PUNISHMENT AND REFORM:
EFFECTIVE COMMUNITY SENTENCES CONSULTATION
RESPONSE ON BEHALF OF THE CRIMINAL BAR ASSOCIATION

Introduction

The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Executive Summary

The primary aim of the consultation is to reduce reoffending rates by making community sentences more credible in the eyes of the public, more effective and where appropriate more demanding. It seeks to provide a valid alternative and genuine choice for sentencers dealing with offenders who are on the cusp of custody.

In doing so it looks to reform both the punitive and rehabilitative elements of community sentences. In respect of the former, it sets out proposals to ensure that there is a clear punitive element in every community order, making community sentences more labour intensive and requiring greater commitment from offenders. In particular the increased use of electronic monitoring technology, driving bans and effective financial penalties is considered. With regard to the rehabilitative element, it seeks to place a greater emphasis within community sentences on reparation, to ensure that as many offenders as possible make reparation to victims and take part in restorative justice approaches whenever possible.

Summary of response

Part 1: Tough and effective punishment, qs 1-25

The CBA agrees that tougher community sentences which include a punitive element should be available as an alternative to custody, but this should not be at the expense of the rehabilitative and restorative elements of a sentence (q.1, 3-5). One way of ensuring the five purposes of sentencing are met (as set out at paragraph 34 of the consultation) is to give the PSR writer an increased role in identifying how they may be addressed taking account of the offender's particular circumstances (q.7). For example, one simple method would be to individually address each purpose in a report with a proposal. Notably we take the view that there are sufficient statutory powers to impose a driving ban where necessary; this should not be expanded upon further due to the adverse impact it may have on employment and rehabilitation.

We take the view that electronically monitored technology may be used to monitor compliance with other requirements if the technology is deemed safe and reliable (q.8). However it should not have a disproportionately punitive element compared with other components of the community order (q.10).

In particular, we feel that tracking offenders would require significant resources and would be disproportionate for offenders deemed suitable for a community order; it should instead be reserved for prolific or dangerous offenders released on licence following a custodial sentence (q.10-14). Tracking offenders in the community raises significant human rights issues. It is a substantial infringement on a person's liberty and privacy. Any order must be proportionate in relation to the more invasive form of monitoring i.e. tracking offenders that should only be limited to serious criminals e.g. Serious Crime Prevention Orders. Those orders have safeguards in the form of prosecutorial and judicial oversight.

We do not support any new power to order confiscation of assets, this power being a form of sentence and outside the POCA 2002 confiscation regime. In short the proposed power is unnecessary as there are sufficient powers available to a sentencer, e.g. restitution and deprivation orders. Rather the way forward is to build upon the improvements in fine collection and enforcement. In those circumstances this new power will not be required (q.15-18).

In relation to compliance of community orders, providing greater flexibility to offender managers is to be applauded, in particular to enable activity to take place as soon as practicable after sentence.

However the proposal to introduce fixed penalties to those who do not comply is problematic and potentially inequitable. Those offenders who are unable to pay a fixed penalty will be breached, whereas an equally culpable offender who has the means will not be (q.19-23).

The CBA support an increased flexibility in the use of financial penalties; this could be facilitated by an explicit reference in the sentencing guidelines as to the flexible use of fines in combination with community orders (q.24).

Part 2: Reparation and restoration, qs 26-35

The CBA supports the intention to enable the delivery of restorative justice ("RJ") in more areas and in more circumstances, and to that end it supports the move to facilitate pre-sentence RJ. Increased publicity as to the positive impact that RJ can have, particularly from the perspective of the victim, is essential to increase successful RJ practices (q.29-30).

As to when it is appropriate for RJ activities to occur, this must be assessed on a case by case basis. However if it is to be available pre-sentence, it must be ready to be implemented immediately so as to avoid unnecessary hearings and adjournments. If pre-sentence RJ is to influence the sentence passed, there must be clear guidance on how this is to be taken into account and an addendum report on the outcome of the RJ process. There is a risk that a prescribed discount for participating in RJ would have an unfair effect upon those for whom RJ is unavailable for any reason; it would therefore be more appropriate for it to amount to a general mitigating feature (q.26-28).

To ensure that RJ practices are expanded upon, increased training and awareness of those on the Bench, the legal profession (both prosecution and defence), social workers, probation workers and YOT workers is required (q.31-32).

Ensuring that the courts have the best possible information about injury, loss or damage requires the police and prosecutors to make those enquiries early on (q.33). Definitive guidelines, particularly for the Magistrates' Court would assist a more consistent approach to fixing the value of compensation orders (q.34).

Removing the £5000 cap on a single compensation order in the magistrates' court would provide greater flexibility; however if this is to be done, then there will be even greater need for definitive guidance on fixing a compensation order (q.35).

Part 3: Rehabilitation and reform, qs 36-45

The CBA welcomes any measure which would help to reduce the incidence of alcohol related offending. However the CBA awaits the results of any pilot scheme of enforced sobriety requirements before providing a firm view as to its implementation (q.37-38). If such a scheme is to be implemented we do not see any reason for a distinction between domestic violence and other violent crime (q.39).

Substantive Response

Part 1: Tough and effective punishment

1. **What should be the core elements of Intensive Community Punishment?**

The CBA supports the general principle that Community Orders should be given more teeth so as to offer a sentencing tribunal a genuinely tough alternative to custody. However, it should be remembered that the core elements of community punishment should reflect the five purposes of sentencing, as outlined in the consultation at paragraph 34. There is a danger inherent in toughening up community orders as an alternative to custody, that the punishment element is given disproportionate significance, at the expense of rehabilitative and restorative elements.

The CBA would suggest that the core elements of intensive community punishment should include more demanding reparation activity, including a restorative element which may involve contact with the victim where appropriate, an electronically monitored curfew and a financial penalty or compensation where appropriate.

The CBA does not endorse a driving ban unless the offence is driving related and there are statutory provision and/or sentencing guidelines that include such a disqualification. There is already ample provision for a motoring disqualification alongside a community order for certain motoring offences, and it would be inappropriate to impose any such ban for unrelated offences. Driving is often a necessity in applying for and pursuing certain jobs and any ban would unnecessarily penalise an offender from engaging in gainful employment, which is so important to rehabilitation.

Similarly, a foreign travel ban is unnecessary in view of the daily curfew which would in any event prevent more foreign travel. Most offenders do not have the means to engage in foreign travel whilst subject to a community order, supervision or curfew.

2. **Which offenders would Intensive Community Punishment be suitable for?**

Intensive Community Punishment would be particularly suitable for first time offenders who have committed a serious offence that would otherwise pass the custody threshold, younger adults in their 20s and 30s who may have a record of offending whilst a youth but have not yet experienced custody, those who may have breached a community order in the past or have a record of less serious offences that have attracted little more than fines. It is also particularly suitable for female offenders with children or other caring responsibilities, for whom a short custodial sentence is unconstructive and disproportionately destructive to their family life and/or housing obligations.

3. **Do you agree that every offender who receives a community order should be subject to a sanction which is aimed primarily at the punishment of the offender ('a punitive element')?**

The CBA agrees that in order for community orders to command more respect from both the public and the sentencing tribunal, there should always be some sanction that is aimed primarily at the punishment of the offender.

4. **Which requirements of the community order do you regard as punitive?**

As outlined in the consultation at paragraph 40, there are a number of community requirements that might serve as a punitive component, depending upon the particular offender. Any mandatory order that would interfere with or restrict the otherwise usual habits or lifestyle of an offender is potentially punitive. Accordingly, for some it might be a curfew, for others a restriction or exclusion from a certain area at certain times, a prohibited activity or indeed the requirement to perform community payback, otherwise known as unpaid work, or pay a fine. The particular punitive disposals should be considered specifically by the Pre-Sentence Report writer so that the sentencing tribunal is made aware of punitive suggestions or particular requirements that would constitute punishment for that particular offender.

5. **Are there some classes of offenders for whom (or particular circumstances in which) a punitive element of a sentence would not be suitable?**

There are certain vulnerable offenders for whom a punitive component would not be suitable. These might be chronic drug or alcohol abusers who would be more appropriately disposed of by way of alcohol treatment or drug rehabilitation, and those offenders with mental illness or learning disability, whose offence was a by-product of their disorder or difficulty.

Moreover, there may also be some for whom the court process or length of proceedings, or particular consequences of their offending might be considered to be punishment enough. In addition, they may also have made personal efforts since the offence and prior to sentencing to achieve some form of restoration to the victim. If there is to be a statutory requirement that every community order should contain a punitive component, there might also be provision for the sentencing tribunal to waive that component in the interests of justice, taking into account various factors such as: the facts of the offence, personal circumstances of the offender, any efforts made to achieve restoration and/or rehabilitation, and other elements of the sentence.

6. How should such offenders be sentenced?

As discussed above, such offenders should be dealt with in a way that meets the other four purposes of sentencing, whether it is by way of alcohol treatment, drug rehabilitation or mental health treatment. In particular, the community mental health treatment requirement is often not properly resourced in certain areas, where the mental health outreach provision is not available to a non-hospitalised mental patient, and is therefore not a realistic or possible alternative for an offender who does not meet the requirements of a hospital disposal.

7. How can we best ensure that sentences in the community achieve a balance between all five purposes of sentencing?

By ensuring that the Pre-Sentence Report writer (or potential offender manager where appropriate) considers all five purposes of sentencing in the Pre-Sentence Report and specifies which elements of the proposed community sentence are to satisfy each purpose. It may be that some elements would satisfy more than one purpose but it should be an additional requirement of the Probation officer to try to consider how the proposed components of a sentence can meet those purposes. This will make it clearer for a sentencing tribunal to see how those five purposes are to be met and thus make the community option more attractive as an alternative to custody.

8. **Should we, if new technologies were available and affordable, encourage the use of electronically monitored technology to monitor compliance with community order requirements (in addition to curfew requirements)?**

The safety and reliability of new technologies needs to be secure before they are used to monitor community requirements, given the consequences of alleged breaches and the powers and resources of offenders to contest those breaches where it may be a question of their word against the technology. It should be remembered that technology may be fallible and prone to mistake and the ability of an offender to contest it may be limited.

However, notwithstanding that precaution, there is no reason why electronically monitored technology should not be used to monitor compliance with other requirements in addition to a curfew.

In relation to the extension of a curfew up to a maximum of 16 hours a day, it should be borne in mind that the interests of an offender in attending employment are extremely important, and equally that this may represent a disproportionate restriction of liberty. It should be remembered that for the purposes of credit for remand time, a curfew of at least 9 hours per day is the equivalent of half a day in custody under s.240A of the Criminal Justice Act 2003.

9. **Which community order requirements, in addition to curfews, could be most effectively electronically monitored?**

As outlined in the consultation, electronic monitoring might be effective to ensure attendance at unpaid work, the compliance with an exclusion order or prohibited activity, and the monitoring of alcohol and/or drug abstinence.

10. **Are there other ways we could use electronically monitored curfews more imaginatively?**

Additionally, electronic monitoring might be effective to ensure cooperation with a restraining order, particularly in cases of domestic violence or harassment. However, this would not prevent contact by telephone or other electronic means.

Electronic monitoring should be used specifically to achieve the effectiveness of other requirements of a community order, and to target the prevention of reoffending, rather than

as a stand-alone component. It should be emphasised that any curfew need not be of a continuous period, but might be staggered throughout the day and night in order to achieve the other purposes of sentencing.

As with all other aspects of sentencing, the electronically monitored curfew should not take on a disproportionately punitive element compared with other components of the community order.

11. Would tracking certain offenders (as part of a non-custodial sentence) be effective at preventing future offending?

It is doubtful how the use of electronic monitoring technology to track offenders as part of a non-custodial sentence could be effective at preventing future offending without sufficient resources being devoted to the identification of and action upon breaches. It is unclear how this could prevent future offending unless the police force is given proper resources to monitor the offender and act upon any breaches. We would need a wholly new approach to the role of monitoring, with proper safeguards to prevent abuse and mistake, and proper resources allocated to the offender to contest any alleged breaches. It seems to the CBA that this is a disproportionately unnecessary weapon to be used alongside the electronically monitored curfew, as it raises the stakes of the punitive component of the community order.

12. Which types of offenders would be suitable for tracking? For example those at high-risk of reoffending or harm, including sex and violent offenders?

It should be remembered that high risk offenders are unlikely to be disposed of by way of community orders and therefore the use of tracking as part of a community order is unlikely to target those at high risk of reoffending or causing harm. The CBA would advocate that the use of tracking be reserved to prolific or dangerous offenders released on licence after a custodial sentence has been served, when there may be a perceivable threat to the public in general or certain groups in particular, and the confidence of the public and/or victim may be retained by the knowledge that the offender will be constantly observed. Community orders are designed to be punishments for those whose offences may not cross the custody threshold or whose personal circumstances may justify punishment in the community. In the latter cases, it may be a particularly onerous or a disproportionate intervention with an offender's human rights and civil liberties.

13. For what purposes could electronic monitoring best be used?

The CBA remains of the view that the use of electronic monitoring is best used to ensure compliance with certain requirements of a community order, such as a curfew. In general, it is a step too far to start to use electronic monitoring for the prevention of reoffending during the course of a community order, when an offender has already been deemed to be safe to serve his punishment in the community and has been sentenced to the constructive and rehabilitative elements of a community order.

14. What are the potential civil liberties implications of tracking offenders and how can we guard against them?

The CBA would respectfully suggest that the implications of tracking offenders who are serving a community order opens up a minefield of civil liberties and human rights issues, and would be subject to challenge on the grounds of disproportionate punishment and restriction of liberty. The purpose of such a requirement must be rigorously scrutinised as must the proposed use to which the monitoring information is to be put. Unless the police are prepared to monitor offenders at all times and be prepared to act upon an alleged breach promptly to prevent further criminality, there is no purpose to it and there will be no teeth to it.

15. Which offenders or offences could a new power to order the confiscation of assets most usefully be focused on?

It may assist to first frame the question. Paragraph 69 of the Consultation signals an intention to explore a new sentencing power that would allow courts to order seizure and sale of assets, as a punishment in its own right. Further this power would be exercised regardless of whether the asset was connected to the offence. The consultation makes it clear that this proposal is stand alone and outside the provisions of the Proceeds of Crime Act 2002 (which is expressly outside the scope of consultation paragraph 63).

It is submitted that a new power of confiscation in these terms is unnecessary and disproportionate. It risks confusing and diluting the law in relation to confiscation and is contrary to the principle that underpins this area.

Existing provisions

As the consultation makes clear, there are existing powers available to a sentencer that would allow the seizure of items connected to the criminal conduct in question. The danger is that yet a further piece of legislation is being added to the statute book where there are existing powers being underutilised. Restitution and Deprivation Orders are two important examples of what is available to a sentencer.

Restitution Order (s.148 PCC(S)A 2000) allows a court to make an order if property has been stolen and the offender has been convicted of any offence with reference to theft. The use of Deprivation Orders (s.143 PCC(S)A 2000) in particular is a very useful tool that can be used to deprive offenders of property involved in an offence (paragraph 62).

There is however, a concern whether these orders are actually being fully utilised and that they are the exception rather than the rule during the sentence exercise. The solution is to highlight awareness through guidance to the judiciary and Magistrates Association, rather than creating a new stand alone provision.

An objective of the consultation, inter alia, is to encourage the greater use of financial penalties (see paragraph 86). It is essential for public confidence and greater offender compliance, that punishments are enforced fairly, efficiently and robustly. The increased efforts to ensure fine defaulters are pursued and warrants of distress utilised where appropriate, is a positive step in greater compliance. With this move towards greater enforceability of fines, it is submitted that the need for a new confiscation order recedes.

Cost

It is to be regretted that there are little if any detail as to the cost impact of these orders. It is perhaps optimistic to infer that stand alone confiscation orders will be cost neutral even where the cost of the bailiff is made part of the order. There will invariably be orders that cannot be enforced through an absence of assets or the discovery that another third party has a right to those assets. It is follows that there is a real likelihood of additional court costs to accommodate additional hearings. The experience of POCA 2002 proceedings is an illustration of the myriad issues that are created when considering these types of orders.

Principle

Finally, there are principled objections to such a course. The consultation makes it clear this power is intended to be a wide one and not confined to property connected to the offence. The principles in relation to confiscation law have developed over the years. Central to this, is that the property seized is connected to criminal conduct, whether it be directly related to the offence (particular criminal conduct) or a criminal lifestyle (applying the qualifying assumptions under POCA 2002). A stand alone confiscation order would appear, in the absence of greater detail, to be contrary to those principles and undermine the legislative safeguards that POCA 2002 provides.

If the property to be seized is *not* connected to the offence, a financial penalty (with more effective enforcement) would appear to a more practical disposal. A sentencer would need to be entitled to consider those assets as matters that could be taken into account when considering the offender's means.

The CBA has argued for some time that the area of confiscation be reviewed by the Government. For example the use of Restrained Funds should be available to an accused to meet his legal costs, rather than be a burden on the public purse. This is but one example of the issues that this area of the law throws up [paragraph 13]. The stand alone confiscation order would add to the problems in this area not alleviate them and is to be deprecated.

16. **How could the power to order the confiscation of assets be framed in order to ensure it applied equitably both to offenders with low-value assets and those with high-value assets?**

Not appropriate. See answer for question 15.

17. **What safeguards and provisions would an asset confiscation power need in order to deal with third-party property rights?**

For the reasons set out above at question 15, it is respectfully submitted that such an order is inappropriate.

18. **What would an appropriate sanction be for breach of an order for asset seizure?**

The power to order a default term as currently is available in the Crown Court would appear to be the simplest option (s.139 PCC(S)A 2000).

However for the reasons set out above at question 15, it is respectfully submitted that such an order is inappropriate in any event.

19. How can compliance with community sentences be improved?

It is submitted compliance can be enhanced by a variety of measures.

Firstly, it is important that when an order is imposed that it is practical and takes fully into consideration the characteristics of the offender. Thus at the outset, the court arrives at an order which has a greater chance of success.

Secondly, momentum is key. Advantage should be taken of the immediate period after an offender has been sentenced and motivation is likely to be at its highest. Any prescribed activity should take place as soon as practicable thereafter and be more intense in terms of expended time at the earlier stages.

The input of a skilled Probation Officer cannot be underestimated. The probation service is under increasing pressure in terms of available staff and workload. One fears with these pressures, less probation officers leads to less compliance.

The nature of an activity as part of an order should have a dual purpose-'community payback' but also an element of rehabilitation. If an offender undertakes a task which results in a sense of purpose or fulfilment, the chances of compliance increase.

Finally, it is essential that any breaches of an order are treated robustly and promptly.

20. Would a fixed penalty-type scheme for dealing with failure to comply with the requirements of a community order be likely to promote greater compliance?

The CBA would defer to the views of the Probation Service in this regard. They have the expertise and experience in dealing with offenders on a day to day basis during the currency of a community order.

Giving greater flexibility to probation officers is to be commended. We welcome greater discretion being provided to probation officers in deciding whether a warning(s) are appropriate before formal breach proceedings are instituted.

However, the introduction of a fixed penalty scheme is likely to dilute the stated intention of greater compliance. Fixed penalties are contrary to a robust enforcement structure and undermine the important role of proper judicial oversight where there is a breach.

The scheme itself risks inequality, for instance what happens if an offender does not have the means to meet a fine? He or she would be likely to be formally breached whereas an equally culpable offender with means and paid, would not be breached.

An alternative approach would be to have a scheme, where the offender would forfeit a set number of hours of work they have undertaken. In simple terms, if they miss a day's work, they have to undertake the missed day and an additional day on top.

Lastly, have those who have been warned or at risk of being formally breached, referred to a group meeting with a magistrate or judge who would attend the probation offices weekly or bi-weekly for a session setting out expectations and the consequence of a breach. Any meeting would be to warn and encourage rather than being punitive. This would fit in with the Coalition principles of local and swift justice.

21. Would a fixed penalty-type scheme for dealing with failure to comply with the requirements of a community order be appropriate for administration by offender managers?

The question draws out a further issue with the introduction of fixed penalties. Offender managers would be in the best position to comment, but it would seem clear that there are dangers with any additional role. The offender manager risks undermining their supervision/rehabilitation role through the introduction of punishment to the relationship – especially where the penalty is financial.

22. What practical issues do we need to consider further in respect of a fixed penalty-type scheme for dealing with compliance with community order requirements?

There are a number of administrative issues involved. In what form will be payment take place-cash, debit card, credit card and/or bank transfer? Where will the payment take place – at the Magistrates Court or at the Probation officers? There will be a need for a record of the above.

23. How can pre-sentence report writers be supported to advise courts on the use of fines and other non-community order disposals?

The report sets out information from one Probation Trust that report writers have not always been aware of the other options available to courts beyond a community order (paragraph 90). This would appear to be the catalyst for the question.

Further training can of course always be utilised to fill any information gaps. However, this example above is an illustration of the daily challenge the judiciary and practitioners have in navigating through the sentencing regime. The sentencing framework in the England and Wales is subject to constant change and as a result is unnecessary complex. New powers are introduced. Existing sentences are renamed time and time again (e.g. community service, community punishment, unpaid work requirements, community payback). The proposed confiscation order outlined above is an illustration of further unnecessary penalties

24. How else could more flexible use of fines alongside, or instead of, community orders be encouraged?

Greater flexibility in the use of financial penalties is to be encouraged.

The Consultation identifies at paragraph 89 the ability of courts to fine alongside a community order. The fine would form the punitive part of the sentence and the community order could form the rehabilitative part.

The starting point would have to be the Magistrates' Court Sentencing Guidelines and Sentencing Council Guidelines. The current guidelines in the form of ranges and starting points reflect the tiered approach to sentencing, namely punishment increases from:

- a conditional discharge
- fine
- community order
- imprisonment (whether suspended or immediate)

This choice as to disposal is recognised in the consultation is set out at paragraph 91. The solution would be to amend the guidelines so that they make explicit reference to the flexible use of fines in combination with community orders. Again a course anticipated in the consultation at paragraph 92.

25. How can we better incentivise offenders to give accurate information about their financial circumstances to the courts in a timely manner

Offenders are required by law to complete a means information form. In short they are compelled by law to provide the information. If there is an evidence concern that some offenders are not providing truthful information, these can and should be investigated as possible criminal offences. If there is to be data sharing with other government agencies, this should be made clear on the face of the means information form and reflected in any declaration made upon signing the form.

Part 2: Reparation and Restoration

26. How can we establish a better evidence base for pre-sentence RJ?

The consultation acknowledges that the most effective and innovative practices for RJ have been borne out of locally driven and locally grown initiatives; it is therefore agreed that local areas are the best starting point to obtain an evidence base for pre-sentence RJ.

RJ relies on the motivation of both offenders and victims and the timing of offering and undertaking RJ is crucial. It would therefore also assist to ascertain the proportion of offenders and victims who would be prepared to engage with RJ if it was available and at what stage victims would be most motivated to engage.

27. What are the benefits and risks of pre-sentence RJ?

The benefits of RJ to both the offender and victims of crime are clear and are acknowledged in the consultation at paragraphs 115-117. The CBA supports the intention of the consultation to focus on enabling the delivery of restorative justice in more areas and in more circumstances.

For RJ to be effective each case requires close scrutiny as to whether it is appropriate for both the offender and for the victim; each case will have its own sensitivities and issues. The CBA recognises that there will be cases in which pre-sentence RJ is beneficial to both parties and in such cases, RJ should be available.

Timing

The time frame in which RJ is offered is critical. If it is offered too soon, the victim may not feel emotionally ready to engage either directly or indirectly with the offender. Equally the offender may not have completely accepted responsibility or the significance of the RJ process. If it is offered too late, the victim may have moved on and may not wish to be reminded of the offence by engaging in RJ. The "right" time will be different in each case. The benefit of pre-sentence RJ is that it increases the flexibility in which RJ can be offered.

However the risk of pre-sentence RJ is that it may require cases to be returned to court for unnecessary court hearings to ensure RJ is available, appropriate and then carried out. This would lengthen the court process for both the offender and victim and may result in wasted court time. If pre-sentence RJ is to work efficiently, when it is offered it must be ready to be implemented immediately.

Motivation of the offender:

RJ is dependent upon the offender undertaking it for the right reasons. There is a risk that where RJ is undertaken pre-sentence, the offender's main incentive will be to reduce his sentence rather than engage with the process itself. This is less likely where RJ is undertaken as part of the sentence itself.

Influence on sentence passed:

The consultation suggests that one reason to undertake pre-sentence RJ is so as to inform and influence the sentence subsequently passed (para.125). For this to be done accurately, it is anticipated that an addendum pre-sentence report or RJ report would be required to update the court on the RJ process.

If the RJ process is to influence the sentence passed, there must be guidance upon how it is to impact upon the sentence passed to ensure parity.

There is a real concern that if there is be a defined discount upon sentence, this will prejudice those defendants who either cannot undertake RJ because it is not available in that area, because there is no identifiable victim of the crime committed or the victim is unwilling to engage. It may therefore be more appropriate to include it as a mitigating feature, rather than to assign participation in RJ a prescribed discount.

28. How can we look to mitigate any risks and maximise any benefits of pre-sentence RJ?

Due to the individualistic nature of the process, it is essential to ensure that there is a thorough assessment process in place to consider the suitability of both the victim and offender. This process should begin at the first point of police contact. The appropriate time frame should be considered on a case by case basis, with regard to the victim's views.

In particular, it is crucial to have a thorough assessment of the offender's attitude shortly before RJ is to be undertaken. This need is recognised in para.128.

Para.126 raises the concern that it has been unclear which part of the Criminal justice system is responsible for managing and overseeing the process. This must be clear in order to ensure that RJ once available is carried out immediately, efficiently and referred back to court for sentence without unnecessary court hearings being required to keep the process in motion.

As stated in response to question 27, guidance as to the impact of undertaking RJ on the sentence eventually passed would assist to ensure consistency.

29. Is there more we can do to strengthen and support the role of victims in RJ?

As was acknowledged in the CBA response to q.20 of the Consultation paper "Getting it right for Victims and Witnesses", publishing the successful outcomes of RJ is essential. To ensure that the role of victims is strengthened and supported this should include material from the point of view of victims, and the benefit that can be gained from confronting offenders through RJ.

A thorough assessment of the suitability of both offender and victim is essential to ensure that the RJ process is a positive one, and one which retains public support.

It is agreed that victims should have the entitlement to request RJ and to receive it where it is available, and subject to the suitability of the offender.

In addition, follow up support for victims should be readily available to ensure that they are able to discuss the RJ process and any subsequent issues where necessary.

30. Are there existing practices for victim engagement in RJ that we can learn from?

The CPS Core Quality Standards (CQS) stipulates that the CPS will use out-of-court disposals as alternatives to prosecution, where appropriate, to gain speedy reparation for victims and to rehabilitate or punish offenders (standard 3). CQS Standard 7 requires the CPS to assess the needs of victims and witnesses and keep them informed about the progress of their case.

The CPS guidance in relation to RJ is predominantly geared towards considering a conditional caution. It emphasises the need to keep the victim informed, for the police to ascertain the victim's views on reparation and RJ and the need to record the victim's views on the case papers.

It states "*Where the direct victim does not want to participate in a restorative process, the police should consider whether there is an available and appropriate community member also affected by the crime or otherwise representing the community who would add value to the restorative process with the offender. In cases where neither the victim nor an appropriate community member is available, a restorative approach could still be used to deliver the Conditional Caution, by encouraging the offender to consider what harm their offence may have caused, and how best they might repair it. This could be done in a one-to-one discussion (with the officer/facilitator), ideally in the presence of family or other supporters.*"

It would assist for this guidance to be extended to considering RJ at all stages of the prosecution process.

In addition, the existing process of engaging the victim in the meeting of referral order panels following the conviction of first time young offenders is one from which advice and examples may be drawn. There are existing practices of local Youth Offending Services which should be considered. Very often the victim is encouraged by the relevant YOT worker to attend the first panel meeting at which the offender meets the panel members, talks through the offence and contributes to the drawing up of the referral order contract. The participation of the victim in that meeting can often enhance the experience of the young offender and provide innovative ideas for reparation activities.

31. Are these the right approaches? What more can we do to help enable areas to build capacity and capability for restorative justice at local levels?

It is agreed that the proposals in paras.131-132 are the right approaches. In particular, (as set out below in response to q.32) it is agreed that guidance to local practitioners on how RJ can be developed is particularly important. Due to the individualistic nature of RJ, it is suggested that it is particularly important to support local initiative as voluntary organisations who seek to deliver it, whilst developing national standards to ensure that the quality of organisations is maintained.

32. What more can we do to boost a cultural change for RJ?

Increased awareness across the legal profession as to the availability and benefits of RJ, may lead to lawyers becoming more interventionist at all stages from the police station onwards. The same applies to those on the Bench.

This should extend to social workers and YOT workers, to ensure that RJ is considered as a diversion to the Criminal Justice System in appropriate cases, and an effective and proportionate response to low level offending, particularly for young offenders. Consideration of RJ as part of an Acceptable Behaviour Contract, a conditional caution, final warning or the recently piloted Youth Restorative Disposal (YRD) is to be encouraged.

As recognised above in response to q.29, increased publicity of the benefits of RJ, for the victim, offender and society as a whole is crucial to increase awareness and promote involvement. In particular, it is important that the public understands that where it follows conviction as a part of sentence, it is likely to be in combination with a punitive element of sentencing and not instead of that element.

33. How can we ensure that courts are provided with the best possible information about injury, loss or damage in order to support decisions about whether to impose a compensation order?

To enable the courts to have the best possible information, the police should have addressed the relevant issues with the victim through a victim impact statement and to obtain receipts and quantum for loss as soon as that information is available. Alternatively, where the victim has attended court, the prosecutor should address this with them so that at sentence the relevant information is forthcoming. It should also be ascertained in the same statement whether the victim does in fact wish to be compensated by the offender.

It is clearly preferable for the information to be forthcoming at the sentencing hearing. However if it is not, it should be incumbent on the prosecutor to consider whether it is appropriate to apply for an adjournment to obtain further information from the victim.

34. How could sentencing guidelines support a more consistent approach to fixing the value of compensation orders?

At present, the statutory framework places a discretion on the court to order compensation for "such amount as the court considers appropriate having regard to any evidence and representations made by the offender or prosecutor" (s.130(4) PCC(S)A 2000). The court must take into account the offenders means (s.130(11) PCC(S)A 2000).

In light of the more onerous "duty" upon the court to consider making a compensation order under s.63 LASPO 2012, there should be further guidance on fixing the value of compensation orders to ensure a more consistent approach.

Whilst the Magistrates Court sentencing guidelines provide guidance on making a compensation order (p.165-167) it would assist to have a definitive guideline, setting out the different stages to consider before making the final order and providing guidance on the appropriate levels of compensation for various losses or injuries. This could helpfully include guidance as to how to adjust the order in accordance with the defendants means, the consideration to be given to any other financial orders passed, and guidance informed by the DWP on the time frame to allow for a new application for benefits (e.g. for those given a custodial sentence who will have to reapply on release).

As was acknowledged in the CBA response to the consultation on "getting it right for victims and witnesses", compensation payment is made in recognition of the pain and suffering that a victim of crime has experienced. That pain and suffering will take a variety of forms and have widely differing effects depending on the individual circumstances. It would be impossible to cater for each and every one and maintain a fair system of payment in which those who deserve it receive it. We consider that the proposed bands of compensation payment should reflect the effect impact of the injury rather than the type of injury.

35. Would removing the £5,000 cap on a single compensation order in the magistrates' courts give magistrates greater flexibility in cases where significant damage is caused and offenders have the means to pay?

It would provide greater flexibility to the magistrates' court, although it is to be noted that a greater order may be made where the offender is charged with two offences, the £5000 cap applying per offence.

However, if the cap is to be removed, there will be even greater need for definitive guidance on the process to take to make an order, and in particular how to take account of the defendants means and adjust the order accordingly.

Part 3: Rehabilitation and Reform

36. How else could our proposals on community sentences help the particular needs of women offenders?

The CBA does not feel able to express a view in answer to this question.

37. What is the practitioner view of implementing enforced sobriety requirements?

The CBA welcomes any measure which would help to reduce the incidence of alcohol related offending. The CBA recognises the difficulties in predicting from the South Dakota data whether the implementation of such a scheme in England and Wales would lead to a reduction in alcohol related offending. Accordingly, the CBA would await the results of any pilot scheme before venturing a firm opinion. In principle, if the benefits to be produced by such a scheme were sufficient to justify the restrictions on the liberty of the subject of the requirement, the CBA could have no reasoned opposition

38. Who would compulsory sobriety be appropriate for?

Again, the CBA would await the outcome of any pilot scheme before venturing a firm view on this question.

39. Are enforced sobriety requirements appropriate for use in domestic violence offences?

As a matter of principle, we see no reason why a distinction should be made between domestic violence and other violent crime. The reason for making such a distinction cited in the consultation paper is that the causes of domestic violence are far more deep-rooted than simply being the cause of intoxication. Our experience is that the causes of other types of violence are also usually more deep-rooted than the mere excessive use of alcohol.

40. What additional provisions might need to be in place to support the delivery of enforced sobriety requirements?

Again, the CBA would await the outcome of any pilot scheme before venturing a firm view on this question

41. **What other areas could be considered to tackle alcohol-related offending by those who misuse alcohol but are not dependent drinkers?**

This question is outside the ambit of the CBA

42. **What do you consider to be the positive or negative equality impacts of the proposals?**

The CBA has no observations on this question.

43. **Could you provide any evidence or sources of information that will help us to understand and assess those impacts?**

No as above.

44. **Do you have any suggestions on how potential adverse equality impacts could be mitigated?**

No as above

45. **Where you feel that we have potentially missed an opportunity to promote equality of opportunity and have a proposal on how we may be able to address this, please let us know so that we may consider it as part of our consultation process.**

The CBA have no further observations