence overrides any gender difference' (M15). One magistrate even stated that employment was a more relevant factor in sentencing than gender. One district judge was willing to admit that he did use the Community Order differently for women:

'I do [use it differently]. I mean, I wouldn't defend that if anyone asked me about it, but I don't like jailing women. I have no feelings about it for men, and I think actually the slow, attritional approach of a Community Order, the one-to-one nature with a probation officer, the relationships that are involved... are well suited to women and they are likely to respond to them.'
(DJ03)

And one judge noted that he always tried hard to find a way not to sentence a woman to custody probably 'because I'm a male sentencer' (CCJ10).

However, despite claims that the order was used in the same way for men and women, respondents were quick to point out that the family commitments that were often associated with women could sway the sentencing decision, and this was a factor that would be taken into account if the offender were male:

'I would deal with a single male parent in exactly the same way. I don't think you should distinguish because of sex.'
(DJ05).

'If it's a woman with young children, you would have to take that into consideration – but we would take it into consideration if it was a man in that situation.'

(M19)

'It might affect things if it is a woman with young children. That would make me lean towards using a Community Order rather than custody. But men and women wouldn't be treated differently if they were being sentenced together for the same crime. I might vary the Community Order slightly for mothers, make it a bit less onerous.'

(M20)

'I think there's a distinction made – right or wrong – between men and women in terms of curfews. Sometimes with women, you know they'd break the curfew straightaway if they had to for their child's welfare. I worry about setting them up to fail by doing that.'

(M14)

Community Order requirements

It was difficult for sentencers to comment on all of the requirements available for the Community Order as only around half of these had actually been used. As far as those requirements that had been used were concerned, they were considered to be useful while the remainder either were not available locally or had not been used. Those requirements that had been used often tended to be seen as most useful: 'They're all tools in a box and some tools get used more than others and you have your favourites, but it depends on what's in front of you' (M22).

Only one sentencer (a judge) claimed to have used all of the 12 requirements. Two district judges initially claimed they had done so, but further questioning elicited that this was not the case. It was evident that none of our respondents were clear about which requirements were actually available to them. Some said that they thought they were not all available, while others thought that they were – 'I think, as far as I know, they're here' (DJ06) – and a third group simply did not know. Whatever the situation is regarding the actual availability of requirements, it is surely unacceptable that sentencers are unclear about what is available and what is not.

Regardless of which requirements were available, only a handful were used in practice, with unpaid work and supervision dominating responses, while curfews, drug requirements and accredited programmes were also mentioned:

'Unpaid work, curfew and supervision – they're the three main requirements.'

(DJ01)

'Supervision is an ever-present within a Community Order; unpaid work is very useful indeed.'

(DJ03)

'... in terms of the obvious ones, the curfew, unpaid work, supervision, drug rehabilitation requirements... I've used.'

(CCJ07)

This leaves seven requirements that were identified as not having been used by at least one sentencer: attendance centre, prohibited activity, mental health treatment, alcohol treatment, residence, specified activity and exclusion. We have already noted lack of availability and lack of knowledge as possible reasons for this. But the argument for making all requirements equally available nationally may founder because so many requirements are not used, raising the question of whether it is worthwhile ensuring

that resources are forthcoming to ensure availability. A vicious circle may emerge whereby lack of use becomes translated as not needed, which would narrow the potential scope of the Community Order. Interestingly, the possible role of the Probation Service was hinted at by several judges:

‘In the end, I’m following, not following, but I’m considering what’s suggested by a probation officer.’
(CCJ08)

‘We always rely upon, the suggestions for what should be attached to the Community Order comes from, the pre-sentence report rather than from the sentencer.’
(CCJ11)

Two important questions emerge from these quotes: first, are sentencers (for whatever reasons) relying too much on probation for the content of Community Orders; and, second, are probation officers sticking too closely to what might be termed ‘traditional’ probation responses?

Enforcement and breach

As we noted in our earlier report, breach has been a concern for community sentences for at least ten years. Problems with the breach process of the new orders were noted by probation staff in our first report (Mair, Cross and Taylor, 2007:28). Also, from data in the most recent *Offender Management Caseload Statistics* (Ministry of Justice, 2007a), it would appear that Community Orders are less likely to be completed satisfactorily than their predecessors: 52 per cent of Community Orders were successfully completed in 2006 compared to 62 per cent of Community Punishment Orders and 78 per cent of Community Rehabilitation Orders.

There was certainly a degree of agreement that breach was being dealt with more speedily as well as more rigorously than previously:

‘We’ve really got to grips with that, I think. The pattern for the last couple of years has been to place most of the breaches before me – perhaps for consistency or perhaps simply to fill out my lists – but the Probation Service has breached people very quickly. I’m really pleased with that.’
(DJ07)

But this brought problems in its wake as, on occasion, it seemed that offenders were being brought back to court rather too quickly and for too little:

‘Because of the government’s need, the political need to make it obvious that community penalties have teeth, the Probation Service are under a lot of pressure to breach very quickly. I’m not against that, I’m not against that at all, but we are now finding that quite a lot of breach proceedings are brought and the defendants brought before the court and the Probation Service are saying, “Well, we didn’t expect him to be perfect, he’s not actually done all that badly. He’s not done as well as people in Whitehall would like but, still, this is the best outcome and we would like the order to continue.” So we say, “Yes, the order must continue.” Fair enough, if that’s what they want, that’s what they’ll get but, meanwhile, they’ll have spent £300–£400 on those breach proceedings and the Probation Service would say, “Well, we could do a heck of a lot more with that money if we actually used it on frontline services.” So I think it might be that there is too much political correctness about always going for breach proceedings when some discretion might save money.’
(CCJ09)

Given the reduced discretion that sentencers had to deal with breaches of the Community Order, making the order more onerous was seen by many respondents as setting offenders up to fail, as they had proved themselves unable to cope with an order of lower intensity. Less flexibility was therefore a problem, although judges and district judges did seem to be able to find ways around this.

‘Well, there are problems. There are huge problems because of the requirements that we have to impose for dealing with matters without re-sentencing by the use of more onerous requirements. Often the problem in the first place is the inability for all sorts of reasons to cope with what is sometimes too great and long a list, so then to impose – for example, if you got someone with a 200-hour component of unpaid work already as part of a package which might include a curfew, it often would include a supervision requirement, and then your option is really to give them more hours when they’re struggling to do the ones they’ve got. Now that might sound a very soft sort of evaluation or way of looking at it, but it’s not, because you’re setting people up to fail frankly. And they’ve got to do it within a timescale, so you’re then thinking the longer you go, the further you’re getting from the actual commission of the offence, and the real problem is when a solicitor stands up and says, “Whatever else he’s done in this case, he’s committed no more offences.” Now that makes it very difficult to be able to deal with sometimes by utilisation of the more onerous requirement, and I’d be the first to admit that often in those circumstances that’s when I go straight back to re-sentence.’

(DJ04)

‘One of the major problems is the fact that one has to, on a breach, if you’re going to allow the order to continue, make it more onerous... Under the old law... you could fine for the breach or make no order, allow the order to continue with no adjudication, depending upon the reasons for the breach. Now you have to make it more onerous and it can become a little bit artificial to the extent that I have, on occasions, added a requirement of a very, very short curfew – for example, two days.’

(DJ01)

‘Sometimes, because of National Standards, we find that people are breached after two really quite minor infringements... and if they’re struggling with an order, the last thing they need is to have it made more onerous... That’s just setting them up to fail. I sometimes adjourn the case for 28 days, adjourn the breach to see how they do and they normally toe the line. And then, of course, what do you do at the end of the 28 days? I adjourn it generally. Simple as that. Crown Court has power to adjourn a case, you adjourn it.’

(CC10)

‘Breach, however, was not always leading to custody – at least not in respect of a first breach which seemed to be used as a warning, and sometimes not even as a result of a second breach. They usually get two or three chances.’

(M22)

‘Second, breach should normally, I think, involve custody but it hasn’t done a few times if the Probation Service feel very strongly about it. Again, it’s very much fact-driven. It depends whether, if the first breach was 18 months earlier and there’s been a massive change in somebody’s lifestyle, then maybe it won’t. So it’s impossible to be dogmatic about it. But, as a general benchmark, I think a second breach would indicate that somebody’s wilfully failing to comply... and therefore should cause you to think in terms of revoking the order.’

(DJ07)

Custody was often used as a threat, but not always imposed. This was a difficult tightrope to balance on, but was needed to bring home to offenders that failure to adhere to the conditions of the order did have sanctions. Interestingly, two judges pointed out that at times they used the Community Order rather than the SSO because of the greater flexibility of the former with regard to breach:

‘You’re much better off, I think, for some cases, giving a Community Order than a SSO, knowing that if it’s breached it’ll come back anyway and you can always re-sentence.’

(CCJ11)

‘... if you impose a SSO and somebody’s in breach, the most they can get is the sentence that has been suspended; so if you have a serious offence, but you only give it eight months suspended and then they’re in breach, eight months is the limit.’

(CCJ10)

The Community Order in relation to its predecessors and as an alternative to custody

From one perspective, the Community Order could be seen as a radically new approach to sentencing through the scrapping of all previous community penalties and replacing them with one generic sentence with a range of requirements. On the other hand, it could just as easily be seen as a logical extension of the old system whereby a somewhat ad hoc collection of sentences and conditions were simplified into one sentence. How the order is perceived in comparison to its predecessor community penalties will have an impact upon how it is used by sentencers.

For the most part, magistrates and district judges both felt that the new order was preferable to its predecessors because it offered much greater possibilities in terms of combining requirements (although, as we have seen, there is little evidence that such possibilities were being taken up), and it could, therefore, be more tightly and more effectively focused on an individual offender. Judges, on the other hand, tended to remark upon the similarities between the Community Order and its predecessors rather than the differences: ‘More or less the same thing’ (CCJ10); ‘I don’t think there’s a significant difference’ (CCJ12); ‘I don’t see any difference’ (CCJ08); ‘A lot of it is just different nomenclature’ (CCJ11). But they also noted the range of options available in the new order, its tidiness, its greater flexibility, and that it was more offender-focused. On the whole, there were no indications that the Community Order was perceived as a radical change. What it did offer was greater clarity for sentencers, offenders and probation officers. But, as one magistrate pointed out, the lack of availability of some requirements hindered the effectiveness of the order:

‘You can combine punishment and welfare in the same order at quite a low level of sentencing seriousness, which you couldn’t do before. There used to be a tension between the two approaches, you had to make a decision about which way you were going to go with the sentence. But that’s not true now. I think that makes for quicker sentencing decisions too, because you don’t have to spend time deciding between the two... and it would be even more versatile if we had training covering all 12 of the requirements. Not having that limits the Community Order’s effectiveness. Same with the limited availability. It would be good to use the exclusion requirement, for example, because it restricts liberty without being more onerous in terms of work they have to do. But the facilities aren’t there to police it locally... If the government says you can do something in sentencing, they should give you the funding to be able to do it in practice... At the moment, it’s postcode justice.’

(M17)

One of the recurring debates about the old-style community penalties was how far they acted as alternatives to custody, and it is all too easy to see the Community Order with its 12 requirements as intended to offer a viable and more rigorous alternative to a short sentence of imprisonment. There can be little doubt that one of the hopes of the Home Office in introducing the order was that it might have an impact upon an ever-increasing prison population.

Sentencers provided a range of views about whether or not the Community Order was being used as an alternative to custody. Most thought the order was used in such a way to a greater or lesser extent: 'definitely' (M20); 'very much so' (M23); 'sometimes, yes' (CCJ12). Another stated:

'Yes, repeatedly yes. But it was ever thus, wasn't it? You think of custody, then in comes the mitigation or the good record and you don't send them to custody, they go to a Community Order... If a case has crossed the custody threshold, there's still less than half a chance that he'll go to custody and the answer is because you can solve it by a Community Order.'

(DJ03)

A minority, however, were adamant that this was not the case:

'I would sincerely hope not. It should never be used as an alternative... and I'm not conscious of ever using it myself as a certain alternative to custody.'

(DJ01)

'It isn't used as an alternative to custody, it's just part of the range of sentences we use.'

(M18)

Judges – perhaps not surprisingly given the nature of the cases they dealt with – were most likely to articulate the need to avoid custody wherever possible, whether this was due to its being seen as ineffective or as a result of the growing pressure on the prison population:

'My view is that there is a duty on judges at the moment, greater than it's ever been, to only imprison when it's absolutely necessary, and the alternative is the Community Order.'

(CCJ08)

'If it's used in that way [as an alternative to custody], if somebody's in breach, then they get the alternative, which is the custodial sentence. Nobody loses in that situation, because if somebody really deserves custody but they are given a chance... and if they blow it, well then they know... and sometimes I will tell somebody what I think the custodial sentence should be and I reserve it and I've got all my notebooks.'

(CCJ10)

'You ask yourself, does this case cross the custody threshold? Yes. But that doesn't mean to say that they have to go into custody, does it? So you then look at the alternatives and you look at the purpose of the sentencing... What I do know is that custody is the last resort. No one likes sending people to prison. You know, one wants to, for every reason you want to keep them out of prison if you possibly can. But you can't always do that.'

(CCJ11)

As far as magistrates were concerned, the Community Order offered a much more rigorous and demanding sentence than its predecessors, so it could be used for those who, in the past, would have been imprisoned. Some felt that they were forced into using

the order as an alternative to custody because of government pressure not to use custody. Prison tended to be seen as a less effective sentence than a Community Order as, in the case of magistrates, the custodial sentences they imposed tended to be short, meaning that the offender would only be in prison for a relatively short time and, realistically, it was unlikely that any work could be done to help with drug problems, for example, in the two months that would be served if a four month sentence was imposed. On the other hand, there was no doubt that prison was necessary for some offenders. One magistrate was exceptional in arguing that the Community Order was not used as an alternative to custody, but she did think, perhaps worryingly, that 'it has displaced fines at the bottom end' (M17).⁷

Most sentencers were aware of the potential problems in using orders to divert offenders from custody: by overloading Community Orders with requirements they might be setting them up to fail and thereby contributing to the prison population. And, according to some district judges, they knew of magistrates who were using SSOs where Community Orders would have been far more appropriate – and the implications of breaching a SSO were more serious and again could lead to increases in the prison population.

Good and bad points of the Community Order

The good points of the Community Order covered similar issues: the range of requirements it offered, its resulting versatility, its ability to combine the various elements of sentencing in one disposal, the way it could be tailored to fit individual offenders, and the fact that it was tidier than the number of community penalties available previously:

'It's the variety that's the real advantage and the real improvement in what we had before.'
(DJ04)

'A single order with its various components, tidier, more sensible and logical, easier to understand for the offender, hopefully.'
(DJ05)

Judges also mentioned that it was a credible alternative to custody, and one judge carefully listed four advantages of the order as he saw them:

'Firstly, it imposes a degree of control which enables the court to bring the defendant back and deal with him if he breaches the order. So it means that you've still got some control as a judge. Secondly, it provides what it says, it provides supervision and assistance for people who need it. Thirdly, it can provide specific training and disciplines for drugs, alcohol, those sorts of matters. And I think, fourthly, it brings the defendant into contact with the probation officer... someone who is considerate, caring, interested, sensitive, who has a normal family and who can talk to them.'
(CCJ08)

The bad points of the order were more difficult to pin down, with many respondents finding it difficult to name any major problems. Those that were mentioned certainly did not seem to indicate any problems inherent in the sentence itself:

- Lack of resources, which meant the some requirements were not available
- Lack of discretion over breach
- The order being seen by offenders as a soft option
- Delays in getting offenders to begin a requirement (and the drug rehabilitation requirement was mentioned specifically by one group of magistrates)
- The various requirements not always fitting together as well as they might.

7. This phenomenon has been noticed by several commentators, most notably Rod Morgan who referred to the 'silting up' of probation caseloads that resulted (Morgan, 2003). It is also an issue that the Community Order was intended to address (Mair, Cross and Taylor, 2007).

The Suspended Sentence Order (SSO)

While the Community Order can be seen as a simple next step in the development of community penalties, the SSO is a rather more radical change. The original suspended sentence was introduced in 1967 and proved popular with the courts but over time failed to have any impact in terms of reducing the use of custody and increasingly lost political credibility as a sentence. As a result, the suspended sentence was restricted in its availability by the Criminal Justice Act 1991 to exceptional cases, which meant that from around 20,000 of such sentences being passed in 1990 the total had dropped to 2,500 in 1995. Thus, the introduction of the SSO in 2005 with its various requirements is, essentially, a brand new sentence.

The SSO is a custodial sentence served in the community and this is what differentiates it from the Community Order. The possibility of confusion is obvious, however, given that both sentences share the same requirements. The SSO is a high tariff sentence with, as Cavadino and Dignan (2007:156) put it, 'punitive bite'. As ever with such sentences, net-widening is an ever-present issue and, as we pointed out in our previous report, even the Home Office acknowledged that this did seem to be occurring (Mair, Cross and Taylor, 2007). Breach of the SSO has little scope for a flexible response, so offenders are more likely than those serving Community Orders to end up in custody if taken back to court. And, to add to the potential for problems, use of the SSO is running at about double original Home Office estimates, with around 40 per cent of SSOs being made for summary offences – a surprisingly high figure for what is meant to be a high tariff sentence (Ministry of Justice, 2007a). So what do sentencers make of the order?

Use of the SSO

While responses to questions about the use of the Community Order had been generally positive, a little more scepticism was evident with regard to the SSO. Around half of the judges and district judges questioned thought that the SSO was being used often and well 'despite what you read in the media with people high up in the Home Office starting to say that so many people breach their SSO that the courts shouldn't impose them' (DJ02). Some referred back to the old-style suspended sentence and regretted its demise:

'I think it's very important. Historically, when the suspended sentence came in, which was in the 1970s I guess, it was a very useful tool for judges. And then, for some reason, the Home Office decided that there were too many suspended sentences and we wouldn't have them any more unless there were exceptional circumstances, which means it went, and now it's come back again. And there's no doubt it's very useful, there's absolutely no doubt in my mind... As often as not, I suspend it for two years, and the return rate, I think, is pretty low.'
(CCJ08)

The other half had some reservations about the SSO and felt that it was being used too often: 'A bit like confetti, it seems to me it's thrown about quite a lot' (DJ06). A couple of judges expressed reservations about the order:

'I think I've made one [SSO]. Two main reasons. First of all, the actual suspending of the sentence at 12 months is, in many cases, when you're into that scenario, too short... And I prefer the flexibility [of the Community Order]... it's far better to see how they do on the Community Order and just keep your powder dry and say, "Right, well I did tell you it would be imprisonment and it's this."' (CCJ13)

'I think there is some philosophical problem about this. I'm not clear in my mind whether the SSO is a Community Order in which the defendant is already told what he is going to serve if he fails, or whether it is an old-fashioned sentence of imprisonment suspended, provided he does certain things... Is it a Community Order in which you use the threat of imprisonment as an extra incentive for him to obey the requirements, or is it one of those cases which actually crosses the threshold and is brought back, perfectly genuinely?' (CCJ09)

Interestingly, there was a feeling amongst the magistrates that the SSO was not used very often by them – despite the fact that, in 2006, of a total of 33,509 SSOs made by the courts, more than two-thirds (69 per cent) were made in magistrates' courts (Ministry of Justice, 2007b):⁸

'Legal advisers advise us against using it.' (M21)

'I've been on a refresher course which actively discouraged the use of this.' (M22)

Other reasons given by magistrates for not using SSOs included: failure meant the offender went to custody; they were conceptually confusing because you crossed the custody threshold but then had to come back down again; and 'if it's good enough for custody, why delay the process?' (M15). The SSO was seen as offering a last chance to offenders and several magistrates invoked the image of the Sword of Damocles when talking of the sentence.

It was notable that respondents from all of the three sentencer groups blamed magistrates for misuse/overuse of the SSO which led to breach.

'I think there is scope for abuse of that order... think there's a danger, quite frankly, and I have to say this, of lay magistrates being misled into thinking that, well, it's the same as a Community Order but in fact we're passing a sentence of imprisonment, so we've got the best of both worlds.' (DJ01)

A clerk to the justices who joined one of the magistrates focus groups admitted that he had 'written to the Bench about the usage of SSOs. There is a danger that magistrates see the SSO as another community sentence... instead of the custodial sentence that it is' (M18). One district judge who considered the SSO to have been 'hugely successful' (DJ03) still criticised lay magistrates for using them too often and in the wrong circumstances. He also believed (incorrectly) that all SSOs had to have a supervision requirement ('as I read the law they have to') and this was a major problem as far as he was concerned because:

'When they go and breach the supervision part of it, the whole lot of it falls to be enforced and it seems grossly unfair for a serious criminal who's gone eight, nine months and still committed no offence to be back before me because he didn't turn up twice at four o'clock to discuss his knitting patterns or something.' (DJ03)

8. It is worth noting that, with around 23,000 SSOs being passed in the magistrates' courts (and district judges will be responsible for passing a number of these) where there are roughly 30,000 magistrates, it is quite possible that a magistrate would only rarely use a SSO.

In discussing the suitability of the SSO for particular offences, custody was far more likely to be mentioned than was the case when talking about the Community Order: ‘an offence that would normally call for custody’ (DJo1); ‘where you’ve crossed the custody threshold and you don’t really want to send somebody to prison’ (DJo6); ‘any offence that crosses the custody threshold but where prison won’t work’ (M20). Violent offenders were also considered to be suitable for a SSO and judges seemed to consider that employment was a significant factor: ‘I’m particularly attracted to it when people are in work’ (CCJo9); ‘People in employment, people who’ve got settled family homes, family responsibilities’ (CCJo8). There was little doubt that an offender had to be heading for custody, though, as one respondent noted, there could be a false logic involved in making a SSO:

‘I don’t know, but I suspect, some people may cheat and say of a case, well, as I can suspend the sentence I think this passes the custody threshold. Well, you’ve got to be careful not to do that.’
(CCJ10)

All were agreed that the SSO was just as appropriate for female offenders as for males, and there was no difference in the way it was used for each group – with the crucial exception of childcare responsibilities. This was one area where a woman might be treated differently from a man, although sentencers were quick to add that not only was this a mitigating factor that they were permitted to take into account, but that it could also apply to a male if he had such responsibilities:

‘It’s certainly being used as much for women as men, and maybe more for women for the same reasons. There are often characteristics about a female defendant, which I’ve indicated already – responsibilities and stuff – and you’re somewhat loath. And also, for some reason, I suppose emotionally, you think that there’s a better chance of a woman responding anyway, than a man. Although whether that is still true, I don’t know.’
(CCJo8)

‘If they’re young mothers, are you going to send them to custody?’
(CCJ11)

‘The only times I’ve issued one of these, strangely, were with women who were maybe prolific shoplifters and had children. I’m not saying that these people can hide behind their kids, but if it was the same woman, same age, same offence and she had no kids, then I would send them down. But should this be the case?’
(M22)

SSO requirements

All of the requirements available for the SSO were thought to be useful, but only a few were actually used. This was partly because sentencers were aware of the Sentencing Guidelines Council (2004) advice concerning the use of requirements with the SSO, and partly because they were perfectly aware of the implications if offenders failed to adhere to their requirements. Unpaid work and supervision were the two requirements mentioned that seemed to be used most often, although a curfew and the drug rehabilitation requirement were also mentioned: ‘... the most important are the curfew and unpaid work’ (CCJo8); ‘The most common requirement with a SSO is unpaid work’ (CCJ10); ‘Normally, I’d just use supervision’ (M20); ‘I’ve used the unpaid work and the drugs element’ (M22).

Two district judges specifically mentioned that they tried to avoid drug rehabilitation requirements in SSOs as, in their experience, offenders tended to find these too onerous, leading to breach.

Because the SSO was a custodial sentence, some respondents claimed to use the more punitive requirements, although the most commonly used requirement is supervision and this is used more often than it is with the Community Order. Some commented that they did not use as many requirements as they did with the Community Order – although, as we noted in Chapter 1, on average the SSO has more requirements than the Community Order. Once again, some comments were made about magistrates overloading SSOs with requirements, and in one area it appeared that the local Probation Service now had a policy of suggesting no more than two requirements for SSOs:

‘I’ve noticed lately that the Probation Service now have started suggesting that there should only be two conditions attached to a SSO. Indeed, I got it in a report from a trainee probation officer the other day, saying there could only be two. What he must be getting is a communication from somewhere saying don’t recommend more than two. Well, fine, that’s OK. I know that I can pass more... but I think two is a pretty good yardstick.’
(DJ07)

Enforcement and breach

We noted previously a relatively low rate of successful completion for the Community Order, but the SSO performs even worse on this measure: only 37 per cent of SSOs were completed successfully in 2006 (Ministry of Justice, 2007a). Enforcement of the SSO was, however, generally considered to be unproblematic by sentencers. Breach was being dealt with more firmly and more quickly by the Probation Service than it had been in the past, and sentencers praised the service for this improvement. A few respondents did voice worries about the lack of discretion in the breach process which they felt could lead to difficulties:

‘Because they [probation] don’t have any discretion on when they can breach any more, they sometimes bring breaches to court without any documentary evidence, but ask us not to activate custody.’
(M19)

‘Probation have tried to pull the wool over our eyes by telling us that there needs to be another report before we can send people to custody for breach. But we just send them straight in if there’s any breach.’
(M20)

One judge had experienced problems with breach, although the focus of his unhappiness was the competence of barristers who were prosecuting breaches:

‘We’re not very happy here with the quality of legal representation by the Probation Service, and I’m dealing with that on behalf of the judges. There’s a feeling that the barristers who come here are perhaps not as competent as some of the other barristers we get who deal with breaches. And often they don’t know, they don’t have enough information about the original offence... it’s a different agency to the CPS who prosecuted the original offence.’
(CCJ11)

On the question of whether breach of a SSO was leading to the imposition of a custodial sentence, there was general agreement that this was likely but not always inevitable:

‘Oh, you’re gone. There is no point in me passing a SSO unless I’m prepared to stand there. My difficulty is enforcing the SSOs made by magistrates, when in fact I wouldn’t have passed them in the first place. But I’ve got to back them up to the hilt,

because I've got my money in them as well. So, yes, you've had it. If you're in front of me on breach of a SSO, you are going down. That's the rule.'

(DJ03)

'It's not inevitable that they'll go to prison, but it's much more than probable... unless there's some very good explanation, then they'll go to prison, and that's the end of it.'

(CCJ08)

'More often than with the Community Order. For a start, the people who have committed these offences should generally be uptariff from Community Orders, and in a way the SSO is a way of avoiding the immediate sentence, and if they throw that chance I've got less anxiety about unsuspending the suspension.'

(CCJ09)

'In many cases we are looking at breaches for similar offences to the first offence and still not imposing custody, just making more onerous conditions.'

(M21)

One very experienced magistrate who thought that 'all breaches lead to jail, really' went on to add, rather regretfully, that 'if you breach them and they go to jail, they're not getting any rehabilitation any more, which I suppose is a sort of failure' (M20).

The SSO as an alternative to custody

The SSO was, of course, designed as an alternative to an immediate custodial sentence. Its predecessor, the suspended sentence, failed to work effectively in that way, as have most of the other post-war sentences seen as alternatives to custody such as the Community Service Order, probation day centres and the Combination Order. On the whole, sentencers agreed that the SSO was indeed being used as an alternative to a custodial sentence – perhaps not on every occasion it was applied but 'almost 100 per cent' (DJ03) of the time, at least if it was used properly:

'Well, it's an alternative to immediate custody isn't it. I mean that's the real point of it. You're looking all the time to see whether you can find a way of not imposing an immediate custodial sentence, not in all cases but in many, many cases at this level.'

CCJ08)

'A SSO is a custodial sentence, and it can only be passed if the requirements for passing a custodial sentence are met... the test for imposing a SSO, the legal test, is exactly the same as the test for imposing any other custodial sentence.'

(CCJ12)

Several district judges pointed out that, as the SSO was, legally speaking, a custodial sentence, there were semantic issues in referring to it as an alternative to custody, but in practice that was how they used it:

'I think in reality it's been regarded as a hybrid between the Community Order and the sentence of imprisonment, although that's not the way it should be seen.'

(DJ05)

'It's a get-out; you don't have to send them down the steps and get security in.'

(DJ06)

A few magistrates were not so sure that the SSO should be used as an alternative to custody; as far as they were concerned, if a case merited custody, then imprisonment had to be imposed. Once again, there was some criticism of magistrates who were considered

to be using the SSO without thinking the matter through – and this led to failure, breach and imprisonment, which would not have resulted if the sentence had been used properly. Even magistrates themselves acknowledged such difficulties:

‘I suspect that it is being used by others as an ‘in-between’ sentence, when the case hasn’t crossed the custody threshold. Not much, but I think that is happening a bit locally... The legal adviser should intervene if the threshold hasn’t been crossed, but I have heard about cases round here where the adviser hasn’t been invited into the room.’

(M17)

‘It’s a grey area really, because you can suspend. Sometimes, I think some magistrates I’ve seen would not have sent people down at all if the SSO hadn’t been there. I can’t prove that, I just suspect that it happens sometimes.’

(M14)

Good and bad points of the SSO

By far the most commonly mentioned advantage of the SSO was that it gave sentencers the opportunity to avoid sentencing an offender to imprisonment; prison was unsatisfactory as little was done there to reduce reoffending, and the SSO offered a last chance where the prison sentence was known if failure occurred. Even so, one district judge still thought that the SSO ‘just puts off the evil day’ (DJo6). The availability of requirements was seen as invaluable and a much-needed improvement to the old-style suspended sentence:

‘I think the imposition of requirements is a very, very good move, because it means that, effectively, one can give somebody a community sentence plus with the bite that, if you don’t do it, this is what you can expect.’

(CCJ10)

‘It can be an extremely useful sentence in cases where it’s got to be a prison sentence... and I think the fact that you are required to impose one or more of these requirements is also a very valuable weapon in the sentencing armoury.’

(CCJ12)

Specific drawbacks were pointed out in respect of the SSO (a handful of judges and district judges saw no drawbacks at all). Several district judges thought that the order might store up problems for a later date with regard to the possibility of breach and the strong likelihood that a return to court would lead to custody. For the judges, the major drawback was that the SSO was limited to 12 months of actual custody and they would have preferred this period to have been a little longer. Significantly, for magistrates, the main problem was the possibility of misuse of the order:

‘The risk of misuse, where the case doesn’t pass the custody threshold.’

(M14)

‘We all could overuse them. There could be real enthusiasm to use them since they are so useful.’

(M21)

‘I’ve appreciated the fact, as we’ve been discussing things this morning, that we should maybe use the Community Order more often, instead of the SSO.’

(M23)

One judge was clear that he preferred the Community Order to the SSO because, as far as he was concerned, it carried a greater threat:

'The SSO is more limited than the Community Order, as with the former you express there and then the level of imprisonment that goes with the crime. Personally, I find it better in most cases to simply say, "You've got these conditions, but they're a direct alternative to imprisonment. One hundred and fifty hours' unpaid work, you're over the custody threshold and therefore any breach of it will be a custodial sentence..." I prefer to have the bigger stick to frighten them with... if I can send them out thinking, "Oh God, I'm not just going to get 12 months, I could get a bit more", and it's that uncertainty. In psychological terms, I'm quite happy. Whether it's right or wrong in justice terms is another matter, but psychologically I'm quite prepared to use the threat of bigger punishment.'

(CCJ13)



General issues

In this chapter we address four issues that are highly relevant to the the new orders. The power to review both Community Orders and SSOs could have implications both for the way sentencers do their jobs and for resourcing. Given the obvious similarities between the two new orders, we wished to explore how sentencers differentiated between them in practice. We also wished to investigate whether, as far as sentencers were concerned, there had been any changes in probation practice associated with the introduction of the orders. And fourthly, Ministry of Justice proposals about the Community Order and the SSO could have important consequences for use of the orders.

Review power

S.191 of the Criminal Justice Act 2003 gave courts the power to review SSOs (in the same way as the Drug Treatment and Testing Order had included reviews of progress), while S.178 provided the Home Secretary with the authority to grant courts the power to review Community Orders, although this latter power was (and, at the time of writing, still is) only available to community justice courts, of which there were two in England and Wales when this research began (a further nine community justice courts have since been opened).

Only one judge and one district judge claimed to have used S.191 to review a SSO – and the latter was based in a community justice centre and very enthusiastic indeed:

‘I think it’s fantastically useful. They all know they’ve got to come in, they all know what’s expected of them, I lay it out, and they all know categorically that the one person they’re going to see and no other is me. I even arrange my holidays around S.191 hearings.’

(DJ04)

For the remainder of sentencers they were either unaware that such a power existed, vaguely aware but had forgotten about it as they had never been asked to carry out such a review in a PSR, or claimed to know about it but did not consider it to be relevant. One group of magistrates had been advised that their local Probation Service did not have the resources to carry out reviews so they should not be used. And one judge claimed to have reviewed cases but because he considered this to be within his discretion and not under the S.191 power: ‘I’ve done it and nobody’s batted an eyelid’ (CCJ13).

While a few sentencers thought that S.191 was useful, despite their lack of use of the power, there was not a great deal of interest in using the S.191 power, especially as it was pointed out by several respondents that if there were any problems with an order then the offender would be brought back to court by the Probation Service:

‘No, it wouldn’t [be useful] because firstly, they [probation] can come to me and say, “Look, it’s achieved its purpose and it can be revoked”, so that’s a big area covered already. And, if it’s breaking down, it’ll be back in the breach court and we can hammer it out there.’

(DJ03)

'It's not something I've needed to use here, but I suppose it very much depends upon how your local enforcement agencies are. If you're happy that they're enforcing Community Orders properly, and I am, then they're policing the orders and I don't need to.'

(DJ07)

'I would say not, for these reasons. First, that where it is available, in my experience it's rarely used to begin with. Secondly, because the probation officer is going to bring him back to court if there is any breach. And thirdly, it's always possible for a judge to require periodical reports, progress reports if you like, as to how it's going on.'

(CCJ12)

'Probation officers can tell people that they're doing well, not a judge or magistrate, as the court lists are too full. It's a resource issue.'

(M15)

'You only need to bring the case back to court if there was a problem with compliance. Otherwise, you'd just be wasting valuable court time by reviewing a case that didn't need to be reviewed.'

(M19)

When asked whether it would be helpful to introduce the review power for Community Orders, sentencers were fairly evenly split between those who were in favour and those against. Again, the role of probation in enforcement was noted and how this seemed to overlap with review. And even some of those who were in favour of the review power being activated noted that there were resource issues involved:

'It would be a good way of policing it, it would help us flex our muscles a bit with the enforcement of Community Orders and would give those sceptics more confidence in the orders.'

(CCJ11)

'If you were going to have a review, imagine the work. The work for the courts, for the Probation Service who'd have to write progress reports. Would they have to be represented? Hope not, because that would cost a lot of money. If the review was going badly would you have them breached?... I think one has to be really careful about the implications.'

(CCJ10)

'I don't think we've got the expertise. The Probation Service has, they're dealing with people all the time and they can see whether they're responding. What do I do? What do I add to it?'

(CCJ08)

'It's a great idea, but it's not workable, the courts would come to a standstill.'

(M15)

'Would probation have the time to do reviews anyway?'

(M20)

Comparing the Community Order and the SSO

On the face of it, the Community Order and the SSO are, to all intents and purposes, virtually the same sentence. There is, therefore, the potential for some confusion between the two, at least on the part of lay people. While several magistrates were adamant that the two sentences could not be compared as they were at different points in the sentencing

tariff, for the rest of our respondents the term that was used repeatedly in differentiating between the two sentences was 'custody'. The SSO crossed the custody threshold, it was a custodial sentence, it carried the threat of custody, it was a clear and unequivocal signal to an offender that he or she had been convicted of a serious offence and custody was looming:

'Well, prison is an ever-present part of one isn't it, but not of the other, and that's the difference in a nutshell. There's a real threat. As I see it, a Community Order is – look, we're trying to help you – and anything to do with imprisonment is – look, we're trying to threaten you.'

(DJ03)

'It's a way of telling an offender – you comply with these requirements or you go down, and this is what you're going to get. No mistake. Whereas a Community Order, while of course it can, and often does, have a punitive effect, has perhaps a greater element of assistance and rehabilitation.'

(CCJ10)

'They are identical, but what you're saying on the SSO, you are someone who ought to go to custody, you crossed the custody threshold and normally you would go into custody, but we'll give you a last chance.'

(CCJ11)

'Only the threshold matters, nothing else. We would never use a SSO if an offence didn't cross the threshold.'

(M19)

'The SSO is given because custody is deserved in that case. You would suspend because you were convinced that they needed help, and that giving them that help would reduce re-offending. Which is part of our job, to reduce re-offending.'

(M14)

The fact that some confusion between the two sentences does exist was confirmed by comments by three district judges who insisted that lay magistrates did not always differentiate adequately between the orders (and it is worth adding that district judges are much more closely in touch with the practice of lay magistrates than judges):

'Perhaps I shouldn't make the observation. There is somewhat of a sophisticated exercise in a discipline which is, after all, quite a scientific discipline, passing sentence, and I sometimes wonder whether or not there is a temptation to take a way out by certain tribunals by simply passing a SSO when it's not appropriate. I'd better say no more than that.'

(DJ01)

'I have to say, although I know this is going on tape, that I have some concerns about legal advisers and whether they are as aware as they ought to be of the guidelines, and are properly advising magistrates on sentence, or whether they're just leaving them to their own devices and letting them run free with the making of SSOs.'

(DJ05)

'I'm a bit concerned sometimes about what I see as being a bit too free a use of [the SSO] by some tribunals who seem to have used it in a situation where, when I look at the case six months down the line... I'm thinking, why didn't they use the Community Order as an alternative, because has this case really crossed the threshold or not?'

(DJ04)

Changes in probation practice

On the whole, sentencers did not recognise any significant changes in probation practice, although there was a general feeling that standards had improved – a perception that has been noted previously (Hough et al., 2003). Probation officers were perhaps more ‘hard-bitten’ (DJ03) than they had been in the past, they were administratively more efficient, breach procedures were more rigorous, although the time taken to breach was longer than previously had been the case, PSRs were better focused now whereas ‘a few years ago probation reports were derisory’ (M19), OASys was resulting in ‘these risk things’ (DJ06) being added to reports. There were occasional complaints about fast delivery reports:

‘With fast delivery reports, I’ve had two or three occasions where someone has had a drug issue and probation have said that if this is the case then they can’t do a FDR, so that person then has to come back in three weeks when they should be dealt with that day. It’s unfair on everyone.’

(M21)

And two judges talked of more wide-ranging changes they had noticed in probation:

‘They’re no longer client-oriented. They wouldn’t now write a report saying, our client says this or our client does that. They are the agent of the court. I don’t know whether that’s quite right. They are the agent by which some penalties are enforced, and I think... there will, in the end, be a change in the public perception of the Probation Service, which I don’t think has happened yet... They’re not the soft soap, let’s go and tell auntie what’s wrong sort of thing any more. I think they are regarded much more as the headmaster.’

(CCJ09)

‘The Probation Service has changed dramatically over the years I’ve been doing this job. In the 70s and 80s they were often men and women, mostly men, who had been in other careers but had, I guess, a more paternalistic feeling for other people, they were more pastoral, and the training was limited. They were super people, tremendous people, and it was all a smaller world then, there were fewer criminals coming up and the probation officers would know these people and know their families. They’ve gone, that sort of probation officer. Now you’ve got young, highly trained, very able, erudite people doing the job, and that’s because that’s what you need. You’ve got a much larger criminal population. When I say criminal, people who commit offences, and they’re much more sophisticated, and so you’ve got to have very capable people dealing with them. So, yes, they’re highly qualified, committed, professional, able people.’

(CCJ08)

But none of these changes had come about as a result of the new orders; they were more likely to be associated with ‘a cultural change in probation’ (M17) or a ‘very good chief’ (M15). What was noticeable, however, but certainly not new as Mike Hough and his colleagues found a few years ago (Hough, Jacobson and Millie, 2003), was the number of sentencers who mentioned with concern the pressure that they considered probation to be under and the lack of resources for the service – a situation for which they had every sympathy (for a detailed analysis of these issues, see Oldfield and Grimshaw, 2008):

‘Their staff levels are too low. The funding isn’t there for new officers, which puts a strain on the existing ones.’

(M14)

'There have been such changes in the Probation Service that they are not sure what they are about... The Probation Service goes from crisis to crisis. It's mainly resource issues. For example, in this court, we have been reduced from seven to three probation staff.'

(M16)

'Their workload has gone up and they must surely struggle.'

(M15)

And one judge put forward an almost apocalyptic view for the Probation Service:

'The big fear I have, to be honest, is that probation is going to collapse before too long... they're creaking, creaking and creaking. All the old hands are starting to disappear, they're going, and we're going to have non-experienced POs in terms of supervision and what goes on in court. Probation do a great job in very difficult circumstances and I just wish they'd give more funding to it.'

(CCJ13)

Ministry of Justice policy proposals

In a policy paper published to coincide with the creation of the Ministry of Justice in 2007, two proposals were made – one relevant to the Community Order and one to the SSO:

'We will also propose to provide that Suspended Sentence Orders are used for the more serious offences, as we originally intended when they were created in 2003. They will apply to indictable offences including either way offences, but not to summary (less serious) offences.'

(Ministry of Justice 2007c:10)

'Building on arrangements for supervising offenders on PPO schemes and on the minimum contact times for offenders on Community Orders with a Drug Rehabilitation Requirement, we will work with the courts to commission and test even higher intensity Community Orders as an alternative to custody for offenders who might otherwise get a short prison sentence.'

(Ministry of Justice 2007c:17)

The proposed limitation to the use of SSOs was initially included in the Criminal Justice and Immigration Bill when it was published in 2007. However, it was removed from the legislation before it received Royal Assent in May 2008. As for the proposed Higher Intensity Community Orders, a later policy paper fleshed these out in slightly more detail:

'We envisage that these projects will test two main concepts:

'Intensive Control Sentence demonstrators: these might include supervision, programme and activity requirements, plus other requirements as necessary. We envisage bids will emphasise new aspects such as peer monitoring, judicial monitoring, engagement with the police and resettlement work.

'Intensive Punitive Sentence demonstrators: made up of unpaid work and curfew adapted to provide a short intensive community punishment as an alternative to very short term custody (6 months and under), including a supervision requirements where appropriate. This could involve a set number of hours of physically demanding unpaid work to be served immediately following sentence and within a short space of time, combined with supervision appointments and curfew restrictions to last for 3–6 months.'

(Ministry of Justice 2008b:22)

Indeed, the first such intensive community sentence pilot commenced in Derbyshire in March 2008.

Given the implications of these proposals for sentencers, we asked our respondents for their views about them. A handful of magistrates were unworried about losing the availability of SSOs for summary offences:

‘The SSO doesn’t add anything to the range of sentences, because you can use all the requirements as part of the Community Order anyway... So the SSO should be limited, no abolished, and for all cases, not some. SSOs tend to be the last bolthole of a desperate defence solicitor.’

(M18)

‘I’m not a great lover of SSOs. I’d welcome it [the proposed restriction].’

(M23)

However, the majority of magistrates and all of the judges and district judges we questioned were not at all happy about the proposed restriction:

‘Furious. Absolutely opposed to it. They [SSOs] are a useful remedy and they’re more than useful, they’re very useful, and if we lose them, well alright I can still probably get there through deferred sentences but the difference is that it’s more cloak and dagger.’

(DJ03)

‘I think it’s horrendous. I think particularly because of the way in which summary and indictable offences are not consistent. How can theft of a Mars Bar be something for which you could have an SSO but thumping a police officer is something you can’t. How can it be right that someone who commits 15 driving whilst disqualifieds can only ever get a maximum of six months, and in fact if they were really awkward⁹ about it and said, “Well I pleaded guilty to every single one”, a maximum of four. I mean that’s to me absolutely ludicrous when you’ve got that business when you can elect trial for a very minor matter.’

(DJ04)

‘If a custodial sentence is available for a summary offence, then the opportunity to suspend ought to be there. I suspect, I don’t know, but I suspect, that the problem is that – dare I say it – perhaps some magistrates perhaps would go more easily to a SSO than to an immediate sentence of custody and, therefore, they go uptariff, because they think it doesn’t matter, we’re going to suspend it.’

(CCJ10)

‘I suppose they’re concerned about the misuse of them by magistrates.’

(CCJ11)

‘I don’t know why just the Crown Court should have this.¹⁰ It doesn’t make any sense if we can send somebody to prison in the magistrates’ courts but not suspend... it’s a recipe for disaster.’

(M16)

‘Getting rid of SSOs would only increase the prison population even further.’

(M20)

One judge described in detail what he saw as the intellectual dishonesty that magistrates would have to practise if the proposal went ahead and was grateful that this was not something that would confront the Crown Court:

9. We presume that the respondent considers this hypothetical defendant ‘awkward’ because, having committed 15 offences of driving whilst disqualified, he deserves a longer sentence than he would get if he pleaded guilty.

10. The respondent is mistaken about the proposed change limiting the SSO to the Crown Court; the SSO will still be available for indictable and triable either way offences and the latter are dealt with in the magistrates’ court.

'It's not, in the circumstances, going to be something which impacts on the work of the Crown Court. So far as the magistrates' court is concerned, I would see it as rather a shame, because although I think it's going to happen much less frequently in a magistrates' court than it does in the Crown Court, I think that there will be a small number of cases in the magistrates' court in which it is appropriate to mark the offence by a prison sentence but in which there is substantial mitigation. Now what then are the magistrates to do? Are they to impose an immediate custodial sentence which can have devastating effects for not just the defendant but also his family, for example? Are they going to impose the immediate custodial sentence on the young woman who has got two or three tiny children at home? Or are they going to just draw back – presumably this is the way in which the magistrates are being presented with the options – draw back and not impose any form of custodial sentence but go back to a community sentence in a situation in which they take the view that a custodial sentence is appropriate? And that, in fact, you could regard as intellectually dishonest; it's not in conformity with the Criminal Justice Act. So I would not be favourably disposed to that limitation but, as I say, it is happily not going to be something which impacts on the Crown Court.'

(CCJ12)

Only a small minority of sentencers showed any positive interest in the idea of Higher Intensity Community Orders, and even those who did were quick to point to resource issues:

'If they're going to put in extra resources, then I'm not too worried, but that's not the way it will work. And the result is that we have these High Intensity programmes with not enough resources, so that the rest is merely diluted and it would spoil something that's already imperfect and under-resourced but might just work. Community Orders are under-resourced by a long way.'

(CCJ09)

'It's a resource issue, though; if it's not properly resourced, then forget it.'

(M15)

Apart from resources, sentencers also mentioned other problems with the idea: loading offenders up with requirements was already something that could be done if they wished to; such an approach was setting people up to fail; what would be done with offenders who were employed; and it was all just yet another example of political window-dressing. For the most part, however, comments were strongly negative: 'simply nonsense' (DJ02), 'rubbish' (DJ03), and 'pointless' (DJ07). One highly experienced judge explained carefully where the problem with custodial sentencing lay as far as he was concerned:

'Yes, well, to begin with, I wish they'd stop messing around. I wish they'd stop tinkering. Endless, endless changes. To the extent that they don't seem to know what their own legislation is. They've passed legislation which – the most fantastic one, which they've now corrected – but the most fantastic one was when they said that you were required for an 18 year old to impose for certain firearms offences a minimum of five years' imprisonment, where you can't pass a sentence of imprisonment on an 18 year old, but there it is in the Criminal Justice Act. They don't know what's in and what's out. Sentencing has become outrageously complicated to the extent that experienced, intelligent judges sometimes struggle to find the way through all these labyrinthine proposals. And if they're proposing the new Higher Intensity Community Order, it's yet another complication that I personally would not welcome.'

'If that's what they're aiming at, then I think that it's probably just another device to try and cut down the prison population, and the way that they should cut down the prison population is not by messing around in that way, it is by looking again at what I think, and a lot of judges think, are just draconian and stupid provisions in Sections 225 to 228 requiring the imposition of a life sentence without an alternative in cases which meet the requirements which are set down there. My understanding is that the government has been warned from an early stage that if they did this there would be lots and lots of these orders – and I'm afraid I'm going by gossip here – but the gossip is that the government just didn't believe the numbers of orders that would be made. I also believe that something like 40 IPPs [indeterminate sentences of imprisonment for public protection] a week are being made, and the number of people that must now be in prison serving the equivalent of life sentences is just fantastic.

'And if they want to hack it around and cut down the number of prison sentences, then I think it should be at that end of the market rather than having Community Orders, Extra Intensive Community Orders, Suspended Sentence Orders. What do we then have? Suspended Sentence Orders with extra intensive requirements? You know, the whole thing just becomes mad. And it's a heartfelt plea this, as you may have detected, I just wish they would leave us alone for a bit and stop messing around and changing all the time.'

(CCJ12)

Indeed, sentencers generally seemed to be weary of what they saw as endless changes that were never fully thought through, as exemplified by one district judge who concluded the interview by saying: 'I just wish they'd stop tinkering and leave criminal justice for five years while we just let it work through and sort it out' (DJo6).

Conclusions

This report provides the first information regarding the views and attitudes of sentencers towards the Community Order and the SSO. By the second half of 2007, when fieldwork was carried out, it is likely that initial teething problems with the orders would have settled down or been resolved. It should be emphasised that only six judges, seven district judges and 50 magistrates took part in the study, so we make no claims for our findings being representative of sentencers as a whole. The courts chosen for the research, however, did represent areas with different usage of Community Orders. It is sentencers who are, ultimately, responsible for making Community Orders and SSOs and, therefore, their views regarding the orders are worth noting – especially as it was obvious in interviews and focus groups that all sentencers had thought carefully about the orders and how they were using them.

There were no discernible differences between sentencers according to their areas' use of the orders, nor was there much evidence of significant differences between types of sentencer. This is not to claim that such differences do not exist; limited resources were available for the research and it is quite possible that by interviewing twice as many sentencers we would have found such differences. It is also possible that the judges interviewed and the magistrates who participated in focus groups were biased as judges were chosen for us to interview by the resident judge at the relevant court, while justices' clerks organised the magistrates who took part. District judges, on the other hand, came with the court selected. Our findings are significant, however, as the first to have considered sentencers' views of the orders, and, therefore, to point to important issues that go some way to explaining how the orders have been used. They are indicative rather than definitive and should be treated as such.

Our main conclusions are as follows.

Training and implementation

- Sentencers felt reasonably well prepared for the new orders; their training had been adequate and only relatively minor implementation difficulties had been encountered.
- Where problems were seen to have occurred they were in relation to the SSO.

The Community Order

- The Community Order was liked for its versatility, preferred to its predecessors, and was considered to be useful for a wide range of offenders.
- There was a clear lack of knowledge about the availability of requirements; and all requirements were not available in each area.
- Unpaid work and supervision were acknowledged as the most commonly used requirements for the Community Order.
- Breaches, it was agreed, were dealt with more rigorously than in the past, but this meant that on occasion some offenders were brought back to court for what were considered to be minor infringements.
- A first breach of a Community Order was unlikely to lead to a custodial sentence, but there were apprehensions about making the order more onerous as this might exacerbate any difficulties an offender had in coping with the order and ultimately lead to custody.

- There was not a great deal of agreement about how far the Community Order was used as an alternative to custody.
- Good points of the Community Order were: its flexibility; the number of requirements available; and the possibility of focusing it on specific offenders.
- There were no major problems with the Community Order, apart from the unavailability of some requirements and delays in offenders starting orders.

The Suspended Sentence Order (SSO)

- Half of the judges and district judges expressed some reservations about the SSO, and magistrates claimed they rarely used it.
- Fewer requirements were said to be used for the SSO than for the Community Order.
- Breach of the SSO was more likely to lead to custody than breach of the Community Order.
- There were persistent accounts of the misuse of the SSO on the part of magistrates.
- The SSO tended to be seen as an alternative to custody.
- Good points of the SSO were: it helped to avoid custody; and the availability of requirements to support the suspension of sentence.
- Bad points were: overuse and misuse by magistrates; and restrictions on its use to custodial sentences with a maximum of 12 months.

General issues

- A number of reservations were expressed about the power to review: it was already possible, it would require considerable resources, and it was considered to be probation's job rather than the sentencers.
- Only around half of our respondents supported introducing the power to review for Community Orders.
- The custody threshold was agreed to be the key to appropriate use of the SSO and to differentiate it from the Community Order.
- There had been a change in probation culture which made staff more professional, although this had little to do with the new orders.
- There was general agreement that the Probation Service was under a great deal of pressure and required more resources.
- Virtually all sentencers were unhappy about the possibility of losing the SSO for summary offences.
- There was little interest in the idea of a Higher Intensity Community Order.

In the light of these conclusions, it is possible to formulate a handful of recommendations that might be considered in taking the new orders forward:

1. More work is necessary on the availability of requirements. Justice considerations alone should mean that all requirements are equally available to all courts. A regular audit (perhaps every three years) of the availability of requirements in areas should be carried out and consideration should be given to providing resources where requirements are lacking – either in terms of simply not being present, or not being of adequate quality. In addition, sentencers should be kept fully informed about the availability of requirements; while probation officers should be aware of what is and is not available, it is not acceptable that sentencers should be kept in the dark about this key issue.

2. It might be worth giving some consideration to the issue of how requirements are used. It is very clear that both the Community Order and the SSO in practice look very like the CRO, CPO or CPRO; there is no evidence that requirements are being used imaginatively or creatively. To a large degree this is the result of reports prepared by the Probation Service whose staff may, not surprisingly, be staying within their traditional 'comfort zone'. But sentencers too bear some responsibility as they may be accepting probation reports uncritically. Scope for innovation and more creative use of requirements would seem to be present and might be explored. It is worth adding that this need not lead to more requirements being used for orders.
3. The presence of so many comments from all levels of sentencers – even from magistrates themselves – about magistrates' use of the SSO (either too frequently, too rarely or adding too many requirements to it) suggests that this is an issue that needs to be addressed, perhaps by more training.
4. More information and perhaps more training would seem to be needed with regard to the power to review orders. Sentencers' lack of knowledge about and consequent lack of use of S.191 should be addressed. Their lack of enthusiasm for the introduction of S.178 to all courts suggests that the power might not be used appropriately if it does become available.
5. The generally negative views about losing the use of SSOs for summary offences and the idea of Higher Intensity Community Orders suggest that these proposals will need to be marketed effectively to sentencers. Most sentencers seemed to be only too aware of the pressure not to send offenders to custody, but also apprehensive about the potential consequences of overloading offenders with requirements.

Overall, sentencers appear to be remarkably positive about the new orders and see few problems with them. Given the number of changes to sentencing in recent years, such a level of satisfaction can be seen as a real achievement. However, perhaps the abiding impression of our interviews and focus groups was a real sense of weariness – exhibited by sentencers at all levels – with excessive government interference to no real purpose. The view that the Probation Service was being stretched to breaking point adds to this feeling of gloom. The fact that sentencers have coped professionally with the introduction of the Community Order and the SSO should not overshadow the pessimism that seems to underpin their views.



Appendix: the interview schedule

1. Thinking back to when the new orders were introduced, how well were you prepared for them?
Were there any problems in implementation? Could it have been done more effectively?
What about training – was this adequate?
What about having the two sentencing structures running in parallel – did that cause any problems?
2. Focusing specifically on the Community Order, how would you say it has been used since its introduction?
Do you think it is appropriate for any particular kinds of offenders/offences?
How appropriate is it for female offenders?
Is it being used differently for women compared to men?
3. What about the various requirements that are available for the Community Order – are they all useful?
Have you used them all?
Are there any that you have never used?
Are they all available in this area?
What about breach and enforcement – are there any problems? Is breach leading to custody?
4. How would you compare the Community Order with the old-style community sentences (the CRO, CPO, CPRO, DTTO)?
5. Is the Community Order being used as an alternative to a custodial sentence?
Why do you say that?
6. Moving on to the Suspended Sentence Order, how has it been used since it was introduced?
Do you think it is appropriate for any particular kinds of offenders/offences?
How appropriate is it for female offenders?
Is it being used differently for women compared to men?
7. What about the requirements available for the SSO – are they all useful?
Have you used them all?
Are there any that you have never used?
What about breach and enforcement of the SSO – any problems?
Is breach leading to custody?

8. Is the SSO being used as an alternative to custody? Why do you say that?
9. Have you made use of S.191 of the Criminal Justice Act 2003 which gives sentencers the power to review an SSO? Why?
Is this a useful power?
Would it be helpful to introduce it for Community Orders too?
10. How would you compare/contrast the Community Order and the SSO?
Why would you choose one rather than the other?
11. Do you think there have been any changes in the way probation officers work since the introduction of the Community Order and SSO?
12. Summing up, what would you say were the good points of the Community Order?
And the bad points?
13. And for the SSO what are the good points? And bad points?
14. Finally, thinking about the recent proposals from the Ministry of Justice, what are your views about the restriction of the SSO to indictable offences?
And what about the proposal for a Higher Intensity Community Order that would act as an alternative to custody?
15. Is there anything else that you want to add about the new sentences?

References

- Cavadino, M. and Dignan, J. (2007), *The Penal System: An Introduction* (fourth edition), London: Sage.
- Hough, M., Jacobson, J. and Millie, A. (2003), *The Decision to Imprison: Sentencing and the Prison Population*, London: Prison Reform Trust.
- Loader, I. (2007), 'Has Liberal Criminology "Lost"?', Eve Saville Memorial Lecture, Centre for Criminology, University of Oxford.
- Mair, G., Cross, N. and Taylor, S. (2007), *The Use and Impact of the Community Order and the Suspended Sentence Order*, London: Centre for Crime and Justice Studies.
- Mair, G. and May, C. (1995), *Practitioners' Views of the Criminal Justice Act: A Survey of Criminal Justice Agencies*, Research and Planning Unit Paper 91, London: Home Office.
- Ministry of Justice (2007a), *Offender Management Caseload Statistics 2006*, London: Ministry of Justice.
- Ministry of Justice (2007b), *Sentencing Statistics 2006*, Statistical Bulletin, London: Ministry of Justice.
- Ministry of Justice (2007c), *Penal Policy: A Background Paper*, London: Ministry of Justice.
- Ministry of Justice (2008a), *Probation Statistics Quarterly Brief: July to September 2007 England and Wales*, London: Ministry of Justice.
- Ministry of Justice (2008b), *Prison Policy Update: Briefing Paper*, London: Ministry of Justice.
- Morgan, R. (2003), 'Thinking about the demand for probation services', *Probation Journal* 50(1), pp.7–19.
- Oldfield, M. and Grimshaw, R. (2008), *Probation Resources, Staffing and Workloads 2001–2008*, London: Centre for Crime and Justice Studies.
- Patel, S. and Stanley, S. (2008), *The Use of the Community Order and the Suspended Sentence Order for Women*, London: Centre for Crime and Justice Studies.
- Sentencing Guidelines Council (2004), *New Sentences: Criminal Justice Act 2003 Guideline*, London: Sentencing Guidelines Council.
- Solomon, E. and Rutherford, M. (2007), *Community Sentences Digest*, London: Centre for Crime and Justice Studies.
- Stanley, S. (2007), *The Use of the Community Order and the Suspended Sentence Order for Young Adult Offenders*, London: Centre for Crime and Justice Studies.



The Community Sentences project of the Centre for Crime and Justice Studies investigates and monitors the new Community Order and Suspended Sentence Order introduced in the Criminal Justice Act 2003. It offers rigorous, objective information and critical analysis about the way the sentences are used during a period of great change in probation practice. This report provides the first information regarding the views and attitudes of sentencers towards the new orders.

The Centre for Crime and Justice Studies at King's College London is an independent charity that informs and educates about all aspects of crime and criminal justice. We provide information, produce research and carry out policy analysis to encourage and facilitate an understanding of the complex nature of issues concerning crime.

www.crimeandjustice.org.uk

£15.00