

BREAKING THE CYCLE – OBSERVATIONS OF THE CRIMINAL SUB COMMITTEE OF THE COUNCIL OF HM CIRCUIT JUDGES

- 1 We represent the 652 Circuit Judges in England and Wales. Circuit Judges preside over the trial and sentence of the vast majority of cases passing through the Crown Court. In addition there are some Circuit Judges who sit in the criminal division of the Court of Appeal. Whilst Circuit Judges do not sit in Magistrates Courts appeals from the decisions of the Magistrates Courts are dealt with in the Crown Court with the result that Circuit Judges are familiar with the work and sentencing practice in Magistrates Courts. Circuit Judges have considerable experience in matters of sentencing and this response is written from a position of practical experience.

INTRODUCTION

- 2 It is not our function to engage in matters of policy which are, of course, issues for others. We have not, therefore, sought to do so. Our observations are intended as comment upon the practical consequences of the potential implementation of proposals advanced. There are, in consequence, areas in the Paper upon which it would not be appropriate for us to comment at all.
- 3 We are a little concerned that there appears to be limited connection between some of the narrative paragraphs in the Paper and the questions posed. Thus there are instances of proposals advanced in the narrative that are not the subject of the questions posed. Where that has occurred and we feel it necessary to deal with the narrative we have done so.
- 4 We are disappointed that the opportunity is not being taken to reconsider and consolidate the current sentencing provisions. The present position is complex, unsatisfactory and confusing especially for those who seek to understand why a Court has dealt with a matter in a particular fashion. The Paper seeks to make the process more transparent and relieve the Court of the obligation to make reference to technical and legislative sentencing requirements. In reality achieving that will be the more difficult whilst the present sentencing regime remains without wholesale reform. There is need for a simplification of the sentencing framework.
- 5 We support the proposition that the ultimate rehabilitation of offenders is a legitimate and desirable aim. It has to be accepted that rehabilitation cannot be achieved with all. There are a number of offenders who will continue to offend no matter what steps are taken or support is put in place. Further the position must also be viewed in the light of changes in the structure and attitudes in society in general. There have, undoubtedly, been changes in both moral and social values which may have contributed to a rise in petty crime that, in itself, forms the starting point for more serious levels of offending. In the timescale of almost two decades referred

to in the Paper much has changed not least society as a whole. We believe that mistakes have been made in the approach to petty crime resulting in Court intervention occurring later than should have been the case¹. Furthermore what have sometimes been referred to as “the causes of crime” remain and may have got worse. There is evidence to suggest that the deprived areas have become more deprived and the state and condition of such areas does not engender community pride and fosters the sort of behaviour that results in criminal offending. There is still an urgent need to address the root causes of criminal activity. Rehabilitation is a late step in dealing with the consequences of an underlying problem.

- 6 We would also make the point that, in large part for the reasons set out in paragraph 5 above, there is no short term solution which will turn matters around. Focussing on rehabilitation is a desirable shift away from a purely punitive approach but it will take time for that to take effect. The danger of overcrowded and expensive prison accommodation still exists.
- 7 We do not propose to become embroiled in statistics. Whilst over the past two decades it has become fashionable to seek justification for every proposition advanced by reference to statistics the presentation and interpretation of statistics may be open to abuse or misunderstanding. Statistics may be slanted to seek to make the point that the writer wishes to make. By way of illustration it is not often appreciated that reoffending statistics are now based upon a 12 month period rather than a 24 month period and that no account is taken of the seriousness of reoffending in determining whether steps taken to deal with an offender have been effective. The actual reoffending figures may, therefore, be higher than postulated in the Paper. We refer to the position in relation to financial penalties as a more detailed example below.²
- 8 A target culture has resulted in pressures in relation to some forms of community intervention. For example targets in relation to drug treatment provision encourage recommendations for such provision where the attitude of the offender is not conducive to success. That does little for the credibility of those provisions nor the rehabilitation of the offender. Even where the provision is correctly targeted the difficulty of breaking a long standing habit is such that breaches will occur during the currency of any order and inflexibility in dealing with those may jeopardise any progress made.
- 9 We agree that legislation and the creation of new offences as the response to each new situation that arises is undesirable. Similarly the ratchetting up of sentencing to meet perceived needs for response to situations does not, in the long run, produce a successful or just approach³.

¹ See paragraphs 62 to 75 below

² See paragraph 47 below

³ All too often we have seen what appear to be “knee jerk” reactions to individual situations without consideration of the likely impact in general.

- 10 The Paper correctly identifies a number of underlying problems that frequently affect those who become involved with the criminal justice system. For many years we have been concerned about the mentally ill and we have drawn attention to the lack of proper provision on very many occasions. Social factors such as housing, the effects of being “in care” and failures in education are indicative of the sort of changes that we mention in paragraph 5 above which will have to be addressed. Drugs and alcohol are at the root of much offending but, until very recently, excessive consumption of alcohol, which is responsible for the majority of offences of violence and disorder, has not received the attention that is clearly necessary.
- 11 There is no “one size fits all” answer to the stated aim of improving rehabilitation and flexibility in approach is essential. For those with social problems underlying their criminal behaviour there is a tension between “robust and rigorous punishments” and the need to rehabilitate which often involves a more constructive approach. In the end the way in which that tension is approached is a difficult political decision.
- 12 Paragraphs 39 and 40 on page 11 of the Paper set out aims and proposals in relation to sentencing but, as we have pointed out in relation to the Paper as a whole, the Questions do not give the opportunity to comment upon many of the proposals. We have some comments that we set out below in addition to the answers to the questions raised in relation to Chapter 4.
- 13 We do not believe that the Paper’s comments on Victim Personal Statements accurately reflect the situation. We have been involved in a great deal of work in this area for some years. Where does the perceived confusion arise? All three purposes set out in paragraph 75 may be relevant and the existing arrangements cater for that. The guidance is in place and in our experience Victim Personal Statements are being made and referred to. The comments may be the result of confusion in the interpretation of statistics rather than an indication of the need for reform. We played a part in the drafting of the information leaflets being routinely provided to victims.

CHAPTER 1

- 14 We do not feel it appropriate to comment upon much of what is set out in this chapter nor, save as below, do we feel able to answer the consultation Questions.

Question 5 – What are the best ways of making Community Payback rigorous and demanding?

- 15 In paragraph 11 we refer to the tension that exists between seeking to punish and seeking to rehabilitate. That is a tension that is plainly apparent with Community Payback. If the aim is to punish hours of mindless painting fences in the company of like minded offenders will achieve that.

It may not achieve the rehabilitation that might follow the “soft option” of working with the elderly or disabled where the offender gets the satisfaction of feeling that he or she has done something worthwhile and may, for the first time, realise the benefit of that. How this tension is resolved is not a matter for us but thought might be given to defining Orders as “punitive” or “rehabilitory” with requirements imposed by the Court to reflect the different situations of offenders upon the recommendations in a Pre Sentence Report. A consideration of the 12 possible interventions available under S 177 of the Criminal Justice Act 2003 shows that some of them are plainly rehabilitative and others equally plainly punitive. Others may have dual functions. A curfew requirement, for example, may be primarily punitive; but may have rehabilitative aspects – such as encouraging a defendant to get up in the morning and go to work on time. Drug Rehabilitation Requirements or mental health treatment requirements are plainly rehabilitative. Unpaid work is prima facie punitive; but a number of the unpaid work schemes which have received Community Awards from the Howard League for Penal Reform provide structured vocational guidance and training, and thus become rehabilitative. Moreover the sense of achievement which participants get once they have successfully involved themselves in, for example, a community regeneration scheme is palpable. There is much evidence which shows that enhanced self-esteem reduces reoffending. There is therefore a case for identifying those who would benefit from an Order directed to rehabilitation and the Court directing a requirement aimed to fulfil that purpose. Breach provisions could be the same in either case although breaches of a “rehabilitory” Order might be less frequent if the Orders were correctly targeted.

CHAPTER 2

Question 17 – What changes to the Rehabilitation of Offenders Act 1974 would best deliver the balance of rehabilitation and public protection?

- 16 The operation of the Rehabilitation of Offenders Act 1974 was subject to review in 2001/2002 and we contributed to the review at that time. The intention of the Act was laudable but it was introduced and enacted nearly 40 years ago. Levels and patterns of criminal offending in the post war years leading up to 1974 were very different as, indeed, were the attitudes of the public to offending. There have also been many changes in sentencing policy. It is also worth noting that the number of occasions when reference may be made or information must be provided have increased over the intervening period.
- 17 We accept that certain types of offending cannot be easily expunged because of the nature of the offending and the risks of repetition. Serious sexual offences are a clear example and are, in any event, subject to the notification and registration requirements. There are, however, other situations where isolated minor offending in the distant past should be the subject of rehabilitation and no longer discloseable. There is a balance to be drawn and a need to keep the provisions as clear and simple as possible.

We would favour a general rehabilitation policy in the sense that if offending is to be treated as no longer relevant or discloseable that should be the position for all purposes.

- 18 Such a position could only be reached by determining first which offences are such that disclosure should be made indefinitely and second what periods should elapse before disclosure is no longer necessary in relation to the remaining offences⁴. It may be that a mechanism for application to treat a conviction or convictions as “spent” after an appropriate period should also⁵ be considered.
- 19 The current structure based upon sentence outcome rather than offence committed represents a somewhat crude approach. It results in anomalies such as the treatment of Absolute Discharges which are not convictions but are treated less favourably than simple Cautions. Conditional Cautions and Condition Discharges remain discloseable after successful completion of the conditions. The rehabilitative effects of requirements in Community Orders are not recognised in that Community Orders remain discloseable after successful completion of medical treatment or program requirements. The fact that a fine has been imposed requires disclosure after the fine is paid when the level of offending would make that unreasonable save in those cases where exceptions apply. A lengthy disclosure period for those sentenced to short terms of imprisonment and an indefinite disclosure obligation upon those sentenced to more than 30 months⁶ may not be justified where the offence was not serious and some time has passed since it was committed⁷.
- 20 A move away from sentence to offence as the relevant criteria would require further detailed consideration and, perhaps, another wide consultation process before a final political decision could be taken. Of course the need for exceptions in relation to particular occupations and the use of information for particular purposes would remain. The present exceptions have developed in a piecemeal fashion and should be reviewed.

CHAPTER 3

Questions 12, 22, 23, 24, 26 and 27

- 21 The concept of payment by results in the context of Orders in relation to offenders leaves us very uneasy. This is an extension of the sort of target culture that can cause untold damage. Whilst payment by results may be a perfectly satisfactory means of securing satisfactory work or products in some situations it may not be in others. The treatment of offenders is an area where we would caution against the adoption of payment by results as

⁴ The existing exceptions which require disclosure for particular occupations or purposes should remain subject to review as mentioned below.

⁵ There are currently suggestions of such a procedure in relation to the Sex Offenders Register.

⁶ Modified in the case of young offenders

⁷ We have in mind the offender who commits an offence at an early age but thereafter leads a blameless life.

a general principle. There are many difficulties with the concept when attached to rehabilitation. What are to be determined to be satisfactory results? By what criteria are those results to be measured? Who is to be responsible for setting the criteria and determining whether they are met? Who is to tender and on what basis?

- 22 We expect that it is possible to contract out the provision of some programs and services. Indeed this already takes place. Contracting out the provision of drug treatment takes place simply because the provision of services on the scale required is beyond the capacity of many hard pressed Probation Trusts. In principle there is no difficulty with that. If, however, those to whom the work is to be contracted are to be paid on the basis of the results they achieve only those cases where a satisfactory result is all but guaranteed will be taken on. There may be few of those. Longstanding addiction is difficult to deal with, as is evidenced time and again by celebrities and expensive clinics, and likely to result in small successes and many failures. We have made the point in paragraph 8 above. If “cherry picking” by providers is to be avoided the criteria for success may make a nonsense of the whole exercise.
- 23 Similarly with unpaid work. It is perfectly feasible to contract out the supervision of the offenders painting the fence. This already happens. Providers who are paid on the basis of rehabilitation, however, will not be anxious to take on all offenders. Those who are first offenders or whose offence is unlikely to be repeated will be accepted with open arms. Those in other categories where the likelihood of reoffending is greater may not. Payment by results which guaranteed the provision of services for all might only succeed if the criteria for measuring success are, in reality, no measure at all. In any other situation there will be a “rump” of offenders who will fall to be handled in some other way or by over stretched Probation Trusts whose resources will have been reduced on the basis that the services are being provided by contractors.
- 24 A temptation to select the programs or the offenders, “cherry picking” the services to be provided, would be almost irresistible and would seriously damage the provision overall. The management of offenders who are, by very definition, difficult to deal with, does not lend itself to payment by results as things stand. The position could, conceivably, be different if Orders treated as either “punitive” or “rehabilitory” as set out in paragraph 15 above but that is a matter for political consideration.

Question 25 – Do you agree that high risk offenders and those who are less likely to reoffend should be excluded from the payment by results approach?

- 25 We agree.

Question 29 – What are the key reforms to standards and performance management arrangements that will ensure that prisons and probation have more freedom and professional discretion and are able to focus on the delivery of outcomes?

- 26 We support a greater discretion for those engaged in the management of offenders particularly in relation to Community Orders. The present process is over prescriptive requiring breach process even where the offender manager's professional judgment would not support such action. For example offenders with drug addiction problems who are subject to drug treatment requirements will often have compliance difficulties particularly in the early stages when overcoming addiction is difficult. The institution of breach proceedings where the offender is making the effort but experiencing difficulties will interrupt the progress of the Order and the treatment with potentially damaging results.
- 27 We do not consider there is need to impose a more onerous requirement in every case of breach. The Court should retain a discretion to do so and not be subject to a mandatory obligation.
- 28 Consideration should be given to a more standardised procedure for instituting breach process. There is a case for the issue of a summons by the sentencing Judge after consideration of the information to introduce an oversight of the position before the expense of breach process is incurred.

CHAPTER 4 - SENTENCING

- 29 Before we address the questions set out in the consultation document it is necessary for us to make some more general but important observations on the text of the Paper. As set out above in paragraph 3 the questions themselves do not always reflect what is set out in the text.
- 30 We have referred to our concern that this Paper does not address the need for fundamental revision of the sentencing framework. The present framework is not the result of a careful consideration of the overall needs but the result of a piecemeal approach. We believe that many of the problems identified in the paper, and some which are not referred to directly, would be best addressed by the creation of a single sentencing Act. That should aim to; Consolidate the existing legislation into one statute; Repeal all unimplemented legislation relating to sentencing; Remove all previous sentencing regimes so that judges have only one sentencing framework to apply irrespective of the date of offending; Renew and simplify the legislation in relation to Community Orders so as to introduce one scheme applicable no matter when the offence was committed; Remove legislative provisions requiring Courts to treat particular matters as aggravating sentences for which there are no need; Remove unnecessary restrictions on judicial discretion and reconsider the criteria for determination whether a child or young person is to be dealt with in the Youth Court or in a Crown Court. Those particular areas to which we refer further below could be incorporated. Such an Act should also reassess the provisions dealing with time spent in custody and adopt one scheme for the early release calculation. The benefit would be the introduction of one comprehensive and simple structure both easier to apply and easier to understand removing much of the perceived difficulty in explaining sentences passed. There are, of course two drawbacks. First

there would be need to take time in the careful construction of the legislation and it could not be introduced within a short timeframe. Second any such legislation would have to be enacted and expressed in terms that did not permit the sort of piecemeal addition and amendment that has produced the current unsatisfactory state of affairs. That might be achieved by having a fixed term with provision for review at the expiration of that term. We appreciate that might be thought to tie politicians into a structure that could not be amended, despite perceived political expediency, for a set period, perhaps the length of a fixed term Parliament. The lessons of the Powers of Criminal Courts (Sentencing) Act, which was amended before its terms had fully come into force, have still to be learned.

- 31 We have expressed concerns about too rigid a sentencing process on many occasions over recent years. Whilst a consistency in approach is undoubtedly desirable consistency of outcome is not and does not reflect the individual circumstances of each case. We support the aim of securing consistency of approach. Those aspects of Guidelines that are directed towards consistency of approach to sentence are of value but we consider that too rigid an approach to the determination of the actual sentence in a case is undesirable and risks injustice. If by transparency it is meant that the simple consulting of some form of table by a victim or offender will predict the outcome come what may such transparency is achieved by prejudicing the proper consideration and determination of individual cases. It is not transparency but rigidity. Judicial discretion is a vital component of the sentencing exercise and we welcome the preservation and extension of that discretion which the Papers seeks to suggest.
- 32 An extension of the principle set out above is a consideration of Schedule 21 of the Criminal Justice Act 2003. It has to be said that the sentencing framework in the Schedule sets out the minimum term to be served in custody, without the release subject to licence provisions, that applies in other areas of custodial sentencing. Further the custodial tariff terms to be imposed by the operation of Schedule 21 are substantially greater than the custodial tariff terms that were generally considered appropriate when such tariff terms were considered by successive Home Secretaries prior to the Criminal Justice Act 2003. There is, in addition, a substantial imbalance between those terms and the custodial outcomes in other serious cases. Some anomalies also arise particularly where a very small sum of money or a low value article is taken during the commission of the offence. The result of Schedule 21 has been an increase in the number of life sentence prisoners who remain in custody for very long periods. We can understand that there is a political need for a legislative role in sentencing for murder but we believe that greater discretion to reflect the particular circumstances of individual cases is desirable⁸.

⁸ It is unfortunate that the recommendations of The Law Commission were not followed through in their entirety. The effects has been the introduction of some provisions that were never intended to be implemented without the remaining recommendations and a failure to consider degrees of murder that would have gone some way towards dealing with the situation that arises under Schedule 21

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

Question 33 – What should be the requirements on the Courts to explain the sentence?

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

Question 35 - How best can we increase understanding of prison sentences?

33 We have assumed that this Paper is directed towards the functioning of the Courts rather than the general education of the public. We are conscious of the work that has been done to provide the public in general with information and understanding. The promotion of Court Open Days, web based information for Court Users and sites such as “You be the Judge” have the potential to increase public awareness and understanding. Those who access this information clearly benefit but the numbers who do so are disappointingly small. Some greater public awareness campaign would be justified.

34 We make the point in paragraph 30 above that simplification has a part to play in explanation of sentencing. The current sentencing requirements result in lengthy and technical sentencing remarks which mean little or nothing to the offender and the observer in Court. Greater simplicity and greater discretion in the way in which sentences are expressed is necessary. The actual effects of a sentence should be clear but the regimes for early release, home detention curfew and executive release coupled with complex licensing provisions have resulted in the actual time to be served being unclear both to the Court and the observer. This has to be addressed.

35 Although the Paper cannot be expected to deal with the problem there is no doubt that the reasons for many sentences are misrepresented in media reports which are often slanted. The ever increasing sensationalism and need to “sell” stories has resulted in the temptation to portray the sentence passed in an inappropriate and occasionally irresponsible fashion.

36 We favour a return to the recall provisions that existed prior to the implementation of s116 Powers of Criminal Courts (Sentencing) Act. Prior to that an offender who committed an offence whilst on licence could expect to serve a consecutive sentence after the completion of the recall of the licence subject to totality. Currently an offender who is released on licence but commits a further offence can be recalled to serve the whole or part of the licence period but will serve the sentence for the new offence concurrently during the recall period. Thus many offenders who commit even serious offences whilst on licence effectively serve no additional sentence for the new offence. That is clearly wrong and needs to be addressed.

37 We are not convinced that a fixed term of recall applicable to all is appropriate. If the period is as low as 28 days there is, in reality, little deterrent. We would favour recall with an appropriate administrative review after the expiration of a fixed period of sufficient length to encourage compliance with licence terms.

- 38 We are wholly opposed to the proposal that a Court should form a view whether a defendant might eventually receive a non custodial sentence and, having formed that view, be required to release that defendant on bail. We do not believe that inappropriate decisions are being made nor do we believe that offenders are being remanded in custody when that is not considered to be the proper course. This proposal is based upon the misconception that the outcome of the process is a guide to the situation at the outset. It is not:
- i The initial bail decision is taken at an early stage before all relevant information is available both about the offender and about the offence.
 - ii Courts apply the Bail Act criteria considering risk posed by the offender.
 - iii At an early stage in the process the Court is in no position to predict sentence but likely outcome is taken into account when the risk is assessed.
 - iv Even if an initial assessment of a likely outcome is possible there are many factors that come into play between the institution of proceedings and the sentencing decision. There are, for example, cases where other matters come to light or where the offender is unable or unwilling to engage in a community sentence
 - v A previous offending pattern may make it very unlikely that an offender will attend the sentencing hearing or refrain from offending in the period prior to the sentencing hearing.
- 39 Further it is important to take account of the following:
- i In those cases where a decision that a community outcome is likely is taken that will give rise to a legitimate expectation that such an outcome will result. That would create a real difficulty for the Court if, in the event, such an outcome is, in fact, inappropriate . Such an expectation may remain even where the offender fails to attend trial and is tried in absence.
 - ii There are cases in which a period in custody is necessary to protect the offender or take the heat out of a situation. A good example of the latter is where domestic violence is in issue. In such cases a sentence that reflects an opportunity to treat an offender who no longer seeks to pursue a relationship may be available at sentence when it clearly was not at first appearance.
 - iii There are a proportion of cases where a community sentence is only appropriate because a period in custody has given the offender the opportunity to reflect.
- 40 We support the retention of IPPs for those offenders who commit serious offences and pose a significant risk of serious harm. We believe, however, that the way in which these sentences were enacted and the criteria that were applied were misconceived. We would suggest that the concept of applying the provisions to those who would remain dangerous after serving a substantial determinate term in custody should remain. In our

view the appropriate “threshold” should be a determinate sentence of 8 years which is the level of sentence attracted by the most serious of cases⁹.

- 41 It may be thought that the introduction of yet another “threshold” which results in prisoners being detained indefinitely under three different regimes upon criteria applied in 2005, 2008 and, if enacted, in 2012 will require a review of the release dates of those already detained under the earlier regimes particularly where the numbers are high and those affected are unable to secure places or completion of the courses they must complete to secure release on licence now.
- 42 We support the greater use of extended sentences for those who pose significant risk of serious harm but whose risk may be managed and reduced in the community during an extended licence period. The current threshold of a 4 year determinate sentence should remain and the power should extend to all qualifying offences whenever committed allowing the abolition of previous “extended sentence” regimes.

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?

- 43 We support an increase in the number of custodial sentences that might be suspended by increasing the maximum custodial term from 12 months to 24 months. We support an increase in the operational period from 2 years to 3 years which will facilitate the completion of programs and courses that address offending behaviour, for example sex offender treatment courses. Whilst we support a discretionary power to add requirements to the suspended sentence Order we do not believe that it is always necessary for there to be requirements and we would advocate removing the obligation to impose requirements replacing the obligation with a discretion.
- 44 Whilst we have indicated our support for greater discretion on the part of offender managers in pursuing breach proceedings we cannot support the granting of powers to take punitive action. If a breach merits sanction formal action through the Court that imposed the Order is the proper response. The granting of powers to take punitive action outside the proper Court process is undesirable and unnecessary.
- 45 There is the existing opportunity for an offender manager to refer an Order to the Court for “good progress” with a recommendation that the Order is discharged and it is a step that is taken in appropriate cases. No further additional power is needed. The Order should always be referred back to the Court in which it was made for discharge. The Court would wish to monitor the outcome of Orders made and may wish to congratulate an offender on his good progress.

⁹ For example the sentence for an aggravated offence of rape has a starting point of 8 years

Question 38 – Would a general health treatment Community Order add value in increasing the numbers of offenders being successfully treated?

- 46 We consider the opportunity to make a generic health treatment requirement could be useful in some cases but both the criteria and the sort of treatment programs that might be offered require much further research and consideration. The concept may be worthy of further research.

Question 39 – How important is the ability to breach offenders for not attending their drug, alcohol or mental health needs?

Question 40 - What steps can we take to allow professionals greater discretion in managing offenders in the community while enforcing compliance more effectively?

- 47 Please see above. We have already commented on the matters raised in these two questions. There is a need to differentiate between those engaged in rehabilitative treatment programs, where compliance at some stages may be difficult for the offender, and the purely punitive Orders where a stricter approach is required. Even in the latter case, however, some flexibility is sensible and offender managers should have some discretion in the institution of breach proceedings.

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?

- 48 Whilst at first sight the figures in paragraph 209 appear impressive the reality is different. Flaws in the calculation of amounts paid undermine the accuracy of an 86% recovery rate. Our enquiries have revealed that remitted fines are still treated as “paid” and that there is an overlap between the treatment of fines and compensation. Further, as is always the case with financial accounting, the figures in one year may not represent the figure attainable in another. For example fines imposed in one year but paid in another will reduce the amount recovered in one year but inflate the figure recovered in the next. There is always a substantial risk of distortion in a cash accounting system. Further the incidence of very large corporate fines that are paid will result in distorted percentages of recovered cash sums in a given year. We believe that these flaws have been recognised and in a recent statement The Court Service expressed the 86% recovery rate as an ultimate aim following the introduction of new procedures rather than a rate that can be recovered now.
- 49 There is a tension between the aim to increase the use of compensation and encouraging the use of fines as a means of punishment. Whilst a sentence may be viewed as a “package” to include an element of both the means of many, if not the majority, of offenders will not permit the payment of both a fine and meaningful compensation.
- 50 In the event that greater use is to be made of financial penalties there will be a greater need for accurate assessments of offenders’ means. That process will, in itself, involve time and expense which will have to be factored in. We appreciate that information from commercial sources

might be used to assist but “credit checks” alone are unlikely to produce the sort of information that is necessary about an offender’s means and commitments. The current financial crisis has exposed the weakness in the commercial sector’s ability to make reliable assessments of the ability of customers to service loans. This, and the current reluctance of the commercial sector to rely upon credit information and make even small loans, leads us to express reservations about the amount of reliable information from that source upon which a Court might act.

- 51 Thus in answer to question 42 we say we have reservations. First there will only be a limited number of additional cases in which a financial penalty might be considered. Second the additional cost of obtaining reliable information about an offender’s means may exceed the savings to the system as a whole once recovery costs are factored in. Third, as things stand, we have no great confidence in the current recovery process.

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

- 52 The Paper does not include any detailed analysis of the Court’s existing powers to confiscate assets, including property and cash, from offenders and, in some circumstances, those who have not actually been convicted of criminal offences. The existing powers are extensive and include the power to confiscate items used in or to facilitate the commission of criminal offences. The powers in the Proceeds of Crime Act, which have been described as draconian, enable the confiscation of assets up to the value of the benefit that an offender has obtained from criminal activity. The wide approaches to the calculation of benefit and the reverse burden both in relation to benefit and assets frequently result in substantial Orders in serious cases. We have remarked upon the fact that these powers are invoked as a matter of course in many cases where the cost and delay involved is simply unjustified and where the prospects of recovery of assets are remote. These are cases where the level of offending is far greater than the offending contemplated in this Paper and the experience of the Courts in this regard is extensive and clearly has bearing on the proposals contained in this Paper.
- 53 There is a case for review of the existing wide ranging powers to simplify what has become a complex procedure particularly in relation to confiscation proceedings under the Proceeds of Crime Act. There may be a need to introduce a “threshold” for the institution of the process where recovery is unlikely to avoid the expense that results from unnecessary and ultimately pointless investigations. This again has impact in relation to the Paper’s proposals for confiscation powers in cases of far lower significance.
- 54 In the case of career criminals or those who engage in offending that results in substantial benefit there are likely to be assets of worth, whether cash or property, that can be realised. Existing provisions are more than adequate to deal with that. Those who offend at low level, for whom the

proposal appears to be aimed, are unlikely to possess assets which, upon disposal, would realise any worthwhile amount.

- 55 The Paper appears to be directed towards asset seizure as a punitive measure either as a “stand alone” sentence or as an adjunct to a Community Order. We are bound to say that this has something of the discredited “take them to the cash point” about it. We can understand that “confiscating their ipods” may be a politically attractive proposition but in practice it is unlikely to be of any real worth and may cost far more in the administration than might be raised by the disposal of any assets recovered. Many of those offenders at which the proposal is aimed will not possess assets that might be confiscated or will simply reoffend to acquire again the asset that has been confiscated. Any asset seizure would have to be proportionate. Recovery of an asset would be problematical. Such offenders are not going to bring assets to Court. Third party rights would have to be considered and protected with the additional expense and delay that would follow from that. Even after that disposal costs would be incurred.
- 56 We do not believe that this proposal would prove to be economic or workable. There is a need to approach this with the real practical issues in mind¹⁰.

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

- 57 This question had been raised many times over recent years and there is no easy answer. Those who become involved in the criminal process do not do so willingly and are unlikely to regard their involvement as beneficial to them. Further they are often irrational or dysfunctional. Many will not face up to the realities until the very last moment. There are a large number who know that there are many problems that can arise before a case reaches Court and holding out in case witnesses do not attend or to secure agreement to lesser charges or a basis of plea is a significant factor in a proportion of cases. There are also cases where the strength of the prosecution increases resulting in a firm not guilty plea being reviewed before trial. It has to be recognised that the human involvement of the defendant does not facilitate the sort of co operation that the Paper seeks to achieve and no matter what proposals are implemented the problems are likely to remain.
- 58 The Consultation on the future of Legal Aid¹¹ has suggested that the payment regime for legal advisers might result in pressure upon defendants at an earlier stage. We have responded to that consultation in some depth

¹⁰ We had hoped that the tendency for consultations to overlap resulting in a disjointed approach had ended with the change of government and we were disappointed to find that this proposal appears in this Consultation by the Ministry of Justice and also in a separate Consultation in relation to Anti Social Behaviour by the Home Office. Surely the principle should be established in one Consultation exercise.

¹¹ Again a concurrent and linked exercise.

and there is no necessity to repeat what is set out therein. A legal representative should not have a direct financial interest in the outcome in criminal proceedings. The decisions in the end are always those of the client. Clients familiar with the workings of the Criminal Justice System will know that there can be many “slips” between charge and standing trial. They will also know that discussion late in the day might produce an advantageous result. It is a misconception to believe that changing the costs regime, which affects the legal representatives will result in criminals adopting a more reasonable approach. Financial pressure on one party involved in the process as a whole will not result in a change of attitude by the other who is unaffected by that.

- 59 The question of how much “credit” is given for a plea of guilty has to be considered in the light of similar observations. Of course the more serious the offence the greater the value of the “credit” with the result that such incentive as is provided by “credit” is greater in relation to serious offending where, of course, admissions are, in our experience, less likely in any event.
- 60 Public understanding of the present sentencing framework does not always take account of the “credit” allowed for a plea of guilty and the “starting point” is rarely reported merely the outcome often resulting in criticism of the sentence. If the amount of “credit” available is increased still further the outcome will appear even more disproportionate to the offending. There is a political difficulty in dealing with that.
- 61 Leaving aside both the attitude and behaviour of defendants and the perceptions of the public there is the desirability of giving increased “credit” to consider. We do not believe that an increase on the current one third credit is appropriate. The reasons are obvious when the consequences are considered. A sex offender who admits rape faces a starting point of 5 years in custody. The credit for the plea reduces the sentence to 40 months. He will serve 20 months in custody. That is a result that many would regard as wrong¹² but it is a greater custodial period than that same defendant would serve if the “credit” was increased to one half. Then the sentence would reduce to 30 months and release on licence would occur after 15 months. If the defendant had been in custody awaiting trial the victim may see him on the streets only weeks after he appeared in Court.
- 62 We are opposed to an increase in the current credit allowed for a guilty plea.

Out of Court disposals

- 63 We have expressed our concerns about the ever increasing use of out of court disposals for what is, in reality, criminal activity for some years. We remain very concerned. Out of Court disposals have, increasingly, been used as a response to truly criminal activity and the general public may

¹² We doubt that many of the public appreciate the present position.

have no idea how the situation has developed and the range of matters that may now be dealt with by extra judicial processes.

- 64 The use of fixed financial penalties as a means of penalising some unlawful actions has been available for many years. We entirely support the view that such a means of dealing with some levels of unlawful activity is appropriate. It represents an immediate and commensurate sanction.
- 65 Until recent years, in our view appropriately, the use of fixed financial penalties has been in relation to offences that might be loosely termed as regulatory in nature, many for matters such as road traffic violations. What has taken place recently has been a greater extension of the use of fixed penalties, in which term we include penalty notices for disorder, beyond regulation to encompass what may be regarded as truly criminal activities. On many recent occasions we have expressed our concerns about this as we do not believe that fixed penalties should be used to punish those who commit truly criminal acts.
- 66 The use of fixed penalties as a response to truly criminal offending is to create the impression that truly criminal offending is not to be treated as significant. We are concerned that this is likely to encourage the belief that crime may not result in retribution and introduce a perception that some criminal activity does not merit proper process or consequences whilst other matters which might be deemed regulatory breach rather than truly criminal activity, result in equivalent or more serious consequences. In the long term such a policy carries substantial risk. Perceived removal of genuine criminal activity from the Courts or perceived downgrading of the consequences of such activity has the long term consequence of increasing its occurrence and escalation. If less serious but nonetheless criminal activity is to result in similar sanctions to regulatory breach it is likely to come to be regarded as no more serious. So at risk of stating the obvious if, for example, theft from a shop attracts the same consequence as unlawful parking it may come to be regarded as equivalent in seriousness. That must have an impact upon the numbers who may be tempted to engage in truly criminal activity but for whom the threat of Court process and public humiliation is a deterrent.
- 67 Moving from the perception of seriousness to consequences we are concerned that the use of a fixed penalty in relation to an offender who commits a truly criminal offence will result in that offender dropping out of the system if the fixed penalty is paid within the 21 days allowed. Thus it is possible that an offence will not appear as such on any antecedents or record of offending. Further, of course, fingerprints or DNA samples will not be taken. There is, in our view, a substantial risk that an offender, whose true risk to the community is not appreciated in the administration of a fixed penalty regime and who drops out of the system after committing a truly criminal offence, may engage in further and more serious offending. A paradigm might be thought to be the offender given a fixed penalty for throwing stones at a train this week who derails the train

with loss of life next week. In due course the occurrence of such a situation in one form or another is almost inevitable. While engaging the full panoply of court process and criminal recording might not prevent the second offence the public will at least be aware that the previous incident had been disposed of in a formal criminal setting and there will have been an opportunity to make some assessment of risk.

- 68 The proper recording of fixed penalties applied to truly criminal activities is essential and the economic impact of that, would undermine the very purpose of the use of fixed penalties. The additional time, paperwork and record keeping would add to the expense and to the burden on police officers which would be substantial if the range of offences is to include truly criminal offences. Comprehensive records would be required. It is not, therefore, a means of reducing cost and police time if it is extended inappropriately.
- 69 There is also a need to consider the victim's perception. Truly criminal activity impacts upon others. They become victims and their perception must be taken into account. It is only necessary to refer to a couple of examples. Let us first consider Criminal Damage up to a value of £500 with the consequence of an £80 fixed penalty. Of course much of that offending occurs in the less fortunate areas. It is beyond doubt that it is the poorer communities that suffer the greatest level of criminal activity. In such areas the victim is unlikely to have adequate insurance. The cost of adequate insurance is beyond many. Even in those cases, in the more fortunate communities, where there is insurance an average "excess" would be £250. Thus the victim who has suffered loss or damage to his or her property will see the perpetrator escape criminal process paying only a fraction of the loss that he or she has suffered. Then there is Threatening Behaviour or Assault. What is the elderly or vulnerable victim to think of the absence of criminal process and sanction when he or she may have endured a frightening and distressing experience?
- 70 It should not be thought that we are opposed to any extension of the use of fixed penalties. As we indicated above we favour the proportionate use of such sanctions in the case of offences that are regulatory in nature rather than truly criminal. We agree there is a case for considering fixed penalties in relation, for example, to drunkenness, alcohol consumption, alcohol sales, some firework offences and dropping litter. What we could not support, for example, would be the treatment of the throwing of stones at trains as equivalent to dropping litter and parking offences.
- 71 The use of simple Cautions as a response to low level criminal offending by some categories of offender is proportionate and appropriate. The necessities are; to ensure that the Caution is commensurate with the offending and no Caution for an offence that is not merely low level offending, nor where the offender is not a suitable offender, usually a first time offender. A Caution is recorded and appears on the offender's antecedents or record. It is a "shot across the bow" with the expectation

that any further offending will result in Court process. Properly deployed it is an entirely sensible measure which has our support.

- 72 We did not support the introduction of Conditional Cautions which we viewed with great concern. We do not believe that Conditions which include punishment, as opposed to cautions against future behaviour, should be imposed by the police or a prosecutor, as employees of the state, rather than by the independent Court process. There are clear implications for the delivery of justice.
- 73 We have another area of concern. What has happened over recent years is an extension of the use of Conditional Cautions beyond a means of dealing with low level offending and into the realm of punishing criminal offenders. This is inappropriate and undesirable. The level of any punishment should not be decided behind closed doors. Whilst in some cases there may be a sound basis for a Caution being issued subject to repayment of loss caused or perhaps agreement to attend a treatment course we do not believe that using a Conditional Caution simply to punish an offender is appropriate.
- 74 The present levels of out of Court disposals are high. We are conscious of the fact that the extra judicial processes to which we refer at paragraph 56 now extend beyond fixed penalties and cautions, whether simple or conditional, including, for example, steps that are referred to as Community Resolution. The range of potential out of Court disposals has grown in a piecemeal fashion and has become over complex and confusing. Further the way in which the practice has developed and increased in itself introduces an unsatisfactory state of affairs. The reality is that the extra judicial processes have increasingly become an additional, almost alternative, part of the criminal justice system that is largely controlled by the state outside any judicial oversight. Judicial or quasi judicial decisions are being taken police officers and CPS employees in relation to truly criminal offending. In the case of Community Resolution the procedure effectively provides for agreement between the police officer, the “victim” and the alleged offender in determining the level of response. Such a procedure may give a “victim¹³” a disproportionate input resulting in the “victim’s” say being determinate at a time when the alleged offender is disadvantaged and under pressure. The weak and vulnerable are clearly at risk.
- 75 There does not appear to be any consistent practice or approach from one police area to another. Whether rightly or wrongly the impression gained is that the policy adopted in an area depends upon what is considered to be in the best interests of the police in that area¹⁴. That, again, is not an appropriate means of ensuring justice overall.

¹³ And not all may in fact be a “victim” in the generally accepted sense.

¹⁴ Cuts in Police budgets may result in pressures that will vary from force to force increasing disparity in approach

76 There appears to be no recognition of the public interest in pursuing the prosecution of truly criminal activity. Although the use of out of Court disposals is an attractive option in times of financial constraint the public interest is, in our view, paramount. To the extent that the Paper proposes an extension of the present level of out of Court disposals and the increase of an extra judicial arm of our criminal justice system we oppose that. Indeed there are substantial grounds for major revision and a reduction in use where truly criminal activity is involved.

Question 45 – Should we give the police powers to authorise conditional cautions without referral to the Crown Prosecution in line with their charging powers?

77 No. For all the reasons set out above this would be an unacceptable extension of the extra judicial process that has developed in recent years. A punitive sanction, other than in circumstances where a fixed penalty would be appropriate, is not a matter for a body with an interest in the pursuit of the allegation.

Question 46 – Should a simple caution for an indictable only offence be made subject to Crown Prosecution consent?

78 Indictable only offences are the most serious criminal offences deemed to be only suitable for trial in the Crown Court. The very fact that this question is being posed must be a source for concern. A simple caution can only ever be appropriate as a response to very low level offending. The implications for the offender who admits such a serious matter are substantial. The risks to the public arising from the decision to caution for very serious offending are great. Some safeguard is essential and, in our view, this is a classic example of the undesirable risks introduced by the extension of extra judicial process in recent times. Crown Prosecution agreement by a senior Crown Prosecutor is the very least safeguard that could properly be applied.

Question 47 – Should we continue to make punitive conditional cautions available or should we get rid of them?

79 We would only retain an option for conditions that result in restorative measures only.

CHAPTER 5 – YOUTH JUSTICE

80 There are, no doubt, others who will contribute in detail on this aspect of the Paper. We support the stated desire to reduce youth offending. We reiterate what we set out in paragraph 5 above. The problem has undoubtedly worsened as the structure and attitudes of Society have changed. Youth justice, whether formal or informal, has not kept pace. We believe that early intervention, both with the offenders and their families, is important with a view keeping some youngsters out of the criminal justice system altogether. Where such measures fail structured and effective response is required.

81 We support the concept of a single remand Order.

CHAPTER 6 – WORKING WITH COMMUNITIES TO REDUCE CRIME.

82 The Paper does not appear to recognise the great strides that have been taken in relation of Case Management in recent years. Whilst changes in parties' culture are an continuing aim the points we have made in paragraph 58 above have some validity in relation to comment contained in paragraph 273 of the Green Paper. It is always necessary to take account of the fact that the defendant, and on occasions the witnesses also, are unwilling participants in the process

Question 56 – What sort of offences and offenders should Neighbourhood Justice Panels deal with and how could those panels complement existing criminal justice processes?

83 We have set out our concerns about the current extension of extra judicial processes above. We are concerned that the position is already developing into a two tier criminal justice system with no clear boundaries and no structure that results in truly criminal offending being dealt with in an entirely inappropriate fashion. These proposals seek to suggest the introduction of yet another tier. Does this, in reality, mean that out of Court disposal is considered by the police and, if necessary by the CPS, but rejected as appropriate and the matter is not then referred to Court, as it should be, but to some extra judicial volunteer body? If so that is a fundamental departure from our criminal justice system. If not what is the point of introducing these Panels in an extra judicial capacity at all? It is unfortunate that the question is framed in a way that suggests that a fundamental and, in our view, wholly inappropriate and unwise decision has already been taken. We trust that is not so.

84 We cannot accept that the example of an ad hoc arrangement in a rural location with limited structure and outside the criminal justice system can be used as the basis for an extension of arrangements of that sort to other locations. It takes no account of the difficulties in urban areas or the difference between a small west country location and the rest of the United Kingdom. Whilst the local arrangement in Chard, however inappropriate it may actually be, might be thought to reflect the needs of that community to propose that it would be a sensible extra judicial level in the national criminal justice system is quite misconceived.

85 There is already in place a procedure for dealing with low level offending that is structured, properly recorded and understood. There are already many volunteers from local communities who play a meaningful part in the administration of justice in our Magistrates Courts. They devote their time to serving their local communities. They have proper training and support. They work in a structured setting applying local justice. They are, in reality, genuine Community Justice Panels working within the criminal justice system. There is absolutely no need to experiment with an

untrained, unsupported and largely informal substitute. Indeed it might be necessary to look again at what is happening in Chard.

- 86 To go down this route would have a seriously detrimental effect on the criminal justice system and the perception of the system by those who view it and its operation from outside.
- 87 We can see a value in local panels advising on what community work might be advantageous in local areas or, perhaps, drawing attention to particular problems but there are, in reality, bodies who already perform these functions.

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges

3rd March 2011