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SOCIETY OF CONSERVATIVE LAWYERS

**A FRESH  
START ON  
SENTENCING**

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## A FRESH START ON SENTENCING

### PREFACE

On the 3rd March this year the Conservative Party published its Security Agenda Green Paper No 4, “Prisons With a Purpose: Our Sentencing and Rehabilitation Revolution to Break the Cycle of Crime”. Containing much fresh thinking on the best way in which to tackle the problems of increasing crime coupled with prisons which are manifestly overcrowded, the Green Paper recognises that the Labour Government will leave Britain with a disastrous legacy on the sentencing of offenders. Today, the sentencing regime welters under the weight of unnecessarily complicated legislation, as the Labour Government responds to each crisis in the criminal justice system with new sentencing legislation on an almost annual basis. Judicial discretion has been sacrificed upon the altar of fixed-term sentences, there is no transparency in sentencing, and in so far as there has been any attempt to tackle the problems of drug-related crime and sexual offending, the measures have proved to be a dismal failure.

In this pamphlet John Riley, an experienced barrister with extensive experience prosecuting and defending serious criminal cases, excoriates the Labour Government for its sentencing blunders. He discusses a range of high level proposals for restoring public confidence in sentencing policy and identifies a better way forward, especially where drug related, knife crime and sexual offending is involved. John Riley’s proposals are not intended to represent a statement of Conservative Party policies, and it is possible that not all Conservative Party members will agree with his suggestions. But the ideas discussed in this pamphlet reflect the careful thinking of a Conservative minded lawyer with considerable experience at the coalface of the criminal justice system. With its focus on the importance of encouraging offenders to develop a sense of personal responsibility, John Riley’s proposals represent a valuable contribution to the sentencing debate.

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# A FRESH START ON SENTENCING

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## Introduction

The Criminal Justice Act 2003 (CJA 2003) sentencing provisions achieved a high watermark in complexity and confusion in criminal justice legislation. Since 1997 the avalanche of new legislation from government has been relentless with ever more ill thought through reactive statutes appearing, each seemingly trying to out do the last in an awful type of legislative “Mr Universe” be-muscled body building competition. The resulting confusion has driven even the best legal minds to utter exclamations of despair. After two years of experience of the CJA 2003 there is still confusion and uncertainty as to how to apply these almost impenetrable provisions. The Court of Appeal, often in sentencing judgements, has to note that particular provisions or further new provisions have been overlooked.

An additional problem in recent times has been the failure of legislators to review the effects of their own work as they pile on the agony without reference to what has gone on before. As a senior judge pointed out in a leading case (Lang, 2005), in order to qualify for one of the new sentences, (imprisonment for public protection, life sentence or extended sentence), the offender must have been convicted of a “specified offence”. There are 153 categories of violent or sexual offences listed in Parts 1 or 2 of Schedule 15 of the CJA 2003, and offences contrary to the Sexual Offences Act 1956 are included in the list. However, the Sexual Offences Act 1956 was repealed on the 1st May 2004 when the new Sexual Offences Act 2003 came into force. Accordingly, none of the new sentences under the CJA 2003 can be imposed in relation to any of the offences still coming before the courts committed at a time when the Sexual Offences Act 1956 remained in force.

If the sentencing problems are bewildering to practitioners, then the likelihood of the public understanding the sentencing process is very slim. Sentences may appear light or harsh depending on the view to be taken by the individual. Surveys suggest that while the public think that custodial sentences are rarely handed down with enough vigour and length, the reality is that, taken as a proportion of the UK’s population, more custodial sentences are imposed by the criminal courts on adult males than in any of our European counterparts. Custody should be the last resort in sentencing, yet too often the sentencer is driven by uncertain, unclear and indecipherable sentencing policy as transmitted by legislation into ever more draconian custodial sentences whose effects in terms of reform of the individual are limited. Resources, both financial and practical, for rehabilitation have been so reduced as to be ineffectual. Too little thought has been given to a

consolidated sentencing framework in this area, linked to the work of the Sentencing Guidelines Council and the Sentencing Advisory Panel.

In this paper, the argument is made out for clear sentencing, delivered from a judiciary that is trusted to do the job. Defendants must be required to take personal responsibility for their actions.

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## **Consolidated Sentencing Framework Document**

Above all, a consolidated sentencing framework document is needed. The framework document should be set out in a statute and needs to cover all aspects of sentencing, with clear references to the overriding sentencing principles for the application of custodial and non-custodial sentences as well as ancillary orders. Creating a single framework document will have the advantage of simplifying the understanding of sentencing policy and its practical application.

Sentencing principles should focus on punishment, rehabilitation and restoration. Victims and members of the public in general, must be able to understand the sentence imposed and regard it as appropriate in all the circumstances. Society's expectations must be managed realistically. Whilst superficially attractive, a "lock them up and throw away the key" attitude gives no more than the short term "feel good" effect of temporarily removing the problem. It does not tackle the greater and more important issues of rehabilitation and restoration.

Judicial discretion in sentencing needs to be restored. Successive Labour Home Secretaries have quarrelled with the senior judiciary on important policy issues following decisions that have not been favourable to the Government's interests. This insidious attempt at politicising the judiciary by expecting them to kowtow to government must be abandoned. Sentencing needs to reflect the circumstances of an individual case and cannot be formulaic, since this merely creates unfairness to the defendant, the victim and the general public. A sentence that is too severe by reason of legislative drive only to be overturned on appeal is of little comfort to any of those involved in the process.

It is sensible for judges to have more control over the progress of a sentence once imposed with the power to vary a sentence if a defendant is clearly responding well. Case management powers should be extended to post-sentence behaviour in keeping with the societal restorative theme.

## **Custodial Sentences – Whole Sentences**

Experience suggests that there must be a custodial threshold test of seriousness taking into account all the facts of the case. This is not to say that a defendant's personal circumstances should not also be taken into account. Imposing custodial sentences only on the basis of the offence is unproductive unless account is taken of the offender's personal mitigation and any aspect of the offence(s) that make it less serious than other offences of its type.

There will be cases where a defendant is responsive to rehabilitation in a non-custodial setting or with some form of reminder acting as a warning as to his future behaviour. But where a custodial sentence (a whole sentence) is imposed, there should be no issue of the defendant serving half or two thirds of the sentence. If a judge deems the offence sufficiently serious to merit custody after taking into account all relevant matters, the defendant should, ordinarily, serve the totality of the sentence that the judge imposes, subject, of course, to the introduction of new powers which would permit a judge to reduce the sentence after imposition where a defendant is genuinely contrite and responding well to his punishment.

In addition to setting the term of a custodial sentence to be served, the judge should also set a term of licence to be served at his discretion. The licence would be kept under continuing review at post-sentence court hearings. Under this proposal it is possible that the licence term could exceed the term served where the probation service form the view that an offender needs more supervision. Equally, there will be cases where an offender is not in need of so much supervision. During the licence period conditions could be imposed. Breach of a licence condition would be punishable by an additional period of custody.

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## **Remission of Sentence**

Where an offender is sentenced to a term of imprisonment, he may become liable for early release subject to him meeting certain conditions and behaviour attainments as specified in the consolidated framework sentencing document. If any part of a sentence is to be remitted, the offender must be brought back to court for the sentencing judge to hear a report about the offender and publicly approve of the remission by applying the recommendation to that effect. Remission of any part of a custodial sentence must be regarded as an earned privilege and not a right. As a general rule, remission ought to follow the constructive application by the offender on fully funded and staffed programmes concerning a range of social, behavioural, educational and work related skills. The provision of a proper structure of skills attainment in custody is central to any reconfiguration of the custodial sentencing regime. Releasing offenders who are better prepared for

life provides an obvious dividend to the public at large. The probation service with enhanced powers and resources should be responsible for overseeing remission qualification.

Where an offender seeks early release, he should apply to attend an acquired skills programme. A form of contract will be established between the offender and the acquired skills programme. On completing the programme a sentence review board may recommend to the sentencing judge that part of the custodial sentence should be remitted. The sentencing judge should be afforded a range of additional conditions that may be imposed to achieve compliance with the new non-custodial element of the sentence. These conditions should include continued attendance at workshop training sessions and any other programme necessary for the defendant's rehabilitation. The probation service would enjoy a greatly enhanced role in the assessment and management of offenders when making post-trial assessments for sentencing judges.

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## **Suspended Sentences**

Judges should not be fettered by legislative formula which, notwithstanding any other feature of the case, would drive them without discretion to impose lengthy and unnecessary custodial sentences. Judicial discretion must be restored; the ability to wholly suspend a custodial sentence needs to be re-introduced. Suspended sentences are not soft options to custodial sentences. Experience suggests that many defendants benefit from a significant degree of external control or warning coupled with restorative work in the community. Custodial sentences should be capable of being suspended for a maximum of 5 years imprisonment over a maximum period of five years.

The “societal” return for greater judicial discretion in custodial sentencing is the expectation that the judiciary will explain and give reasons for the sentences they impose so that the public may see the process being operated clearly. Whilst many judges already explain sentences as part of their sentencing remarks, this needs to become a mandatory requirement set out in the consolidated sentencing framework document.

Greater use of suspended custodial sentences will have the effect of reducing the prison population, keeping the offender under threat of the imposition of a custodial sentence. At the same time suspended sentences will require the offender to enter into a work based or other Restorative Element Contract (REC) with the court and probation service. The REC is a contract which will be set out and signed by the offender in court at sentence. There will be a range of conditions attached one of which will be a commitment to undertake an educational element which will have obvious benefits. The commitment to undertake work or other projects may be linked to the offence and must have a restorative element to it as well as a service element to the community and where

possible a rehabilitative element for the offender. Projects and schemes to supply such work could be funded and provided in part by the private sector.

An offender's progress whilst subject to a suspended sentence will be monitored by the court via the probation service with review periods fixed by the sentencing court to assess progress. An offender will be at risk of custody if the court concludes that the aims of suspending the sentence are not being met, especially in terms of the offender's attitude and application to the work based elements of his sentence. Again, this provision satisfies our overall policy objectives of punishment, rehabilitation and restitution, which in turn impacts positively on public confidence, addresses crime levels by heavily diverting offenders away from crime and towards productive and long term educational, training, work or other activities.

Where a wholly suspended sentence of imprisonment is not considered appropriate, the courts should also be afforded the opportunity of imposing a partly suspended sentence order. Such sentences would run for a maximum of 3 years in total. The first part of the sentence would be served, with the balance suspended to permit the offender to engage in work based projects for the community.

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## **Knife Crime**

In the past eighteen months to two years there has been a significant surge in the number of assaults where a knife has been used to cause injury or death. The majority of these offences have been committed by young males, often on other young males.

There is no offence in law called knife crime. At the present time there are essentially three specific "blade" offences that include knives and deal with carrying a blade in public, having the same in a school and having an offensive weapon in public; many types of knife qualify under that definition.

The current "carrying" or "having" offences and the offensive weapon offence should be combined into a single knife offence which increases the maximum sentence to 10 years imprisonment as some knives (such as butterfly and flick knives) are plainly designed for the infliction of serious injury or death. Gang membership or circumstances which indicate an intention to use a knife for purposes other than deterrence or personal protection should trigger a minimum sentence imposition of two years imprisonment.

What is more, in serious assault offences the use of a knife or other blade should be regarded as a separate criminal offence with a consecutive sentence imposed.

# Drugs and Sexual Offending

Notwithstanding the vast amount of work done in the drug offending area in particular, these two offending sectors contribute to the most destructive aspects of criminal behaviour.

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## Drugs

At the heart of many criminal offences lies the taking and use of illicit drugs. Consistent attacks on drug crime by various criminal justice methods seem to the public at least to have little effect. There are a range of calls from different quarters as to how to deal with the problem, ranging from legalising all currently unlawful substances to heavy sentences for all possession and use of drugs. Focusing on the fundamental principles to be included in a consolidated sentencing framework document, there is one aspect of drug policy which needs to be the pivot around which drug sentencing policy revolves.

A network of fully staffed residential drug treatment centres needs to be established, possibly using some of the current prison estate especially where existing old prison buildings are superseded by new establishments and use can be made of these old buildings. Many offenders do not have the motivation to come off drugs and the drug life style; they need the support and intensive care of regimented residential units which help the offender to develop a level of personal responsibility which will enable them to “kick” the drug habit. There are experts working in the field who would be able to construct programmes for those most able to take advantage of a period spent in a residential drug treatment centre. An offender convicted of a drug offence or drug related offence may be assessed for compulsory residence at a drug treatment centre as an alternative to the imposition of a custodial sentence.

To facilitate the assessment and processing of suitable offenders, all drug offences must be processed through specialist drug offence courts which would be judicially staffed by specially trained District and Crown Court Judges, extending the currently piloted magistrates “drugs courts”. Specialist Crown Court Judges could sit on certain days in specialist drugs courts (which would not necessarily need to be located in a separate building). Inevitably there will be some offenders who do not want treatment or for whom treatment is unworkable but experience suggests that many offenders want to rid themselves of their addiction. The development of a large cadre of residential drug treatment centres would be the core sentence option; these centres would provide a support network of supervised accommodation and programme activity. Hitherto, the Labour Government’s sentencing policy has resulted in the release of vulnerable people back into the community after spending a period of time in custody without providing them with the wherewithal to confront their problems. It is no wonder that the re-offending rates are so high.

## Sexual Offending

As with drugs, responses to sexual offending have seen relatively few innovative ideas during the last ten years. Yet it is during these years that the proliferation of sexual material on the internet especially involving indecent images of children has created large numbers of new sexual offenders. In some instances there is an element of curiosity rather than offenders necessarily being sexual predators, and although on occasions there may be offending behavioural links between viewing images and contact offending this is not necessarily so. Some contact offenders will not necessarily have viewed indecent material; equally by no means all offenders who view such material will progress to commit a contact offence against a child or an adult. What is clear, however, is that a new radical approach to certain types of sexual offending especially concerning children is required. The public is rightly disturbed when sexual offending relates to a child and in some cases lengthy custodial sentences are unquestionably needed for the protection of the public or to punish particularly abhorrent behaviour within this class of offending. But there is a balance to be struck. The public need to understand that in some cases there is merit in seeking to treat some offenders where they may be susceptible to treatment and rehabilitation as an alternative option to the imposition of a custodial sentence.

There is at present very little provision of residential treatment centres for sex offenders. As with those committing drug offences and drug related offences, there is a strong case to be advanced in favour of converting a number of former prisons into specialist sexual offender residential treatment centres. Indeed, with imaginative design it may be possible to utilise the same accommodation for both drugs and sex offending treatment since the centres would share a common aim and purpose. In addition, other secure accommodation needs to be reviewed for the purposes of introducing residential sexual offender treatment programmes. There are many sex offender projects in the community which could be adapted for secure residential schemes with the express aim of compulsorily providing treatment. A sentence relating to a term of treatment in such a centre would be a direct and effective alternative to custody where full and detailed reports had been obtained in the first instance giving the sentencing judge the option of a non-custodial but publicly acceptable alternative.

## Conclusions

A fresh start on sentencing is needed to tackle the increasing levels of criminality witnessed on the streets of Britain and in the homes of its citizens. There are ten core points.

- (1) All sentencing legislation must be consolidated into one manageable “living” document called a Sentencing Framework Document.
- (2) Judicial discretion in sentencing must be restored, and sentencing judges must be afforded a central role in the making of decisions about early release during the currency of a custodial sentence which has been imposed.
- (3) Where the custody threshold has been passed and a sentence of imprisonment imposed, subject to any early release sanction by the sentencing judge at a post-sentence hearing, the whole sentence must be served.
- (4) The sentencing judge must be afforded the power to set a term of licence with or without conditions to be met at his discretion as a method of overseeing the offender and reminding him of his obligations at post-sentence court hearings.
- (5) Breaches of licence conditions will ordinarily result in the imposition of an additional custodial sentence.
- (6) Every aspect of the sentencing exercise must be reduced to writing and given to the offender and his legal representatives at the time of sentence.
- (7) A custodial sentence may be remitted in part at the discretion of the sentencing judge following recommendation by the probation service and others by the defendant demonstrating his commitment to rehabilitation.
- (8) Sentencing policy must focus on assisting offenders to develop a sense of individual personal responsibility.
- (9) Judges must be afforded discretion to suspend all custodial sentences for up to five years imprisonment, for a maximum period of five years. Judges should also be afforded power to partly suspend sentences of up to three years imprisonment.
- (10) A network of regional residential drug offending treatment centres and residential sex offending treatment centres must be developed as a compulsory alternative to the imposition of a custodial sentence. All drug offences and drug-related offences would be dealt with by specialist District Magistrates Courts and Crown Court Judges.

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