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SENTENCERS AND COMMISSIONERS: TIME FOR A NEW RELATIONSHIP?

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All change... and no change

Being invited to look again at criminal justice commissioning through a sentencer's eyes is a bit like going back to one's old school after a long gap. The last time I was invited to offer some thoughts about commissioning was back in 2006[1] when I was a probation board chair. And in this sector, that is a very long time ago: the equivalent of moving from primary school to your first job!

Since 2006 most criminal justice agencies have been through more reorganisations than you can shake several sticks at. For example, the National Offender Management Service (NOMS), the National Probation Service, Her Majesty's Courts and Tribunals Service and the Crown Prosecution Service have all had their makeovers one way or another. The Sentencing Guidelines Council has been succeeded by the Sentencing Council. Later this year we shall have the new Police and Crime Commissioners. No doubt many of you here this evening were involved in some of those changes.

Continuing the school analogy, I guess that the passage of time means we have different classrooms and different teachers. But we still have the same subjects; and it is the contrast between then and now, alongside today's challenges, that provides the focus for my comments.

Here, I should add the usual health warning: the opinions that I am about to express are entirely mine and are from a magistrate's perspective. Having said that, magistrates are part of the judicial family, so the changes and challenges that we face should be seen in that wider context also.

I should explain, too, most of my experience of criminal justice commissioning relates to community sentences, rather than to custodial ones. As magistrates, we pass more of the former than of the latter.

Commissioning – my background

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[1] *Commissioning Correctional Services - A Magistrate's Perspective*, November 2nd 2006, www.judiciary.gov.uk, speeches.

Back in 2006 commissioning was not such a strange beast to me. In my former life at the BBC my activities centred on editorial standards and public accountability. For much of the time I carried out those roles in the context of major structural change. But even before that, from the mid-eighties, there was the requirement that a certain proportion of BBC output should be commissioned from the independent sector. From the early nineties the BBC grappled with a term which is now very familiar: the internal market.

In 1996 came an even greater change: a restructuring to create a production arm, which made programmes, and a programme commissioning arm, which commissioned them, either from those in-house production departments, or from independent programme-makers. The commissioning side was my territory.

So in 2006 I was about to finish a six-year stint as a probation board chair and, therefore, I was familiar with commissioning from a commissioner's standpoint at the BBC; and from the standpoint of an organisation – a probation area - that was about to be commissioned through one of those new-fangled service level agreements, SLAs. To that mix I was able to add my experience as a sentencer, handing out sentences comprising some of the very elements that were destined to become the core of the commissioning process.

In developing my theme then I referred to the part of the judicial oath[2] that requires me to '*...do right to all manner of people...*' I said that it created a duty beyond what happens in court with one offender on one day. I said that it included doing right for victims and witnesses and for the wider community. I spoke of commissioning as an opportunity for local sentencers to engage, probably for the first time, in a process that enabled us to explain to the 2006 version of commissioners - the regional offender managers - what we felt was necessary for our sentencing arsenal.

A new centre of gravity

That was my perspective then. In 2012, I have had to consider first if I still have a perspective on commissioning. I do, of course! But my centre of gravity has changed. On a personal level I am no longer involved directly with Probation, except in the court room as a consumer of its services.

Although our inviolable commitment '*to do right to all manner of people*' remains our judicial rock, how we meet that responsibility has changed a great deal since 2006 – for the better. Magistrates' courts are now expected to deal with cases more efficiently than ever before, mainly by applying the Criminal Procedure Rules.

The requirement for Rules appears in the Courts Act 2003.[3] Most of you will know that their purpose is to draw together in one publication, a set of simple and simply expressed procedures for all criminal courts, to replace a disparate assortment of procedures that had evolved over many years.[4]

Our approach to court business now means applying the Rules to the conduct of all cases: getting early pleas; being clear from the word go about the issues to be tested at trials; doing

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[2] Promissory Oaths Act 1868 s4.
[3] Courts Act 2003 ss 69-73.
[4] *Review of the Criminal Courts of England and Wales* report, Auld LJ, October 2001, page 508, paragraph 272.

all we can to get witnesses to turn up when they are needed; sentencing[5] promptly those whom we convict by following the sentencing guidelines to assess seriousness; taking into account any victim personal statement and telling[6] defendants what the sentence is, why it has been imposed and what its effect will be.

Where we are considering passing community sentences, we work on the presumption that we shall do so following an oral or a fast delivery report. That is a major advance on our former default position, still prevalent in 2006: to adjourn for a full pre-sentence report, taking usually three weeks to prepare. In short, our aim is to take cases through the system as efficiently as possible, consistent with our commitment to do so justly – for defendants, for victims, for witnesses and for our communities.

Progress, certainly, but I am in no doubt that there is a great deal more still to do. Reducing the numbers of ineffective trials by even better case management is but one example.

Current view of commissioning

So, these days who provides the sentences that we pass or, to use the correct language, who is *commissioned* to provide them, does not create many blips on our radar. Once we have dealt with an offender, the court room door swings shut and we move on to the next case.

Generally, involvement arises again only if there is non-compliance or another problem with implementation. Or, regrettably, all too rarely, when an offender makes such fantastic progress that we are asked revoke a community order early.

From the perspective of a sentencer, sentencing is focussed primarily on using the tools we have been given - the sentences that Parliament has created and their management by or through Probation or through HMCTS[7] - rather than on being focussed on concern for where the tools come from or, indeed, how well they work.

But in truth we have always had a keen interest in the tools because it matters to me as a sentencer that the sentences my colleagues and I pass do what we intend them to do. That is because the offending they are meant to deal with damages our communities collectively and the individuals involved directly.

For example, I really do need to be confident that, with financial penalties, everything will be done to get the money in, particularly where there is compensation to victims involved. I need to be confident also that someone who is ordered to do so many hours of compulsory unpaid work does them completely, promptly and constructively; confident that those who are required to have supervision have it and that they are held vigorously to account through it; and confident, too, that offenders who are required to tackle their alcohol and drug abuse do so. As I said in 2006, that interest stems from our commitment under the oath. As I shall explain, demonstration of that interest and engagement has been variable.

However, I suggest that that interest and engagement and the need for that confidence are all the greater where services are commissioned from a wide range of different providers. Thus, a

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[5]Purposes of sentencing, Criminal Justice Act (CJA) 2003 s142: punishment; crime reduction; reform/rehabilitation; public protection; reparation.
[6] The Criminal Procedure Rules 2011 SI 2011/1709, r37.10 (9) (b).
[7] Her Majesty's Courts and Tribunals Service, created in April 2011 by merging Her Majesty's Courts Service with the Tribunals Service.

new commissioning landscape calls for a new approach. So I want to look at some of the tools that have been around for a long time and consider their potential as sources of a new impetus for improving the sentencing machine.

How Parliament sees it?

Over the years, Parliament has conveyed the message that sentencing, and all that goes with it, does not take place in isolation. There is ample evidence of Parliament's belief, as I see it, that those using the state's coercive powers are expected to be aware not only of what sentences are available and how they should be used, but a lot more besides, such as their cost and how well the work. There is an implicit assumption also that such engagement can be undertaken without compromising judicial independence. There are numerous examples.

In 1991 that year's Criminal Justice Act included a provision[8] that the Secretary of State *shall* - not may - *publish such information as he considers expedient for the purpose of persons engaged in the administration of criminal justice to become aware of the financial implications of their decisions.*

The section was amended by the 2003 Criminal Justice Act, adding further purposes: they included the requirement for information to enable us to *become aware of the effectiveness of sentences in preventing reoffending and in promoting public confidence*[9].

My inquiries suggest that no information about the financial implications or about public confidence has been published under this section. Nevertheless, it has not been repealed.

The theme pops up again in the same Act, which created the former Sentencing Guidelines Council. Included in that body's terms of reference was a duty, when producing its guidelines, to have regard to *'the cost of different sentences and their relative effectiveness in preventing re-offending*[10]*.'* Its successor, the Sentencing Council, set up under the Coroners and Justice Act 2009, has the same duty.[11] However, assessing effectiveness depends on information about the characteristics that explain offending behaviour, such as offence seriousness and aggravating and mitigating factors. But such information is not yet available.

You will be familiar with section 210 of the CJA 2003 that requires courts - or allows them - depending on their length, to review drug rehabilitation requirements, DRRs, so that they can consider offenders' progress and encourage or admonish them accordingly.

The position here is more encouraging. Section 210 reviews are routine business for magistrates' courts. In my experience they are valued by magistrates and, generally, by those who are subject to such orders. They generate face-to-face engagement between sentencer and sentenced for which there is seldom other comparable opportunity.

Regrettably, what I term the companion provision - section 178 - that enables the secretary of state to provide for reviews of *any* community order, not just DRRs, has yet to be activated beyond a long-running pilot in a handful of areas.

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[8] CJA 1991 s95.
[9] CJA 2003 s175 amends s95 CJA 1991.
[10] CJA 2003 s170 (5) (c).
[11] Coroners and Justice Act 2009 s120 (11) (e).

Section 191 allows for suspended sentence orders to include provision for a court review. But I am not aware that progress reports under this section are a routine feature of suspended sentences passed in magistrates' courts.

I'll give you a couple more examples. Over the years we have moved from magistrates being in a majority on the former probation committees; to their being well-represented, albeit in a minority, on probation boards, set up in 2001 on the creation of the National Probation Service[12]; to the current position where, on Probation Trusts, which succeeded boards, there are no magistrate members.

There was an understandable concern that the trusts' direction of travel as potential commissioners or commissionees and the commercial implications of that might compromise judicial independence if magistrates were appointed as full members.

In response to the swing from *almost all* to *none* we have a new species: Probation trust advisors. These are magistrates - up to two per trust board - who are not quite board members. They are there on a consultative basis, giving the benefit of their experience without committing themselves, or the wider judiciary, to a particular position.

I can bracket that picture with the evolution to extinction of probation liaison committees - PLCs. They were set up in 1982 as successors to case committees with the remit to '*review the work of probation officers and to perform such other duties in connection with the(ir) work...*'[13] PLCs were abolished by the Criminal Justice and Court Services Act of 2000 because, I recall, their activities across England and Wales were seen as patchy. But as a chair of a PLC I found the arrangement valuable and effective in exchanging information between probation and sentencers. It fostered our interdependent relationship without either of us encroaching on the territory of the other, or compromising judicial independence.

On the plus side, there are various arrangements locally which seek to plug the gap. We have probation forums - in effect successors to PLCS - for meetings between a small number of magistrates and their local probation trusts. Guidance for the forums, issued by the Senior Presiding Judge, lists a range of topics for discussion, couched in terms that are properly mindful of the need to maintain judicial integrity by not discussing individual cases. From time to time also, probation gives presentations to bench meetings and to area judicial forums.[14]

Nationally, we have the Sentencer and Probation Forum. As a former member I also recall that it was a useful committee and I am pleased to see that it remains in being.

Some example, then, of the machinery that shows not only Parliament's intentions, but also if, and how, those intentions have been implemented. As you can see, the picture is inconsistent. There are mechanisms for discussion, although I still think it is a pity that PLCs were abolished. I think also that there is insufficient scope for court room engagement between sentencers and offenders.

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[12] The Local Probation Boards (Appointment) Regulations 2000 SI 2000/3342 r. 5(2) '*where practicable, four of the persons appointed to the board shall be justices of the peace...*'.
[13] Criminal Justice Act 1982 Schedule 11, paragraph 6, amending Powers of Criminal Courts Act, 1973, s 4; and Probation Services Act 1993 ss 12 and 13, repealed by the Criminal Justice and Court Services Act of 2000.
[14] Typically, twice-yearly meetings of an area's senior bench, Crown court and HMCTS representatives to consider judicial matters.

The balance shifts

To add to that, the balance is shifting from almost exclusive state provision of sentences, and their management, to a landscape where the state, through probation trusts, or by other routes, may or may not be the main providers. I suggest that without new attention the engagement gap between sentencers, commissioners, sentence providers and offenders - already inconsistent - may widen. That would be a concern, I feel.

You will know that the main source of that shift in balance is the 2007 Offender Management Act. The framework of NOMS commissioning arrangements puts some flesh on the Act. Its *2012-13 discussion document*[15] defines commissioning thus,

'*The cycle of assessing the needs of courts, offenders, defendants, victims and communities then designing, securing and monitoring services to meet those needs, while making best use of total available resources.*'

The current consultation paper on probation services, expresses the government's intentions to use the 2007 Act '*...to open significantly more probation services to competition including some to aspects of offender management.*' [16]

It explains that those services include, for example, compulsory unpaid work, attendance centres, accredited programmes and activity requirements[17]. For some, probation trusts may be providers, for others they may be commissioners, and perhaps on a much larger scale than now. Moreover, some services may be commissioned on a payment by results basis, which adds a further dimension. The direction of travel is clear: a much wider pool of providers and, therefore, of close interest to sentencers; and an area where means of consultation warrant new attention.

Not only are these important developments in themselves, but also we are about to have an entirely new entrant to our sector – and a potentially major player in realising these ambitions. From November we shall have elected Police and Crime Commissioners - PCCs. I suggest that it is the '*and crime*' part of their brief[18], and the five year police and crime plans they will set out, which will be of particular importance to magistrates.

Commissioners will wish to show their electorates that they have improved the way their areas are policed and how the police and other agencies have dealt with crime. Thus, I suggest, also that to do so they will have an interest in what the courts - the entity at the end of the criminal justice chain - have done to further those aims.

Commissioners' interest here could comprise a number of strands. A typical one might be the rate of throughput of court business. That is an issue - part of a web of interdependencies - which is likely to be influenced as much by parties' propensity to seek adjournments and magistrates' propensity to manage cases robustly as it is by administrative case progression. Another might be the commissioner's interest in how effective particular sentences are in reducing reconvictions.

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[15] *NOMS Commissioning Intentions 2012-13 discussion document, version 2,* Ministry of Justice, 2012
[16] *Punishment and Reform: Effective Probation Services,* Ministry of Justice consultation paper CP7/2012, March 2012, page 14, paragraph 24.
[17] Ibid, paragraph 25.
[18] *Police and Crime Commissioners, what partners need to know,* Home Office, 2012.

Therefore, as with probation trusts, sentencers' input will be important. As with probation trust advisors, that input will have to tread the finest of lines that avoids absolutely being drawn into any political debate and potential compromise. PCCs will be elected on a manifesto. But it is a line which, nevertheless, ensures that judicial interests are comprehensively, fairly and accurately represented.

Not least among those interests from magistrates' perspective may well be about the need for, and quality of, particular commissioned services. They could include, for example, witness services, the bulk of which, from 2014,[19] may be commissioned by PCCs. How the magistracy takes account of the needs of victims, including their role as witnesses in court; the importance that magistrates attach to victim personal statements; and their demands to ensure that more are available at the point of sentencing are important issues.

That goes back to the confidence point that I made earlier. Along with commissioners, sentencers, too, need to be confident that whoever provides these and other services is up to the job. The more so if, as has been suggested, PCCs may take responsibility for probation services at some point in the future[20].

New approach to engagement

The expansion of commissioning, plus the potential for much of that commissioning to be carried out by the PCCs, suggest that, as magistrates, we need to develop a new type of engagement.

I have one or two suggestions now for how that might work, driven by the proposition that - despite our current preoccupations and for all the stops and starts over the years - there has been an unbroken theme. It is that sentencers have a necessary triple interest: as well as an interest in using sentences in court day to day, we have an interest also in their provision; and an interest in how well they work.

I have given examples of how that theme has been expressed and in doing so, I think I have identified three mechanisms:

- those which are working, such as court reviews of drug rehabilitation requirements;
- those which exist in law but have not been fully activated, such as reviews of other community orders, or the provision of information about sentence effectiveness;
- those introduced to anticipate the new environment, such as probation trust advisors.

But I think now that to maintain that triple interest we need a new mechanism to respond to the expansion of commissioning. Naturally, any future engagement must continue to be driven by a central proposition: nothing must be done that could interfere with the absolute protection of judicial independence. Or be perceived as interfering with it.

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[19] *Getting it right for victims and witnesses,* Ministry of Justice consultation paper CP3/2012, January 2012, page 12.
[20] *Punishment and Reform: Effective Probation Services,* Ministry of Justice consultation paper CP7/2012, March 2012, page 28.

On that fundamental point, I note here section 3 of the Constitutional Reform Act 2005[21], which requires everyone with a responsibility for the administration of justice to uphold judicial independence. I note, too, that the legislation[22] that establishes the PCCs describes their duty to work cooperatively with criminal justice bodies in a way that is intended to avoid[23] any suggestion that commissioners can influence decisions taken in individual cases.

Let me look now at what might be done. First, there is the issue of the publication of information under s 95 of the CJA 1991. This is a matter for ministers. Perhaps as commissioning evolves there will be a new impetus to satisfy that provision. Similarly, perhaps, too, new research into sentence effectiveness will be undertaken to assist the Sentencing Council with its duty under section 120 of the Coroners and Justice Act 2009.

That type of information would provide engagement that would add to the mental melting pot, alongside all the other considerations that magistrates bring to bear in deciding on an appropriate sentence in an individual case. I suggest that such evidence would enhance the sentencing process.

Next, I turn to the tier below: practical engagement at a level of individual cases. I am confident that it would be practicable to activate fully the provision of reviews of community requirements under s 210 and to encourage use of s191 of the CJA 2003. I see such reviews as being at the heart of this type of engagement.

Dare I suggest that any additional tasks by probation and the courts to prepare for them would be offset by improved compliance? Respondents to the *Effective Community Sentences* consultation paper[24] may wish to take up the suggestion.

And one other route for improved engagement is over the practice of giving reasons for our sentences. In my experience we are not as effective as I believe we should be, and as the Rules require, in telling those whom we sentence which aspects of their offences – aggravating and mitigating - that we have taken into account in deciding the sentence.

I turn now to the implications for magistrates of an environment where, to quote NOMS, it seeks nationally and locally to fulfil its *commitment to developing a vibrant market of diverse providers.*[25] First, let me make a brief observation about the National Sentencer Probation Forum that I mentioned earlier. It is a useful mechanism, but perhaps its terms of reference[26] merit revision to reflect the broadening of the provider base and of commissioning as the route for determining need.

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[21] Constitutional Reform Act 2005 s3, '***Guarantee of continued judicial independence*** (1) *The Lord Chancellor, other Ministers of the Crown and all with a responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence the judiciary.*'.

[22] Police Reform and Social Responsibility Act 2011 s10.

[23] *Police and Crime Commissioners: What partners need to know*. Home Office, 2012, *criminal justice duty*, page 5.

[24] *Punishment and Reform: Effective Community Sentences*, Ministry of Justice consultation paper CP8/2012, March 2012, page 21.

[25] *Commissioning Support Guidance: An Introduction to NOMS Offender Services Commissioning 2011*, page 46.

[26] Extract from National Sentencer Probation Forum terms of reference: '*The National Sentencer/Probation Forum is a high level group responsible for: promoting communication between sentencers and offender managers (while operating within the bounds of judicial independence); helping to determine need, availability and how to resolve any gap between the two...*' Ministry of Justice, April 2011.

But it I feel that it is with local commissioning wherein lies the new scope for constructive engagement between commissioners and magistrates – and, conversely, the greatest need for caution. However, this is not completely new territory for magistrates.

I am reminded of a community engagement initiative for magistrates [27] introduced in 2008 by the then Senior Presiding Judge, Lord Justice Leveson. It encourages dialogue between magistrates and the community, but makes clear that there can be no discussion of individual cases; and reminds us to remind the public that sentencing decisions are taken only on the basis of the relevant law and the facts of each case. And alongside, we also have probation trust advisors and the principles underpinning their role.

These mechanisms, along with the statutory protection that I have referred to may provide the basis for an approach on which local engagement with PCCs could be based. Plainly, this is protocol territory!

Perhaps such a protocol might look at the scope for public forums where magistrates and PCCs could discuss their perspectives before a general audience, consistent with notion of openness. Then there are court user groups. Some of you may know that there is ministerial and HMCTS support for reinvigorating user groups by widening their membership to include court users from the wider community. Perhaps, from time to time PCCs could attend these bodies, as they might attend area judicial forums. These are rather obvious suggestions, pump primers to prompt debate about how this new relationship might develop. I am sure that there are plenty more innovative, but appropriate, options.

Further dimension

There is, though, a further dimension to be considered about commissioning. One of the distinctive things about the magistracy is that it comprises people from the community that it serves. The community connections that flow from it are seen as a great strength and source of confidence. In the new commissioning environment, those connections also pose a challenge.

At present, on the odd occasions when magistrates find their links bumping into particular cases on which they had been due to adjudicate then they recuse themselves. But I wonder if an expansion of commissioned service providers – as NOMS intends[28] - particularly from the charitable and voluntary sector, will mean that such instances will become more frequent.

The very bodies that may be commissioned to provide the services that I have mentioned may also be the bodies in which community-connected magistrates have interests. These interests may be as board members, investors, staff, shareholders, trustees, and so forth. When to that mix is added the concept of payment by results, the potential for conflict - or perception of conflict – is clear.

In short, the potential for financial interests - personal or organisational – arising from commissions for court services, such as sentences, is likely to increase. So perhaps alongside a new type of engagement we should consider also the creation of a magistrates' register of interests[29], with such a register being available for inspection. You will know that members of local authorities have been required for many years to declare their interests. In a judicial

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[27] *Community Engagement, briefing document for magistrates,* Judicial Studies Board, 2008, page 3.
[28] See footnote 26
[29] Author's paper, *Magistrates and conflicts of interest,* July 2011.

context, as a member of the Criminal Procedure Rule Committee I must declare my interests, as do members of the Sentencing Council.

Establishing a national register would be a task, but perhaps the time has come to consider taking such a step as a development of the duties under the Lord Chancellor's Directions. Perhaps, also, a protocol could form the basis of a magistrates' version of the *Guide to Judicial Conduct* that has been produced for judges for many years. Such a publication would include guidance on circumstances where recusal would be necessary or, in extremis, where interests were incompatible with continued bench membership.

Those then are my reflections. They may be easy to express, but I recognise that that ease may belie many complexities. That is because they are based on assumptions, based on uncertainties. But for all this uncertainty, two things are certain. The first certainty is the continuation of the overriding responsibility to protect our judicial independence, and to show that we are doing so. The second certainty – unchanged since 2006 –is that it is only by sustaining that inviolable commitment that we shall continue to do right to all manner of people.
