



**Punishment and Reform:  
Effective Community Sentences**

**Consultation Response**

**June 2012**

**For further information contact :**

Jodie Blackstock, Director of Criminal and EU Justice Policy  
email: [jblackstock@justice.org.uk](mailto:jblackstock@justice.org.uk) direct line: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100  
fax: 020 7329 5055 email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)

## Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.
2. JUSTICE has for many years produced briefings and consultation responses on community sentences and restorative justice. This response highlights some of JUSTICE's major concerns regarding the consultation's proposals: silence on any question should not be taken for assent.

### **Q1 What should be the core elements of Intensive Community Punishment?**

### **Q2 Which offenders would Intensive Community Punishment be suitable for?**

3. The courts already have the option to impose more than one requirement as a component of a community order. Although only six of the requirements for community sentences make up to 95% of all those used<sup>1</sup>, there isn't enough evidence to explain the reasons for such underutilisation. It could be due to a lack of sentencers' knowledge, lack of knowledge of probation staff, a tendency to stick to comfort zones, confusion about some requirements (for example prohibited activity and exclusion), problems in assessment, local probation policy decisions, waiting lists, or structural problems (mental health/alcohol).<sup>2</sup> Introducing a scheme that will allow a more holistic approach towards the offence is laudable. However, if the Intensive Community Punishment (ICP) scheme purports to present a new sentencing option, it will be important not to make mandatory a certain fixed number of requirements and a fixed minimum duration. Such a scheme would put at risk the tailored nature of community sentences which require precisely attending to the particularities of the offender, the offence, and even the victim. At this point, it would seem of primary importance to seek the reasons behind the reluctance

---

<sup>1</sup> Key issues in community sentences, LSE. Mair and Mills, *The Community Order and the Suspended Sentence Order three years on*, Centre for Crime and Justice Studies (March 2009).

<sup>2</sup> *Ibid*, p 11.

of judges to using more requirements, especially regarding the budget constraints the implementation of certain requirements may face.

4. The demand for tougher and more intensive requirements in itself may not result in a successful sentence in terms of rehabilitation, even if it is seen to be punitive. There must therefore be sufficient flexibility in determining which requirements will be effective.
5. In principle, if ICP can be utilised in circumstances where the offence crosses the custody threshold but there is strong mitigation, in particular of dependent children, the best interests of the children and wider article 8 ECHR rights would be better served by the imposition of this type of sentence. However, the sentence would have to be carefully constructed to meet the person's work and family obligations as well as any health needs that they have.

**Q3 Do you agree that every offender who receives a community order should be subject to a sanction which is aimed primarily at the punishment of the offender ('a punitive element')?**

**Q4 Which requirements of the community do you regard as punitive?**

5. It is important to clarify what is meant by 'punitive'. The Consultation paper refers to making the sentence '*punitive and effective as a custodial sentence*<sup>3</sup>'; seeking to '*create and deliver a tough and intensive community order*.'<sup>4</sup> There appears to be some antagonism between rehabilitation and restoration as aims of sentencing on the one hand, and punishment that provides for some deterrence but primarily retribution through social reassurance on the other. If too much emphasis is placed upon punishment, there is a danger that its retributive dimension can resemble vindictiveness and lead to problems in the community, rather than answers: '*too many community orders do not include a clear punitive element alongside other requirements aimed at rehabilitation and reparation, and so they do not effectively signal to society that wrong doing will not be tolerated*.'<sup>5</sup>

---

<sup>3</sup> Ministry of Justice, Punishment and reform: effective Community sentences", p. 8.

<sup>4</sup> Ibid.

<sup>5</sup> Ministry of Justice, *Punishment and reform: Effective Community Sentences*", p. 10.

6. Acknowledging a punitive element in itself does not necessarily compromise the competing justifications of the criminal justice system so long as the guidelines and principles of sentencing are appropriately considered. Sentencers are already imposing community orders with punishment in mind. It is questionable therefore that community sentences are not tough enough. As the consultation itself recognizes, '*[A]ll community orders involve some restriction of the offender's liberty and in that respect they can all be regarded as punitive to some degree*'.<sup>6</sup> In this respect, if the assessment of the seriousness of the offence is what will determine the sentencing thresholds,<sup>7</sup> it is difficult to understand how, once assessed in view of the offender's culpability and the harm which the offence has caused, external factors such as 'the message to society' can legitimately provide an element to be considered in the determination of punishment that does not fail to instrumentalise the offender.
6. Public opinion is always a dangerous measurement of effectiveness of the criminal justice system. In fact, although the public and the media tend to see community sentences as inherently lenient, research suggests otherwise. For example, curfew orders are perceived as punitive by most offenders as they genuinely restrict liberty. Offenders are acutely aware of the restrictions placed upon them and that the choice of going out without unwanted consequences is removed.<sup>8</sup> Furthermore, when asked,<sup>9</sup> 94 per cent of victims of crime said that the most important thing to them was that the offender did not commit the crime again. The same study found that 81 per cent would prefer an offender to receive an effective sentence rather than a harsh one. All elements of community sentences are punitive because they are not undertaken by choice. In general, the most punitive are those that restrict liberty, though imposing an unpaid work requirement can have equally punitive effects upon a person who has no interest in the work they are required to do. Equally even supervision, which demands engaging in a relationship of hierarchy and control can be particularly difficult for some people. Therefore it is not helpful to identify particular requirements as more or less punitive than others.

---

<sup>6</sup> Ministry of Justice, *Punishment and reform: Effective Community Sentences*, p. 12.

<sup>7</sup> Section 143 Criminal Justice Act 2003.

<sup>8</sup> Hucklesby, *Vehicles of desistance? The impact of electronically monitored curfew orders*, *Criminology and Criminal Justice* 2008 8: 54.

<sup>9</sup> Ministry of Justice (16 November 2007), '*Victims of crime want punishment - but not always prison*'. Available at: <http://www.probation.homeoffice.gov.uk/output/Page391.asp>

**Q5 Are there some classes of offenders for whom (or particular circumstances in which) a punitive element of a sentence would not be suitable?**

**Q6 How should such offenders be sentenced?**

9. Certainly, in the case of some offenders afflicted by mental health problems and young offenders in particular, a punitive approach is inappropriate and ineffective. In these cases the rehabilitative and restorative dimensions of a sentence should be the primary focus.<sup>10</sup>
10. it is important to acknowledge that offenders should not be set up to fail – too many requirements may be hard to manage, particularly if people have mental health or addiction problems. Any programmes must build in a direct relationship with a probation supervisor who has the power to ensure flexibility in the programme and to decide whether breach proceedings are appropriate. This type of sentence is going to require sufficient time set aside in the sentencing exercise to ensure that pre sentence reports properly reflect the requirements and are properly tailored to the offender's ability to meet the sentence as well as their level of culpability.

**Q7 How can we best ensure that sentences in the community achieve a balance between all five purposes of sentencing?**

10. The five purposes of sentencing are not necessarily complementary. 'Reform and rehabilitation of offenders' pursuant to section 142(1)(c) CJA 2003 focuses on the improvement of the individual, in opposition to the 'protection of the public' pursuant to section 142(1)(d) CJA 2003 which aim at requirements that exclude and incapacitate the offender. It is not always necessary to meet all five sentencing purposes in every case and an attempt to do so can lead to unnecessarily complex and unachievable orders. Conversely, many orders effectively managed will intrinsically achieve these aims.

---

<sup>10</sup> See our report *Time for a New Hearing*

11. Therefore it is important to recognise that firstly, the evidence about the use of community orders shows a tendency to rely upon a handful of requirements, due to their availability, lack of knowledge about whether requirements are locally available or not, and the absence of monitoring prohibited activity and exclusion requirements.<sup>11</sup> Narrowing the range of requirements will impact upon the achievement of all sentencing principles. Consequently, increasing the imposition of a range of requirements (not necessarily those suggested to form ICPs), especially in the areas of alcohol and drug dependency and mental health treatment as well as electronic monitoring as a means of monitoring other requirements will achieve greater balance of sentencing aims. There is considerable scope for more creative use of requirements, should resources be made available.
12. Secondly, the importance of meaningful supervision cannot be ignored. Mair and Mills have observed that,

*[G]iven the importance of the relationship between the (offender manager and the offender) that we have noted, any attenuation of a good relationship is likely to have negative consequences. Thus, whether or not some form of supervision should constitute part of all Community Orders or SSOs is a key question<sup>12</sup>.*

Their evidence has shown that the building up of meaningful relationships with probation officers transforms supervision into a vital element of the rehabilitation process. This sentence aim can therefore be either punitive or rehabilitative depending on its application.

**Q8 Should we, if new technologies were available and affordable, encourage the use of electronically monitored technology to monitor compliance with community order requirements (in addition to curfew requirements)?**

**Q9 Which community order requirements, in addition to curfews, could be most effectively electronically monitored?**

---

<sup>11</sup> Mair and Mills, *The Community Order and the Suspended Sentence Order three years on*, Centre for Crime and Justice Studies, p. 46-47.

<sup>12</sup> Mair and Mills, *The Community Order and the Suspended Sentence Order three years on*, Centre for Crime and Justice Studies, p. 47.

13. We are greatly concerned by the proposal to extend curfew requirements to a maximum of 16 hours per day for up to 12 months. A curfew for so many hours a day could, in some cases, constitute a violation of the right to liberty for the purposes of Article 5 ECHR.<sup>13</sup> In order to be lawful, a deprivation of liberty must fall within one of the exceptions listed in Article 5. A curfew falls under 'the lawful detention of a person after conviction by a competent court' (Article 5(1)(a)). However, we believe that there is a strong argument that if the custody threshold has not been passed then the imposition of a curfew constituting a deprivation of liberty would be contrary to domestic law and therefore not 'lawful' for the purposes of Article 5(1)(a).
10. In addition to their potential illegality, we believe that such long curfews are undesirable. They will limit the offender's capacity to carry out positive rehabilitative activities, such as employment, taking children to school and undertaking relevant courses as part of a community sentence.<sup>14</sup> A curfew of 16 hours may lead to frustration with the system and a return to crime. Furthermore, such a sentence could contain the offender in premises where they may perpetuate or fall victim to domestic violence, abuse or neglect. The lengthening of curfew is particularly inappropriate in the case of children for these reasons, not least because of the correlation between children suffering neglect and/or abuse and those who commit offences. As Baroness Linklater observed in the Committee Stage of the LASPO Bill, statistics reveal that a majority of young people breach their curfew orders and the longer the curfew the higher the likelihood of breach.<sup>15</sup> The sentence would simply set children up to fail. There must be consideration of the differing characteristics, circumstances and capacity of children, in accordance with the UN Convention on the Rights of the Child principle that the youth justice system should be distinct from that for adults, and to the Convention's requirement to take into account the desirability of reintegrating children into the community as productive adults.<sup>16</sup>

---

<sup>13</sup> The Supreme Court has observed that a curfew of 16 hours a day where other conditions imposed are unusually destructive of the life the person would otherwise have been living, such as those resulting in social isolation, would amount to an unlawful deprivation of liberty, *Secretary of State for the Home Department v AP* [2010] UKSC 24 at [4].

<sup>14</sup> See the Criminal Justice Alliance briefing for the Legal Aid Sentencing and Punishment of Offenders Bill, HL Committee Stage, December 2011, p4 and research referred to therein available at [http://www.criminaljusticealliance.org/docs/CJALASPO\\_LordsCommitteStage20-12-11FINAL.pdf](http://www.criminaljusticealliance.org/docs/CJALASPO_LordsCommitteStage20-12-11FINAL.pdf)

<sup>15</sup> Hansard, HL Debates, 7 Feb 2011, col 179.

<sup>16</sup> See Article 40 UNCRC.

13. Notwithstanding our concern for the length and duration of curfew order, electronic monitoring (EM) could provide the opportunity to offer other requirements, by effectively monitoring their application, such as with prohibited activity or exclusion. It is hard to see the benefit of EM for alcohol abstinence and foreign travel bans – it would be very hard to ban a person from anywhere offering alcohol without unduly restricting their movement and ability to purchase other items. A foreign travel ban is most effectively enforced by the surrender of a passport rather than a restriction on entering airports, where people may wish to go to meet visitors.
  
14. From a practical perspective, the technology would have to be sufficiently sophisticated to ensure accuracy of the exact location of the person being monitored. For example, we are aware of cases where there have been problems with EM on home detention curfew where people had gone into their garden for a cigarette. EM of an exclusion zone would need to ensure that the technology can identify the boundary of the exclusion zone with absolute accuracy. Again, people should not be set up to fail, but rather, orders should be able to support rehabilitation. For example, the technology could include a warning system (perhaps through a vibration to ensure it is discrete in a public setting) when a person is nearing the boundary of their exclusion zone, similar to the sensors in modern cars to assist with parking.<sup>17</sup>

---

<sup>17</sup> Pilots have already shown this to be a problem:

*The Home Office, which had tested the satellite tracking equipment prior to the start of the pilot, understood both its capabilities and its limitations, as did the monitoring companies and at least some staff in the various criminal justice agencies in the three pilot areas. In ideal conditions, the technology was capable of pin-pointing the location of a tracking unit to an accuracy of between two and ten metres. However, conditions were not always ideal and it was recognised that tracking units would have difficulty picking up signals when located within buildings and that, even when carried in the street, the presence of tall structures could impede or distort the signals that they were able to receive. It was also recognised that offenders who were determined to commit crime could forcibly remove their ankle tags or leave their tracking units behind, although such action would be detected*

Stephen Shute, *Satellite Tracking Of Offenders: A Study of The Pilots In England And Wales*, Ministry of Justice (July 2007), p. 5.

*Probation officers, police officers and YOT workers were generally less enthusiastic about the way that the satellite tracking equipment had worked. They were particularly worried about GPS 'drift' (where GPS plots are, for a short period of time, wildly aberrant) and signal loss. Both created uncertainty in their minds: had the offender tampered with the equipment, had the equipment broken down in some way, or had the signal been blocked by a tall building or other*



15. The technology would also have to have a long battery life and have a warning system so that the offender is not breached when the battery runs out and they are away from a charging point: GPS can drain the battery of a mobile phone in a surprisingly short period of time. Solar powered charging could be explored. In addition, there should not be an automatic breach of the exclusion or curfew order, but the discretion should remain with the probation officer whether to breach.

**Q10 Are there other ways we could use electronically monitored curfews more imaginatively?**

14. Research indicates that offenders and their families are generally positive about electronic monitoring, particularly as a mechanism to keep offenders out of prison and out of trouble (Mair and Mortimer, 1996). It suggests also that electronic monitoring may have a role in stabilizing offenders' lives providing structure (Walter, 2002)<sup>18</sup>. It has been stated by researchers that a crucial factor in desistance in reoffending is the building up of social capital.<sup>19</sup> Social capital fundamentally refers to social connections, ties and networks. It has been defined as,

*[S]ocially structured relations between individuals, in families and in aggregations of individuals in neighborhoods, churches, schools and so on. These relations facilitate social action by generating a knowledge and sense of obligations, expectations, trustworthiness, information channels, norms and sanctions.*<sup>20</sup>

16. If electronically monitored curfews can promote activities that foster that social capital such as the search for employment, participation in the

---

*obstruction? Their other concerns were that maps of offenders' movements were sometimes unclear, insufficiently detailed or difficult to interpret; that battery life was limited; that ankle tags frequently needed changing; that communications between offender managers and the monitoring companies were not as good as they ought to be; and that tracking units were 'intrusive' and infringed civil liberties.*

*ibid*, p 13

<sup>18</sup> Hucklesby, *Vehicles of desistance? The impact of electronically monitored curfew orders*, *Criminology and Criminal Justice* 2008 8: 55.

<sup>19</sup> Hagan and McCarthy

<sup>20</sup> (Hagan and McCarthy, 1997: 229)

community, staying away from past relationships that encourage reoffending, etc, we agree that they could be more effective. In particular, they could try to avoid some of the problems research has found:

*Some interviewees recounted less positive experiences. They reported family problems that were created as a consequence of curfew orders. A small number of interviewees reported a general deterioration in relationships with the people they lived with which appeared to relate predominantly to older people such as their parents. They blamed these problems on the amount of time spent together in the home and the fact that they were unable to leave if situations became fraught. Some interviewees reported that problems were caused with their partners because they were unable to go out or because they needed to return home early<sup>21</sup>.*

17. This would require not only imposing a curfew over night as courts have traditionally done, but asking more questions about the person's home life and family arrangements to ensure that the curfew avoids conflicts and facilitates the ingredients necessary to achieve rehabilitation: finding work, helping with child care, doing the food shop etc.

**Q11 Would tracking certain offenders (as part of a non-custodial sentence) be effective at preventing future offending?**

**Q12 Which types of offenders would be suitable for tracking? For example those at high-risk of reoffending or harm, including sex and violent offenders?**

**Q13 For what purposes could electronic monitoring best be used?**

19. As Hucklesby argues, electronic monitored curfew orders appear to be particularly useful in enabling offenders to reduce anti-social capital, that is, their links with situations, people, places and networks that are correlated with their offending. Electronic monitored curfew orders provide offenders with the opportunity to disengage with their offending lifestyle. In this way, curfew orders facilitate habit breaking and disconnection from criminal networks. There are a number of ways in which this occurs, namely reducing offenders'

---

<sup>21</sup> Hucklesby, *Vehicles of desistance? The impact of electronically monitored curfew orders*, Criminology and Criminal Justice 2008 8: 64.

substance use, keeping them away from their offending associates and ensuring that offenders are off the streets at certain times.

20. There is always a possibility that tracking people's whereabouts could through sophisticated profiling prevent future offending. However, it would be rare cases where it would be possible to do so. It would be incredibly labour intensive because there could be numerous locations where further offending could be committed, for example, a paedophile released from prison on license could be monitored in relation to proximity to schools, but it would be impossible to exclude all schools in the programming of the device. This would have to be monitored by way of human detection.
  
21. Notwithstanding the logistical difficulties, justifying the monitoring of a particular individual *without* a reasonable suspicion that they had committed a crime would certainly need primary legislation. This is because it goes against the fundamental principle of criminal law in the UK that a person is innocent of a crime until they are proven guilty. Police powers are heavily circumscribed and can only be actioned when a reasonable suspicion of offending has occurred. PACE Code A, para 2.2 states that there must be an objective basis for that suspicion based on facts, information and/or intelligence. It can never be supported on the basis of personal factors. It must rely on intelligence or information about some specific behaviour by the person concerned. It would be a huge and concerning departure from what are understood to be fair principles of criminal law to allow post sentence tracking for the purposes of preventing future crime. We have already seen the intrusion into people's lives that wide powers under the Regulation of Investigatory Powers Act 2000 have led to<sup>22</sup> and it is clear that without rigorous parameters and scrutiny other surveillance powers could be exercised in a similar way.

**Q14 What are the civil liberties implications of tracking offenders and what should we do to address them?**

---

<sup>22</sup> See our report *Freedom From Suspicion: Surveillance Reform for a Digital Age* (JUSTICE, 2011)

22. Tracking would have an obvious impact upon the private life of the individual under Article 8 ECHR. In principal it would not have a legitimate aim because there would be no existing suspicion of crime but only of potential future offending and it would almost certainly be disproportionate no matter over what period it was to be in place because it would be monitoring everything that the person does. There would be massive data protection issues concerning the recording of the tracking – whether this was done by a person in real time and for how long a recording would be stored. There would need to be very clearly and narrowly defined terms of purpose for the monitor and parameters for its use otherwise it would become extremely intrusive.
23. The only way we could see a possible use for tracking, once rigorously tested, would be in relation to post conviction exclusion and restraining orders. However, these would still require narrowly defined exclusion zones similar to the proposed GPS system. They would also have to be reviewable and for a defined length of time, in accordance with the exclusion/restraining order.

**Q15 Which offenders or offences could a new power to order the confiscation of assets most usefully be focused on?**

**Q16 How could the power to order the confiscation of assets be framed in order to ensure it applied equitably both to offenders with low-value assets and those with high-value assets?**

24. The questions already reveal the shortcomings of proposing the confiscation of assets as a punishment in itself, by exposing its regressive effects: there is no way of dissociating the confiscation of assets from the seriousness of the crime committed and establishing a framework that differentiates offenders without breaching the principle of legality, on the one hand, or without imposing on economically deprived offenders tougher punishment with probable breach of proportionality in sentencing. In effect, in the case of low income or economically deprived offenders, it will be difficult not only to establish what value of assets correspond adequately with the seriousness of the offence, but also how to do that without affecting third parties such as family members that bear no responsibility over the offence. Likewise, in order not to breach the principle of equality and legality, imposing different

sentences according to the value of the assets of the offenders may raise issues regarding equal treatment over identical offences.

25. Ultimately, we cannot see a justification for moving immediately to the confiscation of assets without the prior opportunity for a person to arrange a mechanism of payment. This is particularly so given that an additional fee will be charged for the bailiff service. This is objectionable and unjustifiable if payment can be made. Confiscation of assets must always be an alternative sanction. Surely the cost of sale of assets far outweighs improving schemes in place for the collection of fines.

**Q26 How can we establish a better evidence base for pre-sentence RJ?**

**Q27 What are the benefits and risks of pre-sentence RJ?**

27. There is already a strong evidence base for restorative justice in general. In our report *Restorative Justice: the way ahead*<sup>23</sup> we observe that restorative justice aims to replace the notion that criminal justice is a matter between state and offender, with the idea that victims, community and offender should own the process. Its objectives are attending to the needs of victims, preventing reoffending by reintegrating the offender into the community, enabling offenders to assume responsibility for their actions; recreating communities that can support victims, rehabilitate offenders and actively prevent further crime and avoiding the escalation of the mechanisms of justice and the associated costs and delays.
28. The key element of restorative justice is informality. This allows for a creative, flexible, problem-solving approach. Meetings - where the parties come face-to-face with each other as people - can break down preconceived ideas and stereotypes. They encourage victims to articulate the harm they have suffered and for offenders to provide a context for their actions. A full knowledge of the perspectives of all parties can promote greater understanding, allowing the victim to move on and the offender to reintegrate. It can access such positive qualities as empathy, reconciliation, forgiveness and genuine apology.

---

<sup>23</sup> Tickell, Shari and Akester, Kate. *Restorative Justice: The way ahead* (JUSTICE, 2004)

Results can be durable and, where agreements are kept, there may be a positive impact on reoffending.

28. On the other hand, the potential risks and weaknesses of such processes lay in the creative space provided for unleashing emotions. Anger, resentment and hostility will not automatically wither away in the face of good intentions. Meetings may also release negative emotions resulting in humiliation, domination by one party, stigma, demoralisation and re-victimisation. Consequently, in order to avoid the risks involved in restorative processes and strengthen its virtues, it is necessary to take into consideration certain principles that underpin its structure in order to successfully achieve its aims.

**Q28 How can we look to mitigate any risks and maximise any benefits of pre-sentence RJ?**

29. Our research has shown that the following elements should be considered:
- 1) Confidentiality: it is necessary to provide the mechanisms to ensure confidentiality of the restorative process in case it fails. If communication breaks down, or agreements are not made or fulfilled, cases will usually be returned to the formal system. In this event, everything starts from the beginning again, and nothing that has been said during conferencing or other type of meeting should be admissible in court.
  - 2) Judicial oversight: According to national and international experiences, courts or youth panels generally play a background role, deciding upon facts which may be disputed or acting as supervisory bodies where agreements cannot be reached or are dishonoured. They have been described as a “safety net”: checking that outcomes are broadly accepted and that the quality of decision making is sufficiently high. This requires judges, in the broadest sense, to be aware of the philosophy of restorative justice and ensure that agreements are the result of negotiation and participation.
  - 3) Voluntary engagement: Restorative processes cannot be imposed on either party. Nevertheless, many defendants may seek to avoid the trauma and uncertainty of court hearings by admitting offences that they could successfully defend. Practitioners acknowledge that

volunteering is unrealistic in this context and have replaced it with notions such as “informed consent” for offenders, and “informed choice” for victims, rather than voluntary agreement. On the other hand, special care must be focused on sufficient preparation of victims and offenders, avoiding the overestimation of the acceptance of responsibility by the offender or the intimidation of victims by sharing the same room with the offender prior to the meeting.<sup>24</sup>

- 4) The role of lawyers: Though the role of lawyers is much more restricted to advising before and after restorative interventions, safeguards have to be put in place in order to avoid breaching the Article 6 ECHR right to a fair trial, article 47 EU Charter right to a fair hearing and due process of law. Case law has insisted on the need for legal representation in the cause of young offenders before the courts and hearing panels and being placed on the sex offenders’ register respectively (*Venables and Thompson v UK*<sup>25</sup>; the Lanark case<sup>26</sup>; *R (on the application of U) v MPC*<sup>27</sup>) as a means to assure the child’s capacity to understand and participate meaningfully in the proceedings. At a minimum, there must be provision for an appropriate adult for both young people and vulnerable adults.
- 5) Mediators and facilitators: research is clear in denouncing inadequate training of facilitators as a key element in the failure of fulfilling restorative justice aims. In this respect, considerable care must be focused in the training of mediators and agents involved in the restorative process.
- 6) Adequate follow-up of conference agreements: it is important to notify victims when they have been honoured and that generally these are sufficiently supported and enforced.
- 7) Excessive focus on the offender, resulting in insufficient attention for the victim.
- 8) Accountability: training, resources for courses, drug treatment programmes and other necessary follow-on measures are fundamental to the achievement of the restorative objectives. It is necessary to create standards of practice built firmly on restorative

---

<sup>24</sup> Tickell, Shari and Akester, Kate. Restorative Justice. The way ahead, JUSTICE Publication, 2004, p.

26.

<sup>25</sup> (2000) Criminal Law Review 187

<sup>26</sup> *S v Principal Reporter and Lord Advocate* (2001) Court of Session (unreported)

<sup>27</sup> (2003) 3 All ER 419

values. In this respect, the main aspect that needs to be carefully assessed is not to create systems based on utopian visions with no reference to objective standards. Accountability is vital to bridge the gap between optimism and reality. The accounts given by the participants at meetings have to be rigorously and sensitively scrutinised and assessed by everybody present and there must be credible 'judicial' oversight. In addition, accountability must be persuasive rather than directive, and must avoid domination – moving forward by means of deliberation, justification and exchange. Facilitators will need good judgement about when and whether to intervene.

- 9) Guidelines and standards: Though obviously necessary, precaution is needed in order to avoid making these too prescriptive. The challenge is to secure flexibility in order to deal with each case in the most sensitive way. The tension between the need for clear parameters for the protection of the parties and a more creative, individualized approach has made scholars suggest the following elements are intrinsic: consensual decision-making; a diverse range of participants (to improve scrutiny and reality-test); the presence of observers; meetings that are neither too big nor too long; the representation of community interests; and the encouragement of expression in relaxed and unthreatening terms.

**Q29 Is there more we can do to strengthen and support the role of victims in RJ?**

**Q30 Are there existing practices for victim engagement in RJ that we can learn from?**

31. Our Report considered conferencing systems in New Zealand, Australia, United States which led to trials in the UK (with a particular focus on youth justice), as well as restorative justice in institutionalised settings in Austria and Norway.<sup>28</sup> Each demonstrative positive practices to enable victim engagement. The overall principle is to ensure that victims feel equally included and valued through the process.

---

<sup>28</sup> See chapters 4 to 9 in particular



32. Victim Support has produced a report which considers the victim's view of different criminal justice approaches.<sup>29</sup> The report observes:

*Restorative justice should be a victim-led process where different methods are trialled throughout the UK in partnership with voluntary organisations. However, it is vital that such trials receive adequate investment to ensure that restorative justice is carried out by appropriately trained and qualified practitioners working to agreed occupational standards. This is necessary to ensure that both victims and offenders alike get as much as possible out of the process.<sup>30</sup>*

**Q31 Are these the right approaches? What more can we do to help enable areas to build capacity and capability for restorative justice at local levels?**

33. We agree that best practice should be uniformly adopted and shared throughout the UK, whilst acknowledging that certain methods will be more appropriate at a local level. Training practitioners not only who will carry out the restorative justice approach, but those who are in the position to refer: police, probation, judiciary and defence lawyers is equally important.
34. Our research has identified that pre-sentencing restorative justice is a priority for children. Our report *Time for a New Hearing* provides a workable model for integrating restorative justice into the youth justice system in England and Wales. Even if full-scale integration of the type that the report proposes were not favoured at this stage, elements of the proposals could be adapted/taken forward singly or in combination for example:
- Rolling out the use of youth offending team 'triage' at the police station (following on from the existing pilots) with some low-level offences being diverted into a youth restorative disposal;
  - Allowing the CPS to divert certain categories of case from prosecution to a restorative conference;

---

<sup>29</sup> Rossett, P et al, *Victims' Justice? What victims and witnesses really want from sentencing* (Victim Support, 2010)

<sup>30</sup> *Ibid*, Recommendation 10

- Expanding the availability of referral orders to repeat offenders and increasing victim participation and the restorative element of the referral order meetings;
- Offering a RJ conference to all offenders sentenced to a youth rehabilitation order (YRO) and their victims, except in a small number of inappropriate cases;
- Offering a RJ conference pre-sentence or post-sentence for serious offences, except in a small number of inappropriate cases, including for children in custody.

**Q32 What more can we do to boost a cultural change for RJ?**

35. Restorative justice represents a shift in language and orientation, creating an opportunity to reinvigorate debate in a political environment that is explicitly trying to address the causes of crime, rather than responding to the demand for ‘toughness’ and punishment. What it offers is inclusion for victims and a determined approach to targeting the causes of crime that can, for the offender, be as ‘tough’ as any conventional criminal justice response, and may be more effective in the longer term.
36. Restorative Justice has been a successful alternative mechanism for a long time. It needs support, publicly, and with conviction. As the Probation Service report has shown<sup>31</sup>, with the right facts, the public agrees that the focus of the criminal justice system should be on preventing reoffending. Restorative justice is a powerful tool towards effective sentencing. Consequently, Government needs to reconcile acceptance of restorative justice principles with the rhetoric of being tough on crime. It should drive public opinion rather than follow it, inform and persuade the public.

**Q36 How else could our proposals on community sentences help the particular needs of women offenders?**

39. The proposal acknowledges the consequences women’s imprisonment has on family life and their family members, in a way that differs from that of men under custodial sentences. In this sense, we welcome proposals such as

---

<sup>31</sup> Note 9 above.

curfew that could work around an individual's childcare responsibilities, tailoring the requirements according to their family status and even mental health issues.

40. As the Prison Reform Trust *Women in Prison August 2010* report<sup>32</sup> shows, there is clear evidence of the economic and social disadvantages women involved in the criminal justice system suffered if compared to the male population. Around one-third of women prisoners lose their homes, and often their possessions, whilst in prison.<sup>33</sup> 28% of women offenders' crimes were financially motivated, compared to 20% of men.<sup>34</sup> Home Office research has found that 66% of women and 59% of men in prison have dependent children under 18. Of those women, 34% had children under five, a further 40% of children aged from five to 10. Each year it is estimated that more than 17,700 children are separated from their mother by imprisonment. Just 5% of women prisoners' children remain in their own home once their mother has been sentenced. Women with babies in prison may be unable to claim benefits for their children. At least a third of mothers are lone parents before imprisonment. Black and ethnic minority women are particularly likely to be single mothers, as more than half of black African and black Caribbean families in the UK are headed by a lone parent, compared with less than a quarter of white families and just over a tenth of Asian families. Black, minority ethnic and foreign national women reported more problems ensuring dependants were looked after than white and British women. Imprisoning mothers for non-violent offences has a damaging impact on children and carries a cost to the state of more than £17 million over a ten-year period. The main social cost incurred by the children of imprisoned mothers – and by the state in relation to these children – results from the increased likelihood of their becoming 'NEET' (Not in Education, Employment or Training).<sup>35</sup>
41. Two consequences for criminal policy can be drawn from these facts: First, the impact of implementing financial penalty in case of breach of order would affect an already financially vulnerable population; and second, community sentences provide the best solution for non-violent offences committed by

---

<sup>32</sup> <http://www.prisonreformtrust.org.uk/uploads/documents/Women%20in%20Prison%20August%202010.pdf>

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

women, not only compared to the male population but also addressing the inequality observed among women of different ethnic origins.

42. A holistic approach to the problem of women offending is the right approach as it tackles the multiple roots behind women's criminal behaviour. Likewise, community sentencing and a combined intervention show positive consequences in reducing reoffending. During two years of the Evolve Project in West Yorkshire, only ten of 218 women engaged in the service were known to have reoffended.<sup>36</sup>
43. There is also wide public support to an approach to women offending that discards imprisonment and offers a community-based service solution instead. An ICM public opinion poll commissioned by SmartJustice in March 2007 found that, of 1,006 respondents, 86% supported the development of local centres for women to address the causes of their offending. Over two thirds (675) said that prison was not likely to reduce offending.<sup>37</sup>

**Jodie Blackstock**  
**JUSTICE**  
**June 2012**

---

<sup>36</sup> Ibid.

<sup>37</sup> Smart Justice (2007) Public say: Stop locking up so many women, London; Prison Reform Trust <http://www.prisonreformtrust.org.uk/Portals/0/Documents/smart%20justice%20-%20public%20say%20stop%20locking%20up%20so%20many%20women.pdf>