

PRISONERS ADVICE SERVICE ANNUAL LECTURE: 24 NOVEMBER 2015

REHABILITATION: STARRY-EYED IDEALISM, OR A REALISTIC ASPIRATION?

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Not only was I immensely flattered to give this lecture, but to be invited by Prisoners Advice Service, for which I have long had such a warm regard for its professionalism and support to its clients, to become a Patron. I only hope that I can be worthy of the compliments which you have paid me.

It is traditional, when a judge retires from the bench, to say nice things about him, probably because you know that on that occasion at least he is unlikely to bite back. There are many of you in this audience whom I have seen as legal representatives at parole hearings: and I wonder if, particularly in the Q & A session for which I hope we shall have some time, you may take advantage of the opportunity to say openly what you privately swallowed at those hearings, in what you believed to be in your client's best interests. Joking aside, I have had nothing but positive experiences from the very many legal representatives whom I have met at oral hearings over the more than 10 years of my Parole Board tenure: and while comparisons are odorous, as Mrs Malaprop would have said, the present as well as former solicitors from PAS (such as Simon Creighton and Matt Evans) are and always have been in the forefront of excellence in this respect. Parenthetically the outstanding work which Simon and Deborah are doing in their attempts to persuade the Court of Appeal to address the consequences of the withdrawal of legal aid for prisoners deserves the thanks not only of the legal profession, but of society generally.

Let me return to valedictory remarks. The distinguished criminal Silk who rose to address me on that now rather distant occasion took the liberty afforded by our joint membership of the same College over 45 years earlier to claim, *verbatim*, that I was not only a clever bugger, but sometimes an awkward bugger. If, which is denied – I still remember my background in civil pleading – I have ever displayed either attribute in any oral hearing of which you have experience, I believe that I did so in the overall interests of the prisoners, rather than those overwhelming pressures which seemed to militate against their progression. In this context my reference to “*the overwhelming*

*pressures which seemed to militate against their progression” should not necessarily be understood as meaning risk averse Offender Managers, albeit some of you might, with reason, think it does. More relevant to this evening, however, were the comments made by the senior judge of my then court, who generously commented on my commitment to constructive sentencing; with particular reference to my regular reviews of those on drug treatment and testing orders. He added that the significant success rate which I had apparently achieved was because offenders were so terrified of their monthly encounter with me that they kicked their habit and immediately went straight. That exaggerated compliment gave me the opportunity to speak impromptu about sentencer supervision: which has been a bit of a cracked record theme of mine over the past 10 years or so. I have revisited what I then said *ex tempore*, because it remains relevant:*

"Judges, speaking generally, and the Bar are fascinated by the trial process. Because of the complexity of sentencing, it is necessary that judges get their sentence structure right. But far too little attention is paid, in my judgment, to sentence outcomes. Outcomes are particularly critical when we have a prison population which, speaking frankly, is going through the roof. The current prison population is at and soon is to surpass its crowded capacity. (I was speaking in 2006. The prison population was then 77,000: last Friday 20 November it was 85,977.) I continued: "That means the churn. That means that the opportunities for education in prison, the opportunities for rehabilitation in prison become ever more nugatory. In the 5-year strategy which the Home Secretary has recently launched, he has identified his vision for the future. That vision will simply not be attainable unless we find ways to modify the inexorable progression of the prison population. It is for this reason that I believe that the way forward is for sentencers, and by sentencers I mean magistrates as well as full-time judges, to become more involved in sentence supervision so that they can, particularly with those who are sentenced to non-custodial disposals over the term of their sentence persuade, cajole, and encourage those who are the primary responsibility of the Probation Service to turn away from the cycle of reoffending, which has been well described as the revolving door."

I must of course resist the temptation, despite my long-retired status, to say anything which could be identified as remotely political. I respectfully echo what Lord Woolf said, in his lecture on the 25th anniversary of the Strangeways riots: *“Let’s take the politics out of sentencing”*. However while the proof of the pudding will inevitably come when the impact of tomorrow’s announcement of the spending review has been identified within the Ministry of Justice, the language adopted by the new Lord Chancellor appears to be in marked contrast to that employed by his immediate predecessor. The fact that Michael Gove was prepared to attend last week’s Longford Trust Annual Lecture and to present Longford Trust awards in person – the first Secretary of State for Justice to do so in the 14 year history of this event – is highly promising; as was the inclusion in his brief remarks on that occasion that *“Prison is a place where people are sent as a punishment, not for further punishment. Human beings whose lives have been reckoned so far in costs – to society, to the criminal justice system, to victims and to themselves – can become assets: citizens who can contribute and demonstrate the human capacity for redemption”*. In calling for prisoners to be viewed as potential assets, the Secretary of State asked for tools to rebuild the lives of those who should be viewed as assets; and in these remarks I hope to offer such tools.

A repeated reference to a "One Nation" approach is inconsistent with a determination to treat those who have been convicted by the courts as non-citizens: they remain citizens, albeit citizens whom society has concluded should face punishment for what they have done which breaks the rules of society; and they are not, and should not be treated as, outlaws – stripped of all legal rights. Legal rights, it may be worth emphasising, are the rights conferred by society on all its citizens as an essential component of the social contract whereby each citizen accepts the supremacy of the State, subject to the State’s agreement to protect and promote the individual citizen’s inalienable rights. John Locke’s 17th century formulation of the Social Contract remains an invaluable principle.

The focus on the rehabilitation of those who have been convicted came with the Rehabilitation Revolution, introduced with much fanfare and some positive optimism on all sides by Kenneth Clarke as Lord Chancellor in December 2010.

It should not be left to students of language to comment on the changes introduced by his successor: "Transforming Rehabilitation" might well have taken a leaf out of the Red Book of Mao Tse-Tung. In retaining the word 'rehabilitation', and some might say inverting and subverting the meaning ascribed to the word in the Rehabilitation Revolution of Ken Clarke, Mr Grayling appears to have adopted the literary approach of Humpty Dumpty in Alice in Wonderland: "*When I use a word it means just what I choose it to mean – neither more nor less.*" So much for the Offender Rehabilitation Act: and the consequential dismantling of the probation service. The jury is still out in relation to whether or not the new CRCs will be in a position to deliver rehabilitation to those whom they are tasked to supervise; or, by contrast, will focus on their twin aims of public protection and private profit. As for the National Probation Service, responsible for the supervision of all those assessed to be of high risk, which for unintelligible and no doubt bureaucratic reasons includes anyone who has received an indeterminate sentence, whether or not objectively the circumstances in which the index offence occurred are likely to recur: it is not just the dismal experience of those who attend oral parole hearings that doubts the ability, let alone the determination, of so many Offender Managers to achieve the rehabilitation of their clients. When the identity of the Offender Manager changes three or four times during the subsistence of the parole review; when the prisoner only meets his Offender Manager over a video link if he is lucky, or more likely meets the stand-in Offender Manager at the oral hearing itself, one is tempted to ask whether the term 'Offender Manager' is an oxymoron – or, for the non-classicists, just a sick joke.

This audience knows all too well that the concept of offender management generally within the custodial environment is no better. In more and more prisons the role of Offender Supervisor, which when I started as a Parole Board member was described as the Seconded Probation Officer – a member of the probation service deputed to supply probation support to those within the establishment, and to provide a link to the probation service in the community – has been delegated to overworked and underqualified prison officers. Overworked, because you cannot discharge the management role effectively if you have a caseload of 100 or more prisoners, whom you may only see once

for the purpose of providing a parole report. Underqualified, because in contrast to the old-style probation officer, prison officers, while qualified by experience, lack the educational qualifications which recruitment to what was once an all-graduate profession required. This is the background to my suggestion this evening that sentencer supervision, which has been shown to make a significant difference in terms of those subject to community orders who are routinely and regularly reviewed by the same judicial officer, should be extended to those who are serving a custodial sentence.

The involvement of the original sentencer, or a representative of the court which sentenced the prisoner, would inevitably improve sentencing practice. With the cost of imprisonment substantially exceeding £2 billion annually, we need to ensure that the purpose of imprisonment is being achieved. No one but a dinosaur believes that the only purpose of imprisonment is incapacitation: that those who are locked up cannot, while locked up, harm others. Everyone else accepts that the purposes of an immediate sentence of imprisonment must reflect the statutory reasons for sentencing, namely punishment; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and making reparation to victims.

Some of you will have seen a recent Panorama film, describing sentencer supervision and the problem-solving approach in, of all places, Texas. Its transformative effect was witnessed in person by the Lord Chancellor: who, so the presenter Ian Birrell (a good friend to PAS) suggested, might well roll out something similar in this jurisdiction. For those of us who have been convinced of the merits of sentencer supervision for many years the revelation is hugely welcome, even if it comes from an unlikely source.

We know, from the success achieved through sentencer supervision of those subject to community orders, how effective continued involvement in an offender's progress can be. It is part and parcel of the duty to identify the appropriate punishment for an offender, specified in Section 142 of the Criminal Justice Act 2003 which I have just summarised. I have personal experience of such sentencer supervision, from some 10 years of performing the role in the Crown Court. I also know that it hugely enhances one's own

job satisfaction, to be able to improve the life chances of others; and a growing number of experienced magistrates are, I am well aware, keen to embrace this. However my theme today builds on the problem-solving approach of those who supervise community orders: I suggest its extension to those serving a custodial sentence.

For most prisoners the punishment is loss of liberty. Sentencers should be told if it is the case that their initial reasons for incarceration no longer remain valid. If the sentencer, following the pre-sentence report, believes that the defendant will, within custody, be enabled to address the causes of his offending, and yet nothing is done to address this, should not the sentencer be told why no progress is being made by that defendant? Should courts delegate to others the responsibility of supervision, both in custody and after custody on licence in the community, of those who no longer need to be locked up?

I venture to suggest that accurate information provided to sentencers of what, following the imposition of sentence, has been shown to be effective – “What Works”, to use the jargon of the criminologist – is a key component of intelligent and purposive sentencing: whether that information relates to particular categories of offenders or their offending, or to the individual who has been dealt with by the specific sentencer. No sentencer would willingly accept the label of an unintelligent and purposeless sentencer. Yet, to the extent that sentencing decisions, taken in good faith at the time, may turn out to be falsified by subsequent events, should not the original sentencer know this? What would we think of a physician who, based on the initial presentation of his patient, devised a particular course of treatment, and then ignored the onset of other signs and symptoms which showed all too obviously that the first diagnosis was wrong? If sentencers have no follow-up knowledge of what has happened to those whom they have sentenced (other than mere incapacitation), how can you expect to achieve intelligent and informed sentencing practice which meets the statutory test for the imposition of punishment of which I have ventured to remind you?

If so supervised within custody the prisoner would discover that the motivation of the sentencer was not to destroy his life, but to continue to discharge the

balancing exercise required by the statutory framework which regulates the imposition of punishment .

Last month I had an illuminating experience. Freed from the restraint of Parole Board membership I attended a lifer information event at HMP Coldingley. Apart from the supportive Governor, the only participants were some Offender Supervisors (all of whom were experienced probation officers – a vanishing category nowadays), and about 40 lifers. All of the lifers were hungry for information about the parole process. The Q and A session was a huge success. It demonstrated that even a retired judge can have a human face; and I believe it was much appreciated. Not only was I able to answer some straightforward requests for practical information (and parenthetically I am now in correspondence with one lifer maintaining innocence about how best to prepare for his pre-tariff review); but to show that even a former sentencer can reflect on the injustice perpetrated by the short-tariff IPP sentence, in every case now long tariff-expired, when the prospects of reaching ultimate release seem to stretch further and further into the distance. Even if the involvement of the original sentencer achieved little more than my experience at Coldingley, in potential rehabilitative terms – the opportunity to display empathy to those who have almost lost hope – its impact might well be considerable.

The standard objection to any initiative within the criminal justice system is that it is expensive. However the model of sentencer supervision which I am suggesting could be cost neutral. Sentencers could routinely be copied in by e-mail to reports generated to Offender Managers from those within the prison; and the sentencer could intervene in the e-mail correspondence as appropriate. Periodically, and at such intervals as might be proposed by the sentencer, reviews would occur of those who are serving longer or indeterminate sentences of imprisonment: chaired by the sentencer, or a representative of the sentencing court, the review would consider the response of the prisoner to the sentence plan. I note, in passing, that sentence plans were once routinely adopted shortly after admission to custody, and then reviewed annually. Recent Parole Board experience is that a sentence plan, or its annual review, is now spotted as infrequently as the Loch

Ness monster. The review which I propose could take place remotely, via Videolink or Skype. A positive response might justify a progression to conditions of lower security; an unsatisfactory one might consider where and how the prisoner could take further steps to address the lack of progress. If this was objectively wilful, the sentencer would be authorised, by new and tailored legislation, to impose further punishment. In this way a "carrot and stick" approach, which would be well understood by prisoners, would promote the reduction of reoffending, as well as addressing the continuing need to detain prisoners in conditions of higher security (which are inevitably more expensive).

The next Criminal Justice Bill is likely to include provisions tailored for the protection and promotion of the interests of victims. The reduction of reoffending inevitably means fewer victims of crime, and safer communities. Less reoffending is likely to lead to a reduction in the numbers of those who need to be held in prison. It is not rocket science.

There are other possibilities. A sentencer who has developed an interest in the progress being made by "his or her" prisoner is likely to be more acceptable to resolve the prisoner's complaints than a more expensive and less timely review by the Prison and Probation Ombudsman. Disputes in relation to categorisation, or even the loss of IEP status, could be authoritatively reviewed by sentencers with growing expertise in the prison environment. At a time of profound change a positive development would be the involvement of the original sentencer in the supervision of those whom they have sentenced. If Government is sincere in its aspiration to achieve the rehabilitation of offenders, sentencers are not only natural partners, but authority figures who can and will exercise their authority to positive effect. The best news is that, properly applied and implemented, it would cost virtually nothing.

It has been a long time since I practised as an advocate; but you never lose the knack of knowing when the audience might not be breast-high with some of your argument. I suspect that some of you are thinking: *"This is all very well; but I simply don't buy the proposition that those judicial officers of whom I have experience will be prepared to adopt the pastoral and supportive role which has been described"*. If that is so, then I must try another tack.

One of the most promising developments which I have perceived in the winds of change wafting round Mr Gove is his apparent willingness to devolve greater autonomy to prison governors, as he undoubtedly attempted to do, when Secretary of State for Education, to head teachers. Here I believe a real opportunity beckons for prison lawyers, and all who seek to promote the interests of prisoners in an era where legal aid restrictions reduce the normal opportunity for representation of a prisoner's interests. It is obviously and, I suggest, beyond argument in the interests of the prison governor to promote the rehabilitation of those in his charge. You would not criticise the hospital administrator who is able to announce to a grateful society that the scourge of Ebola has been removed, and that the hospital is no longer necessary. The responsibility for an offender's rehabilitation should start at the earliest possible moment, ideally when the prisoner arrives in Reception: and not months or years down the line. It is at this point that defence lawyers and prison lawyers have a window of opportunity to provide a service, of real value to a prison governor: assisting in sorting out the practical, emotional, health, educational and many other problems which are likely to beset all prisoners, and of which the defence and prison lawyer is likely to be far more aware than those responsible for running the prison establishment. Many of you will have read the shocking news last Friday of the suicide of a 21 year old transgender female in HMP Leeds. She had threatened suicide if sent to an all-male jail. If the kind of legal service, provided locally under contract to local governors which I am seeking to sketch out were available, it is just possible that such a tragedy – and every suicide in prison can equally be so described – might be avoided.

Prison governors are bound to buy in a range of services in order to discharge the statutory responsibilities which they owe to those in their care. It is axiomatic that Healthcare provision is bought in from Clinical Commissioning Groups (previously known as Primary Care Trusts). Education provision is similarly bought in from education colleges. My modest suggestion is that, without in any way derogating from their primary responsibility to promote and protect the interests of their lay clients, solicitors are well placed to offer to contract with prison governors formally to supply a service which would complement that of Healthcare; and while the parameters of what that service

might comprise is beyond the scope of this initial flotation of the concept, the key components are that the prison governor would be in a contractual relationship with a solicitor, in terms of remuneration; and the solicitor would agree to assist the prisoner far more extensively than is currently the case where the solicitor relies on legal aid for remuneration. To those who assert that it is simply inconsistent with the concept of client confidentiality and client care for the solicitor to be seen to cooperate with the prison authorities my response is: look at the success of the community court, particularly in other common law jurisdictions, where a once-sceptical defence bar quickly realised that open and constructive dialogue with all concerned in a multi-disciplinary approach actively promotes the client's interests.

We live in an 'outcome-focused' world. If the performance management framework of the prison governor (or perhaps, whisper it pianissimo, that of the sentencing judge: judicial appraisal might be a topic for another talk, another day)- if the governor's performance management were to include the effectiveness with which that governor achieved the rehabilitation of those committed to his custody, I believe that my suggestion offers the conscientious governor a tool of just the kind of which Michael Gove spoke in the remarks which I have quoted.

There is another straw in the winds of change: that of restorative justice. The development of both pre-sentence and post-sentence restorative justice is something which should now be treated as a fact: whether or not the necessary trained facilitators currently exist to ensure its success for all situations in which it is likely to be deployed. Here again the assistance which the solicitor may well be able to give to his prisoner client, given the confidence likely to subsist between the prisoner and the brief, is obvious; and may be far more valuable in addressing reoffending than that afforded by participation in an offending behaviour programme.

These thoughts are, of course, only embryonic. If they strike a chord, let us develop them. But in the interests of the rehabilitation of those who are potentially able to profit from these changes, I encourage others to run with the ball which I toss in their direction, and to endeavour (perhaps with rather more success than the England Rugby team) to score a try.