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Response from the Committee on the Administration of Justice to New Criminal Justice Measures for Northern Ireland

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RESPONSE FROM THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE TO NEW CRIMINAL JUSTICE MEASURES FOR NORTHERN IRELAND.

Community Protection Orders

1.1 While not opposed in principle to the introduction of Community Protection Orders, CAJ are concerned at the civil liberties implications of some of the proposals relating to these Orders.

1.2 It is envisaged that Orders will be available in relation to people over the age of 16. This raises concerns in relation to the protection of the rights of children over the age of 16 who may become the subject of a Community Protection Order. Children, under international legal principles, deserve special protection under domestic law. Article 15 of the UN Convention on the Rights of the Child guarantees the right to freedom of association for children. It may well be that the deprivation of freedom of movement inherent in the imposition of an indefinite order on a sixteen-year-old would violate international legal norms.

1.3 CAJ would have some concern, despite the evidential proviso in 2.6 of the Consultation Document, that the process of applying for orders may be open to abuse. This is particularly so in the event that the police are given the responsibility to apply for the orders. We are concerned that the proposals, as currently drafted, may allow for a situation where evidence of a previous caution in addition to evidence from police in relation to conduct or statements, would be sufficient to persuade the court to grant an Order. We believe that some additional evidence should be necessary before an Order is granted. In particular, we believe that the court should be obliged to consider a report from the Probation service before granting an Order.

1.4 We have grave concerns about the proposal in paragraph 2.7 that an Order would last a minimum of five years but could be indefinite. It is quite conceivable that, post appeal, new material may come to light which casts doubt on the safety of the granting of the original Order, or which clearly reduces the risk posed by the subject of the Order. In that context, it would be inequitable for the Order to continue in force, perhaps for five years, as envisaged by para 2.17. We believe that the maximum duration for an Order should be five years, and that there should be an opportunity for either party to have the Order reviewed during that time, with a view to having it varied or discharged. We do not believe that this should require the agreement of all of the parties.

1.5 To partially allay the concerns expressed in para 1.2, we believe that the police should not be given responsibility for applying to court for the Order. We believe that this should be within the provenance of the Director of Public Prosecutions. In the event that the police feel that an Order is necessary they should prepare a file and pass it on to the DPP who will then assess the likely success of an application and, if appropriate, take the necessary steps to begin the process, thereby injecting at least some degree of independence into the process.

1.6 Given the potential length and extent of an Order, we feel it is imperative that the potential subject of such an Order be given the opportunity effectively to challenge an application for an Order. While para 2.14 makes clear that the defendant would be informed of the hearing, we believe it is also incumbent on government to ensure that the defendant be given access to legal aid to ensure he/she is able to be legally represented.

1.7 In relation to the appropriate court to deal with applications for Orders, we have no specific objection to what appears to be the government's inclination towards the County Court, save to say that appeals from that court would in all likelihood take longer to resolve than appeals to it. Therefore, given that the decision of the court of first instance would remain in force pending the appeal, it is likely that an Order wrongly granted or refused will remain in force for longer if granted by the County Court.

Drug Treatment and Testing Orders

2.1 We are somewhat surprised at the proposals contained in this section given that there does not appear to be, in our view, a particularly marked problem in Northern Ireland of drug addicts having recourse to criminal activity to fund their addiction. Insofar as we are aware, the relevant literature supports the notion that drug use in Northern Ireland is primarily recreational. It is our understanding that behaviour of the type which these proposals is seeking to counter is normally related to heroin addicts and there is little evidence of extensive heroin use in Northern Ireland. Indeed the text of the proposals themselves seem to support this view when it is admitted that the number of offenders posing this type of problem in Northern Ireland is comparatively small. It therefore appears to us that the measures proposed, which represent a significant intrusion into widely accepted civil liberties principles, are a disproportionate response to the scale of the perceived problem.

2.2 We also find it slightly illogical that strengthened treatment orders are being considered for Northern Ireland when the experience of compulsory orders in Britain appears to have been a singular failure. Many of the problems highlighted as reasons for the lack of success for the orders in Britain would, in our opinion, remain serious obstacles to the success of such a scheme here.

2.3 We do not intend to comment specifically on the detail of the proposals for the reasons we have outlined. CAJ believes that, as there does not appear to be a serious problem to be addressed, and that experience of similar departures elsewhere is negative, it would be foolhardy and a waste of public resources to proceed along this route.

Doli incapax: abolishing the existing common law doctrine

3.1 The doctrine of doli incapax has afforded some protection to children under the age of 14 in the past. However the concept has recently been the subject of legal challenge and the House of Lords suggested that the

law was unsatisfactory and invited parliament to consider legislative change to clarify the situation. CAJ believes that this should be done in favour of the child, raising the age of criminal responsibility to at least 14, as is the case in Germany. Indeed in other European countries, such as Spain, we understand children under the age of 16 are not deemed criminally responsible.

3.2 In this context it should be remembered the UN Committee on the Rights of the Child has in the past expressed concern to government that the age of criminal responsibility is too low (UNCRC 1995:4) and has since suggested that even 12 years is too young.[1] Rule 4 of the Beijing Rules suggests that in setting the age of criminal responsibility government should bear in mind the impact of "emotional, mental and intellectual maturity on whether a child can live up to the moral and psychological components of criminal responsibility." The Rules note that "in general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority) etc."

3.3 Therefore it is clearly inconsistent that, for example, a child from age 10 years can be deemed to be as capable as an adult of committing murder but incapable of taking any of the decisions relating to his or her own health and welfare.

3.4 Irrespective of debates on the appropriate lowest age limit, in a fundamental way, justice requires that the notion of capacity is the important principle in estimating criminal responsibility. Children committing delinquent acts should, however, be considered in need of support and rehabilitation and facilities and resources provided accordingly. There may be occasions when such children would require secure accommodation, if a danger to themselves or others, but such judgements should not be based on estimates of 'intent' or 'culpability'.

Dealing with unrelated charges

4.1 CAJ agrees with this proposal.

TV links for pre-trial hearings

5.1 CAJ, while appreciating the logistical difficulties involved in the production of prisoners at various courts, are concerned that the use of live television links may impact negatively on the lawyer/client relationship. Presumably the main use of the proposed TV links will be for remand hearings. These are often crucial in ensuring that the prosecution are being sufficiently expeditious in their handling of the case. Obviously it is important in this context for solicitors to be able to consult with their clients. How will private consultations be catered for if this proposal is adopted? This is particularly acute when something is said in the course of a remand hearing which requires a brief consultation between the prisoner and his/her solicitor. Anyone familiar with the way magistrates

[1] Cited in Children and Violence: Report of the Guelbenkian Foundation, 1995: 176.

courts work will be familiar with the practice of a solicitor having a brief and private consultation with the prisoner before agreeing to a new remand date. It is difficult to envisage how this will be accommodated with the use of TV links.

5.2 Additionally, we would assume that the vast majority of remand prisoners are incarcerated in the Maze and Maghaberry. It is already the case that magistrates' court regularly sits in the Maze, thereby resolving the problems incumbent with moving that set of remand prisoners to Belfast for remand hearings. Perhaps a similar system could be set up to deal with remands at Maghaberry.