

**A SENTENCING COMMISSION FOR ENGLAND AND WALES  
OBSERVATIONS OF THE COUNCIL OF HM CIRCUIT JUDGES**

## EXECUTIVE SUMMARY

- 1 The Sentencing Process is but one of a number of factors that contribute to the prison population.**
- 2 The proper exercise of a judicial discretion is not a cause of prison overcrowding.**
- 3 The preservation of judicial independence is fundamental to an independent judicial system.**
- 4 We are opposed to the creation of a Sentencing Commission. We do not believe it to be feasible and any perceived advantages are outweighed by major disadvantages.**
- 5 There is a process for the promulgation of sentencing Guidelines which works and results in a consistency of approach. Consistency of approach not uniformity in outcome is the proper aim.**
- 6 There are numerous statistics already available that can be used to achieve an acceptable level of predictability in relation to the sentencing process in the Crown Courts**
- 7 Devising a framework to impose on a system that is not codified and where there are many anomalies and interests to take into account is almost impossible.**
- 8 Even if a framework of some sort could be devised and imposed it would be a blunt instrument resulting in unfairness and injustice.**
- 9 If the Government were to adopt a proposal for the creation of a Sentencing Commission this would be seen by this Council as a thinly disguised attempt by the State, which is responsible for the institution of criminal proceedings, to ensure that the State achieves the result it desires avoiding the inconvenient intervention of justice.**
- 10 The American dream would result in a nightmare in England and Wales.**

- 1 We represent the 652 Circuit Judges in England and Wales. Circuit Judges most of whom preside over trials and sentencing procedures in the Crown Court which includes the Central Criminal Court. Circuit Judges try and sentence 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. Circuit Judges have considerable experience in matters of sentencing and this response is written from a position of practical experience. Whilst the consultation relates to sentencing in all Courts we are concerned that the principal impact will be in the Crown Courts where the more serious offences are tried and sentenced.
- 2 We are concerned that the consultation period is unacceptably short. This risks giving the impression that a fundamental change in the criminal justice system is being rushed when our experience shows that better decisions are based upon mature reflection. It also causes difficulties for our members who must continue to serve the public and the interests of justice in fulfilling their usual role whilst endeavouring to make a meaningful contribution as professional sentencers. We were disappointed to note that what appears to be regarded as an important data collection exercise was not embarked upon in sufficient time for the results to be the subject of audit or comment during the consultation process. Thus no opportunity to consider or review the results is being afforded to those in the best position to comment upon them. We believe that the Working Group has continued to investigate in other areas whilst the consultation is current, suggestive of inadequate time to produce a complete draft for consultation and a lack of evidence upon which to reach conclusions. That is clearly unsatisfactory. "Why is a major overhaul of the sentencing system deemed to be of so little importance that it can be rushed in this way?"<sup>1</sup>

## **Background**

- 3 We intend to avoid the use of statistics as far as is possible in this response. Statistics may be framed in such a way as to illustrate the point that the statistician is asked to demonstrate. Complex interrelation between prison population, sentence lengths and the total numbers who are placed in custody mean that sentencing statistics alone should not be used to support conclusions which may, in reality, be invalid and run against practical experience.
- 4 We do not accept the suggestion in the Working Group paper about the timing of this exercise. It is quite misleading simply to suggest that this is a propitious time to set up a Sentencing Commission. The reality is that this is being considered now because of the position in the prisons which, as we indicate below, lies at the door of the Executive. If this situation had been avoided in the ways we indicate below, or its impact had been properly assessed in advance, this concept would not have merited any consideration at all, even if it had been raised.
- 5 We must first make it absolutely clear that we do not accept for one moment that the present problems in the prisons are the result of the improper exercise of judicial discretion in matters of sentencing. Despite some erosion of sentencing discretion, to which we refer below, there is no evidence to suggest that judicial discretion is being exercised in a fashion that makes it

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<sup>1</sup> Professor Michael Zander *New Law Journal* April 2008'; Professor David Ormerod *Criminal Law Review* June 2008

necessary to undermine the separation of powers by abolishing or further substantially curtailing the proper independent assessment of cases which are, in the end, matters between the State and the citizen, and introducing an untried, untested and unsophisticated process such as is proposed in the consultation.

6 In our experience there are a number of factors that have combined to produce the current problems. It is important to note that the problem has only reached what some may think to be crisis levels as a result of factors that have largely become relevant within the past decade. Proper judicial discretion has been exercised in matters of sentencing for over a century. We do not accept that sentencing creates the greatest uncertainty. There is no one factor causative of the problem and identifying precisely the degree to which each is individually causative is an almost impossible exercise but the combination has proved to be something of a disaster. The factors we identify are as follows:

- (a) The perceived problems of crime have become a political football with a desire by all in the political arena to secure the interest and support of the public by seeking to address in ever more draconian ways a problem which the executive states in other contexts is not in fact a problem<sup>2</sup>. Not only does this affect sentencing policy but it affects the remand policy to which we refer again below. “The only way for sentencing levels to be reduced is for government to switch to a policy of de-escalation toning down the rhetoric, keeping statutory intervention to a minimum and leaving the Sentencing Advisory Panel and the Sentencing Guidelines Council to get on with the task Parliament has allotted”<sup>3</sup>
- (b) A desire to legislate for every situation and to be seen to be doing so for political expediency has resulted in the creation of up to 4000 new offences within a 10 year period. This compares very unfavourably with the numbers of offences created in the previous 50 years. We have expressed our concerns on many occasions and submitted responses in relation to the proliferation of what might be termed regulatory matters in August 2006<sup>4</sup>. Further legislation in particular areas has impacted. For an example we would draw attention to the Sexual Offences Act 2003 which elevated the offences of “Peeping Toms” and “Flashers” to specified offences triggering the dangerousness provisions in the Criminal Justice Act 2003 and substantially increasing penalties.
- (c) The creation of Prohibitive Orders in the unrealistic belief that there will be compliance in all cases when there is not and custodial sentences are expected to follow<sup>5</sup>. This policy is continuing with proposals, being re introduced into the Criminal Justice and Immigration Bill, for Violent Offender Orders made in proceedings before lower courts with a civil standard of proof notwithstanding Parliamentary objections and our own reasoned objections to this policy. All these measures have been taken without proper consideration of the potential impact. By way of example according to the National Association for the Care and Resettlement of Offenders there is little research available on the effectiveness of ASBOs and little proof that they actually work. Figures released in June 2005 show that 50 per cent of juveniles breached an ASBO, and 46 per cent of those young people ended up in custody for the breach. On 2nd November 2006 the Youth Justice Board expressed grave reservations. These

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<sup>2</sup> See Best value consultation - April 2008 “Crime has fallen by over a third since 1997 “

<sup>3</sup> Professor Martin Wasik former Chairman Sentencing Advisory Panel Criminal Law Review April 2008.

<sup>4</sup> CoCJ Regulatory Justice Sanctioning in a Post Hampton World August 2006

<sup>5</sup> Statistics for breach of ASBOS

concerns have been emphasised by the report of the National Audit Office in early December 2006. Figures released in May 2008 which relate to 2006 confirm what we believe to be a very similar trend in relation to adults. The use of ASBOs in some circumstances may be sensible but widespread variations in numbers suggest that inappropriate use is common<sup>6</sup>. Of course it has to be borne in mind that breach of an ASBO carries a sentence that is likely to be more severe than the sentence for the offence that constituted the breach<sup>7</sup> as may be the position with Violent Offender Orders.

- (d) The creation of minimum terms of imprisonment restricting the proper exercise of judicial discretion in those cases and resulting in longer sentences in some cases where that would not have been the position prior to the minimum sentence being introduced. In cases of murder it is notorious that tariff sentences were significantly increased<sup>8</sup>. We support custodial terms of appropriate length in serious cases. Indeed what is being advanced in the consultation might suggest that we have been too supportive. That does not mean to say that we believe that justice is being done in those cases where the minimum sentence results in an arbitrary sentence and many of our members have drawn attention to examples of that<sup>9</sup>. Again the impact of these provisions has simply not been taken into account properly.
- (e) It would be quite remiss of us if we did not draw attention to the impact of the provisions contained in the Criminal Justice Act 2003 in relation to indeterminate and extended sentences. The impact of these provisions, drawn in a way that was very wide indeed does not appear to have been anticipated by legislators. Whether that is because advice from officials was not sought or such advice was wrong or ignored the fact is that it was forecast that the numbers liable to indeterminate sentences would not rise above 750 and there are already 5500 within the prison system. The immediate impact was to result in larger numbers of prisoners serving longer periods in custody in a prison system that had begun to creak. The Courts sought to alleviate obvious situations of injustice by interpretation of the provisions that gave Judges as much discretion as was possible within the statutory framework<sup>10</sup>. We venture to suggest that without the use of that judicial discretion the current position would be even worse. We have noted that these provisions are now subject to major revision in the Criminal Justice and Immigration Bill. No doubt for political reasons this has not received widespread publicity<sup>11</sup>. There does not appear to be any assessment of the likely impact of that. Further this does not address what is to happen to those sentenced under the current regime but who would not be sentenced in the same way under the new regime. We do not know what thought has been given to the fact that it may take some years for those to pass through and thus out of the prisons<sup>12</sup>; but that eventually the problem created may be alleviated.

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<sup>6</sup> CoCJ Sentencing for breach of anti social behaviour orders – 9<sup>th</sup> October 2007

<sup>7</sup> See CoCJ Sentencing for breach of anti social behaviour orders – 9<sup>th</sup> October 2007 and CoCJ Strengthening Powers to Tackle Anti Social Behaviour 5<sup>th</sup> February 2007

<sup>8</sup> Far lower tariffs were imposed by successive Home Secretaries when the tariffs were not generally in the public domain yet Courts are obliged by the Criminal Justice Act 2003 to impose long tariffs. See also Lord Woolf Daily Telegraph 27<sup>th</sup> March 2008.

<sup>9</sup> For example the 5 year minimum term for possession of a firearm carries the connotation that the offender is objectively more dangerous than others but the offence is not one identified as a specified offence.

<sup>10</sup> See R v Lang [2006] 2 Cr App R(S) 3, R v Johnson [2007] 1Cr App R(S) 674 et al

<sup>11</sup> In a speech to the Parole Board in April 2007 the Lord Chancellor refused to countenance any modification to the IPP regime.

<sup>12</sup> Even transfer to open conditions is limited whilst risk assessment is awaited – see paragraph 6(f).

- (f) Coupled to the above is the failure to provide the courses and support necessary to long term prisoners to enable them to establish their suitability for release. We accept that, in part, this is a result of overcrowding but what is perfectly clear is that there was inadequate planning for the provisions needed for the influx of additional long term prisoners when policy decisions were taken. There are many serving indeterminate sentences well beyond the tariff date because of failure to provide appropriate courses<sup>13</sup>. We see no evidence of funding or other proposals to deal with this serious and fundamental problem.
- (g) The creation of a risk averse culture in cases considered by the Parole Board. Not only has there been a paradigm shift in the approach of Panels of the Parole Board in relation to release or recommendations to transfer to open conditions following some high profile cases but the authority of the Parole Board was undermined for some time by the wholesale refusal of the Home Office to adopt Parole Board recommendations for transfer to open conditions. There has been a failure to support the Parole Board.
- (h) Changes to policy in relation to both breach in Community Sentences and recall on Licences have further contributed to the problem. The numbers of licences increased by 100% in the period between 1995 and 2005 with the number of Community Orders increasing by 50% in the same period<sup>14</sup>. In the last period for which we have figures there were 14,669 recalls, an increase year on year of 58%<sup>15</sup>. The risk averse culture encourages recalls in very many cases where the sensible exercise of some discretion might not result in a return to custody. No doubt in an effort to convince a sceptical public that Community Sentences were, indeed, a condign punishment much emphasis was placed upon breach action to enforce those Sentences. The current “target” to which Probation Boards/Trusts must work, if there are not to be financial sanctions, requires breach action after, at most, two instances of breach. Such discretion as there may have been has been removed. That has resulted, for example, in the disadvantaged or disorganised with chaotic lifestyles, which includes most drug users, being the subject of breach proceedings for failure to keep or delay in keeping two appointments. Our research has shown that somewhere in the region of one third of supervision Orders are breached and this policy results in some 20% of those sentenced to a Community Order finding themselves in custody perhaps after one missed appointment and one late attendance. This, coupled with “targets” for “start ups” increasing the numbers of Community Sentences to be supported by Probation Boards/Trusts, results in those whose original offence was considered suitable for a non custodial disposal being placed in custody for breach. There are, no doubt, greater numbers of breach proceedings enabling it to be claimed that Community Sentences are rigorously enforced but at what cost? The same point may be made on the question of recalls to custody for those on licence. Whilst an attempt to address the problem has resulted in 28 day recalls this has done little to address prison numbers and the safety of the public is not enhanced by what some might consider to be a cynical recall policy.
- (i) We would also refer to the high remand population awaiting trial or sentence. Media pressure attacking those who offend whilst on bail, backed by a significant number of politicians, is unlikely to result in any decrease in numbers and may result in increases. We remain concerned at the numbers remanded in custody who do not receive a custodial sentence. We believe that some 46% do not receive a custodial disposal. A

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<sup>13</sup> See Walker & Wells v Parole Board [2007] EWHC 1835

<sup>14</sup> The Supervision of Community Orders in England and Wales NAO January 2008

<sup>15</sup> Parole Board Report 2006-2007 published in 2007.

proportion of those are acquitted but the larger number are eventually dealt with by non custodial sentences.

- (j) On very many occasions and in relation to many consultations in recent years we have drawn attention to two areas of great concern that impact upon the matters we are considering in this consultation<sup>16</sup>. First there is the question of foreign nationals. There has been a singular failure to deal with this over recent years with the result that there were at least 11,500 foreign nationals in prison awaiting deportation at the end of 2007. The whole question of detaining foreign nationals has demonstrated a failure in policy and the provision of resources leading to an unacceptable situation. Then there is the question of the mentally ill who are subject to custodial sentences because there are inadequate facilities to deal with them in the Community. Again a failure to address the need to provide policy and resources to cater for the mentally ill offender results in Courts being left with no alternative but to imprison people who have little prospect of securing the treatment necessary in prison. In the case of offenders with mental health problems prison is not used as a place of rehabilitation or measured punishment but as a place of confinement. To confine those who are mentally ill in close proximity to those who are not is to damage the long term health and rehabilitation prospects of both categories.
- (k) We would draw attention to the lack of stability within the criminal justice system resulting from an ever changing and ephemeral approach to sentencing policy. There is a clear need to provide a stable atmosphere. The fact that there is no such stability does not rest with the Courts or the Judges. Sudden changes in policy and short term initiatives that result in “bulges” have a detrimental effect. The behaviour and intentions of the executive and legislature are far more difficult to predict than the actions of the judiciary. Inaccuracy in planning is more likely to be the result of political expediency than changes in judicial approach. As an example we would point to the unwise policy that was adopted, in the teeth of opposition from those experienced in the field, that has resulted in matters that were dealt with speedily and effectively in the Family Courts becoming subject to the lengthier process of the Criminal Courts. This procedure has no support from victims, practitioners or the judiciary<sup>17</sup>. There is an increase in the number and length of custodial sentences in the less serious of cases.
- (l) The rate at which sentences fall to be passed may also be subject to the activities of the Police and other authorities and the speed at which they progress with matters. The Courts have no control over this significant driver of the prison population which is dependant upon Police and CPS policies and performance

7 In a number of previous consultations in relation to sentencing we have pointed out that there are other fundamental problems that need to be addressed<sup>18</sup> which, because the solutions are long term, appear to receive little attention.

8 In our view there is clear need to address the matters set out above in order to seek to rectify the current situation rather than to introduce untried measures that will fundamentally change the way in which justice is administered eroding the principle of the separation of powers.

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<sup>16</sup> See CoCJ Making Sentencing Clearer – 21<sup>st</sup> December 2006

<sup>17</sup> Sir Mark Potter and Judge Platt 14<sup>th</sup> April 2008.

<sup>18</sup> See for example CoCJ Strengthening Powers to Tackle Anti Social Behaviour 5<sup>th</sup> February 2007

- 9 We have made the points above to ensure that we deal with any inference that might be drawn from the way in which these proposals have been presented directed, as they are, to restriction of proper judicial discretion. We make it clear that we are not prepared to allow any inference that the proper exercise of judicial discretion is causative of the problem with which this consultation is concerned.
- 10 We also draw attention to the fact that we have been raising our concerns about rising prison population and the impact of legislation and initiatives at quarterly meetings with the Home Office and latterly the Office for Criminal Justice Reform for a period of over 5 years and our ongoing concerns have met with little practical action.

## **General**

- 11 Public confidence in the administration of justice, the integrity of the criminal justice system and the sentencing process depends upon the independence of the judiciary and the consideration of each matter upon its merits by an independent judiciary. Erosion of that principle can only result in a change in public perception to the detriment of the criminal justice system. Both offenders and victims are entitled to expect that cases will be considered individually on their individual merits not as part of what might appear to be something similar to a primitive accounting exercise.
- 12 We have little confidence in the idea that the answers to the problem can be found in the USA where the proportion of persons in custody far exceed the figures in any other western nation rivalling the figures in some countries in the World that could not be set up as an example to others<sup>19</sup>. The USA has 5% of the world's population but 25% of the world's prisoners<sup>20</sup>. We are not impressed by the suggestion that a sentencing abacus in use in one form or another in two of the fifty states in the USA is appropriate in England and Wales. As is recognised there is no direct comparison between those two States and the situation in England and Wales. Whilst the legal systems are "common law" in the general sense there are few actual similarities and the systems for "plea bargaining" and the like are not present, save for the exceptional situation in long fraud cases, in England and Wales. We are not convinced by the apparent enthusiasm of Judges in Minnesota who previously had no discretion at all and welcome the little discretion that was introduced. We doubt that they would express the same views had there been an attack on the sort of discretion applied by Judges in England and Wales over very many years.
- 13 There has been much criticism within the USA of the presumptive / prescriptive sentence frameworks<sup>21</sup> that have developed in the federal Courts and various States including the Minnesota framework<sup>22</sup>. We have noted the decisions of the US Supreme Court in *Booker v USA*<sup>23</sup>, *Gall v USA*<sup>24</sup> and

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<sup>19</sup> Five times per hundred thousand population more than in the UK and ten times more than that in much of the rest of Europe.

<sup>20</sup> International Centre for Prison Studies Kings College London.

<sup>21</sup> See for example: Ronald Wright Yale Law Journal 108 1999, Erik Luna 1<sup>st</sup> November 2002, Nancy Gertner in Yale Law Journal, International Commission of Jurists August 2003, Douglas Motzenbecker Litigation News February 2008

<sup>22</sup> Richard Frazer Crime and Justice 2005.

<sup>23</sup> 543 US 220(2005)

<sup>24</sup> 2007 WL 4292116



Kimbrough v USA<sup>25</sup> in relation to the federal framework, the combined effect of which is that a sentencing framework can only be advisory and there can be no presumption that decisions that do not follow such a framework are unreasonable. We noted that these decisions resulted in Barbara Tombs, executive director of the Minnesota Sentencing Commission, stating that it would be necessary to determine the impact of these decisions, the last two which were in December 2007, on state sentencing schemes. Time and the patience of the reader preclude further detailed analysis in this response but there is clearly uncertainty, dissatisfaction and disapproval of presumptive / prescriptive sentencing frameworks in the US Supreme Court<sup>26</sup>. We would regard the “importing” of a scheme based on something similar as a retrograde step so far as British Justice and the reputation of British Justice are concerned.

- 14 We consider that the introduction of the sort of sentencing framework proposed coupled with the loss of proper discretion that follows would impact adversely on some areas of society. There are equality and diversity issues. Judges dealing with the sentencing of offenders now will take account of many factors including the sex and ethnicity of the offender. It is recognised by Judges that female offenders have problems and responsibilities that must be considered and taken into account if justice is to be done. We have taken part in a major survey of the problems faced by Courts in sentencing female offenders<sup>27</sup>. We have no doubt that a restriction in discretion and the adoption of a framework based upon the offence and the criminal history will work against accommodating the particular problems of female offenders and the families of female offenders<sup>28</sup>. Similarly Judges take into account the situations of offenders from disadvantaged backgrounds and minority communities in determining a just and appropriate sentence. We have noted with horror the results of sentencing exercises in the USA where there is clear evidence that the disadvantaged and minority communities constitute the largest proportion of the excessive numbers in custody. We believe that the introduction of a framework formulated as described coupled with the removal or substantial curtailing of judicial discretion will impact upon the disadvantaged and minority communities unfairly and disproportionately. We are very surprised to see that no consideration of the impact of the proposals has been undertaken, as is usually the case with proposals in the criminal justice field. We believe that the impact on female and ethnic offenders will be disproportionate risking rising numbers of those groups in custody and raising serious diversity issues.
- 15 There is a need to consider how what is postulated can be reconciled with European law, Directives and Human Rights. If the conservative Supreme Court in the USA has difficulties with the concept we imagine that the Supreme Court in England and Wales might adopt a similar view and the European Court may take an even stronger line.
- 16 We have considered the detailed analysis of sentencing systems worldwide that was prepared for the Sentencing Commission for Scotland in May 2005.

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<sup>25</sup> 06-3330.

<sup>26</sup> New York Times 11<sup>th</sup> December 2007

<sup>27</sup> Baroness Corston’s enquiry in May 2005

<sup>28</sup> “Nearly two thirds of female prisoners in the USA are there for non violent offences. Most are mothers Their children face the emotional and developmental effects of separation” Sarah B From Women’s Prison Association 24<sup>th</sup> April 2008

It was concluded that “Consistency in sentencing is important not only to the offender, but also to those directly affected by the crime and to the public, since a perception of inconsistency in sentencing is likely to lead to loss of public confidence in the criminal justice system. We envisage that the introduction of sentencing guidelines would be a gradual process. Under our proposals, particular guidelines, once promulgated by the appeal court, would guide sentencers, but would not dictate sentences in individual cases. We have, however, recommended that where a sentencer imposes a sentence which is outwith the guidelines he or she should be required to provide an explanation for this.”<sup>29</sup>. The Sentencing Commission for Scotland was dissolved in November 2006 once its recommendations, which provided for an advisory panel to prepare guidelines that might be adopted by the appeal court, were accepted in Scotland after the extensive research it had undertaken.

- 17 We do not accept, as is suggested in the consultation, that there are particular problems with part-time judiciary. Under current selection procedures the part-time judiciary in the Crown Court are selected from experienced practitioners. The part-time judiciary are trained to a high standard and have the benefit of the support, experience and assistance of their full time colleagues who are regularly exercising judicial discretion based upon their own extensive experience. We have seen no evidence to support this argument of last resort.
- 18 We are concerned that the proposals are motivated by cost rather than by considerations of consistency or predictability. In this response we demonstrate that appropriate levels of consistency and predictability in sentencing are possible now with a little adjustment to the present systems and an enhanced role for the Sentencing Guidelines Council. The consultation does not appear to consider or recognise that this can be done but concentrates upon the introduction of some new structure that will undermine judicial independence and the separation of powers with no certainty that the overall prison population, which is influenced by other factors, will be any more predictable. It is asserted that individual sentencers would not be required to have regard to resources at the time they sentence. The words are chosen carefully. The reality is that what is advanced is that Judges would have to have to sentence within a framework. It is not suggested in the consultation that the framework should be the province of a Sentencing Commission with the executive and legislature planning the financing around that. Quite the reverse. What the consultation actually postulates is a financial limit being set within which a Sentencing Commission would devise a framework. The Working Group indicate that this is not a matter with which they are to be concerned. Albeit we recognise that the Working Group is concerned not to express a political view on what is primarily for Parliament to determine we find that concept difficult to comprehend if the Working Group is intending to express a view on the viability, impact and practicalities of something that will, if implemented, affect the administration of Justice in the way that it has been administered in England and Wales for over a century.
- 19 We would further comment that no account appears to have been taken of the knock on effect of this. If, as appears to be intended, the object is to reduce the prison population by removing or substantially reducing the discretion of Judges what is to happen to those who are now deserving of a custodial sentence but will no longer receive such a sentence. Whilst there is a token

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<sup>29</sup> Lord Macfadyen September 2006.

reference to non custodial penalties there is no mention of resources for the increased number of Community Sentences; no mention of the currently under funded and struggling Probation Service who battle on despite a lack of support. We note with disappointment that the consultation seems to accept that the numbers of probation officers cannot be increased<sup>30</sup>. Even if that was addressed what provision is made for those who are then breached to meet “targets” and enter prison via that route perhaps a few months after the imposition of the Community Sentence. What proposals are there to reduce the level of re offending amongst those who are released earlier than is now the case? Is this to be achieved by Licence thereby further increasing the level of recalls and re entry to the prison system. These are difficult questions that cannot be addressed by this consultation either within the Terms of Reference or the timescale allowed and are fundamental to a reasoned and sensible long term view. Realistically with questions such as these outstanding no overall savings on cost will be achieved by the proposals advanced in the medium or long term and any short term savings will be illusory.

- 20 There is also the difficulty of accommodating the intentions of the legislature within this concept. If offences are to be rated, and we have no confidence in the practical and just resolution of that, what happens if the legislature decide, as the legislature is wont to do, that a particular matter, such as gun crime, requires an immediate increase in sentence for deterrence. How would a sentencing framework cope with variations in policy affecting individual offences? Is that to mean that the increase must be accommodated by a decrease somewhere else in the framework? If so where and by what criteria? Will there be a need to rate the offences in the framework again to take account of that justifying why an offence considered to be serious at one point is not considered to be as serious at another?
- 21 Then there is the matter of reconciling this with the provisions of section 142 of the Criminal Justice Act 2003. This provision, enacted by the legislature in a bill promoted by the executive very recently, provides that the purposes of sentencing are: (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences. The paper makes reference to the treatment of previous convictions dealt with in section 143 but makes no attempt to reconcile what is, in reality an emasculating cost driven proposal, with the requirements of sentencing defined so recently and based upon concepts that have developed over many years.

## **Guidelines**

- 22 For many years the Court of Appeal has, on its own initiative, given guidance to Courts in relation to sentencing. The Crime and Disorder Act 1998 created the Sentencing Advisory Panel. The Panel, which included members with different backgrounds, conducted research to advise and assist the Court of Appeal in formulating Guidelines. That situation existed from 1999 until 2003. The Criminal Justice Act 2003 established the Sentencing Guidelines Council, which became responsible for issuing Guidelines, and contains a preponderance of sentencers. The Council “would be geared towards achieving consistency in sentencing and increasing public confidence that justice was being done”<sup>31</sup>. The clear intention was to achieve consistent sentencing, which had been the object since the Court of Appeal began to issue guideline

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<sup>30</sup> Consultation paragraph

<sup>31</sup> David Blunkett MP then Home Secretary.

judgments, but added to that was the subtext that some Judges were thought to be lenient when the executive wished to appear to be “hard on crime”. It is important to note that the Sentencing Guidelines Council, whilst obliged to consult, exercises independent judgment: “We should at all costs avoid the House of Commons becoming involved in a bidding war about sentencing levels in which someone argues for a standard sentence of one year for a first time burglar and someone else suggests two and someone else suggests three...A Sentencing Council, however it may be constituted must take a long term and reasoned view of what is appropriate. It should, so far as possible, resist the day to day fashion of sentencing headlines”<sup>32</sup>. Thus the Guidelines that are promulgated by the Sentencing Guidelines Council are prepared, on the advice of and with the assistance of the research of the Sentencing Advisory Panel, by a body with considerable sentencing experience. This process draws on expertise and advice and is not controlled by the executive. As a result it enjoys a considerable amount of respect and authority.

- 23 Guidelines are promulgated after careful and detailed research and full consultation. The consultation process is effective although, in stark contrast to the indecent haste with which this exercise is being conducted, there is frequently unacceptable delay in the latter stages when consultation with Parliament and ministers is required. That delay has the potential to cause difficulty and resulted in real concern when there was an urgent need to review the Guideline on the treatment of guilty pleas in the summer of 2006. The Guidelines are considered and implemented individually recognising the importance of viewing offences in categories. There is no injustice as would result from very different offences being lumped together and treated alike. Guidelines include those dealing with general approach and those dealing with categories of offence. Again this approach achieves fairness in relation to each category of offending and a measured approach to criminal offences over all. There is now a considerable body of experience in the drafting of Guidelines. It enjoys a respect that would not be achieved by the preparation of an all encompassing framework such as that envisaged.
- 24 The Guidelines that are promulgated are not presumptive/prescriptive. They are designed to structure rather than to eliminate proper decision taking by Judges<sup>33</sup>. Whilst Judges are under a statutory obligation to have regard to any guidelines<sup>34</sup> and give reasons for a sentencing decision that is outside the Guidelines<sup>35</sup> those Guidelines are advisory: “We would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double counting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.”<sup>36</sup> We believe this to be entirely appropriate, in accord with proper practice, supported by the public, just, fair and consistent with the European Convention on Human Rights.

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<sup>32</sup> Lord Woolf Lord Chief Justice and Chairman of the Sentencing Guidelines Council

<sup>33</sup> Professor Martin Wasik former Chairman Sentencing Advisory Panel Criminal Law Review April 2008.

<sup>34</sup> Section 172 Criminal Justice Act 2003

<sup>35</sup> Section 174 Criminal Justice Act 2003

<sup>36</sup> R v Millberry [2003] Cr App R 142

- 25 We would draw attention to the identification of aggravating and mitigating features in the current Guidelines. Such a sensible and comprehensive approach would not be practicable or possible within the sort of framework envisaged in this consultation introducing the real risks of injustice to which we have already referred.
- 26 We support the existing practice of promulgating Guidelines for offences or categories of offences. In April 2005 a number of us attended a workshop organised by the Sentencing Guidelines Council at which there was discussion of the concept of “ranking” offences. There were many involved from different backgrounds and with different roles. Even the most primitive experiment revealed that achieving a “ranking” was impossible. Different viewpoints, no doubt genuinely held but from different perspectives considered different offences to be the more serious. Some of the results were quite startling representing individual concerns. The very problem identified by Lord Woolf when referring to parliamentary discussion, to which we refer above was very obvious. Is simply possessing a prohibited firearm more or less serious than rape? How do you reconcile the minimum sentence for the one with the Guideline sentence for the other in a framework encompassing both? The reality is that you cannot. Attempting a framework or the “ranking” of offences would throw up many similar problems. Is causing a death by careless driving more or less serious than a deliberate act that causes grievous bodily harm? The very real risk is that sentencing for some offences will be thrown into an unreal focus and increases in sentencing will follow. Of course there is the additional difficulty that would be encountered where a “ranking” of offences cannot accommodate the proper sentencing of an offence when aggravating features might take the proper sentence above that appropriate for an offence that is “ranked” as more serious. The use of Guidelines for offences or categories of offences avoids this difficulty only seeking to “rank” those offences within sensibly defined categories. In addition the use of Guidelines for offences or categories of offences avoids the difficulty that we have identified in paragraph 20 above when there is a need to take account of the changes in policy of the legislature.
- 27 We support the current system for the drafting and promulgation of Guidelines and the status that they enjoy. We have no doubt that they have achieved considerable consistency in the approach to sentencing. We support the continued use of this process. It is interesting to note that there is a body of opinion that believes the Guidelines have been effective in curtailing the upward spiral of sentencing following media pressure, political rhetoric and intervention.

### **Predictability**

- 28 We accept that predictability is desirable. The parties to criminal litigation need a degree of predictability. A defendant deciding whether to plead guilty will rely upon his legal advisers who will need to advise on likely sentence. Similarly a prosecutor deciding whether to accept a plea to an offence will need to assess the likely outcome. Achieving consistency and predictability is important but should not be at the cost of sacrificing judicial discretion and independence.
- 29 There is predictability built into the use of promulgated Guidelines the use of which enable defendants and prosecutors to assess the likely sentence for an offence in the context of the Guidelines. As we have indicated above we support that concept.

- 30 We do not believe the presumptive/prescriptive Guidelines in relation to sentencing would provide the level of predictability in relation to the numbers in custody that this consultation assumes. As we have indicated at paragraph 6<sup>37</sup> above there are many other drivers affecting the levels in custody at any one time which are capable of drastically changing the custodial situation. It is an illusion to consider that the proposals in the consultation affecting sentencing alone would solve the perceived problem at a stroke. It is no real answer simply to suggest that all these other drivers could be monitored by a Sentencing Commission who could advise annually on their likely effects. It then becomes a question of balance: is it desirable to make fundamental changes to the administration of justice in our Courts and to the independence of the judiciary when the benefit of such drastic action is subject to considerable qualification? Is the Constitutional position and the safeguards built into that to be put at risk when the fundamental difficulty will remain? We would say that it should not. Unless the aim is, in reality, political control and the issues of cost raised in paragraph 18 above, upsetting the current balance is impossible to justify.
- 31 We do not accept that there is a paucity of information which justifies the proposals made in this consultation. A reader might think that there are no means available to make some meaningful prediction of the likely impact of sentencing alone assuming a steady political climate. That is simply not the case. We indicated at the outset that we were not going to get involved in a battle of statistics and their interpretation. That would serve no real purpose. What we can indicate is that the consultation paper itself undermines its argument that there is no level of predictability. There is the prison population projection in paragraph 2.9. From where does that come if there is inability to make meaningful predictions: either it is guesswork or it is founded on some prediction from statistics already available. We know that detailed statistics in relation to criminal offending, sentencing outcomes and consequences are already gathered. Such statistics form the basis for the illustrations in relation to commercial burglary in paragraph 6.28 and theft in paragraph 6.30<sup>38</sup>. Just looking at those two examples it is possible to discern average sentence ranges. We know that statistics exist to demonstrate how many offences in each of these categories are sentenced in a given period: statistics detailing the numbers of person sentenced and the offences are published by the Ministry of Justice quarterly with year on year variations, detailed graphs and annual statements. We are not statisticians but the published figures for theft and handling show 25,472 sentenced in the third quarter of 2005 with an average custodial sentence length, where passed, of 4.5 months. The same figures for the third quarter of 2007 show 26,266 sentenced and an average sentence length, when passed, of 4.1 months. Similarly with burglary; 5906 sentenced in the third quarter of 2005 with an average custodial sentence length, where passed, of 17.1 months and in the third quarter of 2007 6128 sentenced with an average custodial length, where passed, of 16.5 months. Now we have not sought to analyse this further since the statistics available to the Ministry of Justice are not all available to us. The obvious point, however, is that the variation is small over a two year period and the information to predict exists. Again we make the point that unless the aim is, in reality, political control and the issues of cost raised in paragraph 18 above, a good level of prediction is already possible.

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<sup>37</sup> See also paragraph 2.1 of the Consultation

<sup>38</sup> The reference to a “minimum” sentence of 7 years is clearly wrong. That is the maximum sentence

- 32 There is one area in which there is agreement and that is the need for the executive and legislature to seek and pay heed to the predicted consequences of proposed legislative changes on the prison population. As we have set out herein a real cause of difficulty with long term predictability is not the absence of guidelines or statistics but the constant changes in legislation the effects of which are not properly assessed in advance. We believe that the requirement to seek advice before legislating would be a very sensible and perhaps overdue step to take. We do not, however, consider that setting up a Sentencing Commission to achieve that can be justified when the existing expertise of the Sentencing Advisory Panel and the Sentencing Guidelines Council can be brought to bear.

### **The Questions**

- 33 We would first make the point that the Questions are carefully worded suggestive of a decision already taken. We have assumed that no decision has been taken. Our answers must not be read as indicative of any agreement with the concept. We are fundamentally opposed to the concept of a presumptive/prescriptive sentencing framework.
- 34 We have dealt with many aspects in the paragraphs above and consideration of those paragraphs is necessary to give full effect to the answers to the questions below.

#### **Question 1 Do you agree that this chapter identifies the main aspects of our current system that make it hard to predict the sentenced population? If not, please identify other broad factors.**

- 35 No. Please refer to paragraph 6 above. Many drivers are outside the actual sentencing process. We believe that it is possible to adequately estimate the number of offences that might be sentenced and the level of likely sentence by taking account of statistics already available and sentencing guidelines. We do not accept the suggestion that prediction is currently so hard as to require the sort of fundamental changes advanced.

#### **Question 2 Do you agree that paragraph 2.28 above correctly identifies the broad changes which would be necessary to improve the situation? If not, please identify any other changes that may be necessary**

- 36 We consider the basic premise upon which the question is based is wrong.
- (a) We do not agree that paragraph 2.28 identifies what is necessary. There is no attempt to explore or evaluate any alternative. It may be that the haste with which this consultation is progressing has limited proper consideration of what might be required or what is already available. We believe the approach is superficial and flawed.
  - (b) It is presently possible to make predictions in relation to the sentencing of offenders with a degree of accuracy using existing statistics and the evolving Guidelines.
  - (c) Drivers identified in paragraph 2.1 and more extensively dealt with in paragraph 6 above are not dealt with by the proposals in paragraph 2.28.
  - (d) The incremental approach to Guidelines is dealt with in paragraph 26 above and was adopted as the appropriate approach by the Sentencing Commission for Scotland as recently as 2006. We do not believe a framework that is sufficiently flexible and that would accord with the

requirements of justice is feasible. What is being canvassed is expensive, unnecessary and will inevitably result in injustice in many cases.



**Question 3 Is it desirable to create a defined scale of offence seriousness in England and Wales?**

- 37 No. We do not repeat in full the reasoning set out above. We simply ask;
- (a) Why?
  - (b) How?
  - (c) For the reasons set out in paragraph 26 above the mischief created by such a framework would far outweigh any perceived benefit although we are at a loss to see any benefit over what can presently be achieved.

**Question 4 What would be the advantages and disadvantages of creating such a scale?**

- 38 Again we do not repeat the points made above. We can see no advantage over what could currently be achieved. We see real disadvantages. First there is the likelihood that sentencing levels will actually increase. No legislature can lower sentence levels in the political climate that has been created in recent years to satisfy public expectations. There is then the lack of flexibility to take into account:
- (a) Changes in the public perception of particular offences
  - (b) The insertion of offences added to the framework as a result of further legislation.
  - (c) The criticism that such comparisons would attract from the public.

**Question 5 If desirable & how would such a scale be constructed?**

- 39 We have set out our views above. We do not believe that “ranking” and the creation of a just and workable framework is sensibly achievable. There is, in reality, no necessity to embark on this unwise and unjust course.

**Question 6 Should 9 (there be) more detailed guidance to sentencers on the application of Section 143(2) of the Criminal Justice Act 2003?**

- 40 Only a case by case approach is possible if an outcome that is just and properly reflects the significance or otherwise of previous offending is to be achieved. We do not consider that a Guideline would be appropriate to deal with what is often a difficult and sometimes finely balanced decision. A previous conviction many years before may have great relevance in a sex case but old convictions may have no relevance at all in other types of case. Different categories of convictions impact differently on the sentencing process. Sentencers are experienced at dealing with these common decisions. Save in certain situations, such as sex cases or cases of violence and those created by legislation such as mandatory sentences or the regime in the Criminal Justice Act 2003 the impact of previous convictions will often be marginal. A simple incremental approach to previous convictions is undesirable resulting in extreme outcomes as evidenced by remarkable sentences for relatively minor offences passed in the USA; sentences which Judges would not otherwise have thought appropriate to the level of the offending being sentenced. Further it is often the case that an offender who has been sentenced to terms of imprisonment in the past will take advantage of the opportunity that a Community Sentence might offer thus reducing his risk of reoffending.

**Question 7 If yes what form should this guidance take?**

- 41 It may be that the considerations that are generally borne in mind could be reduced to some form of general guidance and we would support that. Guidelines are, in our view as experienced practitioners, unnecessary even if they could be framed. Something along the lines of the Overarching Principles could be prepared by the Sentencing Guidelines Council.

**Question 8 Does the model set out at Annex I provide a possible way forward?**

- 42 No. We believe that Annex 1 demonstrates the difficulty of having an approach based upon the absence of judicial discretion. We do not believe it to be appropriate and it is not a way forward. For the reasons we have already set out we do not believe that it would have any great impact of predictability and the disadvantages far outweigh any advantage. The suggestion that the “behaviour of sentencers in relation to the treatment of previous convictions and... how they ought to apply section 143” should be influenced by a Sentencing Commission is breathtakingly arrogant in the circumstances. We are concerned that this consultation as a whole appears to seek to treat offenders as numbers in some large accounting exercise regardless of the fact that, in any course of action that affects other people in a way that is both personal and often has a serious impact, the fact that they are human beings entitles them to individual consideration. Treating offenders in this way will hinder rehabilitation and do nothing to reduce re offending.

**Question 9 In the light of this should any proposals in a reformed sentencing Framework for England and Wales apply to the sentencing of those under 18 years of age?**

- 43 The duty of the Court when dealing with young offenders is quite different from that when dealing with adults. The Court is obliged to have regard to the welfare of the young offender. This principle, enshrined as long ago as the Children and Young Persons Act 1933 has been refined and restated in legislation ever since. The ways in which young offenders may be sentenced are restricted to take into account the underlying duty to consider welfare and rehabilitation. In many cases circumstances and background may be more important than the offence itself justifying a particular form of intervention. We are very surprised that any consideration should be given to putting the welfare of children and young person at risk. The concept of the sort of framework envisaged for children and young persons is not appropriate and would not survive a challenge in the European Court.

**Question 10 Are the requirements of Section 174(2) CJA 2003 sufficient for a structured sentencing framework?**

- 44 No. If a structured sentencing framework as postulated is adopted but, as we have indicated, we believe such a concept to be flawed.

**Question 11 Would positive endorsement by the legislature, of itself, create a stronger and more presumptive framework?**

- 45 Yes but at what cost. We believe the concept to be flawed for all the reasons we have set out. To add to that executive or legislative encroachment would put the separation of powers at risk undermining the Constitution. Such fundamental changes are ill advised.

**Question 12 Do you think that a more clearly presumptive system should be adopted in England & Wales?**

- 46 No. We are not going to repeat what has been set out above identifying the objections to these proposals. The present Guidelines procedure is perfectly satisfactory and prediction of sentence is already possible. The argument advanced in the consultation that greater predictability is the objective is unreal.

**Question 13 Do you favour the adoption of an enhanced departure provision as outlined above?**

- 47 This question presupposes that we are in favour of adopting the sort of framework system postulated in the consultation and we are not.

**Question 14 you think that an independent body as described above should be established?**

- 48 No. We do not consider that a separate independent body need be created but we are in favour of assessment of the impact of new sentencing policy proposals before legislation or implementation. We believe this could be achieved by an enhanced role for the Sentencing Guidelines Council supported by the Sentencing Advisory Panel with an obligation upon the executive to consult and have regard to the impact of proposed legislation.

**Question 15 Should a Commission's role include assessing the impact on correctional resources of new policy proposals?**

- 49 This could be achieved by an enhanced role for the Sentencing Guidelines Council. There is no necessity to set up a Sentencing Commission for this, or any other, purpose.

**Question 16 Should the Commission additionally be required to comment on trends which might affect correctional capacity or similar Issues?**

- 50 This could be achieved by an enhanced role for the Sentencing Guidelines Council.

**Question 17 Do you think that the Commission might usefully be the same body as would be responsible for structured sentencing (assuming the existence of both bodies)?**

- 51 We do not consider that there should be a structured sentencing framework and thus do not consider that there should be a body responsible for such. We consider that the present Guidelines structure is both appropriate and effective and there is no reason why the Sentencing Guidelines Council should

not be given the enhanced role of commenting on trends. After all the research facilities of the Sentencing Advisory Panel are already in place.

**Question 18 What do you consider should be the process for agreeing a sentencing framework?**

52 We do not believe this to be necessary or desirable.

**Question 19 What role if any should Parliament play in agreeing a sentencing framework?**

53 None. As we do not believe that a sentencing framework is desirable or necessary. We agree that the present procedure which provides that Parliament and Ministers should be consulted before the Sentencing Guidelines Council promulgates a definitive Guideline is appropriate, subject to some improvement in the delays that currently occur. We believe that the Sentencing Guidelines Council, as an independent body, should make the final decision as is currently the position. We do not believe there is any cogent argument for changing that position. To adopt the sort of proposal postulated with Parliament setting a framework would result in executive or legislative interference with judicial functions and result in exactly the situation that Lord Woolf feared<sup>39</sup>.

**Question 20 What do you consider to be the process for amending such a sentencing framework?**

54 We do not believe that a framework is necessary or desirable. Guidelines can be amended by the process that the Sentencing Guidelines Council adopted in relation to the reductions for guilty pleas in 2006.

**Question 21 How frequently should reviews of the framework take place?**

55 We do not believe that a framework is necessary or desirable.

**Question 22 Would a model based on reducing sentencing maxima provide a feasible mechanism for aligning supply and demand?**

56 We agree that this may be a somewhat blunt instrument but it has a place. The example in relation to offences of theft suggests that reduction of the maximum penalty may have influenced the way that such offences are treated but there may be other factors also and the haste with which this exercise has been conducted precludes more detailed research. If the maximum sentence is reduced and the Sentencing Guidelines Council reviews Guidelines there would undoubtedly be an effect on sentencing levels. We have yet to see the effect of the Guidelines on Offences of Dishonesty, which include commercial burglary, presently the subject of consultation.

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<sup>39</sup> See paragraph 22 above

**Question 23 Who should sit on a Sentencing Commission should one be established?**

- 57 We do not support the concept of a Sentencing Commission. Any Guidelines body should be constituted in the same way as the Sentencing Guidelines Council.

**Question 24 Who should chair a Sentencing Commission?**

- 58 We do not support the concept of a Sentencing Commission. Any Guidelines body should be chaired by the Lord Chief Justice.

**Question 25 How should members of a Sentencing Commission be appointed?**

- 59 There is no need to repeat our opposition to the concept. Any veneer of independence is compromised by appointment powers vested in the Secretary of State. Nomination of representatives of the Judiciary and interested criminal justice participants and appointment by the Judicial Appointments Commission for any lay members after competition would be the best course.

**Criminal Sub Committee  
Council of HM Circuit Judges**

HH Judge Ader – Wood Green  
HH Judge Atherton – Manchester  
HH Judge Barnett – Winchester  
HH Judge Clarke – Warrington  
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HH Judge Wood – Newcastle upon Tyne  
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20<sup>th</sup> May 2008