



## Offender Rehabilitation Bill

House of Lords  
Second Reading  
Monday 20 May 2013

On 9 January 2013, the Ministry of Justice published a consultation paper entitled [Transforming Rehabilitation: A revolution in the way we manage offenders](#). The consultation paper proposed a number of reforms to the existing legislation regarding the sentencing and release of offenders, including the introduction of supervision on release for offenders serving custodial sentences of less than 12 months and changes to the requirements available to the court as part of community orders and suspended sentence orders. The Bill implements the sentencing and release reforms set out in the Government's response to the consultation.

The Bill and Strategy present an opportunity for government and local authorities to work together to address the social factors that drive crime. This needs to be reflected in plans, and budgetary arrangements, for cross-departmental working at national and local levels.

This briefing focuses on key provisions of the Bill including:

- Extending statutory supervision to short sentenced prisoners (Clauses 1 -2)
- Arrangements for breach and recall (Clauses 3, 9)
- Supervision of young offenders (Clauses 4, 6)
- Drugs testing and appointments (Clauses 10 – 11)
- Officers (Clause 12)
- Community orders and suspended sentence orders (Clauses 13-16)

The briefing also focuses on key omissions including:

- A presumption against short prison sentences
- Provision for women offenders

The Prison Reform Trust would be happy to assist Peers in drafting amendments addressing the concerns raised in the briefing. We understand that the first day of the Committee Stage is scheduled to take place on Wednesday 5 June. Amendments can be tabled from Tuesday 21 May to Tuesday 4 June. During recess amendments can be sent to the duty clerk at [pbohl@parliament.uk](mailto:pbohl@parliament.uk)

### For further information contact:

Mark Day | Head of Policy and Communications  
07725 526525 | [mark.day@prisonreformtrust.org.uk](mailto:mark.day@prisonreformtrust.org.uk)

Alex Hewson | Policy and Programmes Officer  
020 7251 5070 | [alex.hewson@prisonreformtrust.org.uk](mailto:alex.hewson@prisonreformtrust.org.uk)

## **Extending statutory supervision to short sentenced prisoners (Clauses 1 -2)**

Clause 1 and 2 extend statutory monitoring and supervision to offenders serving short sentences for a mandatory period of up to 12 months. The new legislation will provide that all those released from short custodial sentences will now: first be subject to a standard licence period for the remainder of their custodial sentence served in the community; and then be subject to an additional supervision period for the purpose of rehabilitation. The licence period and supervision period together will last for 12 months.

The new licence period will be applied to all those sentenced to less than 12 months in custody, and the new supervision period will be applied to all those sentenced to less than two years in custody. It will apply to those released immediately at the point of sentence due to time served on remand. The only exceptions will be for those committed but not sentenced to custody (e.g. fine defaulters) or for those sentenced to terms so short that they are not taken into custody.

Conditions for both the standard licence period and the supervision period will be set by the public sector on behalf of the Secretary of State. The menu of licence conditions for the standard licence period will be the same as those for offenders sentenced to 12 months or more in custody. The conditions attached to the supervision period will be more limited, since the supervision period will be solely for the purposes of rehabilitation and will not form part of the custodial term. These conditions will continue to cover supervision and other rehabilitative activity.<sup>1</sup>

## **Breach and recall (Clauses 3, 9)**

Clause 3 deals with the breach of supervision requirements under the new licence conditions. As is the current position for longer-sentenced offenders released on licence, breaches of the new licence period will be dealt with by the public sector administratively.

The public sector will have discretion to consider a reported breach of conditions and will be able to consider warning the offender, asking the Governor to vary the licence conditions (for example, by adding a curfew or imposing electronic monitoring) or ultimately use administrative powers to recall an offender to custody. Offenders who breach the requirements of the new supervision period will be brought back before the court. The court will have the power to impose the following sanctions: a fine, unpaid work, a curfew, or, ultimately, a return to custody for a period of up to 14 days.<sup>2</sup>

Clause 9 relates to the provisions for release of offenders who have been recalled to custody during their period of release on licence. Offenders recalled to custody will generally be recalled for an automatic period of 14 days (as opposed to 28 days for longer-sentenced offenders), but where there is assessed to be a risk of serious harm to the public, offenders can be recalled until the end of their sentence.<sup>3</sup>

## **Key points**

The Prison Reform Trust welcomes the principle of focusing on rehabilitation and extending support to short sentenced prisoners. The needs of this group have been neglected for too long. We welcome the acknowledgement in the Strategy of the importance of addressing common social factors behind their offending, including homelessness, unemployment and substance misuse. This needs to be reflected in legislation, plans and budgetary

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<sup>1</sup> Ministry of Justice (2013) Transforming Rehabilitation: A strategy for reform, pp12-13, London: The Stationary Office

<sup>2</sup> Ibid, p23

<sup>3</sup> Ibid, p23

arrangements for cross-departmental working at national and local levels to address the common social factors that drive crime.

However, it is a matter of concern that the government has chosen to focus on prison as a gateway to rehabilitation for over 50,000 petty offenders instead of ensuring that cost effective, robust community penalties are available to all courts in England and Wales. These proposals represent a disproportionate and unfair punishment, adding, as they do, a further year within the ambit of the criminal justice system for all those sentenced to custody for any period over one day and up to a year.

There is no need for additional legislation in order to achieve the worthwhile rehabilitative outcomes the government is seeking. The proposal to extend statutory supervision to over 50,000 short sentenced prisoners could have unintended social and economic costs. The government should consider carefully the experience of Custody Plus, a similar scheme which was passed by the CJA 2003 but never implemented and rescinded by the LASPO Act 2012 because of its additional cost implications.

The Prison Reform Trust is particularly concerned that the proposals will result in an increase in breach and recall to custody, which will drive up the short sentenced prison population. As the Transforming Rehabilitation consultation acknowledges, many people serving short prison sentences have complex and multiple needs including homelessness, unemployment, drug and alcohol addictions, mental health needs and learning disabilities. This in turn increases the likelihood of breach and recall to custody if sanctions imposed for non-compliance are too onerous. The risk of breach and recall to custody is acknowledged but not quantified in the impact assessment.

The rise in the number of recalls has been identified by the Ministry of Justice as a key driver of the growth in the prison population over the past two decades. The recall population has grown rapidly since 1993, increasing by over 55 times.<sup>4</sup> The recall population increased by 5,300 between 1993 and 2012.<sup>5</sup> Growth in the recall population began in 1999, reflecting the change to the law in 1998 which extended executive recall to medium-term sentences (12 months to less than 4 years).<sup>6</sup> Another example of the unintended impact of legislation is the introduction in 2000 of the Detention and Training Order for under 18s, which contributed in its first year of operation to a rise in the proportion of those aged 12-14 receiving custody from 2.9% to 5.6%.<sup>7</sup>

The government acknowledges in the Summary of responses to the Transforming Rehabilitation consultation that “many” respondents suggested that return to custody for breach should “only be available as a final option after other sanctions have failed, rather than an automatic response in every case”.<sup>8</sup> It assures in the Summary that “conditions attached to mandatory supervision will be geared towards rehabilitation rather than punishment, with discretion for providers to identify the activities that should be carried out. We propose to adopt a range of sanctions to address non-compliance with supervision, only recalling offenders to custody as a final measure.”<sup>9</sup>

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<sup>4</sup> Ministry of Justice (2013) The story of the prison population 1993-2012, London: Ministry of Justice

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Hazel, N et al. (2002) Detention and Training: Assessment of the Detention and Training Order and its impact on the secure estate across England and Wales, London: Youth Justice Board

<sup>8</sup> Ministry of Justice (2013) Transforming Rehabilitation: Summary of responses, p12, London: The Stationary Office

<sup>9</sup> Ibid.

Despite these assurances, there is very little provision made in the proposed legislation to ensure that custody will be imposed as a last resort in response to breach. The menu of licence conditions for the standard licence period are the same as those for offenders sentenced to 12 months or more in custody. Even the more flexible licence conditions imposed during the new supervision period include the option of a return to custody for a period of 14 days.

Therefore, a measure intended to be rehabilitative could end up reinforcing the revolving door of prison, breach and recall back into custody. The impact statement of the Transforming Rehabilitation Strategy acknowledges that: "There will be court costs associated with breaches of this provision, and costs of providing sanctions for these breaches. These will include additional pressure on the prison population arising out of offenders being recalled to custody and further electronic monitoring starts. Initial estimates of these costs are of the order of £25m per year."<sup>10</sup>

In addition, the impact statement states that "There may be an additional burden to the police from extending supervision in the community to offenders released from custodial sentences of less than 12 months, as police time will be needed to deal with offenders who fail to comply with the conditions of supervision. Our initial estimate is that this could cost up to £5m per year."

There is an additional risk that sentencers will use the new short sentences with statutory supervision more often because it is seen as a "safe" and attractive option by the courts. This could mean fewer community orders are imposed despite being cheaper and more effective at reducing reoffending than short prison sentences. As the impact assessment states: "There is a risk that the changes to custodial sentences of less than 12 months could lead to changes in sentencer behaviour, and therefore affect the number of short custodial sentences, and the length of these sentences."<sup>11</sup>

Even if additional mentoring and support for short sentenced prisoners proves successful, for people who have committed non-violent and less serious offences, it will nearly always be cheaper and more effective to impose a community sanction rather than a short prison sentence. Reoffending by offenders sentenced to less than 12 months in prison is estimated to cost the economy up to £10 billion annually,<sup>12</sup> and 57.6% of prisoners sentenced to 12 months or less reoffend within one year of release.<sup>13</sup> For those who have served more than 11 previous custodial sentences the rate of reoffending rises to 68%.<sup>14</sup>

By contrast, community sentences for 18-24 year olds outperform prison sentences by 12.8 percentage points in reducing reoffending. Even when offenders of all ages are closely matched in terms of criminal history, offence type and other significant characteristics, the performance gap remains a robust 8%.<sup>15</sup>

From the proposals, it is unclear how the government intends to meet the costs of extending mandatory supervision to short sentenced prisoners. The impact statement acknowledges that "There will be a cost associated with extending rehabilitative services in the community

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<sup>10</sup> Ministry of Justice (2013) Offender Rehabilitation Bill Impact Assessment, London: MOJ

<sup>11</sup> Ibid.

<sup>12</sup> National Audit Office (2010), Managing offenders on short custodial sentences, London: The Stationary Office

<sup>13</sup> Ministry of Justice (2012), Proven reoffending quarterly January – December 2010, London: Ministry of Justice

<sup>14</sup> Ibid.

<sup>15</sup> Ministry of Justice (2011), 2011 compendium of reoffending statistics and analysis, London: Ministry of Justice

to offenders released from custodial sentences of less than 12 months. This cost will be dependent on the outcome of competition. However, we expect there to be significant downward pressure on costs from competing the delivery of rehabilitation services.”<sup>16</sup> The Transforming Rehabilitation Strategy claims that the “proposals will be affordable within the context of the MoJ commitment to deliver annual savings of over £2 billion by 2014/15 and forward into the next SR” but does not provide further details.<sup>17</sup>

Given the scale of the proposed changes and the speed at which the government intends to introduce them, it is concerning that there is so little detail in the impact assessment included with the proposals. **Peers will want to use the opportunity of the second reading debate to ask the government for a more detailed impact assessment**, including:

- The cost of extending rehabilitative services in the community to short sentenced prisoners.
- An detailed explanation of how it intends to meet these additional costs
- An assessment of how many offenders are likely to be breached as a result of the provision
- An assessment of how many offenders are likely to be recalled to custody
- An assessment of how many additional short sentences are likely to be passed by sentencers as a result of the provision
- An assessment of how the provision will impact on the use of community sentences by sentencers
- An assessment of the impact of the provision on the short sentenced prison population and the prison population overall

### **Supervision of young offenders (Clauses 4, 6)**

Clauses 4 and 6 are intended to ensure that offenders who are under the age of 18 at the point of sentence but reach the age of 18 before release from custody receive the same minimum length of rehabilitative support as those who are sentenced as adults. The Prison Reform Trust has serious concerns regarding the impact of the proposals on young offenders on the cusp of the adult justice system. It is a well established principle in our justice system that young people sentenced for offences committed as juveniles should not be subject to the same expectations and demands as adult offenders.

The introduction of an arbitrary cut off based on age would reinforce rather than address the well documented problem of the transition to adulthood between the youth and adult justice systems.<sup>18</sup> The situation of under 18s on the cusp of the adult justice system has been likened to someone being pushed off a cliff, with the specialised care and support given to young people in the youth justice system suddenly being taken away. The proposal goes against all of the evidence and best practice that has been developed for working with young people in the justice system in the transition to adulthood. This shows that a phased approach which takes account of a young persons’ developmental maturity delivers more successful outcomes than one where there is no scope for a period of transition between child- and adulthood.

In recent years, there have been some welcome developments in policy and practice in working with young people in transition to adulthood. In many areas, for instance in Wales, youth offending teams and probation are working together under integrated offender management arrangements to identify and meet the needs of this group. The T2A pilots in three areas have identified the kind of wraparound support for young adults both as part of

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<sup>16</sup> Ministry of Justice (2013) Offender Rehabilitation Bill Impact Assessment, London: MOJ

<sup>17</sup> Ministry of Justice (2013) Transforming Rehabilitation: A strategy for reform, p45, London: The Stationary Office

<sup>18</sup> <http://www.t2a.org.uk/>

community sentences and after release from prison that are proven to be most effective. The Sentencing Council recognise immaturity as a mitigating factor in its sentencing guidelines. NOMS Commissioning Intentions 2013-14 also recognise young adults as a distinct group in the justice system requiring distinct services and separate commissioning arrangements.

The proposal could undermine the good practice and policy that has been developed for working with this group. The impact of the reforms would mean, for instance, that two boys, born one day apart, who jointly committed an offence and were sentenced together on the same day and given an identical custodial sentence, could end up serving a completely different sentence – the younger entirely in the youth justice system but the elder partly in the adult justice system, under the supervision of a private or voluntary provider and with adult expectations and demands imposed upon him – based arbitrarily on one day's difference in age.

Furthermore, by imposing mandatory license conditions which could increase the risk of breach and recall to custody, the proposals would reinforce the failure of imprisonment and high rates of reoffending on release for this age group. Over half of all young adults given a custodial sentence re-offend within one year of release, and up to two thirds within two years. Not surprisingly, young adults are disproportionately represented in the prison population. At the end of December 2012 there were 6,638 young adults aged 18-20 in prison in England and Wales. Young men from black and minority ethnic backgrounds are even more over-represented than other young people. While numbers of young adults in custody have declined in recent years – due in part to effective joint working between youth offending teams and probation – the impact of these proposals could cause numbers to rise rapidly.

While pockets of good practice exist, figures show that prison is not effective in reducing reoffending by this age group, especially those serving short sentences. Her Majesty's Chief Inspector of Prisons has raised concerns about young adults sentenced to Detention in a Young Offenders Institution (YOI), describing his impression of "young men sleeping through their sentences" in HMYOI Rochester<sup>19</sup> and a lack of engagement in work, education and training opportunities across the YOI estate.<sup>20</sup>

**Peers will want to use the opportunity of the second reading debate to carefully consider the impact of the proposals on young adult offenders. The Prison Reform Trust notes that these clauses could be removed from the bill without impacting on the government's plans for extending mandatory supervision to short sentenced adult offenders.**

### **Drugs testing and appointments (Clauses 10 – 11)**

The government is proposing to tackle problem drug use amongst prisoners as part of their period of supervision on release. Clause 10 amends section 64 of the Criminal Justice and Court Services Act 2000, which makes provision for the Secretary of State to impose a drug testing requirement on offenders aged 18 or over released from prison on licence, and expands the categories of drugs that an offender can be tested for from Class A to Class A and Class B drugs.

Clause 11 inserts new section 64A into the Criminal Justice and Court Services Act 2000, which provides the Secretary of State with a power to impose a new licence condition requiring offenders aged 18 or over on release from prison to attend, in accordance with

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<sup>19</sup> Report of an announced inspection of HMYOI Rochester, HMCIP (June 2011)

<sup>20</sup> HM Chief Inspector of Prisons – Annual Report 2010/11

instructions, appointments designed to address the offender's dependency on or propensity to misuse a controlled drug. This new condition can only be imposed where:

- it has been recommended by an officer of a provider of probation services, and where the Secretary of State is satisfied the offender is dependent on or has a propensity to misuse drugs;
- that the misuse has either contributed to an offence for which the offender has been convicted or is likely to cause or contribute to further offending; and
- the dependency or propensity is susceptible to treatment and arrangements have or can be made for the offender to be treated.

## **Key points**

Drugs are a major cause of offending and reoffending, particularly in regard to acquisitive crime. A recent Prisons Inspectorate survey found that 29% of prisoners reported having a drug problem when they arrived in custody and 6% said they had developed a drug problem since their arrival.<sup>21</sup> Drug use amongst people in custody is reported to be high. A Home Office study found that four out of 10 prisoners said they had used drugs at least once whilst in their current prison, a quarter had used in the past month and 16% in the past week.<sup>22</sup>

The Transforming Rehabilitation Strategy outlines a new "through the gate" approach which will be delivered in a number of resettlement prisons in partnership with the Department of Health. It is clearly important for people to be enabled to continue treatment on release from prison and avoid relapse. The most effective way to achieve this is to ensure that people take responsibility for maintaining treatment and are motivated to break their addiction. Compelling people into taking up treatment can be counterproductive. To achieve successful outcomes requires the Department of Health and health and addiction charities to take the lead in engaging former prisoners in effective treatment.

Peers will want to be sure that these proposals do not blur the professional and ethical boundaries between health and punishment. Although the emphasis in the proposed legislation is on complying with appointments, the appointments could be construed by offenders and health professional as mandatory medical appointments. A number of jurisdictions, including the US, prohibit the use of medical testing as a form of punishment. The American Medical Association states that "Physicians can ethically participate in court-initiated medical treatments only if the procedure being mandated is therapeutically efficacious and is therefore undoubtedly not a form of punishment or solely a mechanism of social control."<sup>23</sup>

The proposals need to be assessed carefully against agreed international UN standards<sup>24</sup> of medical ethics and practice in the treatment of offenders and detainees.

## **Community orders and suspended sentence orders**

### **Officers (Clauses 12)**

Clause 12 amends the CJA 2003 to make changes to the meaning of "the responsible officer", who is the officer responsible for implementing community orders and suspended sentence orders imposed by the court. The current legislative framework combines both

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<sup>21</sup> HM Chief Inspector of Prisons for England and Wales (2012) Annual Report 2011-12, London: The Stationery Office

<sup>22</sup> Singleton et al (2005) The impact and effectiveness of Mandatory Drugs Tests in prison, Findings 223 London: Home Office

<sup>23</sup> Opinion 2.065 - Court-Initiated Medical Treatments in Criminal Cases

<sup>24</sup> Eg the UN Principles on Medical Ethics

delivery and enforcement of a community order or suspended sentence order in one role, the Responsible Officer (RO). Under the current framework, the RO is usually a Probation Trust, as a provider of probation services but for certain types of order it is a provider of electronic monitoring or the person in charge of an attendance centre. The government intends to introduce legislative changes so that:

- delivery of an order can be the responsibility of either the public sector probation service or a contracted provider, depending on who is responsible for managing the offender;
- issuing a warning can be the responsibility of either the public sector probation service or contracted provider; but
- laying information before a court to enforce the breach (and the decision in these cases on whether the breach was reasonable) would be reserved to the public sector probation service.

## Key points

While the government refers to these provisions as “technical legislative changes” in the Transforming Rehabilitation Strategy, they are in fact a key part of the government’s plans to compete the majority of probation work and the management of low and medium risk offenders to the private and voluntary sector. As we outlined in our response to the Ministry of Justice consultation Punishment and Reform: Effective Probation Services<sup>25</sup> and the subsequent consultation Transforming Rehabilitation, the Prison Reform Trust has serious concerns regarding the impact of these proposals. We share the concerns of the Probation Chiefs Association and Probation Association that they could lead to a fragmented service which compromises accountability and puts public safety at risk.

The Transforming Rehabilitation Strategy acknowledges that “Many respondents [to the consultation] were concerned that by retaining responsibility for managing offenders who pose a high risk of serious harm to the public sector probation service, but giving market providers responsibility for others, we might cause fragmentation in delivery.”<sup>26</sup> However, despite the assurances offered in the Strategy and a proposed system for “effectively handling changing risk levels”,<sup>27</sup> it remains unclear how the probation service could be expected to retain responsibility for public safety in all cases when it does not have responsibility for the offender management of the majority of the probation caseload. Contract specifications and the proposed systems of monitoring, risk assessment and cooperation outlined in the Strategy are unlikely to resolve the significant obstacles to effective public protection arrangements which these proposals will create.

In addition to advice to courts and initial assessments of risk, offender management of all community sentences and post-custody licences should remain in the public sector. This would provide the infrastructure for a seamless service, ensuring that offenders were subject to appropriate supervision and oversight where their level of risk changed. It would also provide the continuity of supervision that is essential to effective offender engagement. It is important to set clear national standards for oversight and delivery of community sentences, drawing on best professional practice.

The specific provisions of clause 12 appear to fail to understand the complexities of accountability in the criminal justice system. Those with responsibility for supervising a court

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<sup>25</sup> Prison Reform Trust (2012), Response to Punishment and reform: effective probation services, London: Prison Reform Trust. Available at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/effective%20probation%20services.pdf>

<sup>26</sup> Ministry of Justice (2013) Transforming Rehabilitation: A strategy for reform, pp21-22, London: The Stationary Office

<sup>27</sup> Ibid

order are not only answerable to their paymasters, but also to the courts for the manner in which they fulfil their duties. The government has confirmed in the Transforming Rehabilitation Strategy that “the public sector will decide on action in relation to all potential breaches beyond a first warning, and will advise the courts or Secretary of State on sanctions or recall to custody.”<sup>28</sup> This is to take into account “the potential for perverse incentives for providers in breach decisions” raised by respondents to the consultation” and “will mitigate any risk that commercial interests play a part in contracted providers' decisions on whether to instigate breach or recall proceedings.”<sup>29</sup>

While the intention behind the provision is sensible given the potential for vested interests, it is unclear how a private contractor will be held accountable by the court for its responsibility for supervising an order when it is the public probation service that is responsible for laying information before a court. If a judge or magistrate has concerns about the supervision of a contracted out court order, with one or more organisations involved, who do they ask to appear before them? Again, if the public sector retains the offender management role, having carried out the initial and any subsequent assessments, responsibility is clear.

**Peers will want to seek assurances regarding how public safety will be protected, and how providers of probation services will be held accountable to the courts for supervising court orders, under the government’s proposals.**

### **Rehabilitation activity requirement and other provisions affecting community orders and suspended sentence order (Clause 13-16)**

Clause 13 amends the 2003 Act to create, for community orders and suspended sentence orders, a new "rehabilitation activity requirement". The rehabilitation activity requirement replaces the existing "activity" and "supervision" requirements, which are repealed (see clause 13(4)). The intention behind the new requirement is outlined in the Transforming Rehabilitation Strategy:

While our providers will need to ensure that orders of the court are met and that licence conditions are enforced, we want them to have as much flexibility as possible in their approach to rehabilitating offenders. We want to put trust in the front line professionals who work with offenders and to free them from bureaucracy.

Many consultation responses agreed that these professionals were often best placed to judge what would work for individual offenders, and should be given as much discretion and flexibility as possible, and that by doing this we would achieve the biggest impact on reoffending rates. Our contracts will contain a minimum of bureaucracy and will allow providers flexibility to tackle individual offenders' specific needs. We also consulted on whether there was sufficient flexibility in the community sentencing framework for effective rehabilitation. We have decided to introduce legislation to amend the community sentencing framework to provide greater flexibility in how rehabilitation is delivered, as follows:

The current supervision requirement and activity requirement will be combined into a new single rehabilitation activity requirement.

There will continue to be a separate accredited programme requirement, but the legislation will make clear that providers can also choose to deliver accredited programmes as part of the rehabilitation activity requirement. We will also amend

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<sup>28</sup> Ministry of Justice (2013) Transforming Rehabilitation: A strategy for reform, p23, London: The Stationary Office

<sup>29</sup> Ibid.

accredited programme requirements and attendance centre requirements to allow for greater flexibility as to where they take place.

We have previously introduced legislation to ensure that all community orders contain a punitive element. Combined with more flexibility in the delivery of rehabilitative requirements, this will ensure that community orders contain both robust punitive requirements and flexibility for providers to tackle rehabilitative needs.<sup>30</sup>

## Key points

The Prison Reform Trust welcomes the intention of the government to build on the increased flexibility in the community sentencing framework to strengthen the rehabilitative impact of community orders. Many offenders serving short prison sentences or community orders have complex and multiple needs. It is essential that courts have a range of effective options available and the discretion to match requirements to the particular needs and circumstances of each individual case. We welcome the additional flexibility introduced by clauses 14 and 15 of the Bill. It is also vital that sufficient resources are available locally to meet the full range of requirements.

However, the flexible approach sought by the Ministry of Justice seems at odds with the more rigid and centralised approach to community sentences adopted by the Crime and Courts Act, which introduces a mandatory punitive element to every community order.<sup>31</sup> This will limit the discretion of judges in setting an appropriate sentence and creates an unhelpful and unnecessary distinction between punitive and rehabilitative requirements. The government's own impact assessment of the proposals acknowledged that they could have an adverse impact on reoffending rates by causing primarily rehabilitative requirements to be substituted with primarily punitive ones.<sup>32</sup>

As a result, the uptake of the new rehabilitation requirement by the courts could be severely limited by the duty on the courts to impose a mandatory punitive element with every community order. In order to retain policy coherence and increase the flexibility of the courts, the provision in the Crime and Courts Act to introduce mandatory punitive elements should either not be enacted or be rescinded.

Peers will also want to be certain that the provisions of clause 16 to require an offender subject to a community order or suspended sentence order to seek the permission of the responsible officer or court before changing their place of residence does not result in unnecessary and unworkable restrictions which increase the likelihood of breach and recall to custody. Courts can already specify as a condition of community orders and suspended sentence orders restrictions on an offenders' residency if it is deemed appropriate. It is unclear why a mandatory requirement is necessary. The proposal could result in unnecessary bureaucracy and red tape and impose disproportionate restrictions on an individual's freedom of movement.

Another area where greater flexibility would be welcome is in dealing with non-compliance and breach. Figures published for the calendar year 2009 show that 3,996 people were received into prison establishments in England and Wales for breach of a community sentence.<sup>33</sup> For the large number of offenders with particular support needs such as mental

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<sup>30</sup> Ibid, pp13-14

<sup>31</sup> Schedule 15, Part 1, Crime and Courts Bill (2013)

<sup>32</sup> Ministry of Justice (2012) Consultation on sentences in the community and the future shape of probation services: Impact Assessment 04/01/2012, London: Ministry of Justice

<sup>33</sup> Table 6.9, Offender Management Caseload Statistics 2009, Ministry of Justice

health problems, learning disabilities and difficulties and substance misuse problems, an inflexible approach to dealing with technical breach of licence is counterproductive.

We welcomed the increased flexibility the Legal Aid, Sentencing and Punishment of Offenders Act (2012) allowed a court in dealing with breaches of community sentences through the option of the offender appearing before the court to account for his actions, but taking no action if that were deemed appropriate. We are concerned that the Crime and Courts Act removed this uncommenced provision<sup>34</sup> and would encourage the government to reinstate this measure in the Bill. A rewording of the clause could be considered, from “take no further action” to the court will “review progress, call the offender to account and restate the requirements of the order with which the offender must comply”.

It is important that courts have the flexibility to impose sentencing requirements which take into consideration the particular abilities and support needs of individual offenders to avoid unreasonable or unrealistic expectations being made. Linked to this is the importance of early identification and information sharing across and between criminal justice and health and social services. We welcome the government’s commitment to roll out a national liaison and diversion scheme by 2014, backed by £50m funding from the Department of Health and working in partnership with Ministry of Justice.<sup>35</sup>

A key problem which reduces the flexibility of the courts in matching requirements to the particular circumstances and needs of the individual offender is the variable availability of different rehabilitative requirements across the country. A number of potentially useful rehabilitative options already exist but are not being sufficiently utilised. For instance, the mental health treatment requirement is significantly under-used in community sentencing despite very high levels of mental illness among the probation caseload.<sup>36</sup> In 2010 only 783 mental health treatment requirements were commenced, constituting less than 1% of all community sentences.<sup>37</sup> Although the LASPO Act introduced new flexibilities around mental health treatment requirements, there are a number of complex factors that contribute to their under-use.<sup>38</sup> If these barriers, including a lack of confidence among sentencers about the support people will receive as part of this requirement, are not addressed people will not be able to access the treatment and support they need.

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<sup>34</sup> Schedule 15, Part 5, Crime and Courts Bill (2013)

<sup>35</sup> Crispin Blunt MP, the former prisons minister, said in a statement in the House of Commons on 15 February 2011: “As we made clear in the Green Paper, we will, with the Department of Health, have invested £50 million by 2014 in establishing a liaison and diversion service, both in the police stations and in courts, to ensure that people who should more appropriately be treated in the health service do not go to prison.” See

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110215/debtext/110215-0001.htm>

<sup>36</sup> Recent evidence suggests that at least a quarter of probation service clients have a mental health condition, more than half use alcohol problematically and one in eight misuse drugs: Brooker C et al 2011 An investigation into the prevalence of mental health disorder and patterns of health service access in a probation population. Available at

<http://www.magnacartalincoln.org/cjmh/RFPB%20Executive%20Summary.pdf>

<sup>37</sup> Ministry of Justice (2012) Consultation on sentences in the community and the future shape of probation services impact assessment Fig. 1

<sup>38</sup> See Centre for Mental Health (2009) A Missed Opportunity? Community sentences and the Mental Health Treatment Requirement

## **Omissions from the Bill**

The Prison Reform Trust is concerned that the Bill as it currently stands has a number of omissions which should be addressed, including a presumption against short custodial sentences of three months or less, and provision for women offenders.

### **Short custodial sentences**

The recent announcement to introduce statutory supervision for people serving custodial sentences of under 12 months on release has the potential to be a positive development, providing much needed support for rehabilitation. However, we remain concerned that the justice system (specifically prison) is being used as a gateway to allow people to access support.

As outlined above, the proposal to extend support to short sentenced prisoners through statutory supervision has the potential to drive up the short sentenced prisoner population. Sentencers may use the new short sentences with statutory supervision more often because it is seen as a “safe” and attractive option. This could mean fewer community orders are imposed despite being more effective and cheaper at reducing reoffending than short prison sentences.

Peers may wish to consider whether there should be a presumption against the imposition of short custodial sentences of less than six months. Such sentences provide prison staff with little time to tackle any of the factors leading to a person’s offending, and cause great disruption to their lives. People may lose their employment, housing, or benefits whilst in prison, and these are often unresolved when it comes to their release. Whereas a properly structured, supervised community sentence allows a person to take responsibility for their actions, access the support that they need to tackle their offending behaviour, maintain family contact and reduce disruption to their lives.

### **Women offenders**

This Bill presents an opportunity to place the government’s women’s justice reforms on a statutory footing. The Transforming Rehabilitation Strategy acknowledges “the widespread support amongst consultation responses for ensuring providers are commissioned to deliver services tailored to the specific needs of women offenders”. However, it is not clear from the Strategy, and there is no provision as yet in the Bill, to give women’s specific services sufficient priority. All rehabilitation services will be commissioned under a single contract, rather than competing out services specifically for women offenders, with providers having to “articulate and respond to the particular needs of women offenders where these differ for men”. The Strategy states that the forthcoming review of the women’s custodial estate will “strengthen services for women released from prison,” but does not explain how.

The Strategy asserts that reforms to open up the probation service to market forces will support existing providers of women’s services; however, as these providers are too small and specialist, this will require them to become part of a supply chain to win a contract package area. Their success will therefore be determined by the outcome of whichever prime provider’s bid they align themselves with, irrespective of their own past performance.

The passage of the Crime and Courts Act showed the strength of feeling amongst Peers, led by Lord Woolf, for “the statute [to] contain a statement of recognition of the special position

of women in the criminal justice system”.<sup>39</sup> Lord Woolf’s successful amendment was subsequently struck out during the committee stage in the Commons.

The establishment of a Women’s Ministerial Advisory Board, led by Justice Minister Helen Grant, and publication of Strategic objectives for female offenders is undoubtedly a step in the right direction. The Ministry of Justice should now consider proposals to place provision for women in the justice system on a statutory footing. History shows that, in the absence of specific legislation, commitments to address women’s different needs are often not realised, and momentum can be lost as Ministers and officials come and go. The government should seize the opportunity to give the full force of the law to its plans to reform women’s justice.

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<sup>39</sup> Crime and Courts Bill, 3<sup>rd</sup> Reading, House of Lords, 18 December 2012. Available at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121218-0001.htm#12121864000897>