



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

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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. Some parts of the sentencing green paper deal with operational issues that do not engage our expertise. If we have not commented on a proposal or section of the green paper, this is due to our need to focus on our primary concerns and should not be taken for implicit approval. Where questions raise similar issues we have sometimes answered them in groups.
3. JUSTICE is a member of the Criminal Justice Alliance and the Standing Committee for Youth Justice. In relation to the youth justice, we endorse the response of the Standing Committee for Youth Justice (www.scyj.org.uk) and do not comment separately here on most questions in Chapter 5 of the consultation paper. We further attach to this response our recent report Time for a New Hearing (JUSTICE/The Police Foundation, 2010) which sets out our recommendations for making restorative justice the primary response to offending by children and young people in England and Wales; we have designed a model that would allow RJ to be integrated into the existing youth justice structures of England and Wales, resulting in considerable savings in costs and court time.

Q1 How should we achieve our aims for making prisons places of hard work and discipline?

Q3 How can we make it possible for more prisoners to make reparation, including to victims and communities?

4. JUSTICE supports the development of meaningful employment for prisoners. We believe that where possible work in prisons should provide benefit to the community in addition to bettering the employment prospects of prisoners on release, in order to maximise its reparative and rehabilitative effect. We believe that skilled work and training should be offered as part of this programme in order to maximise rehabilitation through development of interests and positive achievements;

employment should not be confined to unskilled, repetitive labour. If commercial employers are invited into prisons they should be encouraged to provide employment for ex-offenders on release. In addition, paid employment should not be carried out at the expense of other beneficial activity including offending behaviour programmes and treatment for mental health conditions and substance addiction.

5. We would also encourage, in addition to commercial paid work, the availability of voluntary work in prisons of directly reparative effect to victims of crime or others in need in the community. This could stand alone or be offered as the result of post-sentence restorative conferencing. We believe that, except in a small minority of inappropriate cases, restorative conferencing should be offered to all offenders and victims post sentence; voluntary reparation could be agreed in the conference. This should apply to the children's estate as well as the adult estate.

6. In relation to the deduction of earnings, the removal by the state of earnings to which the prisoner is entitled by virtue of his/her contract of employment engages Article 1 of Protocol 1 to the European Convention on Human Rights, the right to peaceful enjoyment of possessions. Such interference with property must be lawful; pursue a legitimate aim in the general interest; and be in 'fair balance' (reasonably proportionate to the aim sought to be realised – a fair balance between the general interests of the community and the individual's fundamental rights). Article 1 of Protocol 1 permits criminal penalties, confiscation orders, etc.: however, unlike these, deductions of earnings are not imposed by a judicial authority in response to conviction for an offence at the point of sentence but afterwards at the point at which the employment commences. In *Azinas v Cyprus*¹ the Chamber of the European Court of Human Rights found that removal of the pension of a civil servant convicted of theft and breach of trust was not in 'fair balance' because the penalty had a disproportionate effect upon the offender. In our view, consideration should be given to proportionality in relation to the level of any deduction and the effect upon the individual offender. Each case should therefore be considered individually, rather than standard deductions being imposed.

Q4 How do we target tough curfew orders to maximise their effectiveness?

¹ Judgment of 20 June 2002. The Grand Chamber subsequently found the application to be inadmissible due to failure to exhaust domestic remedies, but the judgment is a source of guidance.

7. We are concerned that the government is considering increasing the maximum period of a curfew order to 16 hours in criminal cases. In the context of counter-terrorism control orders, the Supreme Court found a 16 hour curfew to be unlawful in the case of *Secretary of State for the Home Department v AP* (judgment handed down 16 June 2010) due to the social isolation occasioned in that case, which rendered the curfew a deprivation of liberty and therefore unlawful as a violation of Article 5 European Convention on Human Rights. The use of such a long curfew would therefore have to be carefully considered on a case by case basis taking into account the individual and family circumstances of the subject.

8. In our view, a 16 hour curfew should not be used as a community sentence; in the case of offending meriting only a community sentence, a sentence so close to a deprivation of liberty cannot be justified (and in cases where it constituted a deprivation of liberty due to the presence of other factors as in *AP*, it would in fact be a custodial sentence and therefore, in our view, unlawful as a community sentence). Further, the imposition of curfews can be dangerous for the subject or family members where domestic neglect or abuse is taking place; and such a long curfew would not in our view promote rehabilitation/reintegration into the community, as it would make employment and other meaningful activity in the community more difficult and would engender social isolation, boredom and frustration. For these latter reasons we also oppose the move to lengthen the period of a curfew from six months to a year. We also believe that increasing the severity of curfews would lead to up-tariffing by some sentencers.

Q27 What is the best option for measuring reoffending and success to support a payment by results approach?

9. We are concerned that the measurements suggested in the consultation paper in the table on p46 are crude and that a more sophisticated approach is necessary if good practice is to be rewarded. A measurement of simply whether a person has received a further penalty notice, caution or conviction within a given time period, even if it is confined to offences resulting in imprisonment, will not reward providers who successfully reduce either the seriousness of offences committed, or their frequency, without eliminating offending entirely. Indeed, for the majority of volume criminals eliminating offending entirely is so difficult a task that we would not expect providers

to be willing to take on contracts on that basis. A complex matrix would have to be developed to graduate reward according to the reduction in the frequency and seriousness of offending. There will always be false positives and negatives where factors other than the sentence delivered will affect the rate and frequency of re-offending. This will encourage larger rather than smaller providers to take on contracts.

10. While we take no position on the use of private and voluntary organisations to deliver court sentences, we are concerned at the underlying philosophical basis for the 'payment by results' approach, namely that delivery of a sentence can be substantially responsible for a reduction in reoffending for large numbers of offenders. While in some cases – for example, drug related property crime, where a substance misuse programme successfully tackling drug dependence may have an enormous impact upon potential to reoffend, aspects of the sentence may have primary responsibility for reduction in reoffending, in many cases other factors may be more important – for example, family influence; housing; employment and educational opportunities; mental health treatment (where this does not form part of the sentence) etc.

Q28 Is there a case for taking a tailored approach with any specific type of offender?

11. The necessary focus on the reduction in frequency and seriousness of offending that we outline above at para 9. means that the starting point for each offender should be different. Further, it may be justifiable to adjust rewards according to the statistical likelihood of reoffending for certain types of offence and offender eg substance misusing property criminals. Otherwise there will be an inbuilt reluctance to take on more criminogenic groups.

Q32 What are the best ways to simplify the sentencing framework?

12. The green paper indicates that the government wishes to 'move all offenders to a single sentencing framework' and 'remove elements of the law that unhelpfully fetter courts' discretion'. We support these aims. The former proposal is not fully elaborated in the consultation paper but includes elements such as the repeal of Schedule 21 to the Criminal Justice Act 2003, which sets starting points for minimum

terms for mandatory life sentences for murder, and an emphasis on the role of the Sentencing Council's guidelines. JUSTICE welcomes the move to recognise the importance of judicial discretion in sentencing in individual cases provided that it is structured appropriately by guidelines to ensure consistency and the taking into account of relevant factors. The government has backed away from the Conservative general election manifesto commitment that 'anyone convicted of a knife crime can expect to face a prison sentence' (the green paper refines this to 'any adult who commits a crime using a knife', a slight difference in language but more profound in practice as it means that mere public possession rather than use will not necessarily result in custody). The green paper also pledges to restrict the use of indeterminate sentences for public protection to cases where the notional determinate sentence would have been ten years' imprisonment – in effect, restricting it to very serious offences.

13. However, if the government were to follow through with the logic of its argument that judicial discretion, structured by Sentencing Council guidelines, offers the best hope for proportionate and consistent sentencing, it should repeal legislative provisions indicating 'mandatory' minimum sentences (including 'three strikes' sentences for class A drugs trafficking offences and domestic burglary under the Powers of Criminal Courts (Sentencing) Act 2000; minimum custodial sentences for some firearms offences under s51A Firearms Act 1968 (inserted by the Criminal Justice Act 2003) and for using someone to mind a weapon (Violent Crime Reduction Act 2006, s28). It should also repeal the 'dangerous offenders' provisions of the Criminal Justice Act 2003 in their entirety. Much focus is placed upon indeterminate sentencing for public protection (IPP/DPP) but these sections also mandate the imposition of discretionary life sentences on the grounds of 'dangerousness' in some cases.
14. JUSTICE also maintains its longstanding principled opposition to the mandatory life sentence for murder. We believe that its abolition and replacement with a discretionary life sentence, with minimum terms to be set in accordance with a Sentencing Council guideline, is an integral part of a coherent approach to sentencing that trusts judges to impose the appropriate sentence in the individual case, while structuring their discretion to ensure appropriate levels of consistency. We would expect very long sentences to be maintained, while allowing for the wholly exceptional cases (such as consensual mercy killing of a beloved relative or excessive self-defence by an armed officer) which are technically murder but where a life sentence would be inappropriate.

15. In relation to IPP/DPP, we believe that these sentences should not merely be restricted but should be abolished. They have proved unworkable in practice, are little understood by prisoners or the public and are likely to have an extremely damaging psychological effect upon many of those subject to them, which is both of concern in itself and an impediment to effective rehabilitation. We are particularly concerned that the criteria for 'dangerousness' make it more likely that such a sentence will be imposed if an offender is suffering from mental illness. Further, we especially oppose the use of detention for public protection for children and young people under 18, since to label a child as 'dangerous' at the start of a long sentence fails to take into account the child's development as they progress towards adulthood, and the psychological impact of an uncertain, potential life, sentence upon a child will be particularly grave. Life sentences (whether IPP/DPP or discretionary or mandatory 'life' sentences) should be reserved for a small number of the most serious adult offenders where both a very long period in prison is justified by the seriousness of the offence (on grounds of harm and culpability) and the lifelong licence period is justified by the ongoing risk to the public – as demonstrated by the offence for which the person is being sentenced and their offending history. Traditionally, this was recognised by the fact that only a small number of offences carried a potential life sentence and for most of these a life sentence would only be imposed for the most serious examples of these offences. In our view, this was the appropriate position. The 'dangerous offenders' provisions extended the possibility of life sentences into cases where they were being imposed to restrain potential future conduct without being required to reflect proven past conduct.

16. The CJA 2003's 'extended sentences' for 'dangerous offenders' (where the licence period is extended) are less damaging than IPP/DPP but our concerns about the dangerousness criteria still apply. If IPP/DPP are to be retained we welcome the indication that the release test may be reformed; the extremely low release rate for these prisoners demonstrates how difficult it is to demonstrate sufficient reduction of risk, particularly in circumstances where prisoners often do not have access to the appropriate courses. However, in addition to amending the test, the administrative problems experienced by the Parole Board must be rectified; as recommended in our

2009 report *A New Parole System for England and Wales*,² sufficient resources must be given to the Board to enable it to hold regular oral hearings reviewing detention post-tariff expiry in life and indeterminate sentence cases and thus comply with Article 5(4) European Convention on Human Rights. In addition, the Board should be given greater power over the listing of its cases.

17. We further support the green paper's proposals to limit the use of custodial remand to cases where the offender would be likely to receive a custodial sentence, except that a residual power to remand in custody where the offender would otherwise be likely to interfere with witnesses (and this cannot be dealt with through bail conditions) should be retained in order to protect the integrity of the criminal justice system. There may also be a need to retain the power to remand in custody for the offender's own protection or (where he is under 18) for his own welfare, although we would expect this power to be exercised very rarely.

Q33 What should be the requirements on the courts to explain the sentence?

Q34 How can we better explain sentencing to the public?

Q35 How best can we increase understanding of prison sentences?

18. We suggest that the simplification of the sentencing framework would, in itself, assist with public understanding. The barrage of criminal justice and sentencing legislation in the preceding decade – often aimed at improving public confidence by being seen to do something about crime – frequently had the opposite effect. The IPP sentence is a striking example of this; despite being almost perversely draconian in some cases (resulting in potentially life sentences given with tariff periods of mere months) it is frequently denigrated in media reports as a soft option: the fact that the prisoner might never be released is infrequently mentioned, with the minimum term (once time on remand is taken into account) reported as, for example, 'X could be out in just three years'³ – reference to the minimum term making it sound less 'tough' than the equivalent determinate sentence. We believe that people lack confidence in the system and believe it to be unduly lenient when they feel that they are being misled –

² Available for download from our website.

³ Eg 'Free in three years? Outrage as mother of Baby P is given a 'soft' sentence', *Daily Mail*, 23 May 2009.

if someone is given a ten year prison sentence they want to know why the person is released after five years – or even less, once home detention curfew, the now abolished End of Custody Licence and/or time on remand are taken into account.

19. We think that this problem could be solved without changing the effect of sentences simply by more honesty and clarity in language. Determinate sentences are now subject to release at the half-way point (subject to HDC) and so a ten year sentence could be expressed not as ‘ten years’ imprisonment’ but ‘five years imprisonment plus five years of supervision in the community’. The effect of HDC and time spent on remand would then have to be explained. Under this linguistic transformation IPP would be expressed as ‘five years to life’ which is a much more honest way of describing this extremely severe sentence – showing that in terms of the period of imprisonment it does not differ from a life sentence – and might even inhibit its use in inappropriate cases. Describing life sentences in this way might also dispel those calls for ‘life to mean life’ that result from misunderstanding of the intention and meaning behind life sentencing. We believe that clear, honest language used in court – and thus filtering into media reporting of sentences – would do much more to promote public confidence than the constant resort to websites, outreach exercises and publicity campaigns, in which the vast majority of people cannot be expected to choose to engage.

20. In addition, the publication of a short guide to prison sentences (and how they work) for journalists would be immensely helpful since media reporting of sentences and their effect is often unintentionally misleading. Even more importantly, a short printed document at each sentencing hearing should be provided to the defendant; victim; defendant’s and victim’s family, if appropriate; journalists/media representatives; and any other appropriate persons, detailing the sentence; its effect in terms of for example, time in custody and time on licence; licence conditions and potential for recall; and why the sentence has been imposed. Such a document should be produced in each case - and could indeed form the basis for the judge’s sentencing remarks. A brief document of this nature would be extremely helpful in preventing confusion (for example, there have been cases where prisoners do not understand the effect of their IPP sentence); in our opinion it is difficult in the emotion of the courtroom to absorb the effect of the sentence, and such information is better given in writing as well as orally.

Q36 Should we provide the courts with more flexibility in how they use suspended sentences, including by extending them to periods of longer than 12 months, and providing a choice about whether to use requirements?

21. We agree that this would be helpful. Suspended sentences should be used in cases where a sentence of immediate imprisonment would be fully justified but for an exceptional reason should not be imposed; this does not only apply to short sentences. The use of suspended sentences would be particularly beneficial in cases where the offender presents a low risk of reoffending and is the primary carer for dependent children or elderly or disabled relatives; or where the offence, while crossing the custody threshold, is of relatively low seriousness and the offender is in employment that would be lost if the prison sentence were imposed (particularly where the offender is providing financially for dependents). In other words, the suspended sentence should be used where the consequences to individuals (in particular, children or other vulnerable dependents) or society of the offender's immediate imprisonment outweigh the need for the sentence of imprisonment to be served.

22. We are concerned more generally, however, that suspended sentence orders may be being used in cases where a community order would be more appropriate, despite the terms of the Sentencing Guideline Council guideline *New Sentences: CJA 2003* which says that it should only be used for an offence that crosses the custody threshold where custody is the only option.⁴ We believe therefore that the legislative criteria for imposing a suspended sentence may need to refer to this. We also believe that suspended sentences should be available for offenders aged under 18.

Q44 How can we better incentivise people who are guilty to enter that plea at the earliest opportunity?

23. We do not believe that a maximum discount of up to 50% for a guilty plea entered at the earliest opportunity will be effective. Firstly, we believe that this discount goes beyond what sentencers and the public would expect and that sentencers are likely to

⁴ See Mair, G. and Mills, H. (2009) *The Community Order and the Suspended Sentence Order three years on: The views and experiences of probation officers and offenders*, London: Centre for Crime and Justice Studies.

raise the notional sentence in order to compensate for the effects of the discount (or simply fail to impose the maximum discount). Further, the reasons for many defendants' failure to plead guilty at the first opportunity are unlikely to be connected with the availability of a discount (which is already substantial) but with disclosure, acceptance of pleas to lesser charges, and legal aid.

24. Since the burden is on the Crown to prove the defendant's guilt, many defendants will not plead guilty until they are able to ascertain the strength of the Crown's case through evidence served upon them. Often, very limited evidence is available at initial hearings; more rapid disclosure of evidence would, we expect, result in guilty pleas being entered sooner in some cases. Further, however, the legal aid available for early guilty pleas is, we understand, very limited and therefore solicitors may frequently advise clients against entering a plea at that stage in order to be able to devote more hours to the case and thus properly assess the evidence and advise the client. This disincentive against early pleas could be addressed by adjusting the fees accordingly. Finally, delays in disclosure will also cause delays in acceptance of suitable pleas to lesser offences by the CPS; more rapid disclosure would encourage earlier resolution of these cases.

Q45 Should we give the police powers to authorise conditional cautions without referral to the Crown Prosecution Service, in line with their charging powers?

25. No. A conditional caution is equivalent in many respects to a community sentence; selecting and imposing appropriate conditions is not a proper function for the police, who are charged with the investigation of crime and apprehension of offenders. We are concerned at the potential for inappropriate or disproportionate conditions to be selected and for overuse of these powers. We believe that if conditional cautions are to continue, the requirement to refer to the CPS should remain.

Q46 Should a simple caution for an indictable only offence be made subject to Crown Prosecution Service consent?

26. While we question the necessity of this measure, we have no objection to it other than that it may occasion delay resulting in longer detention periods. In relation to adult offenders, a simple caution should rarely be used for a very serious offence and referral to the CPS may assist in preventing its use in inappropriate cases. This

proposal should not be applied to offenders under 18, where the rationale for cautioning is very different.

Q47 Should we continue to make punitive conditional cautions available or should we get rid of them?

27. JUSTICE is concerned at the due process implications of conditional cautioning (which in effect resemble a community sentence but are not imposed following a fair procedure before a judicial authority). We therefore agree that they should not contain punitive conditions.

Q49 How can we best use restorative justice approaches to prevent offending by young people and ensure they make amends?

Q54 What are some of the ways we might be able to further involve local communities in youth justice?

28. The JUSTICE/Police Foundation report *Time for A New Hearing* (2010), attached, provides a workable model for integrating restorative justice into the youth justice system in England and Wales. Even if a 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 (YRD);
- Allowing the CPS to divert certain categories of case from prosecution to a restorative conference;
- 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.

Q56 What sort of offences and offenders should Neighbourhood Justice Panels deal with and how could these panels complement existing criminal justice processes?

29. We support the development of Neighbourhood Justice Panels provided that criteria for referral to them are transparent and non-discriminatory and that the defendant consents to being referred. Such panels could provide a diversionary model for low-level offending or operate pre-sentence for offences of low to medium seriousness to allow the court the option of approving the package of measures put together by the panel as a community sentence.

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