

## October 2015 copy for November 2015

Robert Banks, a barrister, writes *Banks on Sentence*. It is the second-largest selling criminal practitioner's text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. The 2015 edition of the book and app was published recently. The app is for Apple iPads and Windows 8/10 tablets and computers and costs £99 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on [www.banksr.com](http://www.banksr.com). There is also a discount available when the print copy and app are purchased together. If you have access to a computer, you can follow Robert on [twitter](#): [@BanksonSentence](https://twitter.com/BanksonSentence) and you can receive his weekly sentencing Alert.

**Q** I am a druggie and I was tried for possession of an article for fraud. There were no live witnesses needed and I gave my explanation for having someone else's credit card. The magistrate, who was on his own, rejected my explanation and gave me a community order with lots of requirements. He also ordered me to pay court costs saying he was required to do so it but he would not have done otherwise. Surely if he is the one who makes the decisions he must have the power not to order it? Also how can it be fair to order it, because it is obvious a druggie doesn't have any money? Isn't telling me to pay £1,000 absurd?

**A** The answers to your questions are relatively simple. The magistrate did not have the power to waive the criminal courts charge because the charge is a mandatory order (meaning it has to be ordered). £1,000 is the fixed rate for a contested trial in the Magistrates' Court for a charge that could be tried in the Crown Court. Ordering you to pay £1,000 is clearly both unfair and absurd. I consider it also undermines the criminal justice system because the orders are so clearly unfair and absurd.

The background is a little more complicated. The legislation for the new charge was rushed through Parliament without any consultation just before the election was called. It was incorporated into an Act by way of an amendment. The Lord Chancellor who pushed it through was Chris Grayling, someone without a legal background or prior experience of the courts. I suspect the rationale was that the money he hoped to raise through this measure would be useful for a cash-strapped government and the charge would encourage people to plead guilty. In public he said he was determined to 'ensure criminals pay their way'. That is a very odd concept.

The reality is very different and the problems are with its mandatory nature and its fixed rates. Some sentencing orders are mandatory but with a built-in opportunity for the court not to apply the order if to do so would be a) unjust (which applies to three-strike burglars and class A drug suppliers) or b) because there are exceptional circumstances (which applies to certain firearm offences). Other orders are mandatory with no built-in opportunity not to apply them. An example of this is the mandatory life sentences for those convicted of murder. So if a doctor, following the wishes of the patient's relatives, ends the life and misery of the patient who is racked with pain and who might only have a day to live, the doctor would be guilty of murder and the court would have to pass a life sentence. The victim surcharge and the criminal courts charge are other examples. Perhaps the worst example was IPP, which was a mandatory sentence, and still imprisons hundreds wrongly. That sentence has now gone but, to use the politician's phrase, 'lessons are not being learnt'.

Looking at these examples one can see the injustice of them at once. If the mandatory sentence is the correct sentence, there is no need for the mandatory rule. If the mandatory sentence is not the correct sentence, the court is forced to pass the wrong sentence. Those are the only situations. Prisons are full of people who are serving the wrong sentence because of these mandatory orders. Politicians, particularly when an election is imminent, enact these mandatory orders no doubt because they feel they are 'getting tough on crime'. Filling prisons with people who should not be there is not 'getting tough on crime'. Filling the prisons with

those people only means they have to let others out early because there is not enough room for extra prisoners.

The reaction to this charge is interesting. One of the first to comment was Private Eye (edition 26/6/15), which drew attention to the plight of TV licence defaulters. The paper estimated that '95% of defaulters were struggling to meet bills on low incomes or on benefits. A typical penalty on a plea of guilty would be £55 fine, a victim support charge of £20 and then £150 for the criminal courts charge. If the defendant pleaded not guilty, the criminal courts charge would rise to £520.' So if the defendant could not afford the train fare to get to court and was tried in his or her absence and the trial took three minutes, the defendant would have to pay the same £150 charge on top of the victim surcharge and the fine. (The Criminal Courts Charge for a conviction in the absence of the defendant is the same as for a guilty plea.) Private Eye quoted a Stockport magistrate, Jeff Waters, who said, "I used to be proud of being part of the justice system, but we are now being forced to inflict grossly unjust and disproportionate punishments."

The following month there were reports of magistrates resigning in protest at the new charge and this month there are reports of courts reducing the fine to take account of this disproportionate charge.

On 25 September 2015, the Lord Chief Justice attended an event in New Zealand to commemorate the 800th anniversary of Magna Carta. He concentrated on Clause 40, which says: 'To no one will we sell, to no one will we deny or delay right to justice.' He said that the charging of fees was permitted provided that it does not fetter or impede access to justice. The Lord Chief Justice then referred to the new criminal courts charge and said, "The scale of court fees with the cost of legal assistance is putting access to justice out of reach of most, imperilling a core principle of Magna Carta. It is something that the judiciary, working with the executive and legislative branches of the state, needs to address."

So the system has all the unfairness of the poll tax. A multi-billion pound polluter pays the same charge as the defendant who cannot afford the bus fare to court. It has all the unfairness of IPP in that the mandatory nature guarantees injustice. It has the same ill-thought-out procedures as unit fines which had to be scrapped.

So what does the MoJ say about it? In an explanatory memorandum (2015/796) it said that 'key government departments were consulted but no formal public consultation was deemed necessary'. In an MoJ fact sheet it says the charge will be collected in a similar way to fines and compensation.

You might ask what is going to happen. A defendant cannot apply to remit the charge for two years, although the court of its own motion can remit the charge after one year. I suspect to start with it will be said that the system will take time to settle down. Then after a huge waste of public money the system will be scrapped. One thing is certain – the estimated £571m worth of uncollected fines will be complemented by a mountain of uncollected criminal court charges.

### **Asking Robert and Jason questions**

All letters should be sent to Inside Time, marked for Robert Banks or Jason Elliott. Letters are then sent by Inside Time to David Wells of Wells Burcombe, who forwards them to Robert and Jason.

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott (PO Box 847, North Shields, NE29 1FJ). Conviction enquiries should be sent to Inside Time and they will be answered by someone else. Unless you say you don't want your question and answer published in Inside Time, it will be assumed you have no objection to publication. It is usually not possible to determine whether a particular defendant has grounds of appeal without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers. Robert

and Jason cannot in their answers in effect do the work that should be done by solicitors and barristers who have the relevant case papers.

No one will have their identity revealed. Letters which: a) are without an address, b) cannot be read, or c) are sent direct to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at [www.banksr.com](http://www.banksr.com).