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Response to Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders

Introduction

This response is written on the basis that decisions on the overarching sentencing framework, penal and rehabilitation policy are policy decisions for the Government and Parliament. However, in so far as the proposals relate to or affect the operation of the courts, this response sets out our views on the basis of our collective experience on the technical and operational aspects and potential consequences of proposed policy options.

Whilst we appreciate that this Green paper is designed to start the debate, it is difficult for the judiciary to offer views on the potential consequences of many of the policy options until there is more detail around the individual proposals. Although many areas are for Government alone, we would be prepared to offer further assistance to analyse the practical impact of any plans which may arise from this consultation.

We are supportive of the overall aim of this Green Paper, which attempts to identify ways to reduce reoffending, providing offenders who show the necessary commitment the opportunity to move away from a life of crime. This is very laudable and we agree that a fresh look at the criminal justice system is needed, with genuinely radical proposals for securing this aim.

This response is shaped by conversations we have had with other members of the judiciary, most notably the Council of Circuit Judges, District Judge (Magistrates' Courts), the Magistrates' Association and the National Bench Chairman's Forum. We are grateful to Mr Justice Sweeney for co-ordinating the response in relation to the section on sentencing reform. Other members of the judiciary will submit their own responses; we are grateful to them for taking the time to do so.

There are three areas of the paper on which we focus in this response:

1. Chapter 1: Punishment and payback (paragraphs 66-70 & 75-83)
2. Chapter 3: Payment by results
3. Chapter 4: Sentencing reform

Chapter 1: Punishment and payback

Improving community payback (paragraphs 66-70)

Question 7: How should we seek to deliver Community Payback in partnership with organisations outside government?

Overall the present Probation Service provides an effective service and in recent years magistrates' confidence in community sentences has increased. However, there remain some concerns relating to occasional poor and ineffective monitoring and management which could be exacerbated by outsourcing the delivery of community sentences to profit driven organisations. It will be crucial to the successful delivery of Community Payback in partnership with organisations outside government, that magistrates have confidence in the quality and monitoring of community sentences.

"Victims will engage with the criminal justice system on their terms" (paragraphs 75-83)

There has been a move in recent years towards a more victim-led approach to criminal justice. This approach, taken still further in the Green Paper proposes that the victim (assuming there is one) is best placed to decide on the punishment of the offender either by deciding whether an offender can be dealt with in a particular way (community resolution) or by being able to set out the impact a crime has had on them (victim personal statements).

We have a number of concerns with this approach: Firstly, in many cases the issue for the trial is whether there has been a victim, for example in the case of an assault where the issue for the trial is self defence. So any input to the process can only be made after the trial when the judge will have formed a view as to the relative culpability of the offender and the seriousness of the offence and its impact on the victim. Secondly, this approach overlooks the fundamental principle that every criminal offence engages the public interest, a concept which remains at the forefront of any sentencing policy. Thirdly, the nature and severity of an offence may have no direct impact on the victim at all; for example, many victims of fraud are not directly aware of the fact. Finally, the sentencing decision cannot depend on the view taken by the victim about how it should be dealt with. Some victims are inclined to be merciful, and others are concerned with what they regard as "justice", which may take the form of vengeance. Very few of them have any direct knowledge of the framework on which the court will endeavour to approach the sentencing decision. In the end, although the impact of a crime on a victim is always relevant to the sentencing decision, the views of the victim him/herself about the sentence to be imposed cannot affect the nature and severity of the sentence.

Victim Personal Statements (paragraphs 75-77)

We welcome the desire to look again at the use of victim personal statements (VPS). However, the expectations of the alleged victim must be managed. The court can of course take the VPS into account but must not be bound by it. The court needs to take a consistent approach to sentencing and cannot increase a sentence because one victim reacts differently to another. If victims do not understand this it will inevitably lead to disappointment if the court chooses not to act on the potentially emotive VPS.

Increased opportunities to use restorative justice approaches (paragraphs 78-81)

Restorative justice schemes are just one element of the framework of out of court disposals, which we are considering separately.

The Green Paper proposes building on "local approaches already used by the police, usually described as 'neighbourhood resolution'". There has been a significant increase in the use of "neighbourhood resolution" (which we have also heard described as "community resolution"), a system which allows the police, with the consent of victim and offender, to decide on the appropriate levels of punishment for a range of offences. In one police force, the extent of alternative disposals is clear from the following statistics. From 2009 to date, the percentage of detected and resolved crime which was charged was between 53% and 54%. Between 2% and 3% of cases were taken into consideration. Cautions comprised between 15 and 19%. Neighbourhood resolution, which was 20% in 2009-10, is currently running at 23%.

There are two important elements to the process; first, the attitude of the victim; second the exercise by the police officer of his/her discretion.

The attitude of the victim:

The officer explains to the victim (and the suspect) the options. How he does so will hugely influence their attitude. One can see that a possibly distressed victim will not choose to go to court if told, for example, that the process will be slow and that it will be necessary to go to court and be cross-examined. Is it right that the victim to a real extent dictates what should happen? There is a public interest quite apart from the victim's view. Moreover, insofar as the officer does separately consider the public interest, there must be a doubt as to how qualified he is to do so. The temptation to try to persuade the parties to resolve the case is self-evident. As resources are reduced still further, one can see the attractiveness in hard-pressed officers deciding it easier to admonish an offender than fill out the required paperwork, appear in court and prove that they have arrested the right person.

The exercise of the police officer of his/her discretion:

We are considering the question of out of court disposals separately; we would make these very preliminary observations about this section: the officer may be exercising his discretion on an incomplete basis. He/she may not know whether there are unpaid fixed penalty notices, or an out of court disposal in another police area for a similar offence. There are cases where the courts have been told that an offender is of good character only to find out by chance that he has a string of unpaid Fixed Penalty Notices which, whilst not criminal convictions in themselves, suggest that the offender should potentially have been brought before the court at an earlier date. There is a general question-mark over the recording of out of court disposals. Further, it is sometimes difficult properly to assess the seriousness of a case. The offence that an offender is charged with often changes as it progresses through the court process due to the fact that, on an objective analysis, the offence is different (and possibly less serious) than that reported by the victim.

Chapter 3: Payment by results

Although the system for provision of community sentences is a matter of Government policy, we support the principle that, whether under the current system or under a system of sub-contracting to other providers of community sentences, there should be incentives to reduce reoffending.

However, magistrates must have the confidence to use the community sentences offered by providers under such a scheme; if that confidence is lost, then magistrates will be more likely to impose sentences with which they are more familiar and trust more. Providers will need to demonstrate that community sentences will be managed and monitored effectively, with offenders being brought back before the court in the event of breach. The contracts for procurement of services under payment by results must be rigorous to ensure that there are no perverse incentives built in to the system which result in, for example, providers only working with those offenders least likely to reoffend; or offering reduced quality to maximise profit gained out of the initial payment.

Chapter 4: Sentencing reform

Question 32: What are the best ways to simplify the sentencing framework?

The sentencing framework has become far too complex through frequent, and sometimes fundamental, legislative change not always thought through, and with enacted proposals not properly resourced. All too often, the practical application of the legislation has only been rendered possible by judicial interpretation on appeal. These pitfalls must be avoided in the proposed sentencing reform.

The single best way to simplify the sentencing framework overall would be by its codification. We recognise that, given the current volume of legislation, its complexity, and the way that it impacts in different ways on different categories of offenders, this would be a very significant undertaking. It would require the involvement of the Law Commission. However, the resultant clarity and cohesion would, we believe, achieve both savings in resource and increased public confidence.

Whether by codification, or more limited legislation, consideration should be given to the following simplification:-

i) Moving all offenders to a single sentencing framework.

ii) Insofar as possible, consistent with Article 7 of the ECHR, making the same types of sentence available whenever a crime was committed.

iii) Simplifying the provisions relating to the treatment of time spent in custody prior to sentence (perhaps through a simplified version of the Criminal Justice Act 1967 scheme or something like it), and applying it to all custodial sentences, including a presumption that time spent on remand in custody, or on an appropriate electronic curfew, should count towards sentence.

iv) Introducing a single system of early release applicable to all offences, whenever committed. For example, in relation to determinate sentences, perhaps a system under which all offenders sentenced to less than 12 months custody would (subject to release on Home Detention Curfew, if applicable) serve half the sentence before automatic release, and those sentenced to 12 months custody or more would (again subject to release on Home Detention Curfew, if applicable) be automatically released at the halfway point, but remain on licence for the whole of the remainder of the sentence. In both cases a provision similar to the repealed section 116 of the Powers Criminal Courts (Sentencing) Act 2000 would enable a court, on conviction for an offence committed before the expiry of the sentence, to order a return to custody. That would ensure both consistency of approach, transparency, and thus public

confidence (which may be lacking in the current system of administrative recall).

v) Repealing all legislation on sentence that has been enacted but never brought into force.

vi) Whether it is necessary to have mandatory minimum sentences and prescribed custodial sentences under the provisions of sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000, and required minimum sentences under the provisions of section 51A of the Firearms Act 1968.

vii) The simplification of the highly complicated processes by which it is decided whether an offender aged under 18 is to be dealt with in the youth court or the Crown Court – perhaps along the lines that the youth court would be entitled to commit or send for trial at its discretion, or to commit for sentence following conviction if on consideration of all the information then before the court it appeared that a sentence beyond the court's powers was appropriate.

viii) The merging of all existing custodial sentences for young offenders into a single type of custodial sentence, with the graduated scheme of sentences of detention and training orders being abolished – given that they can produce anomalies and injustices to young offenders.

Schedule 21 to the Criminal Justice Act 2003 has been interpreted by the Court of Appeal in such a way as to make its application practical and, to an appropriate degree, flexible. Notwithstanding that amelioration, there are undoubtedly anomalies, for example, paragraph 5(2)(c) which renders someone who murders in the course of a minor theft liable to a starting point of 30 years as their minimum term, and the disparity that can arise in sentences for co-defendants when one is a youth.

Question 33: What should be the requirements on the courts to explain the sentence?

The only necessary requirement should be that the court explains the reasons for and the effect of the sentence, with the precise format being for the sentencing judge with guidance from the Court of Appeal. To take a typical custodial sentence, that would involve (as with current practice) a summary of the factual basis on which sentence is being passed, the assessment of whether the custodial threshold has been passed, the identification of a starting point (whether from Sentencing Guidelines or from guideline cases), an explanation of any departure from the guidelines, the consideration and weighing of aggravating and mitigating features, the application of any discount for plea, and the announcement of the final sentence and its effect.

The current statutory requirements to explain why the court has or has not taken a particular course are complicated and unnecessary. For example, Criminal Justice Act 2003, s174 (2)(b), requires the judge to explain why a fine would not be appropriate when imposing discretionary custodial sentences, even for a serious offence; this explanation is unnecessary and often confusing when it is clear to all parties that a fine would not be appropriate.

The current difficulty in explaining the sentence is compounded by the complications of identifying what the actual effect of the sentence is (including, particularly the effect, if any, of Home Detention Curfew which is very difficult, currently, to identify). The reality is that unless and until the framework itself is simplified (including the ability to deal with the potential impact of Home Detention Curfew on the sentence) it will remain difficult to explain.

Question 34: How can we better explain sentencing to the public?

Whilst, with the benefit of a simplified framework, judges will be able to play their part when delivering their sentencing remarks, it must be remembered that this is never easy given the high emotions that can be involved for both the defendant and the victim and the understandable focus of those listening on the outcome.

It is therefore essential, if confidence is to be strengthened, that (with the benefit of a simplified framework) proactive steps are taken by others to provide the public with educational information about the system in general.

We support the proposals made by the Sentencing Council in this regard.

Question 35: How best can we increase understanding of prison sentences?
This question is addressed in the response to questions 33 & 34 above.

However, before turning to the next question we would also like to address the proposals in this section to remove the option of a remand in custody for defendants who are unlikely to receive a custodial sentence, to restrict sentences of Imprisonment for Public Protection (IPPs), and to continue Extended Sentences for Public Protection (EPPs).

Removal of the option of remand in custody:
It is not easy to discern what could be done to amend the Bail Act 1976 in a way that would be either principled or practical. It will be difficult in the early stages of a case to form any reliable view of whether a custodial sentence is likely or not. If bail was granted on the basis that such a sentence was unlikely, there would be the obvious danger of creating the legitimate expectation of a non custodial sentence when, in fact, a custodial sentence is required.

Equally, the decision whether or not to grant bail is quite separate from the decision as to the eventual sentence; it should be based on the risk that the defendant might fail to surrender to custody (including leaving the country altogether), the risk of further offences and the risk of interference with witnesses; there may also be an ongoing dispute with the alleged victim – all or any of which may apply in a case which is unlikely itself to require a custodial sentence.

IPPs and EPPS:

We welcome the review of IPPs.

EPPs are a valuable sentencing option. They should not be subject to the same regime as IPPs as the conditions for their imposition need to be very different. Given the proposed restriction on IPPs they are likely to be used much more often. Therefore greater flexibility in the length of the extension period (albeit still limited, in combination with the custodial element, to the maximum term for the offence) is needed.

Question 36: Should we provide the courts with more flexibility in how they use suspended sentences, including by extending them to periods of longer than 12 months, and providing a choice about whether to use requirements?

We recognise that there are dangers in increasing the period to longer than 12 months – whether because such sentences might be imposed when they should not be, or because they might lead, through breach, to an increase in the prison population.

Nevertheless, we would support an increase in the maximum term of a suspended sentence to two years (as it used to be), and an increase in the maximum operational period to three years.

We do so because there are a number of cases in which this would be of real use – for example, a man of good character whose crime warrants a sentence of more than 12 months, but for whom the consequences of immediate imprisonment would be catastrophically disproportionate to the offence and who is most unlikely to offend again; or for those who would benefit from certain community requirements over a period of three years, and are thus precluded from an otherwise appropriate suspended sentence because the current operational period is not long enough.

Equally there is obvious sense in providing a choice about whether to use requirements, although it is equally important that a suspended sentence should not be seen as a soft option.

We do not believe that it is necessary to return to the former requirement of exceptional circumstances before a suspended sentence can be passed. That resulted in either too little use of the sentence when it was otherwise actually appropriate, or too many unmeritorious appeals arguing that the circumstances of the particular case were exceptional thereby justifying suspension.

Short custodial sentences:

This section of the Green Paper also addresses the issue of short custodial sentences. We agree with the approach set out in the Green Paper not to abolish short custodial sentences; they are a measure of last resort, but the instances in which they are essential are infinitely variable.

More effective and robust community sentences, with greater flexibility for providers to reduce reoffending (focusing on paragraphs 202-206)

It is likely that there will always be a proportion of those sentenced to community sentences who will not fulfil requirements even where there are clear and effective sanctions for failure to do so. However, along with sufficient resources in the first place to provide adequate facilities and supervision, the ability to bring an offender back to court for failure to fulfil (exercised using appropriate discretion) is essential to the overall effectiveness of community sentences, and to public confidence in them.

In relation to the proposal to reduce the level of detail with which a treatment programme requirement must be specified by a court; it is desirable that the court should retain control over the requirements of the sentence. If it is thought necessary to provide for more flexible requirements then that should be agreed between the sentencer and the probation officer on sentence as the degree of flexibility will depend on the extent of the court's confidence in the probation officer's judgement. We have made clear elsewhere that the confidence of the court in the actual operation of the regime is essential; any loss of confidence will have serious and obvious consequences.

In principle an offender should appreciate the consequences of breach, but the statutory provisions for bringing the offender back to court should retain sufficient flexibility where appropriate. It is necessary that the judgement of the probation officer is exercised carefully, because if s/he fails to breach when it is appropriate, then this will result in a lack of confidence in the viability of community orders.

Question 42: How should we increase the use of fines and of compensation orders so as to pay back to victims for the harm done to them?

Fines:

The decline in the use of fines is due, in some part, to the increase in out of court financial penalties and also, in some part, to a loss of confidence in the fine enforcement process – albeit that there have been a number of initiatives to address this in recent times. Although figures relating to the fine payment rate suggest a level of improvement in the fine enforcement process, and may well be accurate, they disguise a real problem by including those fines remitted by the court.

We agree that "financial penalties, set at the right level, can be just as effective as a community sentence at deterrence and punishment." However, the ability to fine is necessarily dependent upon the offender's ability to pay. Courts should always consider imposing a fine in appropriate cases, but they need to have confidence in the collection of fines strengthened by taking accelerated steps along the lines suggested against persistent evaders. There is an obvious difficulty facing the court in that it relies on the offender to provide the information; consideration must be given to seeing if this difficulty could be addressed.

Compensation Orders:

As to compensation orders, s.130(3) of the Powers of Criminal Courts Act 2000 already requires a court to give reasons, when passing sentence, if it does not make a compensation order. Assuming that, as part of the simplification process, that requirement is removed, the imposition instead of a positive duty to consider making a compensation order, unless the victim does not wish an order to be made, would be feasible and would underline the importance of victims receiving direct reparation from offenders.

However, as with fines, the ability to make a compensation order is necessarily dependent on the offender's ability to pay. It is unrealistic to make compensation orders that offenders are not able to pay, or not able to pay within a reasonable time period. It would raise the victim's hopes only for them to be dashed, thereby resulting in further unnecessary suffering for the victim (the more so if there is an elongated payment period) and in a wider loss of confidence in the system. It would also result in wasting resources trying to enforce the unenforceable.

Again, it should be considered whether the difficulty of relying upon the offender to provide information about his/her means could be addressed.

Question 43: Are there particular types of offender for whom seizing assets would be an effective punishment?

There is already a power, by virtue of s.143 of the Powers of Criminal Courts (Sentencing) Act 2000, to seize assets that have been used in the course of committing a crime. In addition, there are extensive powers (which focus upon an offender's assets) to make confiscation orders on conviction relating to benefit obtained from his offence or offences or from his criminal lifestyle – albeit that the relevant provisions would themselves benefit from simplification thereby saving significant amounts of court time.

Consideration should be given as to whether any asset belonging to an offender could be taken into account when assessing his means for the purposes of a fine or confiscation.

Against that background, and whilst recognising the theoretical possibility of asset seizure being used as a penalty in its own right, we find it difficult to identify any types of offender (not caught by the above-mentioned provisions) from whom seizing assets would be a realistic and effective punishment. In addition, experience of the complications involved in confiscation proceedings, whether in proving an offender's ownership of assets, or the value of those assets, causes concern about the likely complexities in the operation of any asset seizure power, and the resultant lack of cost effectiveness.

We wish to add one further matter for consideration – a review of the confiscation regime. We accept that confiscation is one of those areas where, once you start going into detail, it is almost impossible to stop. For a start, there are different statutory schemes (depending on the date of the offence(s)). Just taking the Proceeds of Crime Act 2002 as an example, there is a need to prove benefit via complex assumptions about criminal lifestyle going back 6 years, or benefit from a specific offence or offences, and (having identified the value of the benefit by whichever route) there are then extremely complex provisions dealing with the identification and value of the defendants realisable assets (which dictate the sum in which the confiscation order can be made, and thus the length of the term in default). We suggest that consideration be given therefore to a dedicated working party to examine the issue.

Question 44: How can we better incentivise people who are guilty to enter that plea at the earliest opportunity?

The offender who enters a guilty plea at the earliest possible opportunity saves victims and witnesses from the added distress of having to give evidence in court, and the criminal justice system a significant amount of time and money.

The many attempts to reduce the cracked trial rate over the years have had, at best, limited success. There will always be a proportion of offenders who will wait to plead guilty, if at all, until the last minute - when it finally becomes clear that the prosecution case contains no loopholes that can be exploited, and that all the important witnesses are going to attend.

The existing Definitive Guideline provides for a discount of one third for a guilty plea at the first available opportunity (as defined in Annex 1), and a reducing sliding scale up to the door of the court/after the trial has begun.

In our view, it would not be right neither as a matter of principle nor as a matter of practice to go beyond a maximum discount of one third. Any greater increase beyond that would give rise to a real risk of loss of confidence by the public in the criminal justice system. Indeed any higher discount should be saved for the exceptional case, including, for example, for the elderly man who goes into the police station and confesses to an unreported sexual crime 30 years earlier, whose sense of guilt compels him to confess. Care also needs to be exercised in the context of the discount allowable to a defendant who pleads guilty and then is entitled to a further reduction in sentence under s73 of the Serious Organised Crime and Police Act 2005, for assisting investigations or prosecutions.

In accordance with Annex 1 the first available opportunity may often be at the Police Station. A discount of 50% for an indication of guilt at that stage (which could only be by way of admission in interview to the facts upon which the eventual charge is based, or by way of indication on being charged at the police station with the offence to which he later pleads guilty) risks, even for a suspect whose lawyer is present, crossing the boundary between giving the guilty the incentive to plead guilty and leading the innocent into making false admissions.

In addition, to take a straightforward example, an individual liable to a notional sentence of three years' imprisonment after a trial would receive a sentence of 18 months, and would be liable to actually serve only 9 months, and if eligible for Home Detention Curfew could well be released substantially before that. Such a relatively minimal period in custody (albeit only a few months short of the present position) would cross the line into becoming an inappropriate reflection of the original culpability. The longer the notional sentence after a trial the more likely that is to be the case.

We believe that the appropriate approach would be that suggested by the Sentencing Council, namely (whilst building in flexibility) retaining a maximum discount of one third, and considering creating a greater distinction between the discount available at the first stage and that available later through the process – albeit needing to bear in mind that in very large and complex cases a late plea is a great deal better than a contested trial.

Chapter 5: Youth Justice

Where applicable, our views on youth justice are essentially the same as those expressed when dealing with Chapter 4.

Chapter 6: Working with communities to reduce crime

We are considering further the proposals in this chapter, alongside those relating to out of court disposals, and may respond in due course under this consultation or in another way.