

Criminal Justice Alliance

Response to the Ministry of Justice Consultation 'Swift and Sure Justice' August 2012

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About the Criminal Justice Alliance

The Criminal Justice Alliance (CJA) is a coalition of 67 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system.¹ The Criminal Justice Alliance works to establish a fairer and more effective criminal justice system.

Introduction

Minimising unnecessary and undue delays within the criminal justice system is something the Criminal Justice Alliance welcomes. Uncertainty around timings and court appearances alongside unnecessarily protracted cases can lead to increased expense, stress for victims and witnesses and cause anxiety and insecurity for offenders and their families and dependents. In particular, this can be an extremely seriously worrying issue for female offenders who are very often the sole carers of children².

We believe that speeding up the court process, with appropriate safeguards in place, could bring about positive results for victims and witnesses. For offenders, it can reduce the length of time before they can access positive interventions, such as drug treatment orders or mental health services, minimise disruption to their lives and better link the punishment they receive to the crime they have committed.

We accept that it has the potential to build confidence among the public and victims by demonstrating an ability to efficiently deal with crime in a timely manner and generally improve attitudes of fairness.

However, the desire to increase the speed of the criminal justice system and court process should not be at the expense of justice itself within the court procedure. We set out our key concerns below.

Vulnerable defendants

Although we are generally supportive of the plans to reduce delays in the court process we are concerned that there appears to be the suggestion within the White Paper that simply because cases are straightforward in terms of the offence committed and decision of culpability they can and should be dealt with swiftly. Too often such instances involve very vulnerable individuals with multiple and complex needs.

It requires time to appropriately deal with these people within the courts; to gather the right background information about them, adequately assess their vulnerabilities and communicate with them in a manner that allows them to understand and engage with the court process. The drive towards increased speed should not impinge upon this. We are concerned that the Government's proposals do not do enough to ensure this will be achieved through adequate safeguards.

¹ Although the CJA works closely with its members, this consultation response should not be seen to represent the views or policy positions of each individual member organisation.

² For example, only 9% of children whose mothers are in prison are cared for by their partner whilst they are in prison.

There is the very real concern that these proposals will reduce the ability of courts and criminal justice agencies to identify and assess vulnerabilities at the earliest, and most appropriate, point of contact with the criminal justice system. This inevitably has an adverse affect on the ability of courts to hand down effective and proportionate sentences that minimise the prospect of future re-offending.

The proposals throughout the Swift and Sure Justice White Paper are aimed almost exclusively at low level offences. The majority of individuals involved in such criminal behaviour will receive non-custodial sanctions, such as a fine or community sentence, and will most likely be placed under the supervision of probation. Probation services are about to go through significant changes and are at present under a large amount of pressure to meet case loads with reduced resources. Increased pressure on the courts to speed up processes will have a very real effect on probation's ability to provide the most accurate and up to date information on offenders to those who require it most.

For example, it will have a direct impact on their ability to produce pre-sentence reports, which decreased by four per cent last year, something which we feel is a very worrying development³. Pre-sentence reports have proven to reduce the expensive use of remand⁴ and generally assist sentencers in issuing effective sentences. Probation services have attempted to increase the speed of preparing pre-sentence reports through the use of swifter fast delivery pre-sentence reports which can be made orally. However, there is a risk that these reports are being used too often, even when a standard report is explicitly requested, as probation resources are restrained. The inevitable consequence has been reduced opportunities to identify need, and courts being provided with less detailed information on which to make a judgement⁵.

Finally, with the potential for courts to be opened for extended periods and on weekends offenders could increasingly arrive at prisons at unexpected "out of hours" times. This could have an adverse impact on prisoners accessing appropriate assessment on arrival and undermine the identification of needs. We know that prisoners are most vulnerable in the early days of custody. Prisons should mitigate risks through effective reception, first night and induction procedures. We are concerned any extension of court sittings will impact on this, and that the White Paper does not take sufficient account of impact of proposals on both probation and prisons.

Liaison and Diversion

Over the last few years the Government has made significant and welcome commitments to improve the number and standard of liaison and diversion services across England and Wales. Most recently, Minister of State, Paul Burstow MP, stated that there will be the very welcome investment of £19.4 million for 2012-13.

Liaison and diversion services play a vital role in ensuring individuals with mental health problems are better identified promptly, and, where appropriate, diverted into more effective community services, ultimately improving public protection and safety. This work has the backing of a vast number of organisations co-ordinated by the Care not Custody coalition, founded by the Women's Institute and the Prison Reform Trust.

³ For example, there is a drive towards issuing more and more electronic monitoring measures but fewer and fewer cases involving these are receiving pre-sentence reports, there has been a reduction from near 80% to below 30%.

⁴ Ministry of Justice. Offender Management Statistics Quarterly Bulletin January to March 2012, England and Wales <http://www.justice.gov.uk/downloads/statistics/prison-probation/omsq/omsq-g1-2012.pdf>

⁵ Anderson, S. (2012) Big Diversion Project Current State Analysis of Diversion Services in the North East Region - Final Report. Revolving Doors Agency.

There is a concern that much of the good work that has been achieved by the roll out of liaison and diversion services could be partially undone in the pursuit of speedy justice as criminal justice agents are pressurised by time to bypass offenders from liaison and diversion. A swifter process could hinder attempts to build links with appropriate support agencies including healthcare, housing and employment, as well as missed opportunities for screening and assessment.

It is therefore essential the necessary safeguards are put in place so that this cannot happen. Similarly, we expect that where video link is rolled out across England and Wales it takes into account the location of local liaison and diversions services and ensures that offenders are not in any way circumvented from them.

More generally, attempts to speed up the justice system can impact on the ability to ensure that people with vulnerabilities such as mental health issues, communication and learning difficulties are able to understand and actively engage in the trial process. Excellent work that organisations such as Raising Your Game, a member of the CJA, are doing to attempt to improve the ability of individuals with these issues to understand the court process could be jeopardised as the pressure to get through cases in the timeliest fashion becomes the overriding priority.

The ability to screen and identify prior to sentence for mental health illnesses and other vulnerabilities will inevitably worsen under increased time constraints. At present, the research available suggests that a large number of individuals who are subject to the supervision of probation have unidentified mental health issues; 67% of those with current psychotic disorders and 79% of offenders with personality disorders are not recorded as having such in probation reports. Unless specific safeguards are put in place, this position will deteriorate.

Trying to speed up the court system too rapidly, without taking seriously into account the role of the probation service and other non-criminal justice agencies will simply lead to more instances of missing more and more vulnerabilities

Single magistrates

The CJA has deep concerns about the prospect of having single lay magistrates appearing in police stations and sentencing individuals, even were they are non-contested cases and the offences for which they have been charged are of a very minor nature.

The White Paper states that the offences intended to be covered are often “more relevant to community concerns and might benefit from a localised approach”. We believe that if such a desire exists than it would be more appropriate to deal with these cases through newly formed neighbourhood justice panels rather than single magistrates. It does not appear that having an individual magistrate as opposed to three would be a more localised approach, in fact such a proposal would seem to be the opposite, as three individuals is surely more representative of the locality when compared to one.

The Magistrates’ Association themselves have expressed their concerns over the proposal, with John Fassensfelt expressly stating that being placed in a police station could have an impact on their judicial independence⁶. We would reiterate this concern. Magistrates should not operate out of police stations; it could negatively impact on the perceptions of fairness directed towards magistrates within communities and reduce respect for them.

Magistrates themselves see the fact they sit in benches of three as one their greatest qualities. It is thought that this arrangement leads to better sentencing as more reasoned

⁶ <http://www.bbc.co.uk/news/uk-18823643>

discussion takes place. There are fears, which we echo, that much will be undone by instigating a situation whereby they sit and sentence singularly. There is a significant risk that less appropriate sentences could be handed down, impacting on public perceptions of fairness, proportionality and leading to increased costs.

It will be very difficult to adopt an effective case filter that guarantees proportionality across local areas. Creating an exhaustive list of offences will be far from easy, as will determining to what extent to take prior convictions into account. As a result there is a risk that a large number of cases could be processed through this new procedure when in fact they should have been sent to the magistrates' court. The threat of this process incrementally applying to more and more serious and complex cases, simply because of the fact they are uncontested is a real concern.

Finally, there is the general concern that police officers would choose to send more cases to single magistrates than they do at present to the local magistrates' court simply because it is seen as a simpler and quicker process. This could lead to net-widening and up-tariffing, with serious immediate and future cost implications.

The Government has stated that they are at a very early stage of developing this proposal. We would like to see further research about the potential impact this proposal would have on offenders, victims and witnesses, something the government has committed to do, and would not wish to see any major developments without this.

Neighbourhood Justice Panels

The CJA welcomes and supports the creation and formation Neighbourhood Justice Panels (NJPs). They can help engage communities within the criminal justice system and assist in introducing restorative mediation into communities.

We are hopeful that the introduction of these panels will be a valuable mechanism for developing a strong element of community justice. If implemented in the right manner they could provide an excellent way of introducing a sense of community responsibility for criminal justice within a locality, and empowering people to undertake positive work to prevent and reduce crime, in particular restorative justice.

In many circumstances these panels could present a more positive alternative to addressing some offending behaviour than the formal criminal justice system. This has the real possibility of improving public attitudes towards the police criminal justice system as a whole while drawing communities closer and repairing existing divides.

However, the accompanying impact assessment suggests that NJPs will deal exclusively with cases that police themselves would not have dealt with or else would have used an out of court caution. This brings the potential to net widen and up-tariff substantially, adding significant cost to local authorities' budgets. In many of these instances there is a serious case to be made that they would be better dealt with through non criminal justice mechanisms that can better address the causes of the offending behaviour.

The CJA agrees with the statement that "tackling problems at an early stage before it becomes so serious that it results in a criminal record is particularly important for young people". It is understood that these panels will attempt to avoid criminalising individuals, especially young people. Where police would otherwise have dealt with them formally this will be the case and is a progressive development. The CJA does not believe this will always be the case and it must be remembered that despite positive intentions, there is the risk that panels could on occasion inadvertently criminalise an individual who would

otherwise not have gone on to commit similar behaviour, with obvious negative implications such as stigmatisation and labelling.

It is important that the neighbourhood panels are made up of a broad range of community representatives. Without such they will struggle to develop a sufficient degree of legitimacy within the eyes of the local population. We do not wish them to become dominated by local magistrates, as they are intended to provide a different function and to be more reflective of the local community. We welcome the acknowledgement in the impact assessment that getting representative groups from deprived areas will be difficult and that there is a risk that they become inaccessible to certain groups.

We greatly value the emphasis that these panels place on restorative justice and the role they could play in improving public awareness. However, it is of extreme importance that those who deliver this do so to a high level, with the requisite training. Restorative justice is an extremely positive process, so long as it is done by properly trained individuals. Restorative justice done poorly through untrained facilitators can have negative effects on individual victims and offenders. Furthermore, these panels will need to gain a substantial degree of victim participation which is vital for the success and potential expansion of the programme.

It is vital that these panels aren't seen simply as a way of processing individuals faster. This will undermine their legitimacy and prevent them from creating a positive identity within communities while potentially seriously harming the reputation of restorative justice⁷.

Out of court disposals

Over the past year the Minister, Nick Herbert, has repeatedly stated his unhappiness with the existing position of out of court disposals within the criminal justice system. He continually expressed his belief that too many serious and prolific offenders were receiving them, the differing levels of use between force areas was unacceptable, they had developed in a piecemeal fashion without any framework or supervision and in general too many were handed out. These sentiments are echoed in the White Paper.

However, there is the acknowledgement, which the CJA believes needs to be highlighted further, in the document and the accompanying Impact Assessment that the majority of out-of-court sanctions are administered appropriately, there is not widespread misuse of these sanctions and broadly they provide an effective deterrent to crime. We welcome this measured approach that recognises the importance of these disposals.

A Joint Inspection report on discretion⁸ has shown there is a large variance in the use of out-of-court disposals across areas. We share the sentiment that "It is not possible or desirable to strive for consistency at the expense of local discretion - but wide variations in practice may lead to a perception, real or imagined, of unfairness".

We accept that there are some instances whereby individuals who have repeatedly been involved in criminal activity or have committed a relatively serious may inappropriately receive such a sanction⁹. However, there is also a proportion of individuals who receive

⁷ Clamp, K., and Paterson, C. (2011) Rebalancing Criminal Justice: Potentials and Pitfalls for Community Neighbourhood Panels, *British Journal of Community Justice*, 9(2): 21 – 35.

⁸ Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate. (2011) *Exercising Discretion: The Gateway to Justice* <http://www.hmic.gov.uk/media/exercising-discretion-the-gateway-to-justice-20110609.pdf>

⁹ Policy Exchange. (2012) *Proceed with Caution: Use of Out-of-Court Disposals in England & Wales*

out-of-court sanctions who should not be the recipients of any form of criminal justice disposal, and in the past would not have received one.

For this reason we welcome initiatives such as that put in place in Hampshire. It gives a better overview of the orders within local area whilst allowing for a degree of supervision which is not overly restrictive. Where supervisory boards are established we would like to see broad representation of all relevant local criminal and non criminal organisations. We believe magistrates will have an important role to play on such boards or panels but do not wish them to come to dominate the bodies. We believe this model lends itself to minimising the disruption to an individual officers' discretion to the least amount possible.

The CJA agrees with the Government's suggestion that the issue of out-of-court disposals is one that incoming Police and Crime Commissioners should have a serious interest in, but believe it shouldn't be left entirely to PCCs to ensure the benefits of these sanctions are highlighted; national government have a role to play here as well. For example the level of victim satisfaction with conditional cautions found by the joint inspection report was very high.

Additionally these disposals are low cost when compared to alternatives. Introducing overarching changes without the necessary research and evidence could reduce the use of out of court sanctions. This would affect the number of court sanctions, having immediate cost implications in terms of court time and staffing hours as well as downstream in terms of re-offending and custodial sentences, especially if the trend towards increasing the use of district court judges is continued¹⁰.

The development of the Justice Test may help to develop a degree of consistency over these orders and provide a degree of direction for police officers in certain circumstance were they are presently uncertain. We are supportive of the idea that the police and Crown Prosecution Service (CPS) will have a large degree of influence and say over its final form. The development of this test is to be welcomed so long as it remains un-bureaucratic and the factors it sets out that police should take into account is non exhaustive.

The acknowledgement in the impact assessment that these proposals are being implemented to improve decision making and the effective use of the disposals is very much welcome, along with the fact it is explicitly stated that it is hoped it won't impact on individual officers' discretion. We will follow closely the process of how the test develops and hopes that there is real engagement and direction from police officers and the CPS.

Magistrates' threshold

The proposal to produce a threshold below which magistrates cannot send cases up to the crown court is a concern to the CJA. However, we welcome the express provision that the right of an offender to elect a trial by jury will not in any way be impaired. Several commentators expressed a belief that such would be the case and we are grateful the government has committed to protecting such a fundamental right.

The justification behind introducing some form of threshold would appear to be that there is unnecessary cost involved with sending specific cases up to the Crown Court and that there has been a significant increase in this over recent years. This fails to take into account the fact that there has been a downward trend in this regard since 2010, with a

¹⁰ Morgan, R. and Russell, N. (2000) The judiciary in the magistrates' courts.

6% decrease in 2011 and a 14% decrease in the first quarter of this year compared to the same period last year¹¹. The fact is that magistrates are retaining trials in their jurisdiction more often¹².

Of serious concern is the potential to create a situation whereby a magistrate believes they should send a case up but are unable to and will, as a result, impose the maximum sentence available to them of 6 months, whereas if it had been sent up a more reasonable sentence would have been passed. The impact assessment makes reference to the potential of this proposal leading to greater use of custody although stating there is no evidence that such will happen. We strongly recommend further analysis and research carried out on the impact of this proposal before it progresses further.

Additionally, we do not want to create a system whereby judges do not feel they can issue a sentence less than 6 months to an individual where the magistrate has sent the case up, despite being minded to do so. This is the potential message that could be sent out and although there is of course the safeguard of judicial independence, judges still could be influenced by such. This would be a regressive and costly backward step in our view.

The suggested method of some form of financial model based on the cost of goods stolen may be possible for certain offences but would be almost impossible for others, therefore bring about questions over the issue of proportionality.

We are concerned that having put a threshold in place for certain cases or offences, such as theft and handling, there may be a desire to increase the sentencing powers available to magistrates so that in future further cases are kept out of the more expensive Crown Court. This is something the CJA believes is unjustified and unwarranted; we would expressly warn against this as it could have significant cost implications for the criminal justice system and lead to a disproportionate and less fair justice system.

There is an acknowledgement in the impact assessment that any likely effect of this proposal would be on a small number of cases. We therefore question the value of implementing the proposal.

Increasing Police Prosecution Powers

The CJA accepts that increasing police powers to decide on charging decisions in certain offences frees up time for both the CPS and police officers. Proposals to allow them to do so for minor traffic offences would therefore seem appropriate.

However, we do not wish to see the police increasing powers to decide charge in more serious cases. There is a risk that if the proposal was extended too far individual police officers would find it difficult to understand the complexities around deciding to prosecute and could lead to specific teams developing for the role when such would be more appropriately left to the CPS.

In order to extend such to other offences would in our opinion require further evidence and research. We are extremely interested in seeing the outcomes of the pilot around shoplifting cases where a not guilty plea is anticipated and welcome express statements

¹¹Ministry of Justice. (2012) Judicial and court statistic, 2011.

<http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>. Ministry of Justice. (2012) Court statistics quarterly January to March 2012.

¹² At present there are still a large and increasing number of cases that are being sent up for sentencing, something these proposals will not affect, suggesting magistrates are retaining greater numbers of cases within their jurisdiction.

that this will be closely evaluated. This will help inform development of this policy to other offences and should be used to influence the decision taken on any possible expansion.

Impact on young adults

Young adulthood is a very important time in an individual's life as they leave full time education and transition from youth to adult services, a period that can be very stressful and traumatic.

Young adults are the group most likely to be involved in the low level criminal and antisocial behaviour that this document is primarily directed towards. However, they are also the group most likely to desist from crime. It is therefore extremely important that the most appropriate sanction and procedure is chosen to address any offending they are involved in, one that will best guarantee future desistance and limit the risk of exasperating the behaviour. Great care should be taken by all criminal justice agencies here as the repercussions of making the wrong decision can have such profound negative consequences for the individual's life and also for local communities and services.

We welcome the suggestion that tackling problems at an early stage before it becomes so serious that it results in a criminal record is particularly important for young people. We hope that the Government views young adults as part of this group. Unnecessarily criminalising them will have a negative effect on their probability of re-offending. Therefore the use of out-of-court disposals is very important, where appropriate, to limit the negative effect of labelling and reduce the negative impact on their future prospects.

Where it is felt necessary to bring young adults to court it is imperative there is enough time to assess their vulnerabilities and to be able to take into consideration important factors such as the maturity of the individual. The increasing desire to speed people through the courts will jeopardise the ability to do such. It could lead to poor sentences that do little to protect community safety and are more costly as it increases the likelihood of the individual re-appearing in court.

Impact on Women

There is insufficient thought given in the White Paper to the potential impact on women in the justice system. Women offenders are more likely to commit low level, non-violent offences, but to be drawn into the justice system due to repeat low level offending despite posing no risk to the public.

Women in the justice system have different life experiences, characteristics and needs. As the Corston Report documented, a significant proportion of women offenders have experienced domestic violence and sexual abuse - up to 50% of women in prison report having experienced violence at home compared with a quarter of men, and one in three women in prison have suffered sexual abuse compared with just under one in ten men¹³.

Drug addiction plays a huge part in all offending and this is disproportionately the case with women, with around 70% of women coming into custody requiring clinical detoxification compared with 50% of men; mental health problems are far more prevalent among women in prison than in the male prison population - outside prison men are more likely to commit suicide than women but the position is reversed inside prison, and

¹³ Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system*, London: Home Office.

although women make up about 5% of the prison population, over 50% of the recorded incidents of self-harm take place in the female estate.

Finally, women offenders are far more likely than men to be primary carers of young children, which means any changes to out-of-court disposals will have a disproportionate impact on women and their families.