

COMMUNITY-BASED ALTERNATIVES TO INCARCERATION

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I. INTRODUCTION

This paper will concentrate in the main on community-based penalties but the account would be incomplete without the broader picture of sentencing and penal policy across the justice system in England and Wales.

II. GOVERNMENT POLICY

Government policy is that prison should be reserved for serious and dangerous offenders, and that others are normally better punished in the community. To this end, the Ministry of Justice has been working with the courts and others to try to bring down the prison population, which is at record high levels.

III. PURPOSES OF SENTENCING

Our whole sentencing framework was rewritten in the Criminal Justice Act 2003. For the first time, there was a statutory definition of the purposes of sentencing. These are (as set out in section 142 of that Act):

- The punishment of offenders;
- The reduction of crime (including its reduction by deterrence);
- The reform and rehabilitation of offenders;
- The protection of the public and;
- The making of reparation by offenders to persons affected by their offences.

This definition does not apply to offenders under 18 at the time of sentencing and certain categories of sentences for the mentally ill. Other than those few categories, the purposes of sentencing are now so defined.

IV. SERIOUSNESS OF THE OFFENCE

Whilst courts are obliged to have regard to these principles, sentences will generally be determined according to the seriousness of the offence. Seriousness is made up of:

- harm caused by the offence; and
- culpability of the offender in committing it.

There is also a presumption that recent and relevant previous convictions make an offence more serious. There are thresholds of penalty based on seriousness:

- offences that are so serious that only custody will represent a sufficient response;
- offences that are serious enough to warrant a community sentence.

If neither of these thresholds is reached then a fine or a discharge will be appropriate.

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V. COURT JURISDICTION

There are three types of offences:

- summary, which may only be tried in the magistrates' courts;
- indictable, often known as "either way", which may be tried in either the magistrates' courts or the Crown Court; and
- indictable only, which may only be tried in the Crown Court.

Penalty levels vary depending on the court trying the offence. The magistrates' courts may not impose more than six months' imprisonment for a single offence nor generally fine more than £5,000.

VI. FINES

Fines are available to punish all offences (other than where mandatory minimum sentences apply, such as for murder). In general, the maximum fine that can be imposed by a magistrates' court is defined in terms of level. There are five levels, currently set as follows:

- Level 1 £200
- Level 2 £500
- Level 3 £1,000
- Level 4 £2,500
- Level 5 £5,000

In practice, fine levels are generally much less than the maximum as courts must take account of offenders' means when deciding on the amount to impose. The Crown Court may fine an unlimited amount.

VII. COMMUNITY SENTENCES

Since the implementation of the Criminal Justice Act 2003, there has been a single community order for offenders aged 18 or over that can comprise up to 12 requirements depending on the offence and the offender. These are:

- unpaid work (formerly community service/community punishment) – a requirement to complete between 40 and 300 hours' unpaid work;
- activity – e.g. to attend basic skills classes;
- programme – there are several designed to reduce the prospects of reoffending;
- prohibited activity – requirement not do something that is likely to lead to further offences or nuisance;
- curfew – electronically monitored;
- exclusion – not much used as no reliable electronic monitoring yet available;
- residence – requirement to reside only where approved by probation officer;
- mental health treatment (requires offender's consent);
- drug rehabilitation (requires offender's consent);
- alcohol treatment (requires offender's consent);
- supervision – meetings with probation officer to address needs/offending behaviour;
- attendance centre – three hours of activity, usually on Saturday afternoons, between a minimum of 12 hours and a maximum of 36 in total.

Typically, the more serious the offence and the more extensive the offender's needs, the more requirements there will be. Most orders will comprise one or two requirements but there are packages of several available where required. The court tailors the order as appropriate and is guided by the probation service through a pre-sentence report.

VIII. BREACH

Offenders who commit more than one unacceptable failure to comply with the terms of a community order within a 12 month period are returned to court. If the breach is proven, the court is obliged to make

the order more punitive, or it may re-sentence, including to custody.

IX. CUSTODY

The picture on custody is complicated as there are different sentences for 18 to 21 year olds and for older adults; and depending on whether sentence is under the Criminal Justice Act 2003 or its predecessor, the Criminal Justice Act 1991.

Eighteen to 21 year olds are sentenced to detention in a young offender institution and older adults to imprisonment but to all intents and purposes here, they can be considered to be the same thing.

Maximum penalties are specified for all offences according to the seriousness of the offence. Generally, the maximum will fall into one of the following bands:

- 1 month
- 3 months
- 6 months
- 12 months
- 2 years
- 5 years
- 7 years
- 10 years
- 14 years
- life.

One of the characteristics of the criminal law in England and Wales is that offences are defined very broadly. Robbery, for example, can be the snatching of a bar of chocolate from one schoolboy by another or a multi-million pound gold bullion heist. Hence penalties tend to cluster much lower than the maxima.

X. SHORT SENTENCES – UNDER 12 MONTHS

Those sentenced to under 12 months (still made under the Criminal Justice Act 1991) spend the first half of their sentence in prison and are then “at risk” for the remaining period. This means they are under no positive obligations and do not report to the probation service but, if they commit a further imprisonable offence during the at risk period, they can be made to serve the remainder of the sentence in addition to the punishment for the new offence. The exception to this is those aged 18 to 21 who have a minimum of three months’ supervision on release.

XI. CUSTODY PLUS

The Criminal Justice Act 2003 sought to replace short sentences with custody plus, a new sentence that would comprise a short period (2 to 13 weeks) in custody followed by a period under supervision in the community (similar to a community order). This was because the recidivism rate for short sentences is particularly high and one of the reasons for that is because offenders receive no supervision or support on release. Resource constraints have prevented the introduction of this sentence, which remains on the statute book.

XII. SUSPENDED SENTENCE ORDERS

The government has implemented suspended sentence orders, which enable a court to suspend a sentence of up to six months for a period of up to two years subject to the successful completion of requirements in the community. The courts have used this substantially – we think to up-tariff from community sentences. As breach of a suspended sentence order leads very often to custody, this is having an unfortunate effect on the prison population. The government tried to legislate in the Criminal Justice and Immigration Bill to restrict the use of the order to indictable (including either way) offences but had to give up on account of lack of time for the parliamentary process. They will probably return to this in future legislation.

XIII. SENTENCES OF 12 MONTHS OR OVER

A. Criminal Justice Act 1991

The provisions of the 1991 Act for sentences of more than 12 months have been replaced by those of the 2003 Act but there are still some prisoners sentenced under the 1991 Act who are working their way through the system.

The 1991 Act created a distinction between short-term – those serving under four years – and long-term – those serving sentences of four years or over – prisoners.

Short-term prisoners are those serving between one and four years and spend the first half of their sentence in prison; the third quarter on licence and the final quarter at risk.

Long-term prisoners serving determinate sentences spend the first half of their sentence in prison and then may apply for parole to the independent Parole Board. Parole may be granted at any time between the half-way point and the two-thirds point of the sentence, and will only be granted if the Parole Board considers that the offender is a sufficiently safe bet to release. The test is that the prisoner will not commit a further offence of any kind within the parole window. The offender is on licence from the point at which he is released until the three quarter point of sentence and then at risk for the final quarter. In the Criminal Justice and Immigration Act 2008, the government legislated to treat long-term prisoners (as defined by the 1991 Act) who have been convicted for non-sexual non-violent offences as if they were standard determinate sentence 2003 Act prisoners. These provisions commenced on 9 June 2008 and apply only to prisoners who have yet to reach the half-way point of their sentence on that day.

Life sentences, as their name suggests, last for the remainder of the offender's life. When sentencing, the judge sets a minimum period – normally known as the tariff – that the offender must serve as a punishment before being considered for release. Once this minimum period has elapsed, the offender may be released by the Parole Board but only if it considers that to be an acceptable risk to public safety. The test is different from the one described above – here, the Board must decide whether the prisoner would commit an offence which would harm “life and limb” – this is usually a sexual or violent offence.

B. Criminal Justice Act 2003

The 2003 Act abolished the distinction between short- and long-term prisoners and instead created one between standard determinate sentences and public protection sentences.

Offenders sentenced to a standard determinate sentence serve the first half in prison and the second half in the community on licence. The at-risk period no longer applies.

Offenders convicted of a sexual or violence offence may be sentenced to a public protection sentence. In such cases, the court has to determine whether the offender is dangerous to the extent that he or she is likely to cause serious harm to the public through the commission of a further sexual or violent offence. If the court does consider that to be the case, it may impose a public protection sentence. There are three such sentences:

- life – which should be used where it is available by statute and where the particular crime warrants it;
- imprisonment for public protection (IPP) – where the maximum for the offence is ten years or more and where life is not available or appropriate. An offender sentenced to an IPP serves the tariff as set by the judge and then is eligible to be released if considered safe by the Parole Board. The only significant distinction between life and IPP is that, whereas life sentences last for the whole of the offender's life, the Parole Board can bring an IPP licence to an end after 10 years in the community following release;
- extended sentence – where the maximum for the offence is less than 10 years. An extended sentence comprises the normal custodial period plus an extension period. The offender may be released at any time between the half-way point and the end of the normal custodial period and is on licence until the end of the extension period.

The Criminal Justice and Immigration Act 2008 changed the provisions so as to give judges more

discretion over the use of public protection sentences; for use of public protection sentences to be restricted to offences for which two years' real time is justified; and for release from an extended sentence to be automatic at the half-way point of the custodial period with licence extending then until the end of the extension period. These changes apply to cases sentenced on or after 14 July 2008.

XIV. LICENCE

For the duration of the licence, an offender is obliged to comply with the terms of that licence. These may include requirements to report to the probation service, restrictions as to where he or she may live and what work he or she may undertake, and requirements to attend programmes. If an offender breaches his or her licence he or she is liable to recall to prison, potentially until the end of his or her sentence.

XV. EARLY RELEASE

Offenders serving under four years who meet various criteria may be released up to 4.5 months before they would otherwise be released, on home detention curfew, subject to an electronically monitored curfew.

Alternatively, offenders who meet other criteria may be released up to 18 days earlier than they would otherwise have been released on end-of-custody licence.

XVI. OFFENDER MANAGEMENT

Alongside these matters around sentencing, we must also consider offender management, now the job of the National Offender Management Service. The National Offender Management Model is said to be consistent with the best available evidence on what works in reducing reoffending.

This service encompasses both the probation and prison services, for the first time seeking to harmonize and co-ordinate sentence planning and management under a single umbrella. The principles are as follows:- Resources should follow risk – the evidence suggests that efforts should be focussed on those offenders who are at medium/high risk of reoffending;

- Supervisory practices should incorporate elements of pro-social modelling where the offender is actively engaged in the sentence and is motivated, supported and encouraged to change his or her offending behaviour;
- The relationship between the offender and the offender manager is critical with consistency of supervision promoting the development of a trusting working relationship;
- Supervision and referrals to other agencies for interventions should vary according to the assessed risk levels and needs of the offender; and
- Referrals to partner agencies can be beneficial for offenders with multiple needs and for offenders who would otherwise not have received community supervision. However, the evidence here is mixed.

The objective of the service is for the C's to be delivered – continuity, consistency, commitment and consolidation. Risk is then matched to resources using a tiering mechanism based on four approaches. Tier 1 is punish and includes monitoring and “signposting” to the offender. Tier 2 is Help and includes in addition helping and brokering support for the offender who will fit the low risk and low seriousness criteria. The help may be with health problems, accommodation, employment or learning skills, for example. Tier 3 adds an additional element of personal change on top of the Tier 2 elements and Tier 4 adds Control. These offenders may be regarded as dangerous and/or prolific, who need additional restrictions and controls to manage their risk.

More than half of community and suspended sentence orders ran their full course or were terminated early in the first quarter of 2008. But 36% of community sentences terminated for negative reasons and 1,860 offenders were in custody in August 2008 for breaching a court order. These numbers need to be considered alongside those for persons in prison for breaching their licence following release. In 2007/08, 11,756 determinate sentenced prisoners were recalled to prison – an increase of 5% on the previous year. In the same period, 926 parolees were recalled – a drop of 24% from 2006/07. The parole rate remained the

same at 36%. These figures show a continued trend of “back end sentencing” – a consequence of legislative changes and the increased focus and efficiency of the Probation Service in enforcement of licences.

XVII. RISK ASSESSMENT

Risk assessment is at the heart of offender management and underpins sentence planning, resource allocation, targeting of interventions designed to reduce reoffending and community supervision of offenders. It is defined as “The systematic collection of information to determine the degree to which harm (to self and others) is likely at some future point in time.”

For all involved in offender management, making a full and accurate assessment of risk is crucial to decision making. In understanding the boundaries of risk assessment, it must be recognized that the processes do not conform to an exact science and that no environment is risk-free. Assessment refers to the prediction of future reoffending (in the UK this is normally measured by reconviction) and the prediction of the harm, to both an offender and their victim, that reoffending is likely to cause.

Typically, risk assessment measures two types of risk factor- “static” and “dynamic” and methods of assessment are actuarial or clinical in nature. Static factors are the unchangeable historical characteristics of an offender – such as gender, age and previous criminal convictions associated with higher rates of reoffending. Actuarial risk prediction relies on assessment of these factors. It calculates the probability that an individual will reoffend based on the average reoffending rate calculated from a sample of offenders who match that individual on relevant static factors. Clinical risk prediction in contrast is less structured and relies on interviews and observations of social behavioural environmental and personality factor related to previous offending. These factors are considered dynamic in nature as they are amenable to change via treatment and offender management.

Both actuarial and clinical approaches are limited when used alone. Actuarial assessment cannot identify which offenders will go on to reoffend, merely into which group an individual falls. Clinical assessment can be more prone to bias as it relies upon judgment and can be influenced by an assessor’s opinion of the relative importance of different risk factors. A number of tools are available, many of which have been validated on UK populations and these are used as part of risk assessment processes. Some are actuarial, some clinical and others a combination of both. A number of tools predict specific types of reoffending, for example sexual or violent, others are designed for general application. The most prominent tool now used is the Offender Assessment System (OASys), which is used to assess risk of general offending, likely degree of harm and degree of need posed by an offender in a range of areas. Other widely used tools are Risk Matrix 2000 which predicts the risk of sexual reoffending and Historical Clinical List – 20 (HCR-20) which measures the risk of violent reoffending. Risk assessment in England and Wales is undergoing substantial re-development. The current OASys reoffending predictor will be replaced in the spring by a refined actuarial measure. The new measure scores on dynamic factors which research has shown to be most predictive of non-violent reconviction, such as drug misuse, and accommodation needs, which in addition to criminal history were the best individual predictors of non-violent reconviction. A separate actuarial predictor of violence will also be included and this will be used to form the basis for further judgments regarding risk of serious harm. A further tool is being piloted to examine dynamic risk factors for sexual offenders being managed in the community, building on the Stable and Acute 2007 tool developed in Canada.

XVIII. PROBATION SUPERVISION INCLUDING HIGH RISK OFFENDERS

The number of offenders starting community orders remains relatively stable – 33,200 started such a sentence in the first quarter of 2008. Fifty one percent of these community orders had just one requirement, 14% had 3 or more requirements. Three percent more offenders were being supervised under community orders on 31 March 2008 than a year earlier, up from 98090 to 101,250. Thirteen percent had no previous convictions or cautions – 18% had 15 or more.

The number of offenders starting pre- or post-release supervision increased by 4% to 11,870. The total number of offenders being so supervised was 97,080 at March 2008. This is an increase of over 22% from December 2002 and is largely a result of the changes brought in by the 2003 Act, which means

that offenders now spend longer on licence. High risk offenders are supervised under Multi-Agency Public Protection Arrangements (or MAPPA). These are arrangements set up locally to assess and manage offenders who pose a risk of serious harm. National guidance indicates the use of three levels of management. Level 1 involves ordinary agency management; Level 2 is where the active involvement of more than one agency is required to manage the offender. Most offenders assessed as high or very high risk of serious harm can be managed effectively at Level 2 where the management plans do not require the oversight and commitment of resources at a senior level. The highest level is Level 3 where it is determined that the management issues require conferencing and senior representation from the agencies. The few cases referred at Level 3 – sometimes known as the critical few – are those whose management is so problematic that multi-agency co-operation and oversight at a senior level is required, together with the authority to commit significant resources.

In 2007/08, there were 12,806 Level 2 and 3 offenders. During this period, 79 serious further offences were committed by these nominees. The major aim of MAPPA is public protection. Relevant agencies have a statutory duty to co-operate in the arrangements.

There is also the Prolific and other Priority Offender (PPO) Programme which targets those offenders who commit most crime in the area, or whose offending causes the most damage to the local community. The three strands of the programme aim to:

- Catch and convict offenders who commit most crime in their locality or whose offending causes most harm to their community. There is no standard national definition of PPO. Local areas devise their own selection criteria based on key principles set out in national guidance. PPO's are subject to intense police supervision;
- Rehabilitate and resettle: this involves working with offenders to stop their offending by offering a range of supportive interventions addressing identified needs and risks of further offending. The opportunity to rehabilitate is backed by a swift return to court if offending continues;
- Prevent and deter: to stop the most active young offenders escalating into tomorrow's prolific offenders through youth justice interventions and continued post-sentence support.

Recent research supports a positive assessment of the PPO programme. A comparison of total convictions before and 17 months following the programme showed a 43% reduction by PPO offending, and a comparison from the start of the scheme to 17 months after the start showed a 62% reduction in convictions and a sharp reduction in PPO offending following entry on to the scheme. These reductions cannot necessarily be attributed to the PPO programme as we do not know what would have happened to these offenders had the scheme not been introduced.

A new initiative is integrated offender management, the aim of which is to reduce reoffending. It approaches target offenders in the community who present the highest risks to their communities, especially those short sentence offenders released from prison with no statutory supervision. There are five pilot areas. No evaluation has yet taken place but research is being built into the pilots which were announced in July 2008 and which will run for two years. The schemes are multi-agency partnerships.

XIX. SENTENCE DISPOSAL PATTERNS

Fines are the most common disposal with 941,500 handed out in 2007 – accounting for 66.6% of all sentences. Community sentences accounted for 196,400 cases: 13.9% of all sentences, up 3% from 1997. Immediate custody was given to 6.7% (95,200), up from 93,800 in 1997, but a similar proportion of all sentences. This does not tell the whole story. Use of the fine for indictable offences has dropped dramatically in the last 10 years – falling from 27.6% in 1997 to 15.8% in 2007. Over the same period, the use of community sentences for these offences has risen by 5.3% to 33.7%. The immediate custody rate for indictable offences has remained relatively stable over the past decade, rising slightly from 22.5% to 23.7% in 2007. This does point to the increase in breach and recall numbers being at the heart of the increase in the prison population. In 2007, almost 136,000 were sentenced to custody, immediate and suspended – the highest figure in a decade and up 40% on 1997 numbers. Other disposals include conditional discharges (94,100 in 2007), absolute discharges – 11,000 over the same period down from 18,200 in 1997 and compensation orders – 165,900 in 2007.

The fine became a less popular disposal from the 1990s as enforcement became less effective. Much effort and investment went into improving enforcement and this has paid off in results. In 2007/08, the new amount of fines imposed was £376 million (including transferred fines from previous years). In the same year, £256 million was collected and £106 million was cancelled. The paid and cancelled amounts do not necessarily relate to the fines imposed in that year but could be collected against any fine outstanding regardless of age. The fine has started to be restored as a credible sentence as a result of the efforts to improve enforcement which have resulted in a steady year on year rise in payment rates since 2003 – from 73% in 2003/04 to 90% in 2006/07. In the six years to 2006, there has been a 23% reduction in the number of offences committed by offenders within one year of commencing a court order under probation supervision. In 2006, 36% of offenders commencing a court order under probation supervision committed at least one offence in the following year – down from 40% in 2000. In this period, there has been no change in the number of most serious offences committed within a year by offenders commencing court orders under probation supervision.

Similar trends emerge from those released from prison. In the same six years, there has been a 15% reduction in the number of offences committed by offenders within one year of discharge from custody. In 2006, 46% of offenders released from prison committed at least one offence the following year – down from 51% in 2000. The greatest reductions have been made with offenders sentenced to over one year in prison – over 40% in terms of the number of offences committed.

XX. PROBLEMS AND CHALLENGES OF COMMUNITY-BASED SENTENCES

The first problem – and the most important – is that of public confidence in these sentences, which can be seen as soft options. The British Crime Survey (BCS) shows that crime has fallen by 10% in the last year, representing a million fewer crimes. Police recording of crimes has improved while victim reporting of crime has remained fairly stable since 1997.

Despite this, high numbers of people believe that the crime rate has risen. People have more positive perceptions of crime in their own area than nationally – 65% thought that crime in the country as a whole had increased in the past two years compared with 39% who thought that crime in their home area had increased.

Sentencing has become more complex over recent years. When I appeared before the Parliamentary Public Accounts Committee last October, one MP asked me for a definition of honesty in sentencing – I replied that this was about a sentence being clear and transparent and readily understandable to all. The legal labyrinth which sentencers have to navigate and which practitioners then have to enforce makes such a concept aspirational. If I had a magic wand, I would use it to clarify sentencing so that people understood it. This lack of understanding is in my view the biggest barrier to improving public confidence in the system. Unfortunately, the media does little to help.

We must not underestimate the media influence on public confidence. The trend now seems to be about blame and scapegoats when things go wrong – as they inevitably will. I am certainly not suggesting even for a moment that officials and agencies should not be accountable – but trial by television or newspaper in the absence of many of the facts is not the most mature way of proceeding in these cases. Sadly, in the UK, the public does not accept the facts about the fall in crime and often, according to research polls, regards published statistics as at best incomplete and misleading, and at worst dishonest. This research indicates that people are more likely to believe local rather than national estimates. This is not a quick fix cure but it is not enough to look only internally and not engage and try to inform the community about your work – and to agree to some press interviews and coverage to try and balance reporting where possible.

I go back to my magic wand. I would also use it to put in place an IT system that was common across the criminal justice agencies and which would enable good research to be carried out, as well as for information to be effectively shared. The public just can't understand why, for example, one police service has information that isn't accessed and acted on by police in another area and which may have prevented a high-profile offence.

There is also the issue of judicial confidence – it is vital that the judiciary is independent and is seen to be so. Some parts of the 2003 Act – notably the IPP sentence – were crafted so as to take away judicial discretion and when judges did what they had to do in following the statute with unfortunate consequences, there was public criticism. It has taken over three years for the worst excesses of this sentence to be put right by the 2008 Act. What is a great advance is that in those years there is now a proper agreement between the Secretary of State for Justice and the Lord Chief Justice – the concordat. Communication and understanding have greatly improved and this bodes well for the future.

And then there are resources. We were already facing budget pressures before the downturn in the global economy. All interventions require funding. Our prison population is estimated to increase to between 83,400 and 95,800 by 2015. Community orders too are projected to go up to 258,500 by 2010/11. The increase in knife crime and the expectation to prosecute rather than caution these offenders and for sentencing tariffs here to increase may increase these estimates further. The impact of increased radicalization as well as the impact of technology on crime will also be challenges. What impact will the credit crunch have on crime too?

What has been encouraging is the success of partnership work between agencies. I spoke earlier about MAPPA and integrated offender management as well as the provisions for dealing with the persistent and prolific offender. There are other such partnerships – crime and disorder reduction partnerships and community safety partnerships. These are locally based and involve local government, listening to local people and aiming to be responsive to local needs and make local people feel safe in their communities. There are moves to build on the work so far, including having directly elected chairs of these partnerships and scrutiny committees which will provide people with a way to influence their local police service and hold it to account.

There are also unique opportunities – such as UNAFEI courses and seminars – where we get the opportunity to learn and understand what is happening elsewhere, what has been successful and what has not. This should enable us to make the best possible use of resources as these come under increased pressure.