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PROBATION BOARDS ASSOCIATION CONFERENCE

"THE RELATIONSHIP BETWEEN THE STATE, SENTENCERS AND PROBATION (JUDICIAL AND PROBATION AUTONOMY)"

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THE RT. HON. THE LORD PHILLIPS, LORD CHIEF JUSTICE OF ENGLAND AND WALES

When I was asked to speak at this Conference I did not hesitate in agreeing to do so. This was because it seemed to me that a hundred years of the Probation Service was something that called for a lot of trumpet blowing, and I did not wish to be left out of the band.

I was speaking earlier this year at a National Offender Management Service conference for sentencers and I was able to explain that I have had personal experience of and enthusiasm for the probation service for well over half its life. When I was at school we lived in Maidenhead and a family friend who was a Magistrate arranged for me to spend a day with the local probation officer. Now they call this work experience. What I experienced was the personal dedication of the probation officer to his task of helping offenders to get their lives together and manage them in a way that did not involve re-offending.

The experience was inspirational, and was the origin of my interest in the law. What struck me was the strength of the relationship between the probation officer and the offenders, and if I have a theme today it is that as fundamental to successful offender management is the building of relationships. The job is not primarily about meeting targets, or satisfying a business cases, or enforcing community punishments, or breaching

those who do not comply with orders, or risk assessment. These all may be part of the job, but if building relationships is not at the heart of the exercise, the exercise will be likely to fail.

I was a little puzzled by the full title of my topic for this morning "The relationship between the State, Sentencers and Probation (judicial and probation autonomy)," not least because, so far as I am aware, I did not know of this title until I discovered it on looking through the programme last week. I know a lot about judicial autonomy, which I take to be the same as 'judicial independence', a principle that I know something about.
In a week's time responsibility for offender management is going to pass to the Lord Chancellor.
Under the Constitutional Reform Act 2005 the Lord Chancellor has a special responsibility to have regard to the need to defend judicial independence. I shall have a word to say, in due course, about what this means in the context of sentencing. But I am less sure what is meant by 'probation autonomy' in the context of sentencing. As I shall explain, it seems to me that Government has a legitimate interest in both the lengths and types of sentences imposed and the manner in which offenders are managed pursuant to those sentences.

Apart from anything else, both these matters involve the use of resources. But so far as the judges are concerned, it is for Parliament, by the enactment of laws, to lay down the framework within which judges must exercise their discretion when sentencing. It is not for the executive to dictate to judges what sentences to impose. Indeed it would be quite improper for me, although I am head of the judiciary, to instruct another judge as to what sentence he should impose. Nor must NOMS seek to influence the decisions that sentencers take. There are carefully worked out arrangements governing liaison between sentencers and NOMS – and it is important that these are properly respected.
Probation officers, like judges, have to comply with obligations imposed by statute and, in contradistinction to the position of judges, I am not aware of any principle that prevents the Head of the National Offender Management Service, or the Head of the Probation Service, or the Minister responsible for these services, from seeking to influence the manner in which those obligations are discharged. What one can say, perhaps, is that a degree of individual autonomy is important for a probation officer who is seeking to build a relationship of trust with an offender.

I have been looking at the history of the Probation Service, and the early probation officer certainly enjoyed much more autonomy than he or she does today.

The concept of probation is one, like so many in the field of offender management, that we have borrowed from the United States. The first Probation Officer so called was appointed in Boston Massachusetts in 1878.

At that time there was in England, and we have seen it portrayed this morning, a dramatic increase in the number of convictions for drunkenness and drunk and disorderly behaviour. The precursors of the first probation officers were Church of England missionaries who were supporting the temperance movement and into whose care the London Magistrates were accustomed to discharge first offenders. So far as these offenders is concerned, not all that much has changed over 100 years, save that to alcohol as a cause of offending have been added drugs. This is what Thomas Holmes wrote about young offenders in 1900:
"The great majority of boys and girls go wrong...because of the indifference, idleness, or worthlessness of their parents. I am persuaded that it is not the poverty of the parents, nor the environment of the children, not the possession of criminal instincts that lead the greater bulk of boys to go wrong, but the indifference and incapability of parents".

It was in these circumstances that, in 1907, the Home Secretary, Herbert Gladstone, presented the Probation of Offenders Bill.

This permitted a court to release an offender "on probation" and to order that he be subject to conditions and supervised by a named person, who might or might not be one of the new probation officers. These were appointed to a petty sessional division and subject to the control of the courts for that division. Their duties included:

"to visit or receive reports from the person under supervision...to report to the court as to his behaviour...to advise, assist and befriend him, and, where necessary, to endeavour to find him suitable employment."

Note those words “to advise, assist or befriend”. That was still the spirit of the role of the probation officer when I had my day of work experience. I am not quite so sure that it is today.

How about the cost of the early service? Martin Page in his book on the history of the probation service, comments:

“It seems clear that both the Home Office and the Receiver for the Metropolitan Police District wanted to keep down the unknown cost of the new probation service by paying poorly, encouraging part time work and using voluntary workers.”
Do I hear someone asking “What’s new?”

In the old days Parliament did not have much to say about sentencing. The object of the sentence was to punish and to deter. Sentences did not impose a significant burden on resources – hanging or flogging were not expensive, indeed they were a cheap form of public entertainment. Imprisonment replaced these as punishment comparatively recently, and when it did, the statute tended to do no more than stipulate the maximum sentence that the judge could impose. It was left to the judiciary to decide upon the appropriate sentence that the crime demanded.

In my lifetime the Government, by promoting legislation, has taken an increasing interest in sentencing. There have been a number of reasons for this. First sentencing has become politicised. Government has not been content to leave it to the judges to determine sentence levels – at least so far as many crimes are concerned. Minimum sentences have been imposed in some circumstances. Strasbourg ruled that it was not for the Secretary of State rather than the judge to determine the minimum term to be served for murder.

Government reaction was, in the Criminal Justice Act 2003, to impose minimum starting points that had the effect of significantly increasing the minimum terms that judges now impose.

The second reason is that Government has identified that there is more to sentencing than the imposition of punishment. Whilst this is the first of the objects of sentencing specified

in section 142 of the Criminal Justice Act 2003, other specified purposes include "the reform and rehabilitation of offenders." It has become Government policy to draw a distinction between serious and dangerous offenders, who must go to prison, and those who do not fall into that category, who should receive a community sentence.

Thus section 152 of the 2003 Act provides that the court must not pass a custodial sentence unless of the opinion that the offending was so serious that neither a fine nor a community sentence can be justified. So far as dangerous offenders are concerned, there is a further strand to Government policy.

A distinction is now drawn between the period that the offender must serve by way of punishment and deterrence and a possible further, and indeterminate, period during which he may have to remain in prison in order to protect the public. I speak, of course, of the sentences of 'imprisonment for public protection' or IPP. Now all of this has practical implications for both the Parole Board and the probation service.

It would be reasonable to expect that, when formulating these policies, Government had also had regard to the third reason why they have a legitimate interest in sentencing policy, and that is that this has important implications for resources. If they did, then it is clear that there has been a miscalculation.

The prisons are full and the predictions are that the rate of prison sentencing is bound to outstrip the capacity of the prisons, despite the plan to provide another 8,000 prison places. This is a problem that the Lord Chancellor will inherit on May 9th.

It is, of course, not open to him to solve it simply by instructing Magistrates and Judges to go easy on sentences of imprisonment, for that would be an inappropriate attempt to interfere with judicial independence. It remains to be seen what course he will adopt.

It is not merely the imprisonment of offenders that makes demands on resources. Community sentences also call for resources, as does the supervision of prisoners who have been released on licence and, indeed, the processes necessary to determine whether prisoners given IPP sentences no longer pose a risk to the public so that they can be released. All of this has implications for the probation service.

Community sentences can perfectly well provide the element of punishment that a prison sentence imposes. Unpaid work is the most common form of punishment imposed in the community, and it has the advantage of providing 'payback' to the community. But unpaid work needs efficient organisation if it is to carry credibility. Suitable work in the community must be found. Necessary administrative action must be taken, such as the identification or provision of toilet facilities.

The offenders must be properly supervised and appropriate action taken if they do not turn up for work.

Here I would like to interject some general comments about breaching. I have concerns about a system that requires automatic return to custody where conditions of a community sentence or licence are breached. Such a requirement detracts from the autonomy of the probation officer, who is best placed to distinguish between the offender who has no motivation to undertake his community sentence, and therefore may have to face time in prison, and the offender who has a disorganised lifestyle, but with whom it is worth persevering.

To assume all offenders in breach are in the first category can frustrate the efforts of those who - often painstakingly - work to build relationships with those under their supervision. It also fills up the prisons. John Harding, writing in the Probation Journal last year commented:

"With curtailed probation officer discretion, supervised licences have become a trapdoor to prison. The Inspectorate review of 42 determinate sentence prisoners in five local jails suggested that 48 percent had committed technical breaches of licence."

I can appreciate the argument that an approach of advising, assisting and befriending an offender may not be an appropriate response when he is in breach, but if a probation officer is succeeding in forming the vital relationship with an offender there is a strong argument for leaving him to decide, having regard to the circumstances of the individual case, what is the appropriate course to take in the event of breaches that reflect disorganisation rather than villainy.

The success of community sentences tends to be judged by re-offending statistics. Am I alone, I wonder, in having a suspicion of statistics.

The first Principal Probation Officer, Guy Clutton-Brock, designed a detailed form to be filled in by Probation Officers for the purpose of gaining statistical information.
In his memoirs he recalled presenting it to them for completion and recorded "they resisted it strongly and wisely. Instead of actually doing the work they would have been filling up forms. So I tore it up."

Nonetheless I believe that it is important that we have accurate and detailed information as to what works in offender management. Crude re-offending figures are not good enough. One needs to know not only whether an offender has re-offended but the nature of the re-offending.

Often a community sentence provides for what we describe as intervention. The theory behind interventions is that there is usually an underlying cause of offending. Drug or alcohol addiction, inability to keep one's temper, a psychiatric condition. Deal with that cause and the offending will cease. I am a firm believer in the potential efficacy of drug or alcohol addiction treatment and anger management or domestic violence courses. But where they succeed I suspect that it is usually because they include, or are accompanied by the forming of an individual or group relationship on the part of the offender. I have spoken to Judge Justin Phillips about the drug court that he runs at West London.
He is in no doubt that it is the personal interest in, and relationship he builds with, the offenders that are responsible for the success that, that court enjoys.

Intervention is unlikely to work unless the offender actually wants to conquer the particular cause of his offending. He is much more likely to want to achieve this if he feels that there is someone who cares about his progress and who will respect his achievement. It is earning the respect of someone else that so often carries with it the earning of self-respect.

Where does one find the people who care about offenders and who will form with them the relationships that are such a vital element in rehabilitation. One finds them in the

many voluntary organisations who work with the probation service. And I have always believed that caring for offenders was what the probation service was all about. But it seems to me that there has been a considerable shift in what the probation service is called upon to do.

The job is much more about risk assessment, risk management and enforcement of sentences and licence conditions. Is the job less attractive today? Listen to this gloomy assessment by Finola Farrant in an article entitled 'the Demise of the Probation Service' that I read in the Probation Journal:

"Recent changes within the probation service have heralded increased surveillance and control over the work of probation staff. Targets have been set, evaluations required, cost-benefit analyses undertaken, new entry arrangements and management structures put in place; new organizational discourses have emerged, as these discourses have developed they themselves have impacted upon the probation service until the pluri-paradigms of punishment, risk management, public protection and offender management ushered in such conceptual and ethical changes that the current organization and structure of the probation service is no longer tenable".

I am not sure that I understand all that, but it does seem that the author shares my concerns.

I have concerns about resources. If the prison problem is to have a long term solution this must, I believe, involve diversion of some who are currently serving short prison sentences into community punishment. We need to ensure that the resources are there to manage these offenders. We need to ensure that the resources are there to deal with the ever increasing demand for reports.

I have been considering the Offender Management Bill. I have read the statement that this "will reduce re-offending and better protect the public by improving the way in which offenders are managed." I have read of the plan to create Probation Trusts out of the probation service where it is working well, and to augment the current service by outsourcing and by contestability.

I am not one of those who are against all of this in principle. There were many who were sceptical about opening the prison service to competition from the private sector, but that proved a valuable catalyst for change. I am however anxious that in the search for improvement we do not lose the good that we have got; The new arrangements must accommodate and continue to attract the many, both in the service and in voluntary organisations working with the service, who are working with and relating to offenders, so that the relationships that have been the leitmotif of this talk, continue to be formed.

All are agreed, I think, that successful offender management has got to involve the community. The relationships of which I have been speaking need to be formed in a community. They both gain strength from and give strength to the community. Provision of unpaid work must involve the community, so that it can truly be seen to be 'payback'. Steps taken to increase confidence in community sentencing will often be steps that strengthen the community itself.

North Liverpool is an example that is always quoted as the model of how community justice ought to work, and you will be hearing about that from the next speaker, David Fletcher.

He will, I suspect, confirm that putting together an effective structure for administering justice in the community has benefits in bringing a community together that go well beyond offender management. It is vital that the changes that are in prospect permit and encourage community involvement in offender management.

The Probation Boards Association initial response to the Bill accused it of failing to recognise :
" that the probation service is much more than the sum of the parts of [the probation services set out in the Bill]. It is the glue which holds the criminal justice services together, working as it does with every agency involved in crime prevention, pre-court work, in court, during and post-sentence and life licence."

I govern a public school that has as its motto 'et nova et vetera', 'both the new and the old'. I believe that there is merit in that motto in most situations. In seeking to introduce

improvements by making changes in offender management let us not overlook the merits of a probation service that has served us so well over the last 100 years.