RESPONSE OF THE LAW REFORM COMMITTEE OF THE BAR COUNCIL AND OF THE CRIMINAL BAR ASSOCIATION TO THE SENTENCING ADVISORY PANEL'S CONSULTATION ON PRINCIPLES OF SENTENCING FOR YOUTHS

Introduction

1. The Law Reform Committee of the Bar Council of England and Wales and the Criminal Bar Association welcome the opportunity to comment on the Sentencing Advisory Panel's consultation paper on the principles of sentencing for youths.

Question 1

Do you consider that the use of the terms best interests or well-being signifies any difference in meaning from the use of the term welfare?

2. The term 'welfare' may imply the more immediate effect on the happiness and security of the child**;** 'best interests' suggests an element of paternalistic consideration of long term interest. However the distinction is subtle and unlikely to make any

significant difference.

Question 2

In relation to balancing the purposes of sentencing, do you agree that the approach described in paragraphs 47 – 52 should be the general approach? If not, why not?

3. We agree with the general approach. We strongly support the proposition that welfare of the child is of particular importance to younger children (paragraph 49) and that intervention which tackles causative or contributory offending factors, such as personal, family or social problems, is paramount.

Question 3

Are you aware of any further information relevant to consideration of ethnicity and gender issues and sentencing patterns?

4. No.

Question 4

The panel would welcome your views on whether guidance would be helpful in relation to referral orders? If so, do you agree with the approach set out in paragraph 116?

5. We broadly agree with the proposal provided that it is not too prescriptive. We assume that some assistance to the sentencer would be available from the author of the pre-sentence report, whose recommendation would be tailored to the particular circumstances of the youth concerned.

Question 5

Is there scope for increasing the use of financial penalties? If so, what wider circumstances might merit such a sentence? Should the Education Maintenance Allowance be taken into account?

6. We are unable to provide a meaningful reply to the first part of this question because the decision to impose a fine is case-specific. We tend to strongly doubt that financial penalties have any significant deterrent effect. Moreover, unless the offender is in employment or in receipt of benefit, the burden of repayment is likely to be met by parents, who will themselves often be reliant on low incomes.

7. We are clear however that Education Maintenance Allowance should not be taken into account when ordering fines. These are intended as an inducement to young people to attend educational courses and thereby increase their later prospects of gainful employment. We regard a penalty which interferes with this aim as a retrogressive step.

Question 6

What criteria should be used when settling the overall length of a youth rehabilitation order?

8. The criteria are:

- Age of offender
- Seriousness of offence
- Likelihood of re-offending
- Risk of harm
- Extent of requirement to be imposed
- Time limits contained with any requirements

9. The length of the order will depend upon its purpose. A lengthy order may be required where there is a low risk of re-offending but the order has been imposed primarily as a punishment; conversely a lengthy order may be necessary where the offence was not serious but the re-offending risk is high and the youth requires an extensive period of support and supervision.

Question 7

In addition to the statutory criteria, in what circumstances is it likely to be appropriate to include a fostering requirement in a youth rehabilitation order?

10. A fostering placement is plainly an interference with both a young person's right to family life and with the rights of his family, particularly his parents and siblings. The removal and

accommodation of a child in this way should therefore be considered as a measure of last resort, prior to custody.

11. We consider that, in addition to the requirement for legal representation for the young person, it is essential in the interests of justice that there should be a requirement for legal representation for the young person's parent(s) or guardian(s). It must be borne in mind that the legal effect of an order committing a child to the care of a local authority (through accommodation in a foster placement) is that, for the duration of the order, the relevant local authority shares parental responsibility for the child with any person who currently holds parental responsibility (usually the parent or parents). It cannot be just, or , appropriate that such an order should be made in proceedings in which those whose parental responsibility is to be shared with the State are not both legally represented and able to play a full part in the proceedings.

12. What is envisaged is a sentence under which the young person is committed to the care of a designated local authority and accommodated by that authority in a foster placement. It would be extraordinary to contemplate such a fostering requirement being attached to a sentence (and parental responsibility being conferred on a local authority) without that authority (in addition to any person who currently has parental responsibility or is a natural

parent without parental responsibility) having the right to be represented and heard.

13. In family proceedings, the court would scrutinise the "care plan" for the young person prior to sanctioning a placement away from the natural family. The reason for this is, of course, to ensure that the placement is consistent with the young person's welfare and that it meets religious, cultural and educational needs, including any special needs the young person may have. Further, the court requires to be satisfied that there is a clear, managed and funded plan for the duration of the order, including clear identification of the body responsible for ensuring its implementation. Further, the interference with family life is only to be sanctioned to the extent that it is necessary and proportionate. The aim must be reunification with the natural family unless this is shown to be contrary to the young person's welfare. To that end the court will also scrutinise the care plan in terms of its provisions for contact with the natural family. It is difficult to see how any lower standard than that for the making of such orders in family proceedings could properly be applied in the case of a foster placement imposed as a form of sentence.

14. The LRC is concerned that insufficient consideration appears to have been given to the above matters. If this proposal is to be implemented, in addition to legal representation of all those with (or who are to acquire) parental responsibility, there needs to be provision for the filing, in advance of any sentencing hearing, a of a clear managed plan for the duration of the order including the clear identification of the body responsible for funding and ensuring implementation of that plan and adherence to it. Such plan must clearly set out (as in family proceedings) the services to be provided to the young person, the plan for contact with parents and siblings and the provision for reviews. There should also be consultation with the offender by the YOT/social worker proposing the measure.

15. We are unclear as to how the requirements and implementation of proposed orders will dovetail with orders made under the Children Act 1989. What is to be the position where care proceedings in relation to the young person (and any siblings) are already in existence?, We understand that there is considerable pressure on the family courts and that there are concerns as to the availability of scarce resources, including foster placements and public funding for legal representation. We are unclear as to the extent to which these proposals, if implemented would place further strain on these

resources. It does not appear that this has been considered.

16. We agree that the court must be satisfied that fostering would assist in rehabilitation. We question how the court could satisfy itself as to this under the current proposals. In fact, we would go further and suggest the court should be satisfied that no other order would achieve that aim.

17. A fostering order is a measure whose welfare and legal considerations are more familiar to the family courts but are very unfamiliar to the criminal courts. There are likely to be placement issues, which will require sensitive and specialist handling. It would therefore be appropriate for sentencers to have had dedicated training and, preferably, experience of family courts. It might be that this jurisdiction should be limited to District Judges.

Question 8

In relation to the imposition of a youth rehabilitation order do you agree with the approach summarised in paragraphs 149 and 150? If not, why not?

18. Yes

Question 9

Are you aware of any reliable data on the extent to which orders are breached?

19. We understand that such data may be available from local Probation Services and Youth Offending Teams.

Question 10

Do you agree with the approach to dealing with a breach of a youth rehabilitation order described in paragraph 158? If not, why not?

20. We agree that primary objective in dealing with a breach should be the completion of the requirements imposed by the court. Perhaps a rider could be added: except where they no longer serve the initial purpose of the order to prevent re-offending.

Question 11

What is the most appropriate approach to determining whether a young person is a persistent offender?

21. We agree with the proposition in *R v Charlton* that persistence can be shown not just by frequency of court appearances by reference to frequency of offending. However we also regard responses to

previous court orders to be an important factor in considering persistence. Accordingly a court should be entitled to consider the circumstances of a youth has had no previous opportunity to respond positively to an alternative to custody, or where he or she has previously responded positively.

Question 12

Do you agree:

(a) that trial should generally take place in a youth court, and

(b) that the decision whether a young person should be sentenced in the Crown Court on the basis of the dangerous offender provisions only is best made after conviction?

22. (a) Yes, generally. However there should be some flexibility where the offence is very serious and where, if convicted, the sentence is likely to be one of substantial custody. We are concerned about the disjunction of fact finding and sentencing where there has been a contested trial. In our view, save in unforeseen or exceptional circumstances, the tribunal which assesses the trial evidence, including the evidence and demeanour or attitude of the youth, should be the tribunal that sentences. A judge will be at a significant disadvantage sentencing a youth who has not been tried and convicted before the Crown Court. The basis of guilt and details or nuances of the evidence, which in some cases add to the gravity of the offence but in others may reveal mitigating features, can easily be lost or overlooked.

(b) We express the same concerns regarding the dangerous offender provisions as above, that is to say that the judge will not have had the opportunity of forming a view about the evidence, of a defendant's character or the risk s/he poses where the trial has conducted before a different tribunal.

Question 13

In relation to the determination of whether a young person should be sentenced in the Crown Court, do you agree with the approach summarised in paragraphs 187 – 189?

23. We believe that the approach of the panel to be too prescriptive. Though we sympathise with the ethos of the proposal, we doubt that it could fairly reflect the variety of factors which might properly influence the venue decision.

24. As previously suggested, to ensure the sentencing tribunal is best equipped to carry out its task, it should also have been the trier of fact. Accordingly, in our view, if a case is serious enough to warrant committal to the Crown Court for sentence, it is serious enough to be tried there. Save perhaps for the very youngest offenders, some offences, such as rape, generally attract sentences which necessitate an appearance in the Crown Court.

25. The recommended age spans take no account of maturity. Most practitioners will have experience of youths who possess or display attributes of a person both 2 or 3 years older and younger.

26. The proposal also ignores unexceptional multiple defendant cases in

which it is necessary or desirable for a youth to be tried together with an adult or older youths.

Question 14

In relation to the determination of the length of s custodial sentence, do you consider that an approach such as that described in paragraphs 195 – 197 would be helpful? What elements do you consider should be included within it? Are there any dangers that would flow from such an approach?

27. We agree that the elements identified in paragraph 196 provide appropriate guidance. As regards age, once again we are concerned by the formulaic approach which may ignore the maturity of the youth. In our view any such guideline must oblige the sentencer to consider maturity where some discrepancy is obvious or asserted, and to be sufficiently flexible to allow for other exceptional circumstances.

Question 15

Where an offender crosses a significant age threshold between committing an offence and being sentenced for it, do you agree with the approach in paragraph 213?

28. We agree.

Question 16

Do you have any views on the issues in relation to equality and human rights raised in paragraphs 214 – 218?

29. No, other than to agree with the stricture regarding confidentiality in paragraph 216.

Question 17

Do you agree that the proposals in this paper adopt the right approach to issues of gender, age, disability, race or ethnic group (or any combination of those factors) or would further guidance be helpful?

30. We broadly agree.