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## **Victims or defendant – can there be justice for all?**

The recent criminal justice White Paper, *Justice for All*, states that the Government's reform proposals are guided by a "single clear priority" – "*to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice*".

Many of the White Paper's proposed reforms ought to be welcomed, however, in the Government's desperate drive to appear "tough on crime", it has sacrificed the innocent defendant in order to convict the guilty. Its attempts to justify this on the basis of a "rebalancing in favour of the victim" are fallacious. In reality, the scales of justice are being tilted against the defendant.

The White Paper indicates a shift firmly in favour of what Herbert Packer famously termed a "crime control" regime. It is explicit in its aim of closing the "Justice Gap" between the number of recorded crimes and the number of recorded convictions. This is wholly appropriate. However, the manner in which the Government proposes to achieve this is open to at least three serious objections.

At a basic level, the "Justice Gap" has two distinct, albeit related, elements. The first is the question of police effectiveness in apprehending suspects and charging them, and the second is whether those suspects are ultimately convicted. Whilst the White Paper briefly addresses the first part of the process, its focus is premised entirely on the proposition that too many guilty people walk free from court, despite figures which strongly suggest that the greater part of the 'gap' is in the first part of the

process.<sup>1</sup> Without empirical evidence to support this contention, it is a dubious basis for the controversial reforms proposed.

More fundamentally, the “clear priority” on which the entire reform is premised is open to question. Does the law have to strike a balance between the rights of victims and the community on the one hand, and the rights of defendants on the other? The need to balance conflicting policy considerations is certainly a universal problem in the law. For example, there is a ubiquitous tension between certainty on the one hand, and the achievement of justice on the merits on the other. As these competing policy considerations are so closely related, any move to strengthen one, necessarily results in the weakening of the other. In no area is the tension between policy considerations more obvious than in the criminal justice sphere. Here the choice is between focusing on convicting the guilty or acquitting the innocent. But there is no reason to assume that the relationship between victims and defendants is also of this nature. Does an increase in victims’ rights necessitate a corresponding decrease in defendants’ rights? If not, the entire White Paper, in an attempt to appeal to the sentiments of a public who are clearly concerned about crime, is premised on an entirely false dichotomy.

Thirdly, and most significantly, the White Paper overlooks the potential cost of making inroads into defendants’ rights. Our adversarial justice system provides protection to defendants not to hinder the conviction of the guilty, but rather to protect the innocent. It must not be forgotten that innocent people who are wrongfully convicted, although not ‘victims of crime’, are certainly ‘victims of the criminal

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<sup>1</sup> Police ‘detect’ only 23% of crime: Simmons, (2002) Crime in England and Wales 2001/2002, Home Office Statistical Bulletin

justice system'. It could therefore be argued that several of the proposed reforms will result in yet more victims.

One of the most radical of the proposed reforms is the watering down of the long-standing "double jeopardy" rule, albeit with stringent safeguards to ensure the process is not abused. At first glance, this appears to be a sound proposal and one designed to deal with the evolution of new technology. However, the cost to defendants' rights is substantial. Most fundamentally, given its proposed retrospective effect, thousands of (possibly innocent) people could be in a state of unacceptable uncertainty as to whether they might be tried again. Furthermore, although there is a limit to one retrial, there is no limit to the number of applications that can be made. Paradoxically, the substantial safeguard of "compelling evidence" will also virtually destroy the chance of a fair second trial. Even if 'trial by press' could be avoided by suitable reporting bans, a jury which knows the Court of Appeal has seen "compelling evidence of guilt", can hardly be said to start from a presumption of innocence. There may also be Human Rights Act implications in terms of potential breaches of Article 6 of the ECHR. Moreover, the prosecution will unfairly have precise knowledge of the defendant's case. The effect of reform may therefore be to create more victims of the system.

Another widely criticized proposal has been the restriction of trial by jury in complex fraud cases. There is some merit in this, as juries who simply cannot understand the issues are just as likely to wrongfully convict as to wrongfully acquit. It is also true that neither jurors, nor defendants nor taxpayers benefit from excessively long trials. But whatever gloss is put on the proposal, it is nevertheless the removal of a

defendant's hallowed democratic protection. It is the jury which keeps the system in touch with the morality of the day and offers a breadth of experience which no single judge can match. As the government well knows, public perception is paramount. Juries are trusted and judges are respected and independent. To remove juries will lessen faith in the system, and open the judiciary to unprecedented scrutiny and criticism.

Crime, and the fear of crime, are serious problems which need to be addressed. But the way to do so is not by sacrificing the rights of defendants. In an attempt to appeal to popular punitiveness, the Government has distorted the fundamental principles of due process which have made the British system famous. The guiding aim of the system must not be to simply convict *more*, but to convict *more accurately*.