



**RESPONSE TO WHITE PAPER
'ONE STEP AHEAD – A 21ST CENTURY STRATEGY TO DEFEAT
ORGANISED CRIME'**

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INTRODUCTION

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists. We welcome the opportunity to respond to the organised crime White Paper, *One Step Ahead*.¹
2. JUSTICE agrees that the basic principles of the new strategy against organised crime – to reduce profit opportunities, disrupt organised crime businesses and their markets, and increase the risk of prosecution of the leading figures² - are sensible and appropriate means of reducing crimes such as drug and people trafficking, and revenue fraud. In particular, we would urge the government to look creatively, and in a long-term way, at the potential to reduce profit opportunities. We very much welcome the recognition in the White Paper that measures to reduce demand for drugs, particularly education aimed at preventing abuse and investment in drug treatment to cure addiction, are considered part of the crime reduction strategy.
3. JUSTICE would urge the Government to give further consideration to tackling some of the background incentives to organised crime, such as: the difference in rates of excise and tax duties between the UK and her near neighbours in the EU; the poverty and political corruption that exist in many of the major illegal drug producing countries; impediments to the legal 'economic' migration of people into the UK; and the overall illegality of the sex industry, which often exacerbates the problems and dangers of both exploited and non-exploited persons involved in prostitution.
4. We agree that the relevant enforcement agencies should be reorganised so as to best encourage coordinated nation-wide and international efforts at detection and evidence gathering in relation to organised crime. If the Serious Organised Crime Agency is constituted in the way described, and properly resourced, it should make considerable improvements in these activities. We agree that there is a role for specialist prosecutors to work closely with, but independently of, the new agency, which will hopefully lead to improvements in the efficiency of the charging and prosecution processes.
5. In relation to international measures to combat crime, JUSTICE has generally supported recent developments in EU police and judicial co-operation and their basis in the principle of mutual recognition.³ Serious crime will often be European in dimension and as such will only be addressed on a European-wide basis. However, our briefings have consistently highlighted the risks of extending that co-operation without first ensuring that the premise of mutual recognition - namely that fundamental rights are protected in a comparable way across the EU - has been met. EU defence rights and a common data protection regime are two areas that must be addressed

¹ Cm 6167, 29 March 2004

² White Paper page 12

³ White Paper page 16

urgently if the mutual recognition programme is to succeed. The long-awaited European Commission proposal on minimum procedural safeguards for suspects and defendants in criminal proceedings throughout the EU was a serious disappointment for those hoping for a far-reaching set of safeguards that would guarantee equal and adequate protection to all those affected by EU police and judicial co-operation measures.⁴

THE OFFENCE OF CONSPIRACY

6. The White Paper notes the strong view within the criminal justice community, presumably held by those concerned with the detection and prosecution of offences, that changes to the substantive law are necessary because 'existing conspiracy legislation may not always reach the real Godfather figures, does not provide a practical means of addressing more peripheral involvement in serious crime and does not allow sentencing courts to assess the real seriousness of individual crimes by taking into account the wider pattern of the accused's criminal activities'.⁵
7. However, the White Paper does not spell out in any detail the difficulties occasioned by the offences, and so it is rather difficult to comment on how and why the difficulties arise – is there a deficiency with the substantive law, is it that the law is not being applied correctly, or is it that evidential rules create problems in proving the offence? Conspiracy, properly used, is a potentially very wide offence which concentrates on an agreement to commit an offence, rather than its actual commission. Its prosecution is assisted by the co-conspirator rule, which allows a statement in furtherance of the conspiracy, made by one alleged conspirator, to be used against all alleged co-conspirators, rather than only the maker of the statement. The offence of 'being knowingly concerned in', for example, the fraudulent evasion of the prohibition on the import of a controlled drug, in section 170 of the Customs and Excise Management Act 1979, is also a potentially wide offence. If the ban on telephone intercept evidence is removed, as we recommend below, these offences will no doubt become easier to prove.
8. There must always be some objective criminal activity proved against any member of an alleged criminal enterprise, be they a peripheral player or controlling Godfather. While it may be temptingly easy to be able to accuse and convict someone of having a general criminal tendency or lifestyle, the state must prove specific wrong-doing against anyone accused of a crime. Any charge must be sufficiently and clearly defined, so that the accused person can know the case alleged against them and be in a position to defend themselves. This may well mean that there be proof of a specific act of supply of a commodity, and that there be proof that the commodity is indeed prohibited.⁶ Any new offence of trading in proscribed goods would similarly need to be particularised. The creation of a membership offence, such as belonging to an organised crime group, is likely to entail major definitional problems.

⁴ For further information on EU criminal justice issues please refer to our briefings, which can be found at www.justice.org.uk

9. We would resist the relaxing of the *mens rea* requirements for liability as a secondary party – it is a fundamental principle of criminal responsibility that a criminal act be accompanied by guilty intention, whether as a principal or secondary participant.⁷ ‘Ways of admitting evidence of wider criminality to inform sentence’ will not be possible or fair where the accused does not admit to the wider criminality.⁸ It is for those who argue that the existing offences are too narrow to argue for and justify the need to widening them. We therefore look forward to receiving the detailed Home Office consideration of the need to reform conspiracy and secondary participation offences.
10. However, JUSTICE would caution against the creation, on piecemeal basis, of a raft of new offences. Reform of the criminal justice system in the last decade has happened in an ad-hoc way, with new laws being brought in on top of existing ones and, it would seem, with little thought given as to how they are intended to interconnect. That the substantive criminal law, in particular, should be clear, uncomplicated and accessible to the public is axiomatic, and a system of criminal law that does not possess these characteristics may, in human rights terms, be characterised as arbitrary. The Law Commission has long been working on a criminal code, and is at present revising its 1989 draft. Codification of the criminal law is widely recognised as a very desirable way to promote legal certainty and accessibility. While we acknowledge that some offences are legally complex and in need of modernisation, and that this may impede their successful prosecution, we would submit that piecemeal reform is likely to prove counter-productive in the long term, and that consideration should be given to implementing the Law Commission’s codification project. Rather than altering the fundamentals of the criminal law by creating new offences or changing existing ones, it may also be wise to allow the new Criminal Assets Recovery Agency adequate time to establish its role as a deterrent to organised crime.

COMPELLING INDIVIDUALS TO GIVE EVIDENCE

11. JUSTICE does not support the proposal that specialist prosecutors be given new powers to compel individuals to answer questions. While we acknowledge that the privilege against self-incrimination would rightly prevent any admission so gained being used against the maker of the statement, and is a factor which clearly limits the efficacy of such an investigatory technique against a suspect, other information gained as a result of a statement could be used, in a potentially unfair way, against its maker. Where a witness who has been compulsorily questioned does not attend court, the new hearsay provisions in the Criminal Justice Act 2003 are likely to be used in an attempt to allow the witnesses’ evidence to be read, something likely to be challenged on the ground it contravenes the defendant’s right to challenge the evidence against him.

⁵ White Paper page 40

⁶ White Paper page 41

⁷ *ibid.*

⁸ *ibid.*

12. Obtaining statements by compulsion from people who are themselves under suspicion has the potential to cause significant complications to subsequent trials involving multiple defendants, where one defendant seeks to rely on information contained in a statement made by their co-accused. In the 'Wickes case' defendant C successfully sought to admit, as part of his case, an extract from his co-defendant R's interview, that had been conducted compulsorily by the Serious Fraud Office under section 2 of the Criminal Justice Act 1987. The judge then allowed R's application for severance and a separate trial, because of the potential unfairness caused to R as a result of having been forced to give evidence to explain the circumstances of the interview and his answer. Ultimately none of the defendants involved in the case were convicted.
13. We are particularly concerned at the suggestion that such a power may enable the prosecution to embark on questioning of a suspect's legal advisor. The White Paper appears to acknowledge that legal professional privilege would continue to apply, and the Attorney-General has confirmed this.⁹ Of course, legal privilege has never applied to material created or communicated for the purpose of criminal activity. The scope of legal privilege has been narrowed significantly by the Court of Appeal judgment in the *Three Rivers* case, which held that, in relation to non-litigious matters, the privilege applies only to communications for the purpose of specific legal advice.¹⁰ The ability of a client to confide in their solicitor is an essential part of the right to a fair trial. The potential for solicitors to be questioned, on pain of a criminal sanction, about their client's affairs will have an adverse effect on the solicitor/client relationship in respect of all clients, be they guilty of an offence or totally innocent.
14. If our argument above is not accepted and this power, nevertheless, is introduced, it should be subject to strict limitations. In effect, the suggestion is to expand the power in section 2 of the Criminal Justice Act 1987 from serious fraud to all serious crime. Although the use of such a power against witnesses is less problematic than its use against a suspect, who is protected by self-incrimination privilege, it would still represent a fundamental change in the relationship between the State and its citizens, who have historically enjoyed the right not to be compelled to co-operate with the authorities. The use of this potentially draconian power must therefore be limited to serious offences, clearly defined in statutory form. Compulsory questioning, whether of a witness or a suspect, should be subject to authorisation by a senior legally qualified prosecutor of the equivalent rank to an Assistant Director of the Serious Fraud Office. Any compulsory questioning of a suspect's legal advisor ought preferably to be authorised by a judge, given lawyers' status as officers of the court. Before an investigation is authorised the relevant authority must be satisfied that the interviewee is reasonably suspected of being in possession of relevant information about a serious offence, that the information is not subject to legal professional privilege, that the information is necessary for the successful prosecution of the serious offence, and that there are no other means of obtaining the information. There should be a right of appeal against an authorisation. The agency exercising the power should be required to provide an

⁹ In a letter to the *Law Society's Gazette*, 16 April 2004, p 14

annual report to Parliament in relation to the frequency of such investigations, their success or failure, and any complaints arising.

EVIDENTIAL USE OF INTERCEPT EVIDENCE

15. JUSTICE agrees that an emphasis on pro-active intelligence-based policing is the best way to detect and successfully investigate and prosecute organised criminal enterprises of the type that exist in the UK. Modern methods of electronic surveillance are an essential tool in intelligence-based policing. However, the internationally unusual, indeed, self-imposed blanket ban on the admissibility of evidence gathered by means of telephone intercepts is acknowledged to significantly hamper the prosecution of such people.
16. For many years JUSTICE has supported the removal of this automatic ban. In our 1998 report *Under Surveillance* we recommended that 'lawfully intercepted material under the Interception of Communications Act should be *prima facie* admissible as evidence in criminal proceedings subject to the fairness test of section 78 of PACE'.¹¹ In order to comply with the spirit of the European Convention of Human Rights, we further recommended that all such intercepts should be authorised by a High Court judge, rather than by the Secretary of State.
17. However, the Regulation of Investigatory Powers Act 2000 perpetuated both the ban on admissibility¹² and the Home Secretary's power of authorisation.¹³ We hope that the promised Home Office-led review of the use of intercept evidence in court will recommend that the ban cease. If such evidence does become usually admissible, we would continue to submit that the Surveillance Commissioners, rather than the Home Secretary, be responsible for authorising an interception, and that the principles of proportionality apply - there must be a reasonable suspicion of criminal activity, it must be shown that a phone tap is a necessary infringement of the right to privacy, and any warrant must be time-limited.¹⁴ The Government should also be aware that there will be additional costs arising from the need to transcribe recorded conversations.

REFORMING CRIMINAL TRIALS

18. JUSTICE regrets the very partisan tone in which the White Paper welcomes views on how defence tactics, designed to simply frustrate the trial process, can most effectively be tackled.¹⁵ These tactics are said to include "extensive 'voire dire' hearings, challenging every aspect of the

¹⁰ [2004] EWCA Civ 218

¹¹ See *Under Surveillance: Covert policing and human rights standards*, M Colvin, JUSTICE, 1998, page 76

¹² Section 17

¹³ Section 7

¹⁴ See also 'JUSTICE's Response to the Joint Committee on Human Rights Inquiry into the Government's Review of Counter-terrorism Powers', on www.justice.org.uk

¹⁵ White Paper, page 57

prosecution case and looking for every reason to exclude prosecution evidence.”¹⁶ Worryingly, such a statement implies that there is a duty on the defence to actively assist in the prosecution process, and that challenging the admissibility of evidence, the fairness of police tactics, or the existence of a warrant are simply tactics designed to frustrate the police and prosecution. In fact, in many cases, enquiries in relation to the investigation process and challenges to the admissibility of evidence are an integral part of the defence case.

19. The history of the legal regulation of criminal investigation shows there is a tension between the sort of investigatory tactics some members of the police would like to employ, and the need for there to be limits, created either by Parliament or by the courts, to the use of tactics which can create unfairness, or the arbitrary exercise of power. The development of the law relating to entrapment is a good example. Often the police believe that a particular individual is a criminal, and in some cases, it must be said, with good reason. However, the rule of law requires that the decision that someone is guilty of a criminal offence be made by an independent criminal court, in which the decision-maker is satisfied of the accused person’s guilt to the exacting standard of proof beyond a reasonable doubt. As the miscarriage of justice cases of the last 20 years so tragically demonstrate, sometimes both police and courts get it wrong. In such cases not only is the real perpetrator not convicted, but an innocent person will spend many years in prison.
20. The rules in the Police and Criminal Evidence Act 1984 and internal police best-practice guidelines help to ensure that investigations are conducted fairly and reduce the risk that errors are made. Where the police have collected the evidence lawfully in the first place, applications to exclude that evidence will simply not succeed. Conversely, the ability to scrutinise the way in which evidence is gathered is a powerful disincentive for the police to act illegally. Recent drug cases in the Lincoln Crown Court that collapsed following the discovery that police had illegally tapped conversations between accused persons and their lawyers well illustrate this concern.¹⁷
21. Methods that are currently available to courts, including wasted costs orders, and the ability to reflect the level of a defendant’s co-operation with the system by use of the sentence discount, are adequate means of encouraging co-operation. Any further sanctions would place unfair limitations on the ability of the defendant to pursue any legitimate point open to them.

PLEA BARGAINING

22. We are concerned that the White Paper states that, although ‘it is obviously right that defendants enjoy the full protection of the law’, that ‘it is equally incumbent on the Government to ensure that strong cases can be progressed as quickly as possible, *by encouraging guilty pleas* and

¹⁶ White Paper, page 45

¹⁷ See BBC News, Thursday 1 April 2004 *Drugs case fails over police bugs*
<http://news.bbc.co.uk/1/hi/england/lincolnshire/3590981.stm>

strengthening the powers at agencies' disposal' (our emphasis).¹⁸ JUSTICE has consistently opposed the introduction of a system of formal plea-bargaining as applies in the United States. Indeed, we have expressed concern at the much less controversial idea of a reduction in sentence for a plea of guilty, although we accept that the guilty plea discount has been an accepted statutory sentencing principle for some time, a situation that is unlikely to change. For a detailed explanation of our concerns about plea-bargaining please see our 1993 report, *Negotiated Justice*.¹⁹ In essence, the basis of our objection is the presumption of innocence. There must be no suggestion that the criminal justice system as a whole, and in particular the courts, should subject a defendant to any pressure to plead guilty. There is a risk that where such pressure exists those who are not in fact guilty will plead guilty. Evidence suggests that those who distrust the criminal justice system most, and who are more likely to be black, will enter a not guilty plea proportionately more often than those who trust it. If found guilty they will not qualify for the sentence discount. As a result, indirect racial discrimination is built into the sentencing process.²⁰

23. It is useful to distinguish the following scenarios:

- A reduction in sentence will usually be made following a guilty plea, resulting in a lesser sentence to that imposed following a trial.
- The provisions in schedule 3 of the Criminal Justice Act 2003 allow for an advanced indication of whether a sentence will be custodial or non-custodial to be given by a magistrate, after it has been decided that an either-way offence is within their jurisdiction, and before the defendant elects to go to the Crown Court for trial.
- A private in-chambers conference with the judge occurs before a plea is entered, as to the likely sentence, a practice very much frowned upon by the Court of Appeal. See the cases of *R v Turner*²¹ and others since, including *R v Peverett*,²² where the Court has stressed that only in wholly exceptional circumstances should counsel have recourse to the judge in chambers, an example of exceptional circumstances being where an accused person is unaware they are dying.
- The defence and the prosecution enter into negotiations, resulting in pleas of guilty to some or all charges, or on a particular version of the factual basis for sentencing, with the defence securing from prosecution an undertaking not to oppose a certain type of disposal or range of sentence, which the judge, uninvolved in the negotiation process, is free to accept or reject (as is commonly the practice in Australia).
- US-style plea and charge bargaining, where the parties agree the charges that are to be admitted, and where the penalty or a rigid range of penalties is imposed due to binding sentencing guidelines, with the result that the judge is often persuaded to impose a penalty that the parties have agreed upon. Such an agreement may contain restraints on the defendant's right to disclosure of evidence or their ability to appeal, and may require them to testify against others.

24. Plea-bargaining in the United States has developed as a result of significant differences between their system and ours, in particular the greater role of the US prosecutor in influencing the type

¹⁸ White Paper, page 39

¹⁹ *Negotiated Justice - a closer look at the implications of plea bargains*, JUSTICE, London, 1993

²⁰ R Hood, *Race and sentencing*, Oxford University Press, 1992

²¹ [1970] 2 QB 321

and length of sentence imposed by the court. Here, the prosecution has traditionally had a very limited role in this regard. In addition, courts in the United Kingdom have consistently set their face against in-camera plea negotiation involving the judge, and the cases that have come before the Appeal Court have illustrated the very major embarrassment that can occur. We therefore cannot see how the government is likely to be able to persuade the judiciary to overturn *Turner*, and nor should it. Any form of plea or charge negotiations between the parties should not involve the judge.

25. The greatest unfairness created by the widespread use of plea and charge negotiation is caused by the inequality of bargaining power between the prosecution and the defence. Plea bargaining tilts the power balance in the trial process unfairly in favour of the prosecution by effectively depriving the defendant of the right to contest a charge, due to the very real risk that an unsuccessful plea of not guilty will result in a harsher sentence. The notion that those who are in fact guilty should be encouraged to plead guilty is not, of itself, a bad one. However, in the context of an adversarial system of criminal justice, it is very difficult to find a way of encouraging guilty pleas that does not have the potential to impact adversely on those who are innocent. A system that may encourage a defendant who is not guilty to falsely admit an offence, creates an unacceptable risk of miscarriages of justice occurring. Proposals for the more widespread use of plea-bargaining do not acknowledge the inequality of negotiating positions between the prosecution and the defendant, as the latter faces the potentially very dire consequences of unsuccessfully contesting a charge.
26. Perhaps there is scope for the more limited idea, as is suggested in the White Paper, that a Crown Court judge may give an indication of the type of sentence he or she has in mind, if requested to do so by the defence.²³ As mentioned in scenario 2 above, this has already found legislative expression in the Magistrates' Courts with the passage of the Criminal Justice Act 2003, and was recommended by Lord Justice Auld.²⁴ This could conveniently occur at the Plea and Directions Hearing, or before a trial commenced. However, we see no advantage for this to occur in chambers, or for the defendant to be excluded. It is also essential that the defendant be properly advised as to any other consequences of a plea, such as asset recovery proceedings. This limited form of sentence indication, with safeguards designed to prevent any suggestion of pressure, may not be objectionable.

ENCOURAGING 'QUEEN'S EVIDENCE'

27. The White Paper enthusiastically describes the cooperation of co-defendants with the prosecution as the 'real prize' that 'will speed up trials, increase the impact of prosecutions on wider networks,

²² [2001] 1 Cr. App. R 27

²³ White Paper, page 46

²⁴ *Review of the Criminal Courts of England and Wales*, TSO, 2001, page 443

drawing in major players, and increase the level of mistrust within criminal gangs.²⁵ We acknowledge that in relation to some forms of criminal activity, and particularly organised crime, using the evidence of others involved in the criminal enterprise will be perhaps the only way of detecting and successfully prosecuting it. However, there are serious risks and ethical issues involved in such a strategy, some of which the White Paper acknowledges. In JUSTICE's report *Under Surveillance* similar concerns regarding the use of informers were summarised thus:

There are clearly risks and difficult ethical issues involved in using informers; and those risks become greater the more proactive and targeted their activities. First, there is the potential for malpractice and corruption. As the system depends on secrecy, there is considerable scope for coercive and manipulative behaviour both by the police and informers. According to recent reports, such relationships are the key factor in the corruption allegations concerning senior detectives in the Metropolitan Police. Equally, it is not unknown, for example, for drug dealers to act as informers in order to provide cover for their own activities. Second, there is the question of the reliability of the information supplied. As the motive for informing may be dubious and suspect, so may the resulting intelligence information or evidence. At one end, this will affect policing decisions based on the information, in particular the nature and extent of any investigation; at the other, it risks causing miscarriages of justice because of unreliable evidence.

In addition, there are serious ethical issues. Apart from the public-spirited citizen who gives one-off information, an informant system is principally one of trade and reward: advantages are given in return for information. This gives rise to questions of legal propriety. For example, in what circumstances is it appropriate to do a deal which involves either not prosecuting an informer, or prosecuting on reduced charges? Is turning a blind eye to the extent of an informer's criminal activities justified by the benefit of catching a bigger criminal? If so, does this mean that the police pay less attention to minor crime and the interests of victims? There is also a major ethical issue if the police, in some circumstances, allow a crime to be committed which could otherwise have been prevented.²⁶

28. The so-called 'supergrass' trials in the 1970's in England with respect to organised crime gangs, and in the 1980's in Northern Ireland in cases involving terrorism, clearly illustrate some of the difficulties inherent in the use of such evidence. Witnesses failed to appear to give evidence after being released. Some admitted to having committed perjury when giving their earlier evidence, in cases where they were the main prosecution witness. In each jurisdiction the use of such evidence was discredited and gradually dwindled.²⁷ The White Paper suggests that the reason why co-operation is now rarely used is the reluctance of defendants to submit because the incentives are not seen as clear or substantial enough. This may be partly true, but perhaps a greater reason is fear of the consequences of testifying.
29. Encouraging the more widespread use of 'Queen's Evidence' means that the decision as to the relative roles of the criminal participants is taken away from the court and put into hands of the prosecution, advised by the police. One may question whether this is right. What if the police or prosecution are misled and get their assessment wrong, so entering into a deal with the wrong person, and causing the less culpable participant to get a greater sentence? Entering into deals

²⁵ White Paper, page 47

²⁶ Op. cit., note 11, page 41

²⁷ For a detailed study of the Northern Ireland trials, see *Supergrasses: A study in law enforcement in Northern Ireland*, S Greer, Clarendon Press, 1995

with those who have much to gain in the form of a reduced sentence or immunity from prosecution, or who wish to settle an old score with a criminal rival, creates a significant potential for miscarriages of justice to occur.

30. Despite these concerns we acknowledge that encouraging people to give evidence against their criminal associates will sometimes be a necessary strategy, and that an incentive will be required. We know that courts at present give often-large reductions in sentence for co-operation. The White Paper proposal is to encourage this to happen more by 'enshrining the existing case law in statute' and enabling the existence of a 'binding co-operation agreement' between the prosecution and defendant, so that the prosecution would apply to the judge for a sentence reduction on behalf of the defendant. Whilst we would have no objection to giving statutory form to the principle that cooperation with the prosecution should usually result in a discount in sentence, an idea which we supported in *Under Surveillance*,²⁸ the existence of a formal co-operation agreement would seem to be approaching the sort of US-style plea-bargaining agreement that we, and the courts, oppose. It should be for the judge, not the prosecution, to decide on the appropriate amount of reduction in each case, and there should be no suggestion that the prosecution may suggest or promise a certain sentence, or reduction in sentence.
31. Carefully drawn prosecution guidelines and careful judgment will be needed to ensure that the risk of unreliable evidence is minimised. The decision to seek or accept an offer must only be made by the prosecution and not by an investigator. In some cases it may be appropriate for sentence to have been passed on the witness before they give their evidence. Full immunity from prosecution should be granted in only the most extreme cases, where public interest in the prosecution of the witness is clearly outweighed by the gravity of the offending of the person who is being prosecuted.²⁹ Sensitivity to the interests of any victims of the person with whom a deal is done will be required.
32. The fact that a co-participant has turned 'Queen's Evidence' must be disclosed to the defendant, and in a timely way, so that any pre-trial preparation and instruction-taking can occur. In many cases there will be legitimate concern for the witness's safety. The proper solution to this problem must be the provision of adequate police protection, and not the seeking of non-disclosure of the witness's identity, a practice that would likely result in a breach of article 6 of the European Convention of Human Rights.³⁰
33. In the past the danger of unreliable evidence was mitigated, to some degree, by the mandatory requirement that the jury be warned as to the danger of convicting on the uncorroborated evidence of an accomplice. Such warnings are now discretionary.³¹ Courts must be alert to the need for

²⁸ Op. cit., note 11, page 48

²⁹ We note that the Office of Fair Trading, using its power to prosecute cartel activity under the Enterprise Act 2002, already has a published policy allowing for immunity from prosecution.

³⁰ A 6(3)(d) - Everyone charged with a criminal offence has the right to ... examine or have examined witnesses against him ...

³¹ Since the enactment of s 32(1)(a) Criminal Justice and Public Order Act 1994

corroboration warnings. Where the only evidence is uncorroborated accomplice evidence there is an even greater need for a strong warning to the jury that they exercise caution before relying upon it.

NATIONAL WITNESS PROTECTION PROGRAMME

34. Any effort to encourage fellow criminals to co-operate will fail if they are not confident that they, and their families, will be safe from the very real risk of harm from their associates, both while they are in prison and following their release, a threat which will often continue indefinitely. A properly resourced national witness protection programme may be able to provide the necessary reassurance and effective protection. However, the task will be very difficult to achieve because, by their nature, major criminals have significant resources and the cost of providing lifelong protection will be very high indeed. Once started it will have to continue indefinitely. Work will need to be done to minimise psychological damage caused, for instance, to children who are forced to 'live a lie'. In the absence of adequate protection it will only be a matter of time before someone's next of kin claims the government has failed in its positive obligation to protect the life of someone the authorities know to be in danger.³²

SENTENCING AND EXTENDED LICENCE POWERS

35. JUSTICE is concerned that the White Paper suggests that sentences for crimes such as trafficking in Class A drugs are too low in the UK, compared with those imposed by courts in the US and Australia.³³ Such comparisons are potentially very misleading, as they do not take into account different laws, sentencing practices and local conditions. It is for Parliament to set the maximum penalty for an offence, and in relation to Class A drugs it has set the maximum as high as it possibly can, with life imprisonment for some offences. Court of Appeal guideline cases would suggest that courts do impose significant sentences for these offences.³⁴ The prosecution has the right to appeal against a sentence it considers lenient, and often does appeal. Under the Criminal Justice Act 2003, it is now for the Sentencing Guidelines Council to set sentencing parameters, and we are heartened that the White Paper acknowledges the need to engage with the Council and Sentencing Advisory Panel in its review of sentencing. While we agree that deterrent and preventative sentences will often be necessary in cases of organised crime, it is important that the Government not succumb to a knee-jerk tendency to seek increased sentencing tariffs, as this has the effect of increasing sentences across the criminal spectrum and will further contribute to the UK's burgeoning prison population.

³² See *Osman v UK* [1999] 29 EHRR 245

³³ White Paper, page 52

³⁴ See Archbold 2004, para. 26-107

36. The use of tailored licence conditions post-release is a more creative response than simply seeking increased custodial penalties.³⁵ The prosecution should have to apply to the court for enhanced conditions. They should be objectively justified and not simply sought because the offence can be characterised as one involving organised acquisitive crime. They should only be imposed where they are proportional to the offence and the risk of reoffending, given the potential infringement of the right to privacy that reporting all financial records would involve, and the consequences of failing to do so, i.e. further imprisonment.

JUSTICE, July 2004

³⁵ White Paper, page 53