

# CHAPTER 9

## DECRIMINALISATION AND ALTERNATIVES TO CONVENTIONAL TRIAL

### INTRODUCTION

- 1 Our criminal courts deal with cases that vary enormously in nature, seriousness and complexity. In this Chapter, I gather together and respond to suggestions that particular categories of case should be handled in new ways, suggestions ranging from the removal of certain matters from the criminal arena – ‘decriminalisation’ – to the creation of separate specialist courts.
- 2 As to decriminalisation, the criminal courts, particularly magistrates’ courts, deal with much work which, though important as a means of securing efficient public administration, is concerned with conduct that is on the borderline of criminality and/or is of relatively slight culpability. In addition, society’s view of what justifies criminal proceedings changes from time to time. In considering this issue, I have kept in mind that, however trivial the breach of public duty in question, the potential of criminal proceedings to enforce it may be the only effective means of doing so against some. On the other hand, it is wrong to stigmatise conduct as criminal simply as a means of enforcing a public duty when an average right-thinking person would not so regard it.
- 3 As to separate specialist courts, the first question is what, if any, significant advantages in justice and efficiency they might bring to their speciality over that which a properly resourced general criminal court could provide. The second and overlapping question in each suggested case is whether the likely use would justify the cost of creating and maintaining a separate, dedicated tribunal with a specialist jurisdiction.

- 4 I take the following as my starting points:
- criminal courts should not be concerned with infractions that are administrative or civil in nature, save only and to the extent that efficient public administration cannot be secured in any other way;
  - there is value in providing for resolution outside the courtroom so far as is consistent with justice, the public interest and efficient public administration; and
  - potential savings within the criminal justice system arising from decriminalisation or the modification of criminal proceedings should be measured against the likely cost and disturbance to the public, to enforcing bodies and to those against whom they are proceeding of any alternative means of enforcement.
- 5 I have received a number of suggestions for removal of work from the criminal courts. The most frequent concerned council tax cases and prosecutions for television licence and vehicle excise duty evasion. I have explored the options for dealing with these three categories of case in some detail with a view to recommending changes that might have more general application. In the event, I found less scope for wholesale decriminalisation than I had at first hoped.
- 6 Before continuing, I should distinguish between the two categories of case represented by those examples. Television licence and vehicle excise duty offences are criminal matters giving rise to standard summary proceedings. I discuss these offences in particular, and summary offences in general, in the next section of this chapter. Council tax cases are an example of magistrates' courts proceedings being used to recover civil debts. I consider the appropriateness of such a civil jurisdiction being retained within the criminal courts in the final section of the chapter. I also look at possibilities for specialist courts and alternative responses to criminal behaviour such as conditional cautioning, regulatory enforcement and the wider subject of restorative justice.

## **SUMMARY PROSECUTIONS**

- 7 Where it is argued that existing offences should no longer be the subject of magistrates' court proceedings, there are three main options for change. The first is a fixed penalty scheme with provision for challenge or appeal to the criminal courts. The second is the same procedure but administered by and subject to the adjudication of an independent body. The third is full decriminalisation where the enforcement of any debts is left to the civil courts.

- 8 There are precedents for the first two options. The Road Traffic Offenders Act 1988 makes provision for the imposition of fixed penalties in a large number of minor vehicle-related offences.<sup>1</sup> A formal notice of offence is served on an alleged offender or left on the vehicle. Offenders have a specified time in which to pay a financial penalty or to request a hearing before magistrates. If they do neither, an increased penalty becomes payable and is registered as a fine for enforcement by the magistrates' court. The retention of a right to a court hearing ensures compliance with Article 6. The collection of fixed penalties in each area is the responsibility of the local Magistrates' Courts Committee. Thus, fixed penalty schemes do not remove cases from the criminal jurisdictions, but significantly reduce the work involved in processing them. In 1998, for example, over 3.4 million fixed penalty notices were issued in England and Wales, of which 78% resulted in payment, 14% were registered as fines and less than 1% were referred for court proceedings.
- 9 An example of an independent adjudication body can be found in London where local authorities' parking attendants issue notices requiring payment of a fixed financial penalty within a set period.<sup>2</sup> The penalty is discounted if paid promptly. Penalty charge notices may be challenged, in the first instance to the issuing authority, and then by an oral or written appeal to a parking adjudicator. Over 4 million notices were issued in London in 1999/2000, of which less than 1% were appealed. The penalty is enforceable in the civil courts.

### **Television licence evasion**

- 10 As I have indicated, many submissions in the Review highlighted television licence offences as matters suitable for removal from the criminal courts. The licence fee is a standard hypothecated tax on access to television in its entirety (not just on BBC channels). The Government decides what proportion of the licence fee income should go to the BBC, and currently the BBC receives it all. The BBC collects the fees on behalf of the Government and decides on enforcement and prosecution policies. These policies are based on the Code for Crown Prosecutors issued by the Director of Public Prosecutions and, therefore, take into account public interest considerations such as whether alleged offenders are in genuine financial hardship or otherwise vulnerable. The BBC devolves responsibility for prosecution to a contractor (currently Consignia Customer Management Ltd). The level of over-all collection is high, currently approaching 95% of television users in known households.

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<sup>1</sup> Part III and Sch 3

<sup>2</sup> Scheme 73 set up under the Road Traffic Act 1991, Part II

- 11 Using a television without a licence is an offence of strict liability, carrying a maximum penalty of a level 3 fine (£1,000). There is no custodial penalty in the first instance; imprisonment is only possible (ultimately) as a response to non-payment of the fine. Liability is rarely disputed. During the financial year 2000/2001, around 160,000 prosecutions were undertaken. All cases are listed for a hearing, although the vast majority are then be dealt with as written pleas of guilty. It is the perception of many that this is an inappropriate use for criminal proceedings and a great waste of magistrates' courts' time. An unsatisfactory feature is the inconsistency in magistrates' sentencing throughout the country; fines are generally well below the permitted maximum, but the normal amount imposed (in the absence of any information about means) can vary from £30 to £300 according to locality.
- 12 Full decriminalisation of TV licence enforcement is not a straightforward option. Such an approach would mean that people would no longer risk a penalty as a consequence of using a television without a licence. Instead, detection would result only in the threat of County Court proceedings to recover the cost of the licence. There would, therefore, be no practical incentive to purchase a licence ahead of contact from the enforcement agency. Unlike many other services, there is no easy mechanism for identifying people who are using a television without paying; nor is there any means of cutting off the supply to those who are in default.
- 13 Transfer of responsibility for TV licence cases from the courts to an independent adjudication body would also be problematic. The cost and bureaucracy of such a body would be substantial given the need for national coverage and facilities for local hearings. I have already indicated that the vast majority of defendants charged with using a television without a licence plead guilty by post. The advantage of using an approach similar to that adopted by the London Parking Appeals Service<sup>3</sup>, would be that these cases could be dealt with by way of a penalty charge notice. However, the same benefit can be achieved without creating an entirely new body to deal with the tiny minority of contested cases. The extension of the fixed penalty scheme to include television licence offences would both reduce magistrates' courts' workload and introduce consistency in treatment of offenders. Where enforcement staff had evidence that an individual was using a television without a licence they could serve a fixed penalty notice requiring purchase of a licence and payment of a penalty (discounted for prompt compliance) within a fixed period. Those few people who wanted to contest the case could request a hearing in the magistrates' court as now. Fixed penalties and any penalties imposed after conviction at court would be recoverable as fines in the normal way.

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<sup>3</sup> see para 9 above

**I recommend that the use of a television without a licence should remain a criminal offence, but that it should be dealt with in the first instance by a fixed penalty notice discounted for prompt purchase of a licence and payment of penalty, and subject to the defendant's right to dispute guilt in court.**

### **Vehicle excise duty evasion**

- 14 Similar considerations arise for the offence of using or keeping a motor vehicle without a vehicle excise licence. It is an offence of strict liability, with a maximum penalty of a level 3 fine (currently £1,000) or five times the chargeable duty, whichever is greater.<sup>4</sup> Unlike the lesser offence of using or keeping a vehicle without *exhibiting* a licence,<sup>5</sup> it is not capable of being dealt with under the fixed penalty provisions of the Road Traffic Offenders Act 1988.<sup>6</sup> Prosecutions are brought by the Driver Vehicle Licensing Authority (DVLA). The DVLA is unusual amongst vehicle registration bodies in its combination of the functions of keeping the record, collecting the tax and prosecuting offences; in most other countries a Ministry of Justice deals with enforcement. Despite the DVLA's considerable success in recent years in reducing evasion, the Revenue still loses almost £200 million a year.
- 15 The DVLA operates an out of court settlement scheme under which offenders can avoid prosecution on payment of back duty plus a penalty. This option is offered in all but the most serious cases (for example, repeat offenders or those who owe large sums). The DVLA deals with approximately 1,000,000 actionable offences a year. In 1999/2000 settlements were offered in about 700,000 cases and accepted in about 200,000. The DVLA prosecuted about 300,000 offenders and obtained a conviction in 98% of cases (the majority of defendants pleading guilty). The high level of prosecutions resulting in pleas of guilty has led the DVLA to refine its out of court settlement scheme. Under a revised procedure due to be introduced shortly, offenders will be given the opportunity to pay a reduced penalty provided that they respond within a specified time. Failure to pay will result in the full penalty becoming due and further reminder letters being sent before court action is considered. The DVLA hopes that introduction of the scheme will lead to a further reduction in the number of cases requiring prosecution.

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<sup>4</sup> Vehicle Excise and Registration Act 1994, s 29

<sup>5</sup> *ibid*, s 33

<sup>6</sup> *ibid*, Sch 3

- 16 Failure to hold a vehicle excise licence often comes to light and is prosecuted with other offences, commonly using a vehicle without insurance or a motor test certificate, but also other more serious driving matters and offences of dishonesty. The DVLA makes an important contribution to the prevention and prosecution of crime generally by its provision of accurate vehicle records to the police, the most frequently used source of their information now that cameras are so widely used to collect evidence of road traffic and other offences. DVLA contractors also work with the police, the fire brigade and local authorities to find, clamp and remove cars belonging to or used by known criminals or causing a nuisance. Where other offences are also involved the police and the Crown Prosecution Service often take over and include the vehicle excise licence matter in the main prosecution. In my view, they should always do so.
- 17 The system of vehicle licensing and exaction of duty for it are separate, but complementary functions. The first is an aid to good public administration and crime prevention and detection; the second is the collection of revenue. A number of contributors to the Review have suggested that the collection and enforcement of payment of vehicle excise duty should be separated from vehicle registration by simply adding it to the tax on fuel. This is how a number of European countries deal with it, but they still charge a significant fee for registration to cover the costs of administration. There is also an argument that vehicle owners will not take the requirement to register seriously unless the fee is substantial. The Republic of Ireland experimented with a system of low cost registration and corresponding increase in fuel tax and found that it resulted in a less effective registration scheme. The Republic has now reinstated vehicle excise duty. In the light of this experience, the DVLA expresses concern at the prospect of any change which could be seen as ‘downgrading’ the importance of the obligation to license motor vehicles. This includes, not only its value as a means of tackling all forms of vehicle-related crime, but also of contributing to road safety through the licensing requirement for production of evidence of insurance and a roadworthiness certificate. The DVLA regards the ultimate threat of prosecution, with its maximum penalty of a £1,000 fine, as a vital tool in its task of reducing evasion.
- 18 Other contributors to the Review have suggested that failure to hold a vehicle excise licence should no longer be a criminal offence, but be dealt with by a separate penalty charge notice and adjudication scheme. It is difficult to see how that could work or what financial or other gain it would bring. First, it would not be straightforward to issue penalty charge notices on the street, as in the case of parking tickets, because registration details have to be checked and back duty calculated (although it might well be possible to overcome such practical difficulties by the use of new technology). Second, as I have said, many vehicle excise licence offences are dealt with by the courts as part of a wider prosecution. The establishment of a separate adjudication system could create unnecessary duplication of work and the potential for confusion since

two bodies could be charged with considering and responding to the same set of circumstances. And, any separate system, if it were to match the locality of provision of magistrates' courts, would be very costly and inefficient. Third, removal of the ultimate sanction of prosecution could weaken the registration system and its contribution to detection of crime, identification of offenders and road safety.

- 19 Accordingly, I do not consider that it would be helpful to anybody to decriminalise failure to hold a vehicle excise licence. In practice, the DVLA's out of court settlement scheme is broadly equivalent to a fixed penalty scheme (and the similarities will be even more marked once the discount for early payment is introduced). For that reason, I see no advantage in bringing vehicle excise licence offences into the fixed penalty schemes administered by magistrates' courts at this stage. I recommend below<sup>7</sup> that consideration should be given to the extension of the fixed penalty procedure to a wider range of legal infringements. If fixed penalty schemes were so extended, there could then be benefit in applying the standard approach to vehicle excise licence offences.

### **Other summary matters**

- 20 There is some evidence that the existing fixed penalty provisions for minor road traffic offences<sup>8</sup> are not as widely used as they might be. It is for Chief Constables to decide in respect of which of the permitted offences they will employ the fixed penalty scheme. Contributors to the Review have suggested that it is not consistently used for offences that normally attract fairly standard penalties, such as excessive speed, driving in a bus lane and parking within the confines of a pedestrian crossing.
- 21 Whilst I acknowledge the importance of prosecutorial discretion as a generality, it seems to me that in cases of this sort it should normally be exercised in favour of use of the available fixed penalty system, unless there are particular circumstances requiring the offender to attend court, for example, in the case of a repeat offender or where the offence is related to another or others of greater seriousness not capable of disposal by way of fixed penalty.
- 22 Quite apart from under-use of the present statutory provision enabling fixed penalty criminal proceedings, there are a number of other relatively trivial infringements that could be dealt with in this way. I do not attempt an

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<sup>7</sup> para 25

<sup>8</sup> Road Traffic Act 1988, Part III and Sch 3

exhaustive list, but mention, only as examples, some suggested by contributors in the Review: breaches of local or other public authority by-laws and regulations, for example unlicensed street trading, unlicensed fishing, prohibited smoking, unlawful movement of livestock and many consumer protection offences in the field of food safety, weights and measures and credit. During the course of the Review, the Home Office issued a consultation paper on the possible use of fixed penalties for certain public order offences<sup>9</sup> and, subsequently, inserted an enabling provision into the Police and Criminal Justice Bill, which received Royal Assent in May of this year. Ten additional offences (all falling within the broad category of 'disorderly conduct') are now capable of being dealt with by way of fixed penalty notice. The Home Office is preparing pilots for 2002. The Secretary of State has the power to add to the list of offences by statutory instrument subject to affirmative resolution.

- 23 Other offences might call for different treatment – but still within the criminal justice system – where the issues are too subjective to be readily amenable to determination by the criminal test of sureness of guilt, for example, whether a consumer was 'misled' by a credit advertisement or as to the legibility of a food label. Instead of seeking to prosecute such matters directly, they could be the subject of a notice to correct with which the person served could either comply or challenge by reference to the court.<sup>10</sup> Such a procedure would not remove all such difficult issues from the courts, but it should reduce the number of them.
- 24 The sheer number and variety of, and the many different prosecuting authorities for, all these sorts of offences make it difficult to recommend their removal from the criminal process altogether. Looking at many of them individually, it might be thought desirable to refer them to an alternative and knowledgeable forum in the field. For example, a recent report to the Food Advisory Committee draws attention to the ways in which the formality and rigour of the criminal process in food law can obstruct a satisfactory resolution of the main issue.<sup>11</sup> However, whilst suggesting some form of informed tribunal to resolve contentious issues without the trappings of criminal process, the report's authors acknowledge the need for a criminal law sanction where there are persistent breaches.
- 25 There is an obvious attraction in removing much specialist enforcement work of this sort from the criminal courts to separate, independent and expert tribunals. However, the relatively small number of prosecutions for infringement within each discipline and the great range of disciplines

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<sup>9</sup> *Reducing Public Disorder: the role of fixed penalty notices*, (Home Office September 2000)

<sup>10</sup> cf the enforcement of planning restrictions, in the first instance by an enforcement notice which, if disregarded, becomes the subject of enforcement proceedings before magistrates.

<sup>11</sup> *The Food Advisory Committee Review of Food Labelling*, Food Standards Agency (2001 – in press)



involved would not justify the additional bureaucracy and cost of setting up a large number of alternative country-wide adjudication schemes as an alternative to the courts. The practical, and I believe principled, approach in such cases is not to remove them from the criminal justice system, but to reduce their impact on it by their inclusion in fixed penalty and notice of correction schemes.

**I recommend:**

- **the use of fixed penalty notices in respect of all offences provided for in the Road Traffic Offenders Act 1988, Part III and Schedule 3, unless there are special circumstances requiring the offender to attend court; and**
- **a systematic review leading to similar fixed penalty and/or notice-to-correct schemes for a wider range of infringements that are presently the subject of criminal prosecution.**

## **SPECIALIST COURTS**

- 26 There have been a number of calls in the Review for specialist criminal courts of one form or another. The term specialist court is used very imprecisely and in very different contexts. It has at least three different senses.
- 27 First, certain areas of criminal law may be so complex that the decision-makers need special expertise. Usually this specialist knowledge refers to technical issues for which the ordinary criminal procedures are ill-suited. This might mean that instead of a judge and jury there would be a judge and lay members chosen for their professional qualifications and/or experience as I have suggested for serious and complex fraud cases, or that only magistrates with appropriate training and expertise may sit, such as in the youth courts. Alternatively, it could refer to courts where the tribunal is not altered, but has access to specialist support workers who provide special sentencing options. Although not strictly concerned with diverting the offender from the criminal process, such a court may require the sentencer to have specialist knowledge of the sentencing regime.
- 28 Secondly, there are courts that depart so substantially from adversarial principles of justice as to amount to a different form of tribunal from the conventional criminal court. In the most extreme cases they might dispense with adversarial proceedings altogether, and take the form of arbitration, mediation or other form of dispute resolution. This type of court is usually suggested where the criminal process is so unsuitable to the nature of the

offence or offender as to fail in one or more of its main social functions. Consequently, the focus of its activities will shift from formal adjudication of facts and sentencing to 'restorative justice'. The objective is to obtain the offender's acknowledgement of 'responsibility' rather than to establish guilt, and to find an outcome that deals with the reasons for the offending behaviour. The focus is on problem-solving rather than punishment.

- 29 Finally, some people refer to a specialist court to denote one where a certain type of case is heard at a certain time, for administrative or court users' convenience, such as traffic courts, or night courts. In this instance, there is nothing specialist in the nature of the court, its personnel, or in the powers available to it. It is merely a concentration of work in one time and place that would otherwise have been heard in exactly the same manner at some other time or in some other court. In this sense there is nothing 'specialist' about the court at all; it is a convenience of listing.
- 30 I turn now to the main candidates suggested in the Review for specialist courts.

### **Drug courts**

- 31 The success of drug courts in the United States, particularly those in Miami-Dade County, Florida and the New York City Drug Court, is much lauded. They follow different patterns in different States, but have common features. They are concerned exclusively with cases involving defendants who abuse drugs and offend as a result. They have specially trained and experienced judges who show a high degree of knowledge and commitment to the programme, and regularly review the progress of the individuals whom they sentence. The judges moreover have the advantage of the presence at court of drug workers with testing facilities, personnel from the main social services agencies who help prepare and evaluate the success of each defendant's treatment, and advanced information technology systems for the use of all involved. Their success, therefore, owes much both to the expertise of the judges and to the quality of sentencing support present in or at court.
- 32 Drug courts in the full United States' sense have not been established in this country, although drug testing and treatment orders (DTTOs)<sup>12</sup> introduced by the Crime and Disorder Act 1998 have incorporated some of their procedures and options for disposal.<sup>13</sup> These orders are a new type of community

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<sup>12</sup> Crime and Disorder Act 1998, s 61

<sup>13</sup> a forerunner to DTTOs was the Substance misuse Treatment Enforcement Programme (STEP) project in West Yorkshire, an inter-agency initiative inspired by the United States' experience

disposal that came into force on 1 October 2000 which may be imposed provided that the offender is 16 or above at the date of conviction. They apply only to offences that would otherwise have been suitable for community penalties (thereby capping the level of seriousness), only to defendants who are dependent on or have a propensity to misuse drugs and where such dependency/ propensity requires and may be susceptible to treatment. Their duration may be from 6 months to 3 years (the 'testing and treatment period'). The order requires the offender to submit to treatment and to provide samples for the purpose of determining the presence of drugs in his body as and when required by the treatment provider. There will be supervision of progress at regular review hearings at which the offender must appear before the court, which must be at least once a month. It should be held by the sentencing bench where possible, although in practice this varies in different court centres. A breach of the order allows the court to sentence for the offence as if no order had been made.

33 The drug courts that I saw in the United States were in areas with high numbers of offenders, where there was sufficient turnover to justify the full-time allocation of a small number of judges to hear the cases, docketing of all cases to judges to ensure continuity, and, as I have said, presence at court of drug support workers and representatives of all the main social support agencies. These conditions ensure maximum expertise, commitment and immediate and continuous support from all involved in the process. There may be a demand for such a concentration of expertise in some of our major city centres where there are high levels of drug-related crime. If there is, to make specialist and adequate provision would be very expensive. The United States drug courts tend to be concentrated on major city centres and to enjoy special Federal funding.

34 It seems to me that, rather than attempt a separate drug court or dedicated drug courts in a few large centres, we should concentrate on developing the new drug testing and treatment order regime. However, the United States experience teaches us that, if it is to work as intended, it will need a move to the docketing of judges and magistrates to cases, to ensure continuity in the handling of those subject to the orders, and a major increase and permanent commitment to providing greater resources than it has at present. Home Office research shows that offenders respond to the praise and criticism of sentencers who show an interest in their progress.<sup>14</sup> Continuity has generally been possible in the Crown Court and with District Judges. It has been harder with magistrates, although there are geographical disparities, so that in Liverpool 68% of reviews were by the sentencing bench, while in Gloucestershire 76% of reviews were heard by a court with no previous involvement in the order.<sup>15</sup> It should be a priority everywhere now, when

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<sup>14</sup> *Drug Treatment And Testing Orders – interim evaluation*, Home Office research findings No 106 by Paul Turnbull (1999)

<sup>15</sup> *ibid*

listing such matters, that review is conducted by the sentencers. This should be easier if my recommendations for the magistracy and for a new unified Criminal Court are adopted.

- 35 Substantially improved resources for the court should aim to ensure that there are sufficient and readily available places in treatment programmes so that the best sentencing option is not frustrated by lack of places. There should also be available at court experienced drug workers and, where appropriate, representatives of other involved agencies with detailed information about the offender's behaviour within the programme. Finally, there should be better information technology systems in court to allow the sentencer to view the defendant's history of compliance with the order, previous breaches and other relevant information at a glance.
- 36 Accordingly, I recommend at this stage making better use and support for what we have rather than the establishment of separate or dedicated drug courts. As we gain experience of the drug testing and treatment scheme, opportunities may suggest themselves for dedicated courts in individual centres.

### **Domestic Violence Courts**

- 37 Any form of domestic violence is a criminal offence under the common law of assault, or the Offences Against the Person Act 1861, and varies from summary to indictable-only offences depending on the nature of the violence. The issue is usually one of fact rather than of law. If proved, the usual rules of sentencing apply, so that the severity of the assault will largely determine the sentence. The English courts do not, in the main, distinguish such cases from other offences of violence, and their sentencing options remain the same.
- 38 Yet, it is argued, there are some special features of domestic violence offences that make the court process unsuitable for the conventional courts. The victim's relationship with the offender makes the factual issues less straightforward. There may be suggestions that the allegation has been made in order to punish the defendant for some problem in the relationship. The victim may be under community or family pressure to drop the case, or feel guilt or fear about turning to the courts. Where there are children of the relationship, they may retain contact with the father and she will fear the inability of the courts effectively to protect her from further violence. Domestic violence is often repetitive, and the evidence suggests that it tends to escalate. If the victim takes the matter to court early, before it does so, there is unlikely to be a suitably deterrent penalty; but if she leaves it until later, the admissible evidence cannot usually reflect the history between the

parties and, therefore, the sentence may not reflect the true seriousness of the matter. There is also a tendency to regard such cases as less serious because they occur within the home, and with a possibility of reconciliation as a mitigating factor.

- 39 It has been suggested that domestic violence cases could be dealt with in a more informal setting, unconstrained by the need for admissible evidence and direct proof of guilt, which would help the parties to understand the causes of the violence and reach acceptable solutions. An example of this is the domestic violence court in Calgary, with its 'restorative justice' approach. The project, begun as a pilot in early 2000, aims to bring together many agencies, such as housing and social services, and to create a forum for discussion of appropriate treatment. The panel discusses the family circumstances and the reasons for the offending and seeks to produce an agreed solution, which might be a combination of community orders. The court oversees the process and can call the case in at any stage before sentencing. The project also aims to improve the speed of intervention and expertise about domestic violence in the core criminal justice system agencies. There is as yet no full evaluation of the pilot, but like other 'restorative' approaches that I saw in North America, its success appears to be, not so much in devising alternative procedures, but in gathering together the resources of a number of concerned agencies and focusing minds on the issue.
- 40 There is nothing similar in this country, although there are efforts to improve courts' response to domestic violence. A government interdepartmental working group on domestic violence has these issues under consideration. There is also much going on at the moment to improve inter-agency working as a result of the crime and disorder partnerships under the Crime and Disorder Act 1998. For example, the Leeds Domestic Violence Court project aims to ensure that, as far as possible, domestic violence cases are listed during specified slots within the court schedule to allow for a greater focus on the provision of background information to assist magistrates in making bail and sentencing decisions. A wide range of statutory and voluntary organisations are taking part in this project. I make no specific recommendations on domestic violence courts, but urge the need for all relevant agencies to match their stated policies with action.<sup>16</sup>

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<sup>16</sup> note the CPS Inspectorate Report on Domestic Violence in 1998, which suggests a lack of rigour in applying and monitoring compliance with CPS policy.

## ALTERNATIVE PROCEDURES

### ‘Caution-plus’

- 41 ‘Caution plus’ is a convenient heading for a variety of methods of disposal of criminal offences within the criminal justice system falling short of appearance and sentence in court. In England and Wales we have a system of cautioning by the police which is not generally conditional on offenders giving or complying with any undertakings. There are certain procedures that have some of the characteristics of caution plus. Most recently, the Crime and Disorder Act 1998 has replaced the old system of police caution for young offenders with a system of a reprimand and/or a final warning, the latter normally coupled with a requirement to participate in a rehabilitative programme.<sup>17</sup> There is also the long established ability of revenue authorities to ‘compound’ certain tax offences. But there is no general power in the police or the Crown Prosecution Service or other prosecutors to divert cases at an early stage from the criminal justice process by a combination of caution and, with the agreement of the offender, conditions as to his future behaviour.
- 42 In effect, our police caution amounts to an offender being ‘let off’ with a warning. In 1999, around 266,000 cautions were issued.<sup>18</sup> This amounts to around 25% of all those found guilty or cautioned (i.e. the total number of ‘solved’ crimes). Many regard this as unsatisfactory, both in its lack of regard for the injury or insult to victims and in its lack of rigour as a response to criminality. Concern has also been expressed that the police are under pressure to resolve crimes in this way (cautions are recorded as a ‘clearance’ and are therefore a relatively non-labour intensive method of contributing to one of the key measures of a force’s performance).
- 43 Caution plus or conditional cautioning is widely used in other countries. The closest example from another jurisdiction is the ‘fiscal fine’ in Scotland, where the prosecutor fiscal, with the agreement of the offender, may administer a caution and impose a fine for a narrow range of minor offences as an alternative to court proceedings.<sup>19</sup> Similar and more extensive provisions exist in many European countries. In Germany, for example, the public prosecutor may, with the consent of the court, caution for lesser offences, subject to the accused agreeing to one or more of four conditions: to pay compensation; to make a payment to a charitable organisation or to the Treasury; to do charitable work; and to provide support to someone or something. Other European countries have similar systems, some extending

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<sup>17</sup> Crime and Disorder Act 1998, s 65

<sup>18</sup> these are apparently the most recent “confirmed” figures

<sup>19</sup> Criminal Procedure (Scotland) Act 1995, s 302

to wider ranges of offences and including other conditions, for example, the commission of no further offences within a set period.

- 44 As always, we should be cautious before drawing on other systems, particularly civil law jurisdictions with their very different jurisprudential cultures and forensic traditions. In continental systems there is no such thing as a conclusive plea of guilty; it would be regarded as contrary to the court's duty to establish the truth. So their development of the 'caution plus' option is, in part at least, a means of overcoming their inability to expedite matters by a plea of guilty once a case goes to court. Another important factor is that continental prosecutors, in general, have a different role and status from those of the Crown Prosecution Service in this country. They are closer professionally to the judiciary and there is, thus, more ready acceptance of their power to use the 'caution plus' system as a means of deciding the outcome of certain cases.
- 45 In my view, there is scope in England and Wales for the introduction of a more general, formalised and conditional cautioning system. I shall not attempt a detailed recommendation as to its form; that would require close examination and, no doubt, extensive consultation with a wide range of professionals and others experienced in the criminal process, criminology and sentencing. It could take the form of a discretionary power vested in the Crown Prosecution Service not to prosecute or to withdraw a prosecution on condition, for example, that the offender submitted to some form of penalty or supervision of his conduct and/or offered some form of redress and/or submitted to medical or other treatment. Failure to satisfy the condition could entitle the prosecutor to initiate or reinstate prosecution or to bring the offender before the court for breach of condition.
- 46 Any such scheme should, save for the most minor offences, be the responsibility of the Crown Prosecution Service and subject to the approval of the court. Without the protection of the court's approval, its use could be used or perceived as a 'cop-out' by the prosecution to avoid prosecuting cases that should be prosecuted, or of innocent criminals being at risk of pressure to accept onerous compromises to avoid prosecution, or of the rich being able to buy their way out of prosecutions when the poor could not.
- 47 Consideration of some such general scheme would need to take account of existing means of dealing with offenders within the criminal justice system without involving them in court proceedings or by minimising the content of such proceedings. If there is to be a further extension of this in the form of 'caution plus', it might be wiser to rationalise the whole system rather than just to add another variant. I have in mind: the relatively high proportion of vehicle related offences already dealt with by way of fixed penalty notices; the many minor offences capable of being dealt with by way of paper

proceedings; the existing powers of the revenue authorities to compound, often substantial, offences without reference to the courts; the increasing success of the courts, under the Narey provisions, in securing early hearings of defendants likely to plead guilty; and the many proposals now in the air for ‘restorative justice’. I describe below<sup>20</sup> the various stages in the criminal process at which a restorative justice approach can be applied. A more structured, conditional cautioning system might well prove to be a valuable support for the use of such an approach in the early stages of the process, since it would provide a framework for ensuring compliance with any reparation agreed by the offender. I have recommended at paragraph 69 that a national strategy be developed for the use of restorative justice techniques across England and Wales. That recommendation should be considered alongside the recommendation below dealing with conditional cautioning.

**I recommend that:**

- **consideration should be given to the introduction of a conditional cautioning scheme over a wide range of minor offences, enabling the prosecutor with the consent of the offender and, where appropriate, with the approval of the court:**
  - (a) to caution him subject to his compliance with specified conditions; and**
  - (b) to bring the conditionally cautioned offender before the court in the event of his failure to comply with the conditions; and**
- **in considering the introduction of such a scheme, regard should be had to its place alongside existing provisions for avoiding or modifying the criminal process and future developments in the form of ‘restorative justice’, with a view to over-all rationalisation into a single scheme.**

## **Regulatory enforcement**

- 48 There is also scope for removal of certain matters from the criminal justice system at the upper end of the scale, notably for certain types of financial and regulatory offences. In considering offences as candidates for such a scheme, close attention would need to be paid to the widely expressed concern that it would enable the rich, but not the poor, to buy their way out of prosecution. The Runciman Royal Commission was alive to this concern. It welcomed the

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<sup>20</sup> paras 58 - 69



possibility of the development of a separate regulatory regime,<sup>21</sup> but considered that it should be confined to ‘technical’ breaches rather than offences of dishonesty, that is:

“[w]here the offence is of a technical nature, there has been no specific loss or risk to any member of the public (or if there has, where restitution can be made), and the predominant issue relates to the protection of the integrity of markets rather than to serious dishonesty ...”.<sup>22</sup>

- 49 The Commission considered that this would be so in only “a handful of cases” and warned that, even then, penalties should be sufficiently severe so that it could not be said that ‘white collar crime’ was being dealt with more leniently than other equivalent offences.<sup>23</sup> It also recommended consideration of a procedure in appropriate cases for dropping or reducing a criminal charge in exchange for a defendant’s acceptance of a sufficiently severe regulatory penalty<sup>24</sup> - an extension or modification of the compounding mechanism available to the revenue authorities.
- 50 I am not sure that the candidates for transfer to a regulatory process would today amount only to a ‘handful of cases’, or indeed that they would have done so at the time of the report of the Runciman Royal Commission. Certainly, there is now a proliferation of financial and market controls supported by criminal sanctions that might be more appropriately and better dealt with in a regulatory system tailored to meet the disciplines and understanding of individual markets. Often, the most serious penalty to the offender in such cases is the loss of his profession and/or the ability to continue to trade in the market that he has abused. That is a common-place part of any plea of mitigation in such cases in the criminal courts. The current Director of the Serious Fraud Office<sup>25</sup> favours decriminalisation of frauds, but only for regulatory offences, that is, “those that can be dealt with by, effectively, taking someone off the road by removing their licence”.
- 51 The Runciman Royal Commission’s recommendations produced little governmental response or scope for it until the establishment of the Financial Services Authority as part of the reforms contained in the Financial Services Act 1986. In June 1986 the Authority assumed responsibility for banking supervision. And, pursuant to the Financial Services and Markets Act 2000, it will shortly take over the investment services responsibilities of a number of

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<sup>21</sup> then being considered by the Serious Fraud Office and the Securities and Investments Board

<sup>22</sup> Report, Ch 7, para 63

<sup>23</sup> *ibid*, para 63

<sup>24</sup> *ibid*, para 64

<sup>25</sup> Rosalind Wright

supervisory and regulatory bodies.<sup>26</sup> Once the Authority is fully established it should become clearer what current criminal offences might fall more appropriately within its remit. I consider that it would be premature, and in any event, beyond the scope of this Review, for me to attempt to identify individual candidate offences for de-criminalisation in this field.

**I recommend that once the Financial Services Authority has assumed full responsibility for supervision in the financial services field, consideration should be given to transferring appropriate financial and market infringements from the criminal justice process to its regulatory and disciplinary control.**

### **Parallel proceedings**

- 52 A number of agencies are responsible for the investigation and prosecution and/or regulation of allegations of financial irregularity. Investigations may result in criminal, regulatory and civil proceedings, all covering the same or similar allegations of misconduct. The different regimes and procedures have different standards of proof and disclosure requirements, which can cause serious difficulties in the criminal process for prosecutors and defendants.<sup>27</sup> Civil proceedings are normally stayed until after the conclusion of criminal proceedings, and in certain circumstances, regulatory proceedings will await the outcome of the criminal and/or civil matters. The resulting delays increase the likelihood of successful challenges under Article 6 of the European Convention of Human Rights.
- 53 Since criminal courts cannot normally deal with all the issues arising out of an allegation of financial irregularity, defendants are less likely to plead guilty at an early stage. Even where courts can, effectively, deal with all the important matters, for example, where, in addition to their normal powers of punishment, they can disqualify convicted defendants from continuing to act as a company director,<sup>28</sup> they are often reluctant to do so because of lack of familiarity with the jurisdiction.<sup>29</sup>

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<sup>26</sup> viz Building Societies Commission, Friendly Societies Commission, Investment Management Regulatory Organisation, Personal Investment Authority, Register of Friendly Societies and Securities and Futures Authority

<sup>27</sup> see eg *Saunders v UK* (1997) 23 EHRR 313, ECHR

<sup>28</sup> under the Company Directors Disqualification Act 1986, s 2

<sup>29</sup> *Report on Parallel Proceedings*, p 17, The Society for Advanced Legal Studies Financial Regulation Working Group (December 1999)

- 54 The Lord Chancellor has proposed a form of unification of proceedings in such cases, but based in the criminal court.<sup>30</sup> The court would deal with issues of guilt and sentence as it does now. Present, but not participating in those proceedings, would be two expert assessors. At the end of the criminal proceedings the judge would discharge the jury and he and the two assessors would then deal with regulatory issues. The Society for Advanced Legal Studies' Financial Regulation Working Group did not favour the proposal,<sup>31</sup> giving three main reasons: first, it could lead to greater delay than at present because all regulatory proceedings would have to await the outcome of the criminal proceedings; second, acquittal in the criminal part of the proceedings might sit uneasily with any sanctions subsequently imposed in the regulatory part of the proceedings; and third, combining the procedures in this way could compromise the independence and effectiveness of regulatory processes.
- 55 With respect to the Working Group, I am not impressed by any of those arguments. As to the first, I do not see why the combination of the two procedures should lead to more delay than is now the norm where the criminal proceedings precede, as they normally do, further civil and/or regulatory procedures. As to the second, I do not see why acquittal in the criminal part of the proceedings should embarrass the partially differently constituted tribunal in the regulatory proceedings. To the extent that the regulatory infringement in question is the same as that of the criminal offence charged and the burden and standard of proof in both proceedings are the same, the judge and assessors would no doubt consider themselves bound by the finding of the jury. To the extent that there may be a difference as to the nature of the infringement in question or as to the manner of proof, the judge and assessors would be free to deal with the matter afresh as a regulatory tribunal. As to the third, I do not understand the basis for saying that commission of regulatory issues to a judge and expert assessors from the market or discipline in question could be said to 'compromise' the independence and efficiency of the regulatory process. In my view, this possible combination of criminal and regulatory processes in the hands of the court and expert assessors is worthy of further consideration. It might not be suitable for all cases of this kind, but some, depending on the regulatory traditions in question, might benefit considerably from the speed and combination of skills that such a 'one stop shop' might offer. I have recommended in Chapter 5 that in serious and complex fraud cases the nominated trial judge should be empowered to direct trial by himself sitting with lay members or, where the defendant has opted for trial by judge alone, the latter. In some cases, it might be possible and appropriate for lay members who sit with the judge in the criminal proceedings to be the same individuals who will act as expert assessors for the purpose of any regulatory proceedings. But for the reasons given in

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<sup>30</sup> *The Feasibility of a Unified Approach to Proceedings arising out of Major City Fraud*, KPMG Lecture 1998

<sup>31</sup> *Report on Parallel Proceedings*, pp 10 - 13

paragraph 191 of that Chapter, the composition of the criminal tribunal in such cases should be approached with care.

**I recommend consideration, for appropriate cases of parallel proceedings, of combining the criminal justice and regulatory processes, with a judge as the common president and with lay members or expert assessors for the second and regulatory part.**

- 56 The Working Group recommended a more modest approach to reform which, so far as it goes, is favoured by the Serious Fraud Office. It amounts to encouraging the judge at the sentencing stage in criminal proceedings to consider exercising such regulatory type powers as he has and to giving him some more. Where there are, or may be such powers, the Working Group recommends that the Department of Trade and Industry should in appropriate cases instruct specialist counsel to make submissions at the sentencing stage as to the availability of such power and the desirability of exercising it. Though the latter might be thought contrary to our tradition of prosecuting counsel not seeking a particular penalty, it is not so very different from their accepted practice of seeking particular orders as adjuncts to the main sentence, i.e. confiscation, compensation, forfeiture or costs or, in offences concerning the management of a company, disqualification to act as a director or manager of a company.<sup>32</sup> As to giving the courts some additional regulatory powers of this type, the Working Group suggested the ability to close down fraudulently run businesses, freezing of assets and imposing restrictions and disqualifications similar to those under Chapters V and VI of the Financial Services Act 1986 and wider powers of ordering compensation to victims. They also recommended further consideration of an open system of plea bargaining to enable a defendant to decide on his plea knowing the full range of sanctions he faces, a recommendation that the Director of Public Prosecutions strongly supports, and not just for offences of fraud.
- 57 In my view, to the extent that financial and regulatory matters remain the concern of criminal courts, there is sense in their exercising, wherever possible, their existing powers in that respect as part of their sentencing disposal. There is also sense in extending those powers where it is desirable and practicable to do so. I also agree that they should be assisted for the purpose, but I consider that it could be done by prosecuting and defence counsel, suitably instructed. I do not see why it should be necessary for a third party, say the Department of Trade and Industry in a case prosecuted by the Serious Fraud Office, to intervene for that purpose.

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<sup>32</sup> Company Director Disqualification Act 1986, ss 1 and 2

**I recommend that:**

- **in cases of fraud and other financial offences courts should, wherever possible and appropriate, exercise their existing powers of a regulatory nature as part of their sentencing disposal;**
- **consideration should be given, in appropriate offences, to enlarging or extending the courts' conventional sentencing powers in this respect; and**
- **in the exercise of such powers courts should be assisted by counsel on behalf of the parties, properly instructed for the purpose.**

## **RESTORATIVE JUSTICE**

58 I have always been of the view that we expect too much of the courts as a medium for reducing crime, for remedying wrongs to victims and society and for rehabilitating individual offenders. By the time criminal courts have reached the point of sentence, particularly with young offenders and when custody has become an option, the offender is often well established in a criminal life style. Previous responses to his criminality have failed for one reason or another, mostly because the causes of his crime were so overwhelming as not to be capable of resolution by the limited and under-resourced forms of disposal available. It is at this late stage, or when the offence is so serious that the court must mark society's disapproval by punishment or to protect it from further harm, that the courts are called on, as a backstop, to do the best they can. Before then, there is a wide range of offences and stages of offending which call for a more sensitive and sustained attention than most courts are presently equipped to give, if reduction in crime, rehabilitation and reparation are to have a chance.

59 These are trite sentiments. But they have been given fresh impetus and expression in recent years by exponents, world-wide, of 'Restorative Justice' - in part a modern version of a familiar concept of community involvement in the administration of justice. It is not within my remit or capability to examine so large a subject and its many variations and applications,<sup>33</sup> any more than it is to consider principles of sentencing or alternatives to it. It has been described as more a philosophy than a specific model.<sup>34</sup> Charles Pollard,

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<sup>33</sup> see eg '*Restorative Justice*' *And Other New Penal Patterns*, an essay by Carolyn Hoyle on a conference at Ditchley Park, Oxfordshire, (June 2000)

<sup>34</sup> see *Restorative Justice in Yukon and Northern Canada*, Pierre Rousseau, a paper delivered at the Annual FPS Conference in Canada (September 2000)

the Chief Constable of the Thames Valley Police, a leading exponent and practitioner of the philosophy in this country, has described it as follows:<sup>35</sup>

“Restorative Justice seeks to balance the personal/local needs of victims and communities with the broader goals for society of deterring criminality, punishing crime and reintegrating offenders. Thus it is an *inclusive* process, in which *all* the parties directly affected by the offending behaviour are involved in discussing its causes and consequences, how to prevent its reoccurrence and what should happen to the offender.”

- 60 There is a vast body of contemporary literature, research and practical studies on the subject, and there are many well established versions of it world-wide. Interestingly, a number of these examples can be found in areas where indigenous people have suffered as a result of the imposition of western legal systems without common reference points.
- 61 As Charles Pollard has noted, most of the progress towards restorative justice in this country has been in the youth justice system. This has been given statutory impetus by the Crime and Disorder Act 1998, including its creations the Youth Justice Board and reparation orders, and the Youth Justice and Criminal Evidence Act 1999 enabling youth courts to make referral orders to youth panels to deal with matters on ‘restorative principles’.
- 62 My purpose in mentioning restorative justice is simply to note that it embraces diversion in many different forms at different stages of the criminal process and that those responsible for considering any of the alternatives or minimising exposure to the criminal process that I mention in this Chapter should include it in their general consideration. Any initiatives in this field should be part of an over-all and principled reform aimed at removing from the courts matters for which they are not appropriate or necessary, while leaving them, in the main, to deal with matters for which they are well suited, in particular, marking society’s disapproval and safeguarding public and private safety.
- 63 With that in mind, there seem to me to be at least six stages at which notions of restorative justice might be applied to a case as it approaches or makes its way through the criminal justice process.<sup>36</sup> I believe that general features of all or most of them are the offender’s acceptance of guilt, his informed consent to the process, his recognition of the harm he has done and desire to make reparation for it, his rehabilitation, some involvement of the community

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<sup>35</sup> in his submission in the Review; see also his article, *Victims and the Criminal Justice System: A New Vision* [2000] Crim LR pp 5 - 7

<sup>36</sup> cf Nova Scotia’s Programme for Restorative Justice (June 1998), Department of Justice, Nova Scotia

and, where there is an individual victim, the victim's willing involvement in the process. The stages are:

- before charge, in cases identified by the police and/or prosecutor in accordance with general criteria or guidelines, and subject to return to the criminal justice system if the diversionary disposal fails;<sup>37</sup>
- between charge and first appearance in court, in cases identified by the prosecutor and, again, subject to return to the criminal justice system if the diversionary disposal fails;
- at or after the first appearance in court and during the pre-trial process, in cases identified by the parties and/or the court, and with the approval of the court;
- after conviction, in cases identified in the judicial process by the parties and Probation Service and/or other social service, by referring the matter of disposal to some non-court agency or agencies and/or involved persons, possibly including a conditional withdrawal of the conviction from the record;<sup>38</sup>
- in sentencing, as a complement or alternative to traditional court disposals; and
- after sentence, in cases identified by the parties and Probation and/or Prison Services and/or social services, through a judicial process of conditional vacating of the conviction and or sentence.

64 Whilst the mechanics of, and criteria for, intervention at any of those stages are likely to be different, there might be something to be said, as part of an exercise of over-all reform in this field, to put them under the oversight or direction of a single agency or joint body.

65 There are considerations, which others will have to evaluate, of the types and level of seriousness of the offences appropriate for some form of diversion, of the cost and the efficacy of various proposals when compared with forms of disposal now available and of the attitude of defendants, victims and of the public at large. As to the offences appropriate for some form of diversion from or in the course of the normal criminal justice process, even the most enthusiastic and experienced supporters of restorative justice recognise that there are limits. There are some cases that are just so serious and/or where the public needs protection and/or those which require to be publicly aired, that they will need to go through the court process at least some of the way.<sup>39</sup> However, I note that in New Zealand restorative justice procedures are used

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<sup>37</sup> see, eg, the Thames Valley Police "restorative conference" scheme; and schemes for adults in Scotland provided by the Scottish Association for the Care and Resettlement of Offender

<sup>38</sup> eg the successful drug courts in the USA, the various forms of "circle sentencing" found in Canada, the Toronto Drug Treatment Court and the Yukon Family Court

<sup>39</sup> see *Mentally Disordered Offenders: Finding a Focus for Diversion*, p 294, Elizabeth Burney and Geoffrey Pearson, Blackwell Publishers Ltd (1995)



for serious and persistent offenders, though mainly in the youth justice system.<sup>40</sup>

66 There are three further points. The first is that restorative justice in the short term is expensive in the range and level of resources necessary to give it a chance of success. However, there is experience in Canada,<sup>41</sup> Australia, New Zealand, parts of the USA and other countries that proper investment can secure significant long-term and wide spread savings to the community in the reduction of crime.<sup>42</sup> Immediate and adequate commitment of resources by all the necessary agencies at the diversionary stage and maintenance of them thereafter is the key to successful restorative justice schemes. Lack of such immediacy and resources has blighted or impeded many initiatives already in the system. At the most basic level it has prevented the Probation Service from making more than it has of the various forms of community disposals that have been around for years. Similarly, schemes for psychiatric diversion of mentally disordered defendants, which have been set up in the last ten years or so in many magistrates' courts, are faltering for want of adequate planning, organisation and resources.<sup>43</sup> And, as is now well recognised but largely absent in the present working of the criminal justice system, such diversionary schemes are the shared responsibility of many agencies. These are not just those immediately concerned with the criminal justice process, but also other agencies vital to the success of the wide range of non-custodial responses already available and under consideration – notably those responsible for mental and physical health, housing, education and employment. There are models in the inter-agency panels in young offender cases, their strength lying in their responsibility for assessment, recommendation and implementation. I should mention in particular the recent introduction by the Youth Justice and Criminal Evidence Act 1999 of mandatory referral to a youth offender panel of all young offenders who plead guilty, unless the crime is serious enough to warrant custody or the court orders absolute discharge or a hospital order.<sup>44</sup>

67 Second, it is, in my view, important to have a machinery for symbolic and practical involvement of the courts as the representative and ultimate protector of society for this purpose, in:

- determining whether diversion from the traditional court process is appropriate;
- in protecting defendants and victims from bureaucratic oppression or insensitivity;

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<sup>40</sup> *Victims and the Criminal Justice System: A New Vision*, Charles Pollard, [2000] Crim LR pp 5 - 17

<sup>41</sup> in particular, the drugs courts in many of the major centres

<sup>42</sup> including the reduction of court sittings and closure of penal institutions

<sup>43</sup> *ibid*, pp 293, 294, 296 and 308-9; and see *Court Diversion at 10 years: can it work, does it work and has it a future?*, David James, pp 507, *Journal of Forensic Psychiatry*, Vol 10 Mp 3 (December 1999)

<sup>44</sup> now consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 and being piloted in a number of areas



- in ensuring that defendants and, where appropriate, victims are heard and that both are treated fairly;
- in monitoring and, where necessary, ensuring compliance with agreed forms of disposal;
- where there is default, in bringing the matter back to court; and
- over-all, in securing fair and proportionate outcomes.

68 The goal of fair and proportionate outcomes is important, particularly in the light of Article 6 requirements for a fair trial, given that restorative justice procedures can be a complementary part of or substitute for the criminal justice process. For example, out of court processes that may be determinative or highly influential as to outcome could be challengeable as unfair if the offender is not afforded adequate representation before or in the course of them, or access to documentation.

69 Third, it is plain that the courts, in particular, judges and magistrates – especially magistrates – will continue to have an important initiating, supervisory and fall-back enforcement role in the working of restorative justice in its developing and different forms. Some may take to it more readily than others. Most will require encouragement and training to make proper use of it. As it develops, the judiciary and magistracy should be closely consulted about it and trained in its possibilities and disciplines, as also should legal practitioners, court staff and those involved in the various criminal justice and social service agencies. Piloting of all new initiatives is obviously desirable. Care will also need to be taken to inform and persuade the public that it is a force for good, in particular crime prevention. Finally, it should be accompanied from the start by a practical and simple system of monitoring so that it can be seen whether it is such a force in all its aspects, including justice and fairness to all, reduction of crime and cost.

**I recommend the development and implementation of a national strategy to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales**

## **ENFORCEMENT OF CIVIL DEBTS**

70 I indicated at the beginning of this Chapter that council tax cases are one example of the use of the criminal courts to enforce civil debts. In addition to local authorities, the Inland Revenue and Customs and Excise are able to use proceedings in the magistrates' courts to pursue debtors. There are significant

variations in the procedures used by and the powers available to each of these bodies.

- 71 Local authorities faced with non-payment of council tax or non-domestic rates must first seek a liability order from a magistrates' court. Such summonses are issued in bulk, but only a minority of defaulters attend court. Nevertheless, many magistrates' courts devote a half day session monthly, or even fortnightly, to dealing with this work. The court is required to make a liability order if it is satisfied that the sum is payable and remains unpaid. The fact of non-payment is rarely in issue. Council tax payers have a right of appeal on a number of matters to a valuation tribunal, so there is very little of substance to be dealt with by the court at this stage. In the case of non-domestic rates the position at the liability order stage is different, since there is a much more limited right of appeal to a valuation tribunal. In such cases, magistrates may have to determine quite complicated issues, often involving large sums of money.
- 72 Once a local authority has obtained a liability order, it is entitled to take certain types of enforcement action including attachment of earnings, attachment of allowances and the distress and sale of goods. The magistrates' court is not involved in this action. If the debt remains unpaid, the local authority can seek committal, or suspended committal, of the defaulter to prison as a means of securing or encouraging payment. The court will only make such an order if it is satisfied that the non-payment is due to the defaulter's culpable neglect or wilful default and that there is no available alternative. However, the inquiry into the defaulter's means that such a process entails can be very slow, involving repeated, protracted and, often, distressing hearings for all concerned.
- 73 Unlike local authorities, the Inland Revenue has discretion whether to use summary proceedings to pursue debtors. Other options available to it are: distraint (carried out independently without the need for a warrant from a court); county court proceedings and proceedings in the High Court.<sup>45</sup> The Taxes Management Act 1970 limits summary proceedings to debts not exceeding £2,000, but the process tends to be used to recover amounts in the low hundreds. The Revenue submits complaints in bulk, prompting the issuing of summonses by the magistrates' court. If payment is not made by the hearing date, the court will grant an order for payment. For those who do not pay the sum adjudicated by the court, and where the execution of a distress warrant has not met it, the court can ultimately have the defaulter arrested and commit him for failure to comply with the order.<sup>46</sup> Though such

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<sup>45</sup> Taxes Management Act 1970, ss 61, 65 - 68

<sup>46</sup> Magistrates' Courts Act 1980, s 96

power is rarely exercised, its existence is no doubt a powerful incentive to the defaulter to pay up.

- 74 The use of summary proceedings to recover civil debts is clearly effective. Local authorities report a high response rate to the threat of court action and achieve a council tax collection rate over-all of 95.6%. Similarly, the Revenue reports that 75% of defaulters clear their debt on receipt of a warning letter or of a magistrates' court summons. There would naturally be cause for concern if any change to procedures endangered these impressive performances, not least because of the negative impact on the public purse.
- 75 Nevertheless, I am troubled by the blurring of the distinction between two very different elements of the justice system which arises as a result of the use of criminal courts to enforce civil liabilities. Indeed, some contributors have suggested that it is precisely because defaulters are unable to make this distinction that the summary enforcement of civil debts proves so effective. The stigma and fear associated with the criminal courts may well be providing an additional incentive to defaulters to clear their debt and avoid court proceedings. While recognising that a degree of confusion might have practical benefits, I do not think it appropriate that the state should seek to profit from such misunderstanding.
- 76 The enforcement of civil debts in magistrates' courts brings with it one significant practical consequence. That is the possibility of imprisonment as a sanction for non-payment. Many magistrates, and various groups concerned with the liberty of the subject, are unhappy about the former's punitive role in support of tax collection against those in society usually least able to understand or cope with their civic obligations. There are also some practical difficulties as to how magistrates may or should exercise their discretion in individual cases which has given rise to some indigestible jurisprudence. It seems to me appropriate, therefore, to question the application of a serious criminal sanction to a civil and civic wrong.
- 77 It has been suggested to me that the county courts would struggle to cope with this enforcement work. There is obvious concern that county courts would not achieve the debt recovery rates currently secured by magistrates' courts. I acknowledge that moving the work would not be a straightforward matter. Much would need to be done to iron out differences in the processes used by each agency, to align those processes with existing county court practices and to ensure that outcomes would not suffer as a result of the move. However, the fact that considerable preparation would be required, is not sufficient reason to avoid proposing long term changes that should achieve clarity and consistency in the way that all civil debts are enforced. The enforcement review currently being undertaken by the Lord Chancellor's Department should result in improvements to the consistency and effectiveness with

which debts and orders are enforced generally. In due course, it seems to me appropriate that county courts should take over responsibility for enforcing any and all civil debts. Such enforcement could be carried out by way of bulk process as is the case with many of the high volume creditors who currently make use of county courts.

**I recommend that preparatory work should be undertaken with a view to the removal, in due course, of all civil debt enforcement from courts exercising a criminal jurisdiction.**