The Criminal Jurisdiction of Magistrates

Eighth Edition

Probation and other Non-Custodial Orders

Brian Harris

Barry Rose

THE CRIMINAL JURISDICTION
OF MAGISTRATES

EIGHTH EDITION

PROBATION AND OTHER NON-CUSTODIAL ORDERS

BY

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GENERAL INTRODUCTION

Books are not exempt from the general rule that everything gets dearer. No one who has to buy books for professional purposes wants to waste money on inessentials. It was with this in mind that the publisher suggested there might be readers whose use of this book is confined largely to certain parts. Thus, the solicitor advocate may be interested in evidence, court practice, legal aid and costs, the prosecuting solicitor in proving the case, the process officer in commencing the prosecution, the court clerk in sentencing, the probation officer in probation and community service and the lay justice in the powers and responsibilities of his office. By offering each of these subjects in separate booklets the purchaser can select those which suit his needs. In a large firm, moreover, it will be financially practicable for each solicitor to have a copy of those parts of the book which he needs to take into court instead of having to rely on sharing a common volume. The idea of publishing the book in separate parts has other advantages. First, each part can be revised as it goes to press, thus ensuring that the law is stated at the last possible date. Secondly, when in future a particular branch of the law is amended it will be relatively easy to issue a new edition of that part only instead of the whole work. Supplements, thank goodness, should be a thing of the past. It is not intended to abandon the complete book in its conventional form: it is expected that there will be sufficient readers who will want both it and the constituent parts which most interest them. Thanks to modern printing technology it will be possible to publish the complete book in a different makeup from the parts without going to the expense of resetting type. This will take place, however, only after the constituent parts have all appeared and will contain yet further alterations, bringing the law right up to date.

The basic framework has remained almost untouched throughout seven editions. It was time for a review. Looking at the contents from the user's standpoint has brought about some unexpectedly profitable conjunctions of subject matter. Thus,

Commencing the prosecution is based on the old chapters 1, 2 and 3 and Appendix E (jurisdiction of the London courts) together with some additional material.

Proving the case is based on the old chapter 7 together with elements of chapter 6. To this has been added all the principal statutes on the law of evidence in criminal cases, together with the Judges' Rules, extracts from the decision in *Turnbull* and the law of attempt as codified in the Act of 1981.

Bail is based on the old chapter 8.

Committal proceedings and selection of mode of trial is based on the old chapters 4 and 5 together with elements from chapters 6 and 9, and the former Appendix C. (Lord Chief Justice's directions).

Trial and sentence is based on the old chapters 6 and 10 together with the treatment of juveniles from chapter 9. To this has been added notes on the role of the prosecutor, oppression and abuse of process, withdrawal of prosecution and ascertaining the facts on a plea of guilty.

Imprisonment and other custodial sentences is based on the old chapters 11, 12, 13 and 14.

Probation and other non-custodial orders is based on the old chapters 16, 17, 18 and 21.

Fines, compensation and property orders is based on the old chapters 15, 17 and 19, along with the former Appendix D (Attachment of Earnings).

Binding Over is based on the old chapter 23.

Legal Aid and Costs is based on the old chapters 22 and 25.

Appeal is based on the old chapter 24.

Magistrates and their courts is based on the old chapter 26.

Common Offences and Disqualification is a new feature consisting of a comprehensive list of offences commonly met with in magistrates' courts, including their maximum penalties and mode of trial, to which has been added the old chapter 20 and Appendix F (Endorsement Code).

In the introduction to the first edition (1969) I wrote:

> Fundamentally, my approach has been to assemble together all the relevant Acts and Rules on any one topic, avoiding, so far as possible, undue repetition and cross reference, so that each chapter aims at setting out completely the law concerning a separate aspect of the powers and procedures of magistrates' courts. However, as there is nothing more conducive to intellectual indigestion than a mass of undigested statutes, every chapter has been prefaced by an introduction stating in brief compass the outlines of its subject matter by reference to the provisions dealt with therein.

While holding good to that basic approach, greater emphasis has been laid in this new edition on the introduction as a means of providing a broad conspectus of the law. Each introduction incorporates the common law where it is uncodified, describes in outline the relevant Acts and Regulations and incorporates the most important decisions. As before, the introduction is followed by the statutes in chronological order with commentaries where necessary.

The consolidating Magistrates' Courts Act 1980 is fully incorporated in the new edition, as are the consolidating Rules of 1981. I have abandoned the former practice of printing the Rules together in one place; instead, each Rule is now to be found at the end of the part to which it relates. The energetic passage of Lord Justice Donaldson through the Divisional Court, while clearing the backlog of work in that Court, nevertheless left in its wake a batch of decisions (not all of them uncontroversial) vitally affecting the work of magistrates' courts. Because of the change of format it is not proposed to review them here. As before, this book does not deal with the juvenile court (as to which see *Clarke Hall and Morrison on Children* by Jackson, Booth and Harris), but the law relating to juveniles in the adult court is fully covered.

I was fortunate indeed to have the first edition of this book read for me by the late George Wilkinson, whose work on road traffic is still the practitioner's *vade mecum*, albeit now edited by others. His only rebuke was whenever I drew attention to an area of difficulty in the law wihout venturing an opinion of my own. "What the reader wants is advice", he wrote. I have tried to learn that lesson, but the value of the advice you must judge for yourself.

October 1981. Brian Harris.

CONTENTS

STATUTES

PROBATION AND OTHER NON-CUSTODIAL ORDERS

PROBATION -

As an alternative to sentencing an offender aged 17 or over a court can, with his consent, place him on probation, that is to say, direct that for a fixed period of from six months to three years he shall be under the supervision of a probation officer and subject to the conditions of the order: Powers of Criminal Courts Act 1973, s. 2.

The Home Office advise that: -

> The fundamental aim of probation, as of all methods of penal treatment, is to uphold the law and protect society. The particular object of placing an offender on probation is to leave him at liberty in the community but subject to certain conditions regarding his way of life, with skilled help available to him from the probation service to cope with the problems and difficulties that may have led to his offending, and with an obligation to co-operate with his supervising probation officer as regards reporting, receiving visits and heeding the advice given to him. Through the discipline of submission to supervision by a probation officer, this method of treatments seeks both to protect society and to strengthen the probationer's resources so that he becomes a more responsible person. As regards the situations in which the making of a probation order is appropriate, the views of the Departmental Committee on the Probation Service are still valid: they concluded (para. 15 of their report) that there was an *a priori* case for using probation where:-
>
> (*a*) the circumstances of the offence and the offender's record are not such as to demand, in the interests of society, that some more severe method be adopted in dealing with him;
> (*b*) the risk, if any, to society through setting the offender at liberty is outweighed by the moral, social and economic arguments for not depriving him of it;
> (*c*) the offender needs continuing attention, (since otherwise, if condition (*b*) is satisfied, a fine or discharge will suffice);
> (*d*) the offender is capable of responding to this attention while at liberty.
>
> (The Sentence of the Court)

The Home Secretary has reminded magistrates of the view expressed by the Departmental Committee on the Probation Service that a social inquiry report should normally be obtained before a probation order is made: Home Office circ. 28/1971

A probation order may require the probationer to comply during all or any part of the probation period with such requirements as the court, having regard to the circumstances of the case, considers necessary for securing the offender's good conduct or for preventing a repetition by him of the same or of other offences: Powers of Criminal Courts Act 1973, s. 2(3). Requirements as to residence are specially treated in s. 2(6), *ibid*. Requirements as to medical treatment may be included only in accordance with s. 3, *ibid*. The payment of compensation and

damages must not form part of the order (s. 2(4), *ibid*), although these may be ordered separately under s. 35, *ibid*.

Before making a probation order the court must explain its effects in ordinary language to the offender and what can happen in default or on commission of a further offence. The court may not make the order unless the offender expresses his willingness to comply with its requirements: s. 2(6), *ibid*.

Combining Probation with other orders

Since a probation order is made "instead of sentence" it cannot be combined with any other sentence or order in lieu of sentence *on the same offence: R.* v. *McClelland* (1951) 115 J.P. 179; [1951] 1 All E.R. 557; (wrong to combine fine and probation). Ancillary orders such as disqualification (Road Traffic Act, 1972, s. 102) and compensation (Powers of Criminal Courts Act 1973, s. 12(4)) may however be made on the same offence as a probation order.

A probation order may not be made on one offence and a suspended sentence on another: Powers of Criminal Courts Act, 1973, s. 22(3).

In the ordinary way a probation order must operate forthwith. It is, therefore, wrong to make such an order at the same time as passing a sentence of detention centre training which will postpone the effective commencement of probation: *R.* v. *Evans* (1959) 123 J.P. 128; [1958] 3 All E.R. 673; or at the same time as a sentence of imprisonment: *R.* v. *Emmett* (1968) *The Times,* December 21. Otherwise, there seems to be no reason why a probation order on one offence should not be combined with a different disposition on another offence, such as a fine (*R.* v. *Bainbridge* (1979) L.S. Gaz. 28).

Day Training Centres

A court may include as a condition of a probation order a requirement that the offender shall during the probation period attend a specified day training centre. The pre-requisites to such an order are:

(i) notification by the Secretary of State that a centre is available for persons of the offender's class or description residing in the petty sessions area in which he resides or will reside;
(ii) a place at such a centre;
(iii) (as with any other term of a probation order) the offender's consent: Powers of Criminal Courts Act 1973, s. 4.

The order may not be combined with a condition of medical treatment under s. 3: s. 4(2), *ibid*.

The objects of day training centres are described by the Home Office as providing:

> "full-time non-residential training for offenders with the aim of equipping them to cope more adequately with the normal demands of modern life. The scheme has been framed with a particular view to the needs of the inadequate recidivist, whose offences often reflect a lack of basic social skills and tend to lead to a succession of short custodial sentences which usually afford little opportunity for the kind of training from which he might benefit. Examples of the kind of training envisaged at the day training centres are: remedial education where needed; simple work training; matrimonial counselling and advice on home economics. Initially, four experimental centres will be established.
>
> "The centres will be run by the probation service, drawing on a range of local agencies and resources. Attendance at a day training centre will be a new optional requirement in a probation order. Attached to each centre will be a small group of probation officers with low case loads comprising

probationers attending the centre and others who although under supervision have not yet entered the centre or have completed their period of attendance.

"Attendance at a centre will be full-time during a five-day week, with a maximum of 60 days attendance. Thus, attendance at a centre will not be appropriate for an offender who is in regular work, and an offender sent to a centre will not normally be free to take up work while still subject to the requirement to attend it. Therefore, arrangements for the payment of living expenses are required, and since the offender will not be eligible for ordinary social security benefits (because he is not available to take up work) there is special provision in s. 54 under which maintenance payments for the offender and any dependants will be made."

(Home Office booklet on the Criminal Justice Act 1972).

Breach of Probation

Breach of any of the requirements of a probation order renders the probationer liable to:

— a fine of up to £50, or
— an attendance centre order (if available).

Alternatively, unless the order was made by the Crown Court, he may be dealt with in any manner in which the court could deal with him if it had just convicted him of the original offence: Powers of Criminal Courts Act 1973, s. 6(3). In the first two cases the probation order continues unaffected; in the third it is replaced by the subsequent order. If the probation order was made by the Crown Court the magistrates' court may commit the offender to that court on bail or in custody to be dealt with: s. 6(4) and (5). A summons or warrant may issue to compel the attendance of a probationer at court for the purpose of dealing with an alleged breach provided the information is laid during the probation period: s. 6(1). Breach proceedings are to be distinguished from the powers of the court upon the commission of an offence during the probation period.

Commission of a Further Offence

Since a probation order is an alternative to sentence the commission of a further offence during the probationary period followed by conviction therefor renders the offender liable to be dealt with as for the original offence (but in this case the court has no option of punishing the offender and allowing the probation order to continue): Powers of Criminal Courts Act 1973, s. 8. In the case of a probationer who commits further offences during the currency of a probation order made by the Crown Court magistrates' powers are confined to committing him to the Crown Court or taking no action. Where one magistrates' court sentences an offender who was placed on probation by another magistrates' court the consent of the latter or of the supervising court is necessary: s. 8(9), *ibid*.

Amendment and Discharge

Probation orders may be amended in accordance with sch. 1 to the Powers of Criminal Courts Act 1973: s. 5, *ibid*. Where the amendment is to substitute a different division the court is required to act upon the application of the probation officer: para. 2(1) of sch. 1, *ibid*. No summons is necessary. Other amendments, except where cancelling or reducing the period of any requirement or on the application of the probationer, must be by summons and with the consent of the probationer: para. 5(1) and (2) of sch. 1, *ibid*.

A probation order may be discharged on the application of the probation officer or probationer: para. 1 of sch. 1. No summons is necessary.

It is the supervising court which has jurisdiction to amend a probation order:

para. 2 of sch. 1. Similarly, it is the supervising court which can discharge the order where it was made by the court by or before which the probationer was convicted (para. 1(2) of sch. 1) except when the order was made by the Crown Court and it includes a direction reserving that power to the Crown Court. In all other cases the power to discharge resides in the court which made the order: para. 1(4) of sch. 1. A justices' clerk may amend a petty sessions area: Justices' Clerks Rules 1970.

Scotland

For a Scottish order relating to a person residing in England *see* the Criminal Procedure (Scotland) Act 1975, s. 389 and for English orders relating to persons residing in Scotland, the Powers of Criminal Courts Act 1973, s. 10.

Conversion to Conditional Discharge

When a probation order ceases to be appropriate the unexpired portion may be converted to a conditional discharge on the application either of the probationer or the probation officer: Powers of Criminal Courts Act 1973, s. 11(1). The hearing may be conducted in the absence of the probationer if the probation officer producing a written statement from him to the effect that he understands and consents to the proceedings: *ibid*, s. 11(3).

Absolute and Conditional Discharge

When punishment is inexpedient and probation inappropriate an offender may be discharged either absolutely or conditionally, under s. 7 of the Powers of Criminal Courts Act 1973. Upon conviction of a further offence, a conditional discharge (which may be for up to three years but, unlike a probation order, has no minimum period) has the same consequences as a probation order—*see* s. 8, *ibid*.

The Effects of Probation and Discharge

Neither probation nor discharge, absolute or conditional, counts as a conviction, except for the purposes of the proceedings in which the order was made and certain specifically exempted purposes: Powers of Criminal Courts Act 1973, s. 13. But this immunity is removed if the offender is subsequently sentenced for the original offence.

Appeal

There is no right of appeal to the Crown Court against the making of a probation order or an order for conditional discharge: Magistrates' Courts Act 1980, s. 108, although the conviction itself may be challenged unless the plea was one of guilty: subs. (1), *ibid.*

SUPERVISION ORDER

A juvenile may not be made the subject of a probation order, and if supervision is considered desirable should be remitted to the juvenile court under the provisions of the Children and Young Persons Act 1969, s 7(8).

Supervision orders may be made in both care and criminal proceedings. An order made in criminal proceedings may fall to be considered in the adult court when the supervised person has attained the age of 18 and either (1) there is an application for the terms of the order to be varied; or (2) the supervised person has failed to comply with any requirement of the order: s. 15, *ibid*. (Proceedings of this nature in respect of 17-year-olds and younger are dealt with in the juvenile court). The supervised person may be brought before the court by summons or warrant under s. 16(2) of the Act, but his attendance is unnecessary in the cases listed in subs. (5), *ibid*.

The restrictions on the reporting of juvenile court proceedings contained in the Children and Young Persons Act, 1933, are applied to the adult court in relation to proceedings resulting from supervision orders by virtue of s. 10 (1)(b) of the 1969 Act. This fact must be announced by the court in the course of the proceedings: subs. (2), *ibid*.

COMMUNITY SERVICE

A magistrates' court convicting an adult of an offence punishable with imprisonment may, instead of dealing with him in any other way, make a community service order, that is an order that within the next 12 months he should for a stipulated period of between 40 and 240 hours perform unpaid work under the direction of "the relevant officer". The power to make such an order is subject to the following pre-requisites:

(i) the court being notified by the Secretary of State that a community service scheme exists in the petty sessions area in which the offender resides or will reside;
(ii) the receipt by the court and consideration of a probation officer's report;
(iii) the court being satisfied of the suitability of the offender and the availability of the work; and
(iv) the consent of the offender: Powers of Criminal Courts Act 1973, s. 14.

The Home Office describe the aims of community service as follows:

> The community service order was introduced with the primary purpose of providing a constructive alternative for those offenders who would otherwise have received a short custodial sentence. An order can be made in respect of any offender convicted of an offence "punishable with imprisonment"—it is not a requirement of the law that the court would have imposed a prison sentence on that particular offender had it not given him a community service order. Nevertheless it was the emphasis both of the Advisory Council on the Penal System in its report on Non-Custodial and Semi-Custodial Penalties (often referred to as "the Wootton Report") in proposing the introduction of community service, and of Parliament in giving effect to the recommendations of the Council, that community service should be seen as a penal sanction that made serious demands on the offender and could thus be regarded as a viable alternative to a custodial sentence. The offender is penalized by being deprived of his leisure time, but for a constructive and outward-looking purpose; he has an opportunity to make reparation to the community against which he has offended by working for its benefit; and in some cases he will be brought into direct contact with members of the community who most need help and support. Whilst the main aim is to ensure that an offender completes satisfactorily the number of hours' service ordered by the court, it is hoped that working for the benefit of the community will also have a positive effect on the future attitudes and conduct of the offender.
>
> (The Sentence of the Court)

When a court adjourns a case after conviction for the purpose of obtaining a probation report in order to ascertain the offender's suitability for community service and the report shows the offender to be suitable for such an order, the court ought to make it because otherwise a feeling of injustice would be aroused: *R.* v. *Gillam* (1981) Crim. L.R. 55.

When two or more community service orders are made at the same time the court may order that the hours shall be served concurrently or additionally, so

long as in aggregate they are not more that 240: Powers of Criminal Courts Act 1973. s. 14(3). A later order may be made consecutive to an earlier order: *R.* v. *Evans* (1977) 141 J.P. 141; [1977] 1 All E.R. 228, so, however, that the total period does not exceed 240 hours.

The work is performed by the offender at such time as the relevant officer may instruct, except that it must be completed within 12 months of the order: s. 15(2), *ibid.*

Combining Community Service and Other Orders

Community service is a sentence and as such may not be combined with any other sentence or order in lieu of sentence on the same offence. Thus it cannot be combined *on the same offence* with a fine: *R.* v. *Carnwell* (1979) Crim L.R. 59; 68 Cr. App. R. 58. It would not seemingly be wrong to make a community service order on one offence and a fine on another. However, it is bad sentencing practice to make a community service order on one offence and a suspended prison sentence on another: *R.* v. *Starie* (1979) Crim. L.R. 731: L.S. Gaz., June 13.

Nothing in the Powers of Criminal Courts Act 1973, s. 14(1), prevents the making at the same time as a community service order of an order of compensation, restitution or deprivation of property: s. 14(8), *ibid.*

Breach of Community Service

Breach without reasonable excuse of any requirement of a community service order may be dealt with by a magistrates' court:

(*a*) imposing a fine of up to £500; or, if the order was made by a magistrates' court,
(*b*) dealing with the offender in any way in which he could have been dealt with on conviction if the order had not been made;
or, if the order was made by the Crown Court, by
(*c*) committing the offender to the Crown Court to be dealt with: s. 16(3), *ibid.*

A custodial sentence may be expected on breach of a community service order where the making of the order had saved the offender from an immediate custodial sentence: *R.* v. *Howard and Wade* (1977) Crim. L.R. 683. However, a custodial sentence is usually inappropriate where an offender has completed a substantial proportion of the work required: *R.* v. *Paisley* [1979] 1 Cr. App. R. (S) 196.

Scottish Orders

A Scottish court may make a community service order in respect of an offender residing in England and Wales by virtue of the Community Service by Offenders (Scotland) Act 1978, s. 6. Breach of such an order may be punished by a court in this country: Powers of Criminal Courts Act 1973, s. 16(3).

Extension

Either the offender or the relevant officer may at any time while the order is in force apply for the 12 month period to be extended and the court may so order if this appears in the interests of justice having regard to circumstances which have arisen since it was made: Powers of Criminal Courts Act 1973, s. 17(1).

Revocation

Similarly, upon application by the offender or the relevant officer the court may in like circumstances revoke the order or revoke the order and deal with the offender in any manner in which he could have been dealt with by the court of conviction

(s. 17(2)), but only where the order was made by a magistrates' court. In other cases it may commit the offender to the Crown Court.

Amendment

The petty sessions area in which the offender resides or will reside must be specified in the order: Powers of Criminal Courts Act 1973, s. 14(4); and on his removal to another area may be amended in accordance with s. 17(5), *ibid.*

MEDICAL TREATMENT

The mental condition of a defendant may affect both the issue of his guilt or innocence and the disposition of his case upon conviction.

Insanity under the M'Naghten rules is probably a defence to all crimes; though for obvious reasons it is in practice pleaded only in cases of homicide. A special defence statutorily confined to murder is that of "diminished responsibility" under s. 2 of the Homicide Act, 1957. Neither of these defences has any significant part to play in summary jurisdiction and they are thus not dealt with in this work.

Magistrates may be concerned with two categories of abnormal mental condition:

(1) mental disorder (of certain specified forms) of a nature and degree which warrant detention in a hospital for medical treatment; and
(2) a mental condition such as requires and may be susceptible to treatment, but which is not sufficient to warrant such detention.

In the second category of case, however trivial the offence, the magistrates may, if they make a probation order, include in it a requirement that the offender shall submit, for the probation period or any lesser period fixed by the court, to treatment, whether residential or otherwise, by or under the direction of a doctor: Powers of Criminal Courts Act, 1973, s. 3. (See above).

Hospital and Guardianship Orders

Offenders in the first category may be dealt with by a hospital order or a guardianship order made under s. 60 of the Mental Health Act, 1959, where the offence is punishable on summary conviction by imprisonment. If the category of mental disorder is mental illness or severe subnormality (as defined in the Act) the court need not even proceed to conviction, but may make an order as soon as it is satisfied that the offender "did the act or made the omission charged": s. 60(2), *ibid.* The court may make a hospital or guardianship order only on the advice of two suitably qualified doctors, whose reports may be received in writing when the defendant consents to this course: s. 62, *ibid.*

A hospital order authorizes detention of the person named therein in a specified hospital: s. 60(1), *ibid.* It is authority for him to be conveyed there within 28 days and for the managers of the hospital to detain him in accordance with the Act: s. 63(1), *ibid.* A guardianship order confers on a local authority or other specified person all such powers as would be exercizable in relation to the patient if they or he were the patient's father and he were under the age of 14: ss 63(1) and 34(1) of the Act.

There is a right of appeal to the Crown Court under s. 70 of the Mental Health Act, 1959, against the making of a hospital or guardianship order in circumstances where the court does not proceed to conviction. In all other cases the general right of appeal to the Crown Court is available under the Magistrates' Courts Act 1980, s. 108.

Restriction Orders

"It must be borne in mind that when only a hospital order is made:

"1. It is only authority for the patient's detention for one year in the first instance. This authority can be renewed if the medical practitioner in charge of the treatment of the patient (whom I will call the 'responsible medical officer') reports to the hospital managers that it appears to him that further detention is necessary in the interests of the patient's health or safety or for the protection of others. The hospital managers, however, are not bound to act on such a report and may refuse to extend the period and accordingly discharge the patient. Further, if the patient is 16 or over, he or his nearest relative can apply, at certain intervals to a mental health review tribunal who may in any case direct the patient's discharge and must do so if satisfied that he is no longer suffering from a mental disorder or that his further detention is not necessary.

"2. The patient can be discharged at any time by the hospital managers whose power is unlimited or by the responsible medical officer whose power is also unlimited or by a mental health review tribunal as already stated.

"3. Once discharged the patient is no longer liable to recall.

"4. A patient who is absent without leave cannot be re-taken into custody and indeed ceases to be liable to be detained (*a*) if he is over 21 and is classified as psychopathic or subnormal after six months' absence, (*b*) in any other case, after 28 days' absence.

"If however, a restriction order is made in addition to a hospital order: (i) there is authority to detain the patient for at any rate the duration of that order, though the Secretary of State may terminate it at any time if satisfied that it is no longer required for the protection of the public; (ii) the patient can only be discharged with the consent of the Secretary of State or by the Secretary of State himself; (iii) the Secretary of State has power in discharging the patient himself to make the discharge conditional, in which case the patient remains liable to recall during the period up to the expiration of the restriction order. This power is particularly useful as a means of keeping a discharged patient under the supervision of a probation officer or mental welfare officer for a longer period than would be possible if there were no restriction order; lastly a patient who is absent without leave may be taken into custody again at any time . . .

"This is not meant to suggest that restriction orders should be made in every case, but it is very advisable that they should be made in all cases where it is thought that the protection of the public is required. Thus in, for example, the case of crimes of violence and of the more serious sexual offences, particularly if the prisoner has a record of such offences, or if there is a history of mental disorder involving violent behaviour, it is suggested that there must be compelling reasons to explain why a restriction order should not be made": *per* Lord Parker CJ, in *R.* v. *Gardiner* (1967) 131 J.P. 273; [1967] 1 All E.R. 895 at p. 897.

Where, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, the court considers that a hospital order would provide insufficient security to the public it may, instead, commit the offender to the Crown Court under s. 67 of the Mental Health Act 1959 with a view to a restriction order being made. Such a committal can only be ordered on conviction: it is not enough to find that the offender did the act or made the omission charged. Such an order is authority for the detention of the offender for a fixed period and ensures that he cannot be released without the consent of the Secretary of State. By s. 67(4), *ibid.*, a committal under s. 67 may be coupled with a committal for sentence under the Magistrates' Courts Act 1980, s. 38.

Medical and Mental Reports

Reports on the physical and mental condition of an accused person may be called for on adjournment:

(*a*) when the court is satisfied that the accused did the act or made the omission charged in the case of an offence punishable with imprisonment: Magistrates' Courts Act, 1980, s. 30; or

(*b*) after a finding of guilt in the case of any offence: Magistrates' Courts Act 1980. *See Boaks* v. *Reece* (1957) 121 J.P. 51; [1956] 3 All E.R. 986.

The accused may be remanded in custody only if (*a*) the offence is imprisonable and (*b*) it is impracticable to make the report on bail: Bail Act 1976, sch. 1.

The method of dealing with such reports is laid down in the Mental Health Act 1959, s. 62(3).

The costs of a doctor giving oral evidence under the Magistrates' Courts Act 1980, s. 30 may be ordered from central funds in the case of an indictable offence: Costs in Criminal Cases Act 1973; and in the case of all offences: Magistrates' Courts Act 1980, s. 30(3). Similar provision is made for written reports in the Criminal Justice Act 1967, s. 32(2).

DEPORTATION

The Secretary of State has power to make a deportation order against a person in the circumstances specified in s. 5(1) of the Immigration Act 1971, one of which is contingent upon the recommendation of a court.

A non-patrial (see below) who has attained the age of 17, convicted of an offence for which he is punishable with imprisonment may, subject to the service of notices in accordance with s. 6(2) of the Act, be recommended by the court for deportation: s. 6(1), *ibid.* When the offender is not sentenced by the magistrates' court but is instead committed to the Crown Court for sentence or to be dealt with the power to make a recommendation vests in the superior court.

The question of whether an offence is one for which an offender is punishable with imprisonment is to be determined without regard to any enactment restricting the imprisonment of young offenders or persons not previously sentenced to imprisonment. Nor is the power confined to convictions strictly so called but extends to all cases where an accused is "found to have committed" a qualifying offence: s. 6(3).

The following guidelines for courts were laid down by Lawton, LJ, in *R.* v. *Nazari and Others* (1981) 145 J.P. 102; [1980] 3 All E.R. 880:

> First, the court must consider, as was said by Sachs, LJ, in *R.* v. *Caird* [1970] 54 Cr. App. R. 499, whether the accused's continued presence in the United Kingdom is to its detriment. This country has no use for criminals of other nationalities, particularly if they have committed serious crimes or have long criminal records. That is self-evident. The more serious the crime and the longer the record the more obvious it is that there should be an order recommending deportation. On the other hand, a minor offence would not merit an order recommending deportation. In the Greater London area, for example, shoplifting is an offence which is frequently committed by visitors to this country. Normally an arrest for shoplifting followed by conviction, even if there were more than one offence being dealt with, would not merit a recommendation for deportation. But a series of shoplifting offences on different occasions may justify a recommendation for deportation. Even a first offence of shoplifting might merit a recommendation if the offenderr were a member of a gang carrying out a planned raid on a departmental store.

> Second, the courts are not concerned with the political systems which operate in other countries. They may be harsh; they may be soft; they may be oppressive; they may be the quintessence of democracy. The court has no knowledge of those matters over and above that which is common knowledge, and that may be wrong. In our judgment it would be undesirable for this court or any other court to express views about regimes which exist outside the United Kingdom of Great Britain and Northern Ireland. It is for the Home Secretary to decide in each case whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh. The Home Secretary has opportunities of informing himself about what is happening in other countries which the courts do not have. The sort of argument which was put up in Nazari's case is one which we did not find attractive. It may well be that the regime in Iran at the present time is likely to be unfavourable from his point of view. Whether and how long it will continue to be so we do not know. Whether it will be so by the end of this man's sentence of imprisonment must be a matter of speculation. When the time comes for him to be released from prison the Home Secretary, we are sure,, will bear in mind the very matters which we have been urged to consider, namely whether it would be unduly harsh to send him back to his country of origin.
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> The next matter to which we invite attention by way of guidelines is the effect that an order recommending deportation will have on others who are not before the court and who are innocent persons. This court and all other courts would have no wish to break up families or impose hardship on innocent people. The case of Fernandez illustrates this very clearly indeed. Mrs Fernandez is an admirable person, a good wife and mother, and a credit to herself and someone whom most of us would want to have in this country. As we have already indicated, if her husband is deported she will have a heartrending choice to make — whether she should go with her husband or leave him and look after the interests of the children. That is the kind of situation which should be considered very carefully before a recommendation for deportation is made.

The sentence may consider the consequences of deportation on the offender: *R.* v. *Thoseby and Krawczyk* [1979] 1 Cr. App. R. (S) 280. (defendants had married residents of UK.). However, fears of the treatment the offender will receive if deported are matters for the Secretary of State and not the court. *R.* v. *Caird and Others* [1970] 54 Cr. App. R. 499; *R.* v. *Antypas,* [1972] 57 Cr. App. R. 207; *R.* v. *Sabharwal* (1973) Crim. L.R. 132; *R.* v. *Nazari, supra.*

It was not the intention of the (pre-existing legislation) that a recommendation for deportation should be part of the punishment for the offence in the sense that the court should give a reduced sentence when a recommendation was made. Courts should sentence the prisoner to the penalty he deserves and then deal with the recommendation quite separately: *R.* v. *Edgehill* [1963] 1 All E.R. 181.

There is no power to make a recommendation when the executive act cannot follow thereupon. Thus a recommendation may not be made where a deportation order is still in force: *R.* v. *Kelly* [1966] 3 All E.R. 282; 130 J.P. 424.

A recommendation under this section may be made in respect of a national of an E.E.C. member state. However the Secretary of State's powers are limited by the E.E.C. restrictions upon interference with the free movement of workers in accordance with art. 48 of the treaty. By virtue of art. 3(2) of Directive 62/221 previous criminal convictions do not by themselves justify a recommendation although they may be evidence that the continued presence of the accused represents a present threat to public policy: *R.* v. *Bouchereau,* [1978] 2 W.L.R. 251 (European Ct.). And *see R.* v *Secretary of State for the Home Department, ex parte Santillo* [1981] 2 All E.R. 897.

It is inappropriate to make a recommendation for deportation on a national of a