



Breaking the Cycle

Gaining the views of criminal justice practitioners and retail offenders on effective sentencing

A Response to the White Paper *A Smarter Approach to Sentencing* and the *Police, Crime, Sentencing and Courts Bill*

May 2021

Contents

Foreword	03
Introduction from Alex Norris MP	04
Acknowledgments	04
Executive Summary	05
Specific Responses to the Police, Crime, Sentencing and Courts Bill	08
1. Introduction	10
Criminal Justice: A System in Crisis	10
Reoffending	11
A Smarter Approach to Sentencing	12
The Police, Crime, Sentencing and Courts Bill	13
Focus of the Report: Retail Theft and Violence	13
2. Out of Court Disposals and Deferred Sentencing	16
Out of Court Disposals	16
Diversionary Cautions	16
Community Cautions	16
Issues and Concerns	17
Deferred Sentencing	20
Restorative Justice	21
3. Sentencing: Process and Practice	25
The Court System	25
Changing Trends in Sentencing	26
Pre-sentence Reports	27
Decline in the Use of Pre-sentence Reports	28
Supporting the Delivery of High-quality PSRs	29
Post-sentence	30
Problem-solving Courts	30
Assaults on Frontline Workers	32
4. Probation and Community Sentences	36
Community Sentencing	37
Community Sentence Treatment Requirements	38
Co-production of Services	41
Electronic Monitoring of Offenders	42
House Detention Order	45
From 'Tick Box' Supervision to 'Robust and Responsive' Community Sentences	46
5. Prison	48
Short Custodial Sentences	48
A Presumption Against the Use of Short Custodial Sentences	49
Drug Rehabilitation and Therapeutic Communities	52
Conclusion: Time to Change	53
References	54

Foreword



We continue to champion and support the safety of our colleagues and their communities. Back in 2018, we launched our *Safer Colleagues, Safer Communities* campaign as we were facing a rising tide of violence and abuse against shopworkers and escalating levels of youth violence in communities.

You will remember back in 2019, Co-op commissioned Dr Emmeline Taylor to produce research on both the impact of violence on shopworkers and the motivations of offenders. It explained that this constant abuse has a terrible impact on retail workers' mental health, not to mention the catastrophic effects that physical violence will have.

Since then and due to the pandemic, 2020 has proven to be one of the most challenging years in history, especially when it comes to crime and violence on shopworkers. Since the start of 2020, we have seen abuse, threats and actual violence towards colleagues continue to increase at an alarming rate.

Due to the change in environment, we wanted to explore how the British public views shopworkers. So, in November 2020 we published a piece of research that looked at consumer attitudes and behaviours towards shopworkers since the start of the pandemic. This research found that one in five customers admitted to being verbally or physically aggressive towards shopworkers during Covid-19, despite the fact that 90% of the British public feel that shopworkers have provided an essential service during the pandemic. This same research also showed us that four out of five of the British public agreed with our call for greater sentences for offenders who are violent and abusive towards shopworkers.

Through our *Safer Colleagues, Safer Communities* campaign at Co-op, we have invested more than £140m in measures to protect colleagues, and we will continue to invest to make sure we keep our colleagues safe. The investment has provided colleagues with state-of-the-art CCTV, headsets and fog cannons among many other measures. Alongside this we will also continue to raise money for local community groups who tackle the root causes of crime. So far we have raised over £6.6m which is supporting 2865 local causes.

I was delighted to see the Scottish Parliament pass Daniel Johnson MSP's Bill which now provides greater support and protection for shopworkers in Scotland, including our own colleagues. However, we must continue to stand together as retailers to press for change across the rest of the UK so that all shopworkers are provided with the same level of protection that they deserve.

Dr Emmeline Taylor has carried out another vital piece of research linked to the protection of shopworkers, which looks at the *Police, Crime, Sentencing and Courts Bill* and the White Paper *A Smarter Approach to Sentencing*. This provides clear opportunities for the UK Government to follow Scotland's lead in legislating to protect shopworkers across the rest of the UK.

Co-op will continue to play its part in supporting the safety of colleagues and their communities. We believe that by coming together we can help solve seemingly intractable problems so that we can all move forward together.

Jo Whitfield

Food Chief Executive, The Co-op

Introduction from Alex Norris MP



The Coronavirus pandemic has exacerbated the unacceptable wave of crime, violence and abuse that retail workers are forced to suffer, simply for doing their jobs.

Last year, Usdaw reported that abusive incidents doubled since the outbreak, and even as early as March 2020, before lockdown measures were in place, the British Retail Consortium had already seen a 9% annual increase. The Association of Convenience Stores estimated that 83% of people who worked in their sector had been subject to verbal abuse in the last year. The impact of these incidents can be devastating for workers, both physically and mentally.

Parliament asks our retail workers to exercise crucial public functions over the restrictions of sales of alcohol, cigarettes, acids, knives and more - all in the interest of public safety. I believe we have a special responsibility to support them when we do. This has grown even more during the pandemic. We have made necessary changes to their work environment and we know that has meant greater pressure on them. We must have their back.

Personally, I have been raising this issue in Parliament for the last three years by submitting two Bills, both known as the *Assaults on Retail Workers (Offences) Bill*, to Parliament through the Private Members process. So far, the Government has stymied their progress. We need the Government to change their position and to act, in law, to protect these workers.

This means that the task ahead of us, in order to make assaults on retail workers aggravated offences and therefore subject to increased sentences, is to put in front of the Government a weight of evidence so overwhelming that they have no choice but to enact it into law.

These Bills would have got nowhere at all without Dr Emmeline Taylor's work in this area, which has already proven to be a fundamental part of this endeavour, with her review of evidence and policy in 2019 providing the backbone of the argument that I, my fellow Parliamentarians, and members of Co-operative Party and Usdaw have been making to date.

Her latest research in response to the *Police, Crime, Sentencing and Courts Bill* - and the policy paper that proceeded it - which she has presented in this report is equally important. The gathering of first-hand evidence from such a wide range of stakeholders in the sentencing process, including the offenders themselves, provides a new human perspective to the arguments that have been made to date.

These incidents are completely unacceptable, and I know that everyone campaigning on this issue is determined to forge a situation where retail workers can feel safe while doing their jobs. This research will no doubt be a vital part of making that happen.

Alex Norris MP

Member of Parliament for Nottingham North.

Acknowledgments

This study would not have been possible without the support and commitment of several organisations, companies and individuals. First and foremost, sincere thanks to the Co-op for funding the research into the proposed sentencing reforms as part of their *Safer Colleagues, Safer Communities* campaign.

We are extremely grateful to the 20 criminal justice practitioners who generously gave up their time to share their professional expertise and experiences as well as their views on the new Government proposals.

In addition, ten prolific offenders talked candidly about their lives and crimes and reflected thoughtfully on what could potentially have worked, and when, to steer them away from criminality. It is always a challenge to engage perpetrators in discussions about their criminal activities and we are very grateful for their frank and forthright views.

Thank you to Jon Taylor and Dr Holly Powell-Jones for their research support and to Professor Nicola Padfield for providing expert comments and suggestions.

Executive Summary

- This report is based on the findings from interviews with a range of criminal justice practitioners, including police officers, magistrates, probation officers, restorative justice practitioners and youth justice managers, and ten convicted prolific offenders. The aim of the study was to gain their views on what effective sentencing could look like against the backdrop of the policy reforms outlined in the White Paper, *A Smarter Approach to Sentencing*, and the legislative changes in the *Police, Crime, Sentencing and Courts (PCSC) Bill*. The interviews took place between October 2020 and March 2021 following the release of the White Paper. The report draws upon the professional expertise of the criminal justice practitioners and the first-hand experience of convicted offenders who between them had more than a thousand interactions with the criminal justice system.
- Retail crime is high volume. Wholesale and retail premises experienced an estimated 10.1 million crimes in 2018 of which 7.1 million were incidents of shop theft – more than 19,000 incidents each day. In addition, the British Retail Consortium estimates that there are more than 400 incidents of abuse and violence towards shop workers committed every single day. Such high-volume offences require immediate action to address not only their alarming frequency, but also the increase in severity.
- The White Paper is unrealistic in the aims set out for the new OOCs. It claims that the cautions will enable those with ‘mental health issues, health vulnerabilities or other complex needs’ to access appropriate services and ‘get to the root cause of their offending’. Given that the maximum duration of an attendance requirement is 20 hours on the Diversionary Cautions and 10 hours on the Community Cautions, OOCs are not sufficient in duration or intensity to address complex needs. Furthermore, given the lack of services for individuals with severe mental health issues and/or drug or alcohol dependency, it is not clear how timely and impactful service provision will be provided.
- The White Paper anticipates that the greater use of deferred sentencing will provide opportunities for restorative justice practices to be deployed. However, there is no further details provided. The government should renew the restorative justice action plan, now three years overdue, if it is committed to greater use of highly effective restorative justice practices.
- The Government estimates that the new OOCs will be more expensive than the current system, with the additional cost burden falling largely on the police and Crown Prosecution Service (CPS). Since available data does not suggest that reoffending rates are likely to go down as a result of the cautions, it is difficult to see how the additional expenditure is justified.

Out of Court Disposals and Deferred Sentencing

- Police forces currently have access to up to six out of court disposals (OOCs) for adults (Cannabis/Khat warning, Community Resolution, Penalty Notice for Disorder, Fixed Penalty Notice and Simple and Conditional Cautions). The PCSC Bill will reduce this to two statutory OOCs: a Diversionary Cautions and a Community Cautions.
- More guidance is required for police forces as to who is an appropriate recipient of Diversionary Cautions or Community Cautions.
- The use of the disposals needs to be carefully monitored to ensure that they are being used as intended. There must be adequate transparency and accountability to ensure that they are used proportionately and fairly both within police boroughs and across them. It is troubling that the new cautions could be used to give low level offenders, and particularly vulnerable ones, relatively onerous penalties out of court without legal representation.

Sentencing Process and Practice

- A sensible proposal in the White Paper is to streamline the way the most serious indictable offences are dealt with by removing unnecessary hearings held at the magistrates’ courts that formally commit the case to the Crown Court for trial.
- The criminal courts have amassed huge backlogs of almost half a million cases. Although the Coronavirus pandemic has exacerbated the problem, the courts in England and Wales were already severely overstretched with demand outstripping capacity following the closure of hundreds of courts. There is nothing in the White Paper to address the severity of the backlog and the additional pressures that this is placing on the prison estate. The remand population is at its highest annual figure in six years and represents 15.5% of the prison population, with many individuals being held beyond the legal time limit. The number of outstanding cases will continue to rise unless court capacity is significantly increased.

-
- The proposal in the White Paper to support the National Probation Service (NPS) to deliver high-quality pre-sentence reports (PSRs) by recruiting additional staff at court to deliver them is welcome. The NPS needs to be adequately resourced to provide detailed and timely PSRs that offer evidenced-based sentencing options to reduce the likelihood of reoffending and protect the public and/or victims(s) from further harm.
 - Further research is needed to understand why sentencers are dispensing with the PSR requirement to the extent that they are. It is recommended that clear guidelines are provided to sentencers to outline when a PSR should be delivered.
 - If sentencer confidence in community sentences is to be restored then more information and training on what community sentences entail, as well as their effectiveness relative to other disposals, needs to be provided. In addition, sentencers should have the opportunity to review the progress made by offenders on community sentences.
 - There is significant support for problem-solving courts amongst offenders and criminal justice practitioners. However, in order for such courts to be effective, they must also have the infrastructure in place to support referrals and treatment pathways. Offenders are receiving inappropriate sentences because magistrates report a severe lack of available services for mental health problems, and drug and alcohol treatment.
 - The Bill intends to increase the maximum penalty for assaulting an emergency worker from 12 months to two years' imprisonment and will provide the courts with enhanced powers to sentence in a way that reflects the severity of the offence. The amendment to the *Assaults on Emergency Workers (Offences) Act 2018* recognises the risks that emergency workers face while carrying out their duties. In light of the increase in the frequency and severity of assaults against shop workers, it is understandable that those working in the retail sector would like similar legislation to protect them. Enacting the *Assaults on Retail Workers (Offences) Bill 2019-21*, currently at second reading, will signal to perpetrators and victims that these crimes will be taken seriously.



Probation and Community Sentences

- Much of the rhetoric in the White Paper relates to making community sentences tougher and more robust. This paper reflects on whether it is indeed tougher and longer community sentences that are required or whether adequately resourcing the probation service to effectively manage community sentences as they currently stand would be equally, if not more, effective.
- The intended increased use of Community Sentence Treatment Requirements (CSTRs) as an alternative to short custodial sentences (as well as to other community sentences), when assessed as appropriate, is welcome. Increasing take up will not only require significant investment in treatment services but also the availability of staff at court to conduct assessments, to gain the informed consent of offenders, and to draft a pre-sentence report with the CSTR as a sentencing option. As with any sentence proposal, ensuring that sentencers are aware of the disposal, familiar with what it entails, and are confident in its delivery are all key to it being used.
- The PCSC Bill increases the maximum length of time a curfew can be imposed for to two years (from 12 months) and increases the daily maximum to 20 curfew hours per day, whilst maintaining the seven-day period maximum of 112 hours. The criminal justice practitioners consulted in this study raised multiple concerns about this extended duration, with many believing that it would set offenders up to fail. In the absence of evidence, it is not possible to determine the impact that an extended period of curfew will have on those subjected to it. Further research is needed to examine whether the positive impacts of curfew outweigh any counterproductive or negative ones, e.g. reducing the likelihood that those subject to it will access services, find employment or if they are more likely to breach the order.
- The proposal to encourage the flexible use of curfews is welcome. Tailoring the restrictions to the times most likely to limit re-offending or other problematic behaviours must surely be more effective than standardised hours. Individuals must be able to fulfil caring responsibilities, to access services, and to undertake other activities that will assist with their determination not to reoffend (e.g. training or employment).
- Empowering responsible officers to manage variations to the curfew without requiring a return to court is positive. However, this must be within clearly defined and specific parameters or could otherwise risk contributing to sentencers' already low confidence in the enforcement of community sentences if they feel that their judgment is being undermined.
- The White Paper outlines plans to trial a highly restrictive House Detention Order with young adults. Without a clear rationale, there is no reason to target the Order at young adults (aged 18-20). The Ministry of Justice (MoJ) should carefully review evidence to determine whether low level offenders are the appropriate cohort for house detention. Pilot studies should also consider the impact on those with whom the offender lives, the impact on opportunities to undertake education, training and work, and the rates of, and reasons for, breach (compared to other orders).

Prison

- Short custodial sentences of up to six months account for almost half (46%) of sentenced admissions to custody. Adults discharged from short custodial sentences have the highest reconviction rates compared to any other sentence type, with a proven reoffending rate of 63.6%.
- The Bill does not introduce a presumption against custodial sentences of less than six months. These hugely ineffective sentences return the highest reoffending rates as they do nothing to rehabilitate offenders and yet they often disrupt any protective factors that offenders had prior to entering prison (e.g. stable accommodation or employment). In the absence of a presumption against short sentences, more needs to be done to educate sentencers about the negative effects of short sentences. Furthermore, more needs to be done to ensure that meaningful work is undertaken with prisoners serving short custodial sentences (e.g. drug rehabilitation, employment skills, and education).
- All prisoners should have the opportunity to live in a drug-free environment, with suitable treatment and support. If the Government is not committed to a presumption against short sentences, it must focus on how meaningful work can be completed in the time that offenders are in custody in order to reduce the exceptionally high likelihood of reoffending. Drug Recovery Wings (DRWs), previously piloted, provide one such option in conjunction with a throughcare programme that ensures individuals have suitable accommodation upon release (that is similarly drug-free) and a continuation of therapeutic support, as well as access to, and pathways to training and employment.



Specific Responses to the Police, Crime, Sentencing and Courts Bill

1. Cautions (Clauses 76-99)

The PCSC Bill will reduce the number of statutory out of court disposals (OOCs) to two: a Diversionary Caution and a Community Caution. If used appropriately, these 'conditional' cautions could provide a more meaningful penalty than 'simple' cautions and encourage offenders to address the root causes of their criminal behaviour. However, we know very little about how the new system will work in practice and the proposals are not without issues.

The use of these disposals needs to be carefully monitored to ensure that they are being used as intended. There needs to be adequate transparency and accountability to ensure that they are used proportionately and fairly both within police boroughs and across them. It is troubling that the new cautions could be used to give low level offenders, and particularly vulnerable ones, relatively onerous penalties out of court without legal representation.

The Ministry of Justice should be honest about the potential impact of these disposals. Such short interventions will not 'get to the root cause' of offending and should not be promoted, as they currently are, as suitable for individuals with 'complex needs.' Given that the maximum duration of an attendance requirement is 20 hours on the Diversionary Caution

and 10 hours on the Community Caution, the OOCs are not sufficient in duration or intensity to address complex needs.

The Government estimates that the new OOCs will be more expensive than the current system with the additional cost burden falling largely on the police and CPS. Since available data does not suggest that reoffending rates are likely to go down as a result of the cautions it is difficult to see how the additional expenditure is justified.

2. Problem-solving Courts (Clauses 128 and 129)

The Bill introduces some changes in order to pilot problem-solving courts, incorporating previously tried problem-solving approaches. There is a large amount of support for problem-solving courts amongst offenders and criminal justice practitioners. However, in order for these courts to work effectively they must have the infrastructure in place to support referrals and treatment pathways. Offenders currently receive inappropriate sentences in part due to a severe lack of services providing mental health, and drug and alcohol treatment.

3. Increase in Penalty for Assault on Emergency Worker (Clause 2)

The Bill increases the maximum penalty for assaulting an emergency worker from 12 months to two years' imprisonment and will provide the courts with enhanced powers to sentence in a way that reflects the severity of the offence. This increase, by amending *Assaults on Emergency Workers (Offences) Act 2018*, recognises the risks that emergency workers face while carrying out their duties.

In light of the increase in the frequency and severity of assaults against shop workers, it is understandable that those working in the retail sector would like similar legislation to protect them. More than 400 incidents of abuse and violence towards shop staff occur every day. The *Assaults on Retail Workers (Offences) Bill 2019-21* is currently at second reading. Enacting the Bill may provide an opportunity to undertake meaningful work with offenders through deferred sentencing (see chapter two). The legal leverage of the new Act could potentially improve the likelihood of long-term change in offender behaviour. If an individual does not comply with the conditions placed upon the deferment, the more severe sentence may be imposed.

4. Increases in Maximum Daily Curfew Hours and Curfew Requirement Period (Clause 125)

The PCSC Bill increases the maximum length of time a curfew can be imposed to two years (from 12 months) and increases the daily maximum to 20 curfew hours per day, whilst maintaining the seven-day period maximum of 112 hours. The criminal justice practitioners consulted in this study raised multiple concerns about the extended duration with many believing that it would set offenders up to fail. In the absence of evidence, it is not possible to determine the impact that an extended period of curfew will have on those subjected to it. Further research is needed to examine whether the positive impacts of curfew outweigh any counterproductive or negative ones, e.g. reducing the likelihood that those subject to it will access services, find employment or if they are more likely to breach the order.

5. Power for Responsible Officer to Vary Curfew Requirements etc (Clause 126)

Empowering responsible officers to manage variations to the curfew without requiring a return to court is positive. However, this must be within clearly defined and specific parameters or could risk contributing to sentencers' already low confidence in the enforcement of community sentences if they feel that their judgment is being undermined.



1. Introduction

"I think the only way you stop crime is by dealing with the root cause, isn't it?"

[Magistrate]

In September 2020, the Ministry of Justice (MoJ) published the White Paper, *A Smarter Approach to Sentencing* (ASATS), shortly followed by the *Police, Crime, Sentencing and Courts Bill* in March 2021.

This report was commissioned by the Co-op to provide insight on the policy reforms and legislative changes relevant to retail offenders. In order to do so, it draws upon the findings of in-depth interviews with ten prolific offenders who between them had amassed more than one thousand interactions with the criminal justice system and received multiple community and custodial sentences. In addition, a range of experienced criminal justice practitioners including police officers, magistrates, probation officers, restorative justice practitioners and youth justice managers provide valuable insight into their experiences of effective practice and their views on the proposed reforms.

The interviews took place between October 2020 and March 2021 following the release of the White Paper. All the names of participants have been changed to protect their identity and quotes have been attributed anonymously.

Criminal Justice: A System in Crisis

The criminal justice system (CJS) in England and Wales is in many ways broken. It has become so disjointed that the fragmented disarray of components can scarcely be termed a 'system' at all. Dramatic funding cuts, successive reforms, disastrous privatisation experiments, and what the Rt Hon Robert Buckland MP has described as 'legislative hyperactivity'ⁱ across the CJS has resulted in an overly complex, fragmented and ineffectual system that often fails to deliver justice for victims, protect communities or rehabilitate offenders. For over a decade the justice system has been severely undervalued and underfunded: investment has been cut by 24% in real terms between 2010-2019.² It is little wonder that it has reached crisis point.

The Criminal Courts

The criminal courts are buckling under a backlog of more than 457,000 cases, an increase of 100,000 since the onset of the Coronavirus pandemic. Even before the pandemic, the courts in England and Wales were severely overstretched. Between 2010 and 2020, over half the magistrates' courts across England and Wales were closed; 164 of 320 (51%).³ As a result, victims of crime have to wait longer for cases to be heard and defendants awaiting trial spend longer on remand in custody (at the expense of the tax payer), or out on bail in the community. The number of outstanding cases will continue to rise unless court capacity is significantly increased.

The Police

In terms of policing, eight successive years of budget cuts to Britain's police forces stretched resources to breaking point. Central government funding for policing was reduced by 22% in real terms between 2010 and 2019, resulting in 21,000 fewer police officers in addition to 18,000 fewer police staff and 6,800 fewer police community support officers.ⁱ The severity of cuts has made it difficult for forces to respond in a timely fashion, if at all, when offences occur. This, not surprisingly, has resulted in diminishing confidence amongst victims and the wider public. In July 2019, the Prime Minister pledged to recruit 20,000 police officers. This is certainly a step in the right direction, but it is in effect only reversing cuts made to law enforcement since 2010.

Prison

The prison 'system' is also suffering. Having undergone a sharp increase in the prison population – it doubled between 1993 and 2012 (from around 44,000 to 86,000)ⁱⁱ – prisons are beset with problems including prevalent drug misuseⁱⁱⁱ, overcrowding and violence. The revolving door of prison is spinning at a dizzying pace for some offenders whose lives are characterised by repeated short custodial sentences. Viewing prison merely as an 'occupational hazard' or even as respite, is a view held by many prolific offenders, highlighting that a short custodial sentence offers neither deterrence nor rehabilitation.

i As at 31 March 2019, there were 123,171 police officers in the 43 police forces (an increase of 0.6% since March 2018). This minuscule increase follows a decade-long decrease in the number of police officers. The number of police officers has decreased since the peak at 31 March 2009, from 143,769 to 123,171 officers as at 31 March 2019 (a reduction of 14%). Home Office (2019) *Police Workforce, England and Wales, 31 March 2019* (second edition). Statistical Bulletin 11/19.

ii Over the following 8 years there has been a period of stability (with the prison population remaining at around 85,000) – though there was a fall in the prison population of around 2,000 in early 2018 as a result of changes to Home Detention Curfew (HDC) policy. The population remained at around 83,000 until March 2020 when the impact of the COVID-19 pandemic became clearly apparent with a significant drop in cases being dealt with by the courts.

iii Between 2012/13 and 2017/18, the rate of positive random tests for 'traditional' drugs in prisons increased by 50%, from 7% to 10.6%, and drug use in prisons is now widespread, particularly in male local and category C prisons. HMPPS (2019) *Prison Drugs Strategy*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792125/prison-drugs-strategy.pdf

The Probation Service

The widely acknowledged failure of the *Transforming Rehabilitation* project, introduced in 2015, has left probation services worse off than they were before the Ministry of Justice embarked on its reforms. The part-privatisation of probation services through the creation of Community Rehabilitation Companies (CRCs) was not only a costly mistake, but it also failed to reduce reoffending, with the average number of reoffences committed by each reoffender actually increasing.⁴

The 'siphoning off' of low-risk offenders to private CRCs resulted in a large barrier emerging between the courts and those providing the majority of community sentences. The patchy, and often inadequate, provision of 'services' impacted on sentencers' already low confidence in community sentences and trust in probation's ability to deliver them. A report by the Public Accounts Committee stated:

*"In its haste to rush through its reforms at breakneck speed, the Ministry of Justice not only failed to deliver its 'rehabilitation revolution' but left probation services underfunded, fragile, and lacking the confidence of the courts."*⁵

Following criticism from successive inspectorate reports, the CRC contracts were terminated at the end of 2020 and the probation sector renationalised. From June 2021, the National Probation Service (NPS) will be responsible for managing all offenders on a community order or licence following their release from prison in England and Wales.

Reoffending

Not surprisingly, the complexity, confusion and inadequate resourcing across the component parts of criminal justice in England and Wales does not deliver good results. In 2018/19, around 80% of those who were convicted or cautioned had already received at least one previous conviction or caution.⁶ Currently, the overall proven reoffending rate for England and Wales is 28.1%. This means that over a quarter of offenders reoffend within one-year of completing a custodial or community sentence. However, this figure masks the fact that the rate is far higher when offender characteristics or court disposal is taken into account. For example, juvenile offenders have a proven reoffending rate of 37.3% and adults released from custodial sentences of less than 12 months have a proven reoffending rate of 61%. Those aged 18-25 years old sentenced to prison have the highest reoffending rates of any group (75% reoffend within two years of release from prison), and the highest breach rates of adults serving community sentences.⁷ It is hard to conceive of any other sector continuing 'business as usual' with such a monstrous failure rate.

"Dealing with repeat offenders wastes so much police time. It's the same offenders over and over again."

[Police Officer]

Such high reoffending rates highlight the fact that current court disposals fail to tackle the root causes of crime (such as substance abuse or mental health problems), and in some cases are even making them worse. The financial cost of reoffending is estimated to be a staggering £18 billion each year, and the human cost – for victims and their families and for offenders stuck in an entrenched life of criminality – is incalculable.⁸

A Smarter Approach to Sentencing

In September 2020, the Ministry of Justice (MoJ) published the White Paper, *A Smarter Approach to Sentencing* (ASATS)⁹ promising many changes to the sentencing and release framework in England and Wales as part of a wider programme of criminal justice reforms. The White Paper outlines four key aims for a new sentencing framework:

1. keeping dangerous offenders off the streets for longer to protect the public;
2. ensuring that punishment is appropriate for the crime committed;
3. working to tackle the many complex causes of offending, and;
4. providing the opportunity and support to reform for those who truly want to turn their backs on crime.

Given the mistakes that were made due to the failure to pilot the proposals introduced under the *Transforming Rehabilitation* agenda, and the rapidity of its adoption, it is unfortunate that the White Paper was not preceded by a Green Paper to facilitate full and proper consultation with stakeholders and experts. Whilst change is needed, it is vital to get it right. There is an opportunity to bring about reforms that will make a real difference to offending behaviour as well as deliver satisfactory justice to victims.

The White Paper is more than 100 pages long and claims to set out a 'bold agenda.' Yet the breadth of topics comes at the expense of detail. At times, large policy areas are afforded only a cursory mention with little or no further information (deferred sentencing and restorative justice are just two examples).

The White Paper takes a bifurcated approach to sentencing: on the one hand, the proposals are flush with political rhetoric, of being 'tough', and 'robust' with mandatory sentencing, a cessation of automatic halfway release, more restrictive community curfews and an emphasis on community sentences becoming 'tighter' and more onerous. On the other hand, there is a recognition that many offenders have complex needs (e.g. mental health needs, substance addiction, homelessness) which underscore their criminal behaviour and it is only by addressing these factors that they will desist from crime.

While the document pledges to make community sentences 'tougher', the Government admits that the work of the probation service has not been 'sufficiently valued' (p.59) and that the *Transforming Rehabilitation* agenda substantially weakened its ability to provide quality supervision. It is worth reflecting on whether it is indeed tougher and longer community sentences that are required or whether adequately resourcing the probation service to manage community sentences as they currently stand would be equally, if not more, effective.



The Police, Crime, Sentencing and Courts Bill

Following the White Paper, the *Police, Crime, Sentencing and Courts Bill* (PCSC) was introduced in the House of Commons on 9 March 2021 (Bill 268).

Whereas the White Paper outlines broad areas for policy reform, the Bill presents specific legislative change. As a result, only some of the policies outlined in *A Smarter Approach to Sentencing* are included. While this is understandable since much policy can rest on existing legislation, there is a risk that some of the much needed reform of sentencing and effective offender management will fall by the wayside. It is notable that much of what has been carried through into the Bill is the more punitive aspects of the ASATS agenda i.e. making community sentences 'tougher' and more 'robust'. Without the support required to address the criminogenic needs of repeat offenders through treatment and rehabilitation, this will only result in an increase in the use of custody as offenders breach their orders.

The overarching direction of the proposals in the Bill relevant to retail offenders is to encourage greater use of community sentences to 'help to relieve demand on prison places' (ASATS, p.40). This could have been strengthened by introducing a presumption against short custodial sentences as a strong message to sentencers to consider all available community options before imposing a short prison sentence. Similar presumptions are already in place in Scotland and Ireland. The omission of a presumption represents a missed opportunity to cement the approach in policy.

Reforms that can really make a difference to the volume and severity of crimes committed in England Wales require meaningful investment. There needs to be a commitment to rebuild community-based services (in particular, mental health, drug and alcohol services, and housing) that have been in decline since 2010. At a time of mounting public debt, it is not clear how far the commitment to 'empower probation' extends.

"There needs to be a large-scale investment in community services and in the partner organisations that encircle probation - in housing, employment, drug and alcohol treatment, mental health treatment. Otherwise, it won't work because all you're doing is overstretching an already stretched service"

[Senior Probation Officer]

Focus of the Report: Retail Theft and Violence

The White Paper is broad-ranging and touches upon almost all aspects of sentencing including automatic release, whole life orders, reducing reoffending, youth sentencing and 'empowering probation' to deliver 'robust and responsive' community sentences. The significant issues of racial disparity and of female offenders are annexed.

This report focuses on how the sentencing proposals (both the overarching agenda laid out in the White Paper and the legislative changes in the Bill) will address the offending behaviour of a specific cohort of offenders, namely, those who commit crimes in the retail sector: in particular, theft, and assaults against shop workers. The perpetrators of these crimes are often repeat offenders, and some have received and served a considerable number of community and custodial sentences.

Overview of Retail Theft and Violence

Retail crime is high volume. Wholesale and retail premises experienced an estimated 10.1 million crimes in 2018 (a substantial increase on the 8.1 million estimated the previous year).^{iv} The year-on-year increases since 2015 have largely been driven by rises in theft by customers. In 2018, 82% of the 10.1 million crime incidents were thefts and, specifically, almost three-quarters (71%) of all incidents were theft by customers. This equates to 7.1 million incidents of shop theft – more than 19,000 incidents a day. While this volume of offences is concerning, it is a gross underestimate – one source calculates a more realistic figure to be 38 million shop theft offences per annum¹⁰. Yet, the number of arrests for shoplifting has plummeted, and the number of perpetrators charged has fallen by at least 25%.^v It is little wonder that shop workers describe the current situation as ‘soul destroying’.

In addition to high rates of theft experienced by the retail sector, there is an alarming rise in violent assaults against retail workers. The latest *British Retail Crime Survey* released in March 2020, found over 400 incidents of abuse and violence towards shop staff occur every day; an increase of 9% on the previous year.¹¹

The *Association of Convenience Stores (ACS) Crime Report 2020* estimates that there were more than 50,000 incidents of violence against shop workers, a quarter of which resulted in injury. That’s 34 individuals being physically injured each day while serving their communities. In addition, the ACS estimated that 83% of people who worked in the convenience sector had been subjected to verbal abuse over the past year.¹²

Both the BRC and ACS report a concerning increase in the use of weapons in attacks on shopworkers. The ACS survey found almost 10,000 of the reported attacks in convenience stores involved some sort of weapon; 43% involving a knife and 5% involving a firearm. Attacks with axes, hammers and syringes were also reported.

These alarming figures were released just before the severity of the impact of COVID-19 became apparent, and before ‘lockdown’ restrictions were put in place

in March 2020. Sadly, the situation was about to get a lot worse. Despite being recognised as essential ‘key workers’ during the COVID-19 crisis, shop workers have seen the levels of violence and verbal abuse directed at them soar. As customers have become agitated by restrictions, queues and limits on stock, some have directed their frustrations at public-facing employees working hard to serve their communities.

The union Usdaw reported that abusive incidents toward shop workers has doubled since the outbreak of COVID-19.¹³ Respondents to their survey reported being spat at, coughed at and sneezed at when asking customers to practise social distancing or wear a mask. Some stated that they had been physically pushed and verbally abused when trying to enforce buying limits on in-demand products. On average, retail staff were being verbally abused, threatened or assaulted every week during the crisis, compared with once a fortnight in 2019.

Ushaw’s *Freedom from Fear* survey results for 2020 highlighted that 9 out of 10 workers said that they had been verbally abused in the last 12 months, 60% received threats of violence from a customer and a staggering 9% said they had been physically attacked. Measures introduced to manage the impact of the Coronavirus pandemic were cited as the most common trigger for violence, verbal threats and abuse targeted towards shop staff, including: enforcing social distancing, managing queues outside stores, enforcing the wearing of face coverings, and limiting the number of specific items purchased in each sale.



^{iv} The Commercial Victimisation Survey (CVS) was paused during 2019 while a review was undertaken to assess user needs. The revised survey was scheduled for September 2020 but due to the Covid-19 pandemic, fieldwork has been delayed. Data is taken from the 2018 survey findings. Home Office (2019) *Crime against businesses: findings from the 2018 Commercial Victimisation Survey*. Statistical Bulletin 17/19. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829399/crime-against-businesses-2018-hosb1719.pdf

^v It is estimated in 2018 that arrests for shoplifting plummeted by 17%, and the number of perpetrators charged fell 25%. Hemmings, C. and Clark-Neal, D. (14 September 2018) ‘Shoplifters and a law that doesn’t deter them’, BBC News. <https://www.bbc.co.uk/news/uk-45512468>

This report draws on in-depth interviews with prolific offenders to provide a clearer understanding of the role and impact of different sentences. They identify what can work – and when – as well as highlighting the futility and even counterproductivity of some court disposals. In addition, a range of experienced criminal justice practitioners including police officers, magistrates, probation officers, restorative justice practitioners and youth justice managers provide valuable insight into

their experiences of effective practice and their views on the policy direction outlined in the White Paper, *A Smarter Approach to Sentencing*, and the legislative reforms in the *Police, Crime, Sentencing and Courts Bill*. Given the rapidity of large-scale restructuring across the CJS in the past, there is understandably scepticism that the reforms under the ASATS agenda will be evidenced-based, properly resourced, and appropriately evaluated.



2. Out of Court Disposals and Deferred Sentencing

Out of Court Disposals

Out of court disposals (OOCs) are sanctions used in cases where a charge or prosecution is perceived not to be in the public interest. Disposing of a case out of court is intended to provide a proportionate, less costly and swifter justice outcome. There are currently six OOCs available to the police (Cannabis/Khat warning, Community Resolution, Penalty Notice for Disorder, Fixed Penalty Notice and Simple and Conditional Cautions).

Following the piloting of a 'two-tier framework' which reduces the number of OOCs to two, the PCSC Bill will introduce 'diversionary' and 'community' cautions across England and Wales (which differ slightly to those piloted). Currently, fourteen police forces in England and Wales have adopted the two-tier framework. The proposed legislation will ensure that police forces are using the same system for disposing of cases out of court, bringing about national consistency which is welcome.

The cautions can be issued by 'authorised persons' (police officers, police community support officers (PCSOs), Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) and those authorised by a 'prosecution authority'^{vi}).

Diversionsary Cautions

Clauses 77 to 85 of the Bill introduce Diversionary Cautions as a new out of court disposal (OOC). The Diversionary Caution may be used for any offence, including indictable-only offences (those that must be tried in a Crown Court) and can only be used when the offender admits the offence and accepts the caution and the conditions attached to it. Although it is stated that they should only be used for indictable-only cases in 'exceptional circumstances' and with consent of the Director of Public Prosecutions (DPP), it is hard to imagine a Diversionary Caution being an appropriate response to an indictable-only offence. This possibility should be carefully considered before the Bill is enacted.

A Diversionary Caution must have one or more conditions attached to it from the following:

- Rehabilitative and reparative conditions: These include restrictive conditions (i.e. those that prevent offenders from going to certain places), attendance conditions (i.e. alcohol misuse support groups) and unpaid work conditions (i.e. community service). Attendance and unpaid work conditions can only require an offender attend up to 20 hours.

- Financial penalty conditions: Regulations would set rules for deciding the value of the fine. There is no minimum or maximum fine value stipulated in the Bill.
- Foreign offenders conditions: Conditions can be issued to foreign offenders which require them to return to their home country.

It is stipulated in the Bill that reasonable efforts should be made to obtain the views of any victim/s of the offence and take them into consideration when selecting the conditions.

If an offender to whom a Diversionary Caution was given does not comply with the conditions attached without reasonable excuse, then they may be arrested and may face prosecution for the offence they were cautioned for.

Community Cautions

The Community Caution is similar to the Diversionary Caution. The Community Caution is limited to more minor offences and explicitly cannot be used for indictable-only offences or triable either way offences. The conditions, outlined below, are identical except attendance and unpaid work conditions can be imposed for a maximum of 10 hours (compared to 20 hours on the Diversionary Caution) and the 'foreign offenders condition' is not available.

Community Cautions must have one or more conditions attached to it from the following:

- Rehabilitative and reparative conditions: These include restrictive conditions (i.e. those that prevent offenders from going to certain places), attendance conditions (i.e. alcohol misuse support groups) and unpaid work conditions (i.e. community service). Attendance and unpaid work conditions can only require an offender to attend up to 10 hours.
- Financial penalty conditions: Regulations would set rules for deciding the value of the fine. There is no minimum or maximum fine value in the Bill.

As with Diversionary Cautions, the authorised person giving the caution must make reasonable efforts to obtain the views of any victims regarding the conditions. Failure to meet a Community Caution condition (including a financial penalty condition) could result in a police-issued fine.

vi A 'prosecution authority' would be defined as the Attorney General, the Director of Public Prosecutions, the Director of the Serious Fraud Office, the Secretary of State and any persons proscribed in future regulations.

There has been considerable frustration amongst shopworkers that persistent offenders often receive ‘simple cautions’ that do nothing to address the crime, deter further offending, or punish the offender. Replacing them with Diversionary and Community Cautions appears to offer a more meaningful sanction that can begin to address some of the root causes of offending. However, we know very little about how the new system will work in practice and the proposals are not without issues.

Issues and Concerns

The Diversionary and Community Cautions introduce relatively tough sanctions with similarities to court imposed Community Orders. For example, similar to a Community Order they can include unpaid work (up to 20 hours on a Diversionary Caution compared to a minimum of 40 hours on a Community Order) and the attendance of prescribed activities. The Cautions will appear on a criminal record check for six years after issue and, for certain serious offences, will always be disclosed in a criminal record check.

The cautions are disposed out of court by an ‘authorised person’, typically a police officer or PCSO. There is concern that these more punitive and enhanced cautions will be given in the absence of any judicial oversight or scrutiny. It is not clear if the Crown Prosecution Service (CPS) will be required to authorise the dispensing of Diversionary Cautions although it appears unlikely.^{vii} There needs to be adequate transparency regarding the issuing of the new cautions to ensure that they are used proportionately and fairly both within police boroughs and across them. It is troubling that the new cautions could be used to give low level offenders, and particularly vulnerable ones, relatively onerous penalties out of court without legal representation. As more offenders are likely to be issued an OOCd that could result in prosecution if conditions are not met, more cases are likely to end up in court. This presents the potential for ‘net widening’ where more people become caught in the criminal justice system who would not have done so under the previous system. The Cautions can have serious consequences for recipients since, for example, having a criminal record could potentially jeopardise future employment opportunities.

One would presume that a key motivation behind the introduction of new cautions would be to reduce reoffending. However, the available data does not suggest that reoffending rates are likely to go down as a result of the cautions. The MoJ’s evaluation of the 2014 pilot of the two-tier framework found no statistically significant difference between the short-term re-offending rates of OOCd offenders in pilot areas to those in comparable police force areas not using the framework.¹⁴

It is anticipated by the Government that the introduction of the Conditional Cautions will be more expensive than the current system of OOCds. It is estimated that they will cost an additional £109.19 million over ten years, although this is thought to be an underestimate.¹⁵ In addition, they will require more police time to administer and monitor. At a time when police resources are already severely overstretched, it is not clear how this additional burden on police time will be absorbed. If the new cautions are unlikely to reduce reoffending it is not clear on what basis they present value for money. A cost-benefit analysis was not undertaken as part of the pilot evaluation due to methodological difficulties.¹⁶

The White Paper suggests that the new OOCds would enable diversion of ‘those who have mental health issues, health vulnerabilities or other complex needs into appropriate services as a condition of the disposal, getting to the root cause of their offending.’ However, the maximum duration of an attendance requirement is 20 hours for the Diversionary Caution and 10 hours for the Community Caution. This is not adequate time to address the issues and complex needs identified. Although both Diversionary and Community Cautions can have rehabilitative and reparative conditions attached to them, it is not thought to be appropriate to use them in serious cases of drug or alcohol dependency as the requirements are not sufficient to begin to tackle addiction. The cautions need to be realistically targeted so as not to set recipients up to fail.

It is important that repeat offenders are not given multiple cautions that do nothing to change their offending behaviour. Prolific offenders require considered intervention from the justice system in order to tackle the root causes of their offending behaviour.

vi The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced changes to the Conditional Caution scheme including the removal of the requirement for a Prosecutor to authorise adult and youth Conditional Cautions.

David's Story: The Need for Diversion into Youth Services

David has been convicted of more than one hundred shop theft offences. He had grown up in an abusive household from an early age. He describes becoming involved in crime as a cry for help, and later, using class A drugs, including heroin, to suppress his childhood trauma. He is now 41 years old and living in supported accommodation.

"When I was really young, I started getting involved with drinking and smoking cannabis. I started sniffing aerosols and glue and all that kind of thing, it progressed really fast onto more serious substance use. My mum wasn't around so I was left to fend for myself. There was no 'get up and go to school', none of that.

I was out and about on the streets, just wandering around. I didn't go to school because I didn't have a uniform and they didn't care. By the time I'd got to my GCSEs, I was using class A drugs: cocaine

and heroin and stuff like that. So, then I started committing the offences to match the drug use. It's as simple as that: I needed the money to buy drugs. I would steal anything and everything that wasn't tied down.

I look back now and realise it was a cry for help. I was just trying to get someone to notice me, to seek attention, to say, 'I'm here, I need help. I'm in trouble here.' But there was no one listening. I was using drugs to shut everything away. I was hiding in substances, living in a heavy fog.

I look back and I'm sad to see what I've done to my life. I have been a prolific offender for many years. It's such a shame really, I was a bright kid. I don't feel good about it at all, and I know I've probably hurt a lot of people and caused a lot of damage to society. Maybe if someone would have taken notice of the problems I had at an earlier age, it would have been different."



PCSC BILL PROPOSAL: To make provisions for two new out of court disposals: Diversionary Cautions and Community Cautions

RESPONSE: Removing the use of 'simple cautions' and replacing them with conditional cautions could offer some benefits. There was a perception that too many repeat offenders were not facing any consequences for their actions or accessing services that could potentially reduce the likelihood of them reoffending, much to the frustration of victims. However, there are several aspects of the two new OOCs that require further consideration:

- More guidance is required for the police as to who would be an appropriate recipient of either a Diversionary Caution or a Community Caution. Given their enhanced punitiveness it is important that they do not result in inappropriately tough penalties being dispensed to low level offenders who otherwise would not have received a criminal record.
- The White Paper is unrealistic in the aims set out for the new OOCs. It claims that the cautions will enable those with 'mental health issues, health vulnerabilities or other complex needs' to access appropriate services and 'get to the root cause of their offending'. Given that the maximum duration of an attendance requirement is 20 hours on the Diversionary Caution and 10 hours on the Community Caution, the OOCs are not suitable for individuals with complex needs such as a serious drug or alcohol dependency since the intervention is not sufficient in duration or intensity. Furthermore, given the dire lack of services for individuals with severe mental health issues and/or drug or alcohol dependency, it is not clear how the required service provision will be accommodated.
- It is difficult to imagine a Diversionary Caution being an appropriate response to an indictable-only offence. This possibility should be carefully considered before the Bill is enacted.
- The Government estimates that the new OOCs will be more expensive than the current system with the additional cost burden falling largely on the police and CPS. Since available data does not suggest that reoffending rates are likely to go down as a result of the cautions it is difficult to see how the additional expenditure is justified.



Anthony's Story: "If nothing gets resolved, then nothing changes" - Missed Opportunities for Intervention and Diversion

Anthony drifted into crime at the age of ten but it was only several years later as a teenager that he began committing regular offences. He describes a lack of boundaries at home and growing up in a culture that normalised criminal behaviour as contributing towards his own offending. There were multiple points at which interventions could have steered him away from a life of crime punctuated by short spells in prison.

"I was ten years old when I committed my first offence. I was mixing with lads who were a little bit older than me and I felt I had something to prove. I wanted to fit in and impress them. I skived off school one day and hung out at one of the lad's houses. He was older and didn't have school and his mum was out at work. We sat around smoking weed and they decided that they were going to break into a house. It was just for the fun of it, I didn't think it was going to be anything too serious so I went along too. But some things were stolen. It wasn't long before the police came knocking on the door and I was arrested and taken to the police station. I just got a slap on the wrist and they gave me a caution because it was my first offence.

My parents had split up when I was young and I didn't get on with my step dad. Things got very difficult at home so when I was 15 years old I went to live with my grandparents and that's when my behaviour started spiralling out of control. I had no

discipline, no boundaries. I could come and go as I pleased. Obviously, at the time I loved it but looking back that was a big mistake. I started taking drugs, sniffing solvents and then my crimes started getting a bit worse until eventually I was sent to prison for the first time when I was 15.

It was a big shock when I first went to prison but I had a co-defendant with me so we looked out for each other. It probably sounds strange but because of where I was brought up I just thought it was normal. Like, that's what we do at that age - get into trouble and go to prison - so I just got on with it.

When I came out, I was put in a children's home. I then ended up in prison again for another burglary. I got six months for that one. I started to steal from shops because I didn't think it was as bad as burglary. I used to think to myself I'm not hurting anybody physically or mentally and that's how I justified it. I've probably got 80 or 90 convictions for stealing from shops, maybe more. It's ridiculous that I don't even know how many convictions I've got because it's so many.

I've since been in and out of prison because if you don't deal with the core issues then you are just going to carry on. With shoplifting, it's a slap on the wrist or just in and out of prison. You have not dealt with anything so before you know it, you are back out - no home, no job - so you just start committing crime again. Then it's back behind the cell door again. If nothing gets resolved, then nothing changes."

Deferred Sentencing

Deferred sentencing refers to the power of the court to defer passing sentence for up to six months. The purpose of deferment is to enable the court to take into consideration whether an individual's circumstances have changed since conviction. The deferment can have conditions imposed that the court considers to be appropriate in changing the offender's conduct, circumstances or willingness to make amends.

The following conditions must be satisfied before a sentence can be deferred:

1. the offender must consent (and in the case of restorative justice activities, the other participants must consent);

2. the offender must undertake to comply with requirements imposed by the court; and
3. the court must be satisfied that deferment is in the interests of justice.

The White Paper outlines the intention to 'encourage courts to use existing legislation, and existing services such as Liaison and Diversion as well as community advice and support services, to deliver more effective routes for people into services' (p.12). This is a very positive step. However, there are no further details given on how the courts will be encouraged to use existing services and in what ways engagement (or not) by the offender should influence the courts decision-making.

The Centre for Justice Innovation have highlighted three key benefits to the greater use of deferred sentencing.¹⁷ First, they point to evidence that suggests that the legal leverage of a deferred sentence, i.e. the prospect of a more severe sentence being imposed if the offender does not comply, can have a positive impact on compliance with rehabilitative support. Second, they suggest that deferred sentencing can enhance perceptions of procedural fairness by giving offenders the time to comply with conditions, make steps towards reparation (e.g. by engaging in restorative justice processes) or by changing their circumstances. It has been shown that when people feel they have been treated fairly, they are more likely to comply with the criminal justice system in future and are potentially less likely to reoffend. Thirdly, the use of deferred sentences has the potential to divert offenders from short custodial sentences which can often result in doing more harm than good (see chapter five). This could help to stop the revolving door of prison for some offenders.

Currently there is no mechanism to prescribe how an offender's compliance with the conditions imposed upon them during deferment will materially alter a court's sentencing decision. This was highlighted in the evaluation of the NHS Liaison and Diversion schemes in 2016 which was unable to detect whether they had been able to successfully divert cases away from remand or custodial sentences.¹⁸ In the absence of a clear and transparent mechanism to incentivise engagement by changing the individual's criminal justice pathway if they comply, a key strength of deferred sentencing is diluted.

Greater use of deferred sentencing offers a window of opportunity for retail offenders to engage in treatment services that could potentially address the root causes of their offending behaviour and change their route through the criminal justice system. It could also provide space to encourage the greater use of restorative justice, where victims and offenders consent to it.

Restorative Justice

"Restorative Justice is one of the most impactful sentencing options someone can have."

[Probation Officer]

The White Paper emphasises that: 'The greater use of deferred sentencing will also provide opportunities for restorative justice practices to be deployed' (p.52). However, it is not made clear how opportunities for restorative justice (RJ) will arise or how they can be capitalised on. Restorative justice is only later mentioned in relation to the sentencing of youth offenders and the abolition of the Reparation Order. In doing so, it is stated that RJ 'has significant benefits both for the victim and for the rehabilitation of offenders.' (p.101). It is unfortunate then that more has not been made of the opportunity to make greater use of restorative justice since it has been proven to be a very effective criminal justice mechanism. A systematic review of experimental evaluations concluded that restorative justice conferences show a 'highly cost-effective reduction in repeat offending, with substantial benefits for victims.'¹⁹

There is a huge level of support amongst criminal justice practitioners for the greater use of restorative justice. It is not surprising given the positive results that evaluations of restorative justice programmes have shown.

What is Restorative Justice?²⁰

Restorative justice (RJ) brings those harmed by crime or conflict and those responsible for the harm into communication. It can take the form of victim-offender mediation either through direct contact between the offender and victim or indirect communication involving written letters or third parties. RJ conferences involve the discussion of the offence, its consequences and resolution with victims and perpetrators (as well as their supporters and other affected parties if relevant and appropriate), facilitated in a safe environment by a trained mediator. The process can also involve reparation or compensation where this is appropriate and agreed between offenders and their victims.

Restorative justice could be a particularly effective means of repairing the harm caused in incidents involving shop workers. A Ministry of Justice summary of the evidence on re-offending suggests that ‘research to date has identified good results with people who have committed property or violent offences where there is a clear identifiable victim. Offenders with a medium or high risk of reconviction appear to respond well.’²¹

The Home Office’s *Response to the Call for Evidence on Violence and Verbal Abuse Toward Shop Workers* highlighted that many victims were dissatisfied with the response that they had received from the criminal justice system. In particular, victims reported: a lack of understanding of how, or opportunity for, victims to explain how they have been affected by crimes committed against them either through a Victim Personal Statement or Business Impact Statement.²²

One of the key strengths of restorative justice is the high levels of victim satisfaction it provides. Victims’ satisfaction with the handling of their cases is consistently higher among those who attend RJ conferences, compared to those dealt with solely by standard criminal justice processes such as the courts.²³

Key factors underscoring high levels of victim satisfaction with RJ conferences relate to its focus on dialogue which enables the victim to ask questions such as why the offence occurred and why they were the target. In addition, the victim’s ability to have direct involvement in the outcome of the conference (e.g. an apology or reparation) has been regarded positively by victims.

“These criminals rarely see the consequences of what they’ve done. Bringing the victim and perpetrator together to discuss what happened, why it happened and for them to understand each other can produce extremely good results. Restorative justice is very worthwhile. It should be taken more seriously, invested in and grown. Because ultimately, if you can get both parties coming away satisfied with the outcome, then I think that’s very efficient bang for your buck rather than just locking people up. It really does seem to have quite dramatic effects. And my feeling is that it’s currently under-recognised and under-funded as a disposal tool.”

[Magistrate]



For prolific offenders who committed theft offences to fund a drug addiction, restorative justice can become an important part of the process of reintegration as a law-abiding and responsible member of society. RJ provides an opportunity for offenders to face the consequences of their actions, recognise the impact that it has had upon others and where possible make amends. In this way, RJ has the potential to help rehabilitate offenders and enable them to desist from crime.

"My probation officer said 'how would you feel about writing a letter and giving it to your victims?' So, I wrote a letter to say sorry. We took it to the shops where I had committed offences. I thought that they wouldn't want to know. I thought that they would hate me. But it was different. They were actually quite pleased and said 'fair play to you.' Some of them even shook my hand, I couldn't believe it, and that was, for me, the beginning of the process towards true rehabilitation."

[Offender, male, 41]

"I have gone back to some of the shops that I used to steal from when I was using drugs and apologised to them in person. I felt I needed to do that as part of my rehabilitation. I'm not a horrible person but the drugs drove me to steal and make the wrong choices. I want to make amends and apologising is the first step."

[Offender, male, 43]

Where victims do not wish to come face-to-face with the perpetrators of crimes, pre-recorded video resources could be used to highlight the fear, trauma and long-lasting mental health consequences that retail workers report following a violent assault.

"Restorative justice works very well. It is perfect for crimes against shop workers and businesses because they are so often seen as a victimless crime."

[Senior Probation Officer]

"We need to put the focus back onto the victims of assault and what we know works for them such as more sentencing proposals around restorative justice."

[Probation Officer]

As well as providing consistently high levels of victim satisfaction, community-based restorative justice can be a more effective means of reducing reoffending than other criminal justice sanctions, particularly custody. A Ministry of Justice evaluation of restorative justice suggested that it led to a 14% reduction in the rate of reoffending.²⁴ Furthermore, the use of face-to-face RJ conferences has been found to be highly cost effective: a meta-analysis of studies in the UK demonstrated that overall, the value of benefits of averted crimes is eight times the cost of delivering RJ conferences.²⁵ In other words, for every £1 spent on delivering a face-to-face meeting, £8 was saved through reductions in reoffending.

The legal framework exists for courts to utilise deferred sentencing to increase restorative justice provision for both youth and adult offenders. However, in the absence of a commitment to renewing the national action plan for restorative justice^{viii}, the positive recognition of its strengths risks not being translated into practice. There is much more the MoJ can do to create new schemes to encourage the use of restorative justice conferencing.

viii There have been three published restorative justice action plans for the criminal justice system. The latest one was published in 2014 covering the strategic plan to March 2018.

ASATS WHITE PAPER PROPOSAL:
To encourage courts to use existing legislation and existing services such as liaison and diversion. In addition, using deferred sentencing to provide increased opportunities for restorative justice practices to be deployed.

RESPONSE: Greater use of deferred sentencing provides a window of opportunity for retail offenders to engage in treatment services that could potentially address the root causes of their offending behaviour, change their criminal justice pathway and ultimately reduce reoffending. To increase their potential effectiveness there are a number of issues to consider:

- Deferred sentences would benefit from greater structure. Specifically, if they are to have legal leverage, they need to clearly outline in what ways compliance will materially influence the court's decision.
- The encouragement to use diversion and the implied support for restorative justice do not go far enough. There is no mention of restorative justice in the Bill and the absence of a commitment to renewing the national action plan for restorative justice makes it unlikely that the recognition of the strengths of RJ will translate into greater usage. There is much more the MoJ needs to do to encourage and enable the greater use of restorative justice practices.

Chapter Conclusion

Out of court disposals, when used correctly, are supposed to deliver speedier and less costly justice. In order to do so, they need to be appropriately targeted to the correct cohort of offenders so as to prevent an escalation of offending behaviour and provide satisfactory justice to victims. The two proposed cautions provide an opportunity to intervene at an earlier stage and potentially divert individuals from court, preventing them from becoming entangled in the criminal justice system. This is a welcome step. However, there are concerns that there is the potential for net widening: if more offenders are issued an OOCd that could result in prosecution if conditions are not met, more cases are likely to end up in court. The Government estimates that the new OOCds will be more expensive than the current system and unlikely to reduce reoffending. As such, the objectives underscoring their implementation require clarification. In addition, there needs to be more prescriptive guidance regarding when and under what circumstances the Diversionary Caution and Community Caution should be used.

The White Paper pledge to encourage the use of deferred sentencing could provide offenders with an opportunity for meaningful engagement with a range of treatment services if implemented correctly. In particular, greater use of restorative justice offers many potential benefits, and should be developed further.

3. Sentencing: Process and Practice

Sentencing decisions in England and Wales are currently guided by the five purposes of sentencing, set out in the Sentencing Act 2020:

- 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 offence.

Addressing the five aims, sentencers have a range of disposals that may be divided into three camps: custodial sentences, non-custodial sentences served in the community, and fines. Fines represent by far the most common sentence, accounting for 77% of all sentences in the latest year for which figures have been published (October 2019 to September 2020).^{ix} Immediate custody represents approximately 7% and community sentences approximately 8%.²⁶

The Court System

The system of sentencing and the administration of community and custodial sentences has evolved in a piecemeal fashion with at least seventeen major pieces of sentencing law being introduced in the last thirty years.²⁷

Currently, all criminal court cases start in a magistrates' court^x, and around 95% end there. Just under 1.5 million cases were received by the magistrates' courts in 2019.²⁸ The more serious offences are passed on to the Crown Court, either for sentencing after the defendant has been found guilty in a magistrates' court, or for full trial with a judge and jury. There were just over 100,000 cases received by the Crown Courts in 2019.

ASATS White Paper Proposal: Streamlining offence hearings

RESPONSE: A sensible proposal in the ASATS White Paper is to streamline the way the most serious indictable offences are dealt with by removing the unnecessary hearing held at the magistrates' courts that formally commits the case to the Crown Court for trial.

Two inquiries by the Justice Committee conducted in 2015–19 both highlighted with concern the 'Government's failure to develop an adequately funded, overarching national strategy for the magistracy'.²⁹ As a result, the court system was already in a weakened state when the Coronavirus pandemic hit. They are now operating with a crippling backlog of more than 457,000 cases, an increase of 100,000 since the onset of the pandemic.

"Over the years, I've seen the court system degenerate. Now there are simply no staff. The legal clerk, a fully trained legal advisor to the magistrates, is now the one having to photocopy papers and ring various bodies outside the court. It is very inefficient."

[Magistrate]

The number of outstanding cases will only continue to rise unless court capacity is significantly increased. The introduction of 'Nightingale courts' may relieve some of the load but won't resolve the long-term capacity issues. As a result, victims of crime will have to wait longer for cases to be heard and defendants awaiting trial will spend longer on remand in custody placing an additional burden on the already crowded prison estate or out on bail in the community.

It is concerning that there is no mention of a strategy in the ASATS White Paper to address the significant backlog of cases awaiting delays experienced by offenders and victims awaiting justice. These delays present a significant financial cost as well as an additional emotional burden for victims, witnesses, and defendants.

^{ix} Although fines are a popular disposal amongst sentencers, drug affected offenders were resolute that they were futile because the only means they had to pay them was by committing more crimes. For example, one offender commented: 'I've had fines coming out of my ears. They'd build up and then I would go to prison and then the fines would get dealt with as well while I've been in prison.' [Offender, male, 43]

^x Magistrates in England and Wales are unpaid volunteers from the local community who commit to serving a minimum of 13 days per year. While they undergo training (initially approximately 21 hours) they are not required to be legally trained and yet they have considerable powers and can sentence offenders to up to 6 months in prison (or up to 12 months for more than 1 crime), community sentences or a fine of an unlimited amount. They are guided in court by a Legal Advisor on the law and procedures.

Changing Trends in Sentencing

There has been a marked change in the composition of court disposals over the last decade. The proportion of offenders dealt with by a community sentence almost halved from 13.9% in 2009 to just 7.4% in 2019.³⁰

The year-on-year decline has been attributed to a lack of confidence amongst sentencers that community sentences will be delivered in an effective and timely manner. This has stemmed from:

- a lack of information about the services provided by Community Rehabilitation Companies (CRCs);
- a lack of transparency about the Rehabilitation Activity Requirement (RAR) introduced as part of the Transforming Rehabilitation agenda in 2015;
- barriers to dialog between CRCs and sentencers about community sentence options;
- serious concerns about the quality of the work of CRCs when these are exposed in breach proceedings; and
- concerns about availability of substance misuse and mental health treatment requirements for offenders, the use of which has fallen by 50%.³¹

While many of these issues will be addressed following the ending of CRC contracts and the reunification of the National Probation Service, there needs to be a huge and concerted effort to increase confidence in community sentences amongst magistrates and the judiciary.

As communication has broken down, in part due to the privatisation of many criminal justice functions, confidence in the delivery of effective sentences – both custodial and community-based – has waned amongst sentencers. Huge chasms have emerged between different elements of the criminal justice system, notably the probation services and the judiciary.

Inefficiencies have spawned, requiring burdensome and unnecessary procedures that drain skilled practitioners' time at the expense of other aspects of their role which are of greater value. For example, over the last ten years, there has been a significant decrease in the number of pre-sentence reports (PSRs) recorded in magistrates' courts to the extent that now just 5% of court disposals had a PSR prepared. A well-prepared PSR provides judges and magistrates with a detailed account of the circumstances of an offence, an expert assessment of the risk posed by an offender, an overview of the underlying criminogenic factors and an assessment of what needs to be done to prevent reoffending.



Pre-sentence Reports

It cannot be presumed that sentencers are familiar with what the different requirements on a Community Order entail and whether an individual would be well-suited to undertake it. Pre-sentence reports (PSRs) have historically been the vehicle through which sentencers are informed about the suitability and likely efficacy of different disposals for defendants.

"I've had one session with probation to understand the detail of the various Orders and that was many years ago. I think it would be useful to have a bit more understanding of what actually happens in these Orders; what a Drug Rehabilitation Order actually involves and that kind of thing."

[Magistrate]

A pre-sentence report (PSR) is prepared by a member of probation staff based on an interview with the defendant. Its primary purpose is to assist the court in determining the most suitable method of dealing with an offender. It typically provides a summary of the facts of the case, a risk and needs assessment about the individual circumstances of the offender and the offence(s) committed, highlighting the risk the offender poses and to whom, potential vulnerabilities and/or underlying drivers of the individual's offending behaviour. Having brought together these components, the PSR author will undertake an analysis of the sentencing options, and provide an independent sentence proposal in line with the sentencing guidelines.

^{xi} The Sentencing Act 2020, section 30 sets out the expectation that a court must obtain and consider a pre-sentence report before imposing a community sentence or discretionary custodial sentences (i.e. non-mandatory custodial sentences) unless the court is of the opinion that it is 'unnecessary.'

PSRs are currently provided in one of three formats: Standard Delivery Report (SDR), Fast Delivery Report (FDR) or an oral report. The SDR is a written report that is structured by the computerised Offender Assessment System ('OASys'). It should provide a full risk assessment and a proposal for sentencing that takes into account the risk of harm, the likelihood of re-offending, the nature of the offence and the suitability of the offender to the proposed sentence. They involve considerable skilled resource from the probation service and can provide invaluable information to the court on the suitability of different disposals. A well-tailored sentencing plan that addresses the

offender's circumstances that led to the offence being committed can reduce an offender's likelihood of reoffending and protect the public and/or victims(s) from further harm.

Fast Delivery Reports (FDRs) are a condensed version of the PSR. There are two types: written and oral. In such circumstances the Probation Officer conducts a short interview with the offender before providing verbal feedback to the court. The format is structured differently to a PSR and draws upon a number of 'tick boxes' to expedite the presentation of data.³²

In 2016, the NPS set out its national target for 90% of all court reports to be short format reports comprising 60% oral and completed on the day, 30% written FDRs, and 10% SDRs.³³ Clearly a cost-cutting exercise, the ambition to move to predominantly short reports comes at the expense of effective sentencing. Not only is there little time to assess the offender and verify the information, but there is also insufficient time to identify the availability of suitable services should they be required.

"The PSR is very useful. We rely on probation to dig beneath the surface of the offender. They are very helpful and insightful, because often what you see on the surface isn't what's going on underneath. Nowadays we get a lot of fast-tracked reports. Previously, you'd have to adjourn the case to another day, which obviously, puts more time and expense, but now probation spend an hour or so with the person and then they come back in the afternoon with a recommended sentence. Nine times out of ten, we go with the recommendation of the report."

[Magistrate]

With high levels of concordance in some courts, it is imperative that the PSR author has had adequate time to establish the facts, assess the risk the offender presents, and identify an appropriate sentence.

^{xi} The Sentencing Guidelines which judges and magistrates follow are available at <https://www.sentencingcouncil.org.uk/news/item/sentencing-council-consults-on-expanded-explanations-in-guidelines/>

Decline in the Use of Pre-sentence Reports

Over the last ten years, there has been a significant decrease in the number of PSRs recorded in magistrates' courts falling from 156,659 in 2009 to 75,900 in 2019; a drop of 52% percent. In 2019, just 5% of cases sentenced in the magistrates' courts and 27% of cases sentenced in the Crown Court had a PSR. Sentencers are generally expected to use a PSR before passing any community sentence (other than a stand-alone unpaid work requirement) or any custodial sentence (except mandatory custodial sentences). Yet, with the numbers of PSRs falling, a greater proportion of community and custodial sentences are now being passed without one. This means that sentencers are often unaware of important risk factors, offender circumstances and unresolved needs that are directly associated with offending, thus undermining effective decision-making.

The shift away from full reports to Fast Delivery Reports is deeply problematic. In 2019, 96.8% of all reports presented to the courts in England and Wales were short format reports: 43% written FDRs and 53% oral reports.³⁴ While this might expedite court outcomes, there is the very real chance that important factors are missed, unsuitable sentencing options proposed, and inappropriate sentence plans produced.

"The courts need to work a lot closer with probation. I've known people who have been doing really well and they might have had a wobble. They just need a bit of help but then they've been sent to prison, so then they're back at square one again."

[Offender, male, 40]

"If magistrates are sentencing without a pre-sentence report, then they're not necessarily going to understand the criminogenic needs and the risk of managing that offender. We are trained as probation officers to understand what criminogenic factors are, to understand offending behaviour and patterns and to conduct an informed risk assessment as to whether the offender can be managed in the community."

[Probation Officer]

Given that, in many cases, a PSR is pivotal in helping the court decide whether to impose a Community Order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender, this dramatic fall in the number of PSRs is strongly linked to the decline in the use of community sentences.

The Centre for Justice Innovation estimates that if PSRs were still being used as commonly as they were in 2012-13, there would be an additional 33,000 community sentences a year, reversing around 85% of the decline since 2012-13.³⁵



Supporting the Delivery of High-quality PSRs

PSRs are the mechanism through which experienced NPS practitioners assist the court in determining the most suitable method of dealing with an offender, taking into consideration the circumstances of the offence and offender needs (e.g. mental health, substance misuse, family context, etc.) and the suitability of sentencing options.

The MoJ White Paper outlines a commitment 'to ensuring that probation staff are supported to deliver a high standard of reports and to significantly increase the proportion of court disposals which benefit from a PSR.' (ASATS, p.51). This aim will be achieved, it is suggested, by investing in additional staff at courts to support more, higher-quality PSRs for more cases. However, it is maintained that the current judicial discretion to determine when a PSR is 'unnecessary' will be retained. As outlined above, PSRs were delivered for just 5% of magistrates court disposals and so in 95% of these cases the magistrate deemed a PSR to be unnecessary. As such, increasing their use will require a considerable cultural shift amongst the magistracy. The White Paper doesn't indicate how this will be achieved.

"Information makes a good PSR; knowing that probation has dug around the perpetrator's situation so we get to understand the person and find the most appropriate disposal. The more information one gets that is relevant to a person's life, the more helpful it is to being able to pick a sentence that you think is going to address the issue rather than just punish them."

[Magistrate]

"Sometimes the quality of fast-track reports might not be as high as a PSR because the person doing it is under a strict time criterion. The probation officer has limited time to make inquiries about the offender or to verify any information they are told."

[Probation Officer]

"Some of the fast-track reports are not worth the paper they're written on because they're based on a half-hour chat. You really need a couple of interviews with the offender, do some proper digging about that person's background, and maybe chat to their family to get a much more rounded picture of the individual."

[Senior Probation Officer]

Research conducted in Greater Manchester found a difficult balancing act between delivering PSRs in a very short space of time (so as to avoid adjourning cases) and ensuring all relevant factors were covered and a tailored sentencing assessment was provided. Under considerable time-pressure, the use of 'copy and paste' templates had inevitably materialised which only served to frustrate sentencers and further diminish the perceived value of the report. Issues such as repetition, lack of clarity, and the length of the report were all found to impact negatively upon the effectiveness of the PSR in influencing the sentence outcome.³⁶

ASATS WHITE PAPER PROPOSAL:
Improving the quality and timeliness of pre-sentence reports.

RESPONSE: The proposal to support the NPS better in delivering high-quality PSRs by recruiting additional court-based staff is welcome. The NPS needs to be adequately resourced to provide detailed and timely PSRs that offer evidenced-based sentencing options to reduce the likelihood of reoffending and protect the public and/or victims(s) from further harm. In addition, judges and magistrates need to be encouraged to ask for PSRs.

Post-sentence

Judges and magistrates remain largely unaware about what happens to offenders post-sentence. Rarely do they witness the progress of, and offenders' compliance with, court orders. This has contributed to their loss of confidence in non-custodial sentences, since sentencers do not have any reassurances that sentences are carried out effectively.³⁷ The part-privatisation of the service exacerbated a lack of confidence in community sentences. CRCs were awarded 'black box' contracts meaning that there were no prescribed requirements for offender management. This, perhaps unsurprisingly, led to some overtly poor practice. The then Chief Inspector of Probation, Dame Glenys Stacey, highlighted that thousands of offenders were being monitored by a phone call every six weeks and that some staff were responsible for 200 cases at a time.³⁸

"As magistrates we don't get to see how Community Orders are implemented. We give them and we believe that person X is going to do 60 hours of community work and complete a drugs or alcohol rehabilitation programme. And at the time of ordering that, with probation present, and having read their reports, it all makes sense on paper. How it actually works in practice, I have no idea."

[Magistrate]

"We don't learn because we don't see the ultimate outcomes. We only see half the story and not the ending. So, we don't really know what works."

[Magistrate]

If sentencers' confidence in community sentences is to be restored then more information and training on what community sentences entail, as well as their reoffending rates relative to other disposals, needs to be provided. In addition, it would be beneficial to provide sentencers with the opportunity to review the progress made by offenders on community sentences.

Problem-solving Courts

"If we want to rehabilitate offenders, we need to start looking at them as multi-faceted human beings rather than just a 'shoplifter' or a 'drug addict.'"

[Senior Probation Officer]

It is unlikely that an offender will cease offending until the underlying causes of their behaviour are addressed. Issues such as drug addiction, alcohol abuse, mental health problems and homelessness are all known to contribute towards a propensity to commit criminal offences. Targeted at those offenders whose offending 'is linked to substance misuse and other complex needs' (p.54), the White Paper proposes to pilot a new 'problem-solving court' approach, providing intense treatment interventions and referrals to wider support services.^{xii} The sentences will have judicial oversight through regular court reviews, more intense probation supervision, and a system of incentives and sanctions to encourage compliance.

In order to pilot problem-solving courts in a way that incorporates previously tried problem-solving approaches, the Bill introduces some legislative changes. These are:

- giving the court a power to review community and suspended sentence orders and to initiate breach proceedings at a review hearing;
- expand the power to test for illicit substances outside the provisions of Drug Rehabilitation Requirements; and
- enable the court to impose short custodial penalties for non-compliance.

xii Established in 2005, Specialist Domestic Violence Courts (SDVC) were the first of the problem-solving courts to be introduced in the UK.

There is a large amount of support for problem-solving courts amongst offenders and criminal justice practitioners. However, there is some scepticism that it is 'old wine in new bottles'. In order for the courts to work they must also have the infrastructure in place to support referrals and treatment pathways.

"Problem-solving courts are a move in the right direction, but you have to have the framework and the infrastructure, in place for them to work. If it is simply referring them to the same underfunded drug service and they have to report back in six month's time, well we know that's not going to work. In that respect, it's not problem-solving at all. This has to be a new approach."

[Police Officer]

"People often come in front of us that shouldn't be thrown in prison but there is no alternative. This is where a problem-solving court would be a very positive step forward. You need a joined-up approach between services and people trained in problem solving and listening and asking the right questions who are also informed about what's available out there by way of remedial services."

[Magistrate]

The sentences given via problem-solving courts are described as alternative sentences to custody in the White Paper (p.54). It is important to note that recurrent attempts to introduce 'alternatives to custody' have failed to displace the use of custody, but rather serve to displace less intrusive community orders - the well-established process of sentencing inflation. The pilot evaluations must pay especial attention to ensuring that sentence inflation does not occur, i.e. that the intensive treatment is not focused on offenders who otherwise would not have received a custodial sentence. Furthermore, research has found that problem-solving courts can result in 'net widening', whereby individuals find themselves in the criminal justice system because the police view the courts as the best way of securing them help.³⁹ The pilot studies need to be attuned to this possibility.

ASATS WHITE PAPER PROPOSAL:
Piloting enhanced problem-solving court models in up to five courts, targeted at repeat offenders who would otherwise have been sent to custody.

RESPONSE: Problem-solving courts have returned positive results on breaking the cycle of reoffending, particularly by drug-affected prolific offenders who can be diverted into treatment. However, previous trials, despite being effective, have had their funding withdrawn or not continued following the pilot phase. If the problem-solving courts are found to be effective, they will require a long-term commitment from government to fully resource them and expand the approach beyond the pilot sites. The proposed 'alternatives to custody' require careful monitoring as previous studies on 'alternatives' have highlighted the potential for sentence inflation and net-widening.

A Police Officer's Perspective: "We need long term solutions"

"From start to finish, the problem is lack of funding: the police are stretched, the courts are stretched, the prisons are stretched. It's become very disheartening. We arrest someone and then while they're released under investigation for one shoplifting incident, they'll get arrested for another.

I've said it multiple times: 'we'll be dealing with him again next week'. They get charged, they go to court, they get these orders, they don't comply and then you're arresting them again a week later for the same thing. It's just a joke. It's not working but it's just the same thing on repeat.

The current response to dealing with drug users and severe alcoholics, who are constantly offending to feed those habits, is too short term and they're just falling back into the same cycle. It's a bit clichéd, but

rehabilitation is what's needed. That word gets thrown about but there's no genuine rehabilitation of these people. There have been funding cuts to everything. So, all the services that should be there to properly deal with these people as a whole, have been cut: mental health services, drug services etc.

The reason why shoplifting incidents are getting dealt with so leniently is also because of funding cuts. You can't afford to have police officers dealing with a shoplifter who's nicked £60 worth of goods when you've got constant calls coming in.

Unless there's more funding put into long-term rehabilitation and long-term solutions to dealing with prolific drug users, the ones that are stealing from shops to fund their habit, they're constantly going to keep falling back into that vicious cycle."

Assaults on Frontline Workers

The *Assaults on Emergency Workers (Offences) Act 2018* modified the criminal offence of common assault or battery in instances where it is committed against an emergency worker. It provided for a maximum custodial penalty on summary conviction or on indictment of 12 months' imprisonment. The *Police, Crime, Sentencing and Courts Bill* introduces a provision to increase the maximum penalty from 12 months to two years' imprisonment and will provide the courts with enhanced powers to sentence in a way that reflects the severity of the offence.

Following the increase in the frequency and severity of assaults against shop workers, the *Assaults on Retail Workers (Offences) Bill 2019-21* was introduced to parliament in September 2020. The Bill proposes to make certain offences, including malicious wounding, grievous or actual bodily harm and common assault, aggravated when perpetrated against a retail worker in the course of their employment. It is not surprising that similar calls to protect shop workers have emerged.

Despite unanimity across industry bodies that legislation is needed to protect the three million individuals that work in the retail sector, the Government has rejected the calls, stating that 'it remains unpersuaded of the need for a specific offence'.⁴⁰ However, in Scotland, the growing problem has been responded to with the passing of *The Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill* by a unanimous vote, becoming an Act in February 2021. The law makes it a specific offence to assault, threaten or abuse retail workers, particularly when the worker is applying an age-restriction (for example, asking for proof of age from someone trying to buy alcohol).⁴¹

"In the same way that if you attack a police person or an ambulance person or somebody working in a hospital, that's clearly an aggravating feature. Why shouldn't it be the case if you attack a bus driver or somebody working behind a shop or a bin man, what's the difference?"

[Magistrate]

"It would be a deterrent. It might not stop someone stealing, but it certainly may stop them becoming aggressive if they get approached and challenged. I don't think it's a bad proposal at all."

[Police Officer]

"Shop staff are just doing their job, and their job description isn't to deal with violent criminals, so if they're getting assaulted I think it's a pretty good idea to have a law specifically to deal with it, just like us when we get assaulted."

[Police Officer]

Across the UK, shop workers have served on the frontline of their communities throughout the COVID-19 crisis, and yet levels of violence and verbal abuse directed at them has soared during the pandemic. It is understandable that many shop workers and industry bodies would like legislation similar to the *Assaults on Emergency Workers (Offences) Act 2018* to recognise the risks that they face while carrying out their work.

There are five logical conditions which must exist before an increase in the severity of criminal penalties can work as deterrents:⁴²

- Potential offenders must realise sentence levels have increased
- Potential offenders must think about heavier sentence levels when contemplating their offences
- Potential offenders must believe they have at least a reasonable chance of being caught
- Potential offenders must believe that, if caught, the heavier sentencing policy will be applied to them
- Potential offenders must be prepared to desist where (i-iv) are present.

Few violent offenders will contemplate the sentences that their actions are likely to attract prior to the offence and so it is doubtful that these conditions will be met. In addition, it is well-documented that crimes committed in the retail sector often go unreported.

According to the *Home Office 2018 Commercial Victimisation Survey (CVS)*⁴³ reporting rates remain low across the different categories of crime. The 2018 CVS asked those respondents who had experienced crime in the past year whether or not they had reported the most recent incident of each crime type to the police. The findings are as follows:

- 45% of assaults and threats
- 70% of robberies
- 42% of theft by customers, and;
- 35% of theft by unknown persons

With so many crimes not being reported there is a reasonable chance that offenders do not think they will be caught. Furthermore, without treatment for drug-affected offenders, it is highly unlikely that they would be prepared to desist from crime.

"Will it deter all offenders? Probably not. But what it does do, is it refocuses and puts the emphasis back onto the impact on the victim. And that's important, because in a lot of these cases that gets left out."

[Probation Officer]

In light of the above, it is unlikely that introducing a specific offence for assaults on shop workers will deter the bulk of offenders. However, it could provide an opportunity to undertake meaningful work with offenders through deferred sentencing (see chapter two). Furthermore, the legal leverage of the new Act could potentially improve the likelihood of compliance with treatment services and secure long-term change in offender behaviour. If an individual does not comply with the conditions placed upon the deferment, the more severe sentence may be imposed.



A Police Officer's Perspective on Assaults Against Shop Workers: a Desperate and Dangerous Situation.

"In the last month I've attended several attacks on shop workers, including one where a shoplifter brandishing a screwdriver assaulted two female shop employees.

The common theme unfortunately is that the sort of people that engage in those sorts of crimes are drug users. A lot of the time that you're dealing with them they are, for want of a better term, off their face on drugs or alcohol. The desperate nature of these offenders and the fact that they are intoxicated makes for a potentially very dangerous situation. The inhibition just isn't there, they just don't care. If it means they're going to get away then they'll assault someone.

I think these people are so used to getting away with it. I'm not sure what the figures are, but I would say that the prosecution rate is extremely low. The prolific offenders, they'll be well aware of this, and they know that once they get out of that store the likelihood of them getting caught is next to none.

Hopefully a new offence with a heftier sentence will be a deterrent. It might also give shop staff the confidence to engage with the police. At the moment, they are only too aware that these people know where they work and if they've assaulted them once and got away with it, they are very likely to come back and do it again. They need to know that it will be taken seriously."

PCSC BILL PROPOSAL: To increase the maximum penalty for assaulting an emergency worker from 12 months' to two years' imprisonment and provide the courts with enhanced powers to sentence in a way that reflects the severity of the offence.

RESPONSE: The increase to the maximum penalty for assaulting an emergency worker would provide a public statement of the need to protect front-line workers and punish those who assault them during the course of their work. There have been calls to enact a similar law for shop workers and the *Assaults on Retail Workers (Offences) Bill* is currently at Second Reading. If used alongside deferred sentencing it could offer a mechanism to leverage compliance with treatment and requirements.

Chapter Conclusion

Despite the best efforts of practitioners on the ground, sentencers have low confidence in the delivery of community sentences. The part-privatisation and outsourcing of probation functions under the Transforming Rehabilitation agenda resulted in the management of offenders becoming increasingly opaque. This was particularly the case when imposing the newly introduced Rehabilitation Activity Requirement which only offered vague parameters to sentencers on what the requirement entailed. Sentencers were right to be sceptical as evidence of poor practice soon emerged and the little confidence that they had in community sentences took a further knock. Compounding the problem, was a reduction in the number of PSRs being

delivered to court which has contributed to a reduction in the number of community sentences being given. While many of these issues will be addressed following the ending of CRC contracts and the reunification of the National Probation Service, there needs to be a huge effort to increase confidence in community sentences amongst magistrates and the judiciary. This could involve training for magistrates and the opportunity to review sentence outcomes. The use of problem-solving courts is a promising means of better responding to the underlying causes of crime. Going forward, the National Probation Service requires adequate resources to enable them to provide quality, detailed and timely PSRs in court as a means of achieving effective sentencing practice.



4. Probation and Community Sentences

"My fear is that community sentences will just get more and more draconian. So, you end up cluttering up the system and not fixing the problem."

[Magistrate]

From 2014-2021, the probation service of England and Wales was operated by the public-sector National Probation Service (NPS), which managed the most high-risk offenders across seven divisions, and 21 private-sector Community Rehabilitation Companies (CRCs), that managed medium and low-risk offenders (the demarcation denying the existence of any fluctuation in risk status). Following criticism from successive inspectorates, in July 2018, it was announced that the MoJ would terminate the CRC contracts at the end of December 2020, 14 months early, and all sentence management responsibilities for low-, medium-, and high-risk offenders would be held by the National Probation Service (NPS).

Between 2009 and 2014, the number of offenders supervised by the Probation Service decreased year on year. It then increased with the implementation of the Offender Rehabilitation Act 2014 (ORA) in February 2015 when all offenders on a custodial sentence became subject to statutory supervision on release from prison (prior to this, only adults sentenced to over 12 months in custody and all young offenders were subject to statutory supervision).^{xiii}

"Probation has gone through a fairly traumatic period. Transforming Rehabilitation was brought in and it was a total mess. The supervision of offenders became quite negatory."

[Senior Probation Officer]

A Brief History of the Probation Service

There have been many changes to the probation service since its conception with the passing of the Probation of Offenders Act 1907. The Act required probation officers to 'advise, assist and befriend' those under their supervision. For most of the twentieth century, probation officers underwent the same professional training as social workers, but this was set aside in the mid-1990s when the then Government decided that social work was an inappropriate way to approach the service. The 'advise', 'assist' and 'befriend' ethos was dispensed with in favour of 'public protection', 'enforcement' and 'rehabilitation' in the late 1990s, later cemented by the Criminal Justice Act 2003 which specified the purposes of sentencing as: the punishment of offenders; crime reduction; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their crimes.

The Criminal Justice and Court Services Act 2000 created a National Probation Service for England and Wales, replacing 54 probation committees with 42 local probation boards and establishing 100% Home Office funding for the probation service.

In 2014 the *Transforming Rehabilitation* (TR)⁴⁵ agenda brought major structural reform to probation services. It dissolved the probation trusts and split the service into two parts: the public sector National Probation Service (NPS) and 21 Community Rehabilitation Companies (CRCs). The reforms introduced a Payment by Results (PbR) offender rehabilitation market, where private and

voluntary sector providers competed for nationally commissioned contracts to manage offenders in the community, with the financial rewards linked to achieving reduced reoffending rates. The NPS worked with those at 'higher risk of serious harm or with prior history of domestic violence and sexual offences' and was responsible for advising the courts on sentencing (through PSRs). The CRCs were responsible for supervising offenders serving 12+ months who were assessed as presenting a low or medium risk of harm.

The TR reforms also, under the Offender Rehabilitation Act 2014, extended 12 months of compulsory post-sentence supervision to offenders serving short custodial sentences (i.e. prison sentences of under 2 years). This added approximately 40,000 offenders to the supervision caseload of probation services.

In July 2018, amid growing pressure, it was announced that the MoJ would terminate the CRC contracts at the end of December 2020, 14 months early. It is estimated that the Ministry's attempt to stabilise the CRC contracts when they were struggling and its decision to terminate them early cost the taxpayer an additional £467 million more than was required under the original contracts. A damning report by the House of Commons Committee of Public Accounts⁴⁶ stated that the reforms had 'left probation services underfunded, fragile, and lacking the confidence of the courts' and 'in a worse position than they were in before the Ministry embarked on its reforms'.

Community Sentencing

A community sentence combines some form of punishment with activities carried out in the community. Judges and magistrates can choose from a menu of possible requirements in order to tailor the sentence to the individual. The aim of the requirements is to punish offenders, change their behaviour so as to reduce the likelihood of reoffending, and make amends to the victim of the crime or the local community.

The number of community sentences has halved over the last decade. In 2019, 87,000 offenders were sentenced to a community sentence, representing 7.4% of court outcomes compared to 196,000 community sentences in 2009, representing 13.9% of sentences at all courts.⁴⁷

Community Order Requirements

Community orders consist of one or more of the following requirements:

- unpaid work requirement (40 – 300 hours to be completed within 12 months)
- rehabilitation activity requirement (the court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete. The responsible officer will decide the activities to be undertaken. Where appropriate this requirement should be made in addition to, and not in place of, other requirements. Sentencers should ensure the activity length of a RAR is suitable and proportionate.)
- programme requirement (specify the number of days)
- prohibited activity requirement
- curfew requirement (2-16 hours in any 24 hours; maximum term 12 months)
- exclusion requirement (from a specified place/ places; maximum period 2 years: may be continuous or only during specified periods)
- residence requirement (to reside at a place specified or as directed by the responsible officer)
- foreign travel prohibition requirement (not to exceed 12 months)
- mental health treatment requirement (may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied: (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but is not such as to warrant the making of a hospital or guardianship order; (b) that arrangements for treatment have been made; (c) that the offender has expressed willingness to comply.)
- drug rehabilitation requirement (the court must be satisfied that the offender is dependent on or has a propensity to misuse drugs which requires or is susceptible to treatment. The offender must consent to the order. Treatment can be residential or non-residential, and reviews must be attended by the offender (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months))
- alcohol treatment requirement (residential or non-residential; must have offender's consent; court must be satisfied that the offender is dependent on alcohol and that the dependency is susceptible to treatment)
- alcohol abstinence and monitoring requirement (where available)
- attendance centre requirement (12 – 36 hours. Only available for offenders under 25 when convicted).

The Government has been calling for more to be done to increase the effectiveness, credibility and robustness of community sentences for several years and there have been successive attempts to make them more punitive and onerous. The Bill outlines new proposals for community supervision which, as outlined in the ASATS White Paper, claims 'combines robust punishment and management of risk with a renewed focus on addressing rehabilitative needs' (p.36) of offenders, including: increasing the availability and usage of Community Sentence Treatment Requirements (CSTRs), increasing the length of available electronically monitored curfew and encouraging more flexibility, giving probation the power to vary electronic monitoring requirements, within a prescribed limit, and abolishing the little-used Attendance Centre Requirement and Attendance Centre Order.

Community Sentence Treatment Requirements (CSTRs)

The Ministry of Justice acknowledges in the White Paper that not nearly enough has been done to tackle the causes of offending, particularly where it is driven by drug and alcohol misuse. It reports that 29% of offenders currently starting community sentences have mental health problems, a third misuse drugs and 38% misuse alcohol.⁴⁸ When addiction and/or mental health issues are significant contributory factors in offending behaviour, this needs to be effectively addressed in order to prevent reoffending.

There are three types of Community Sentence Treatment Requirements (CSTRs) available:

- Alcohol Treatment Requirements (ATRs)
- Drug Rehabilitation Requirements (DRRs)
- Mental Health Treatment Requirements (MHTRs)

However, despite many offenders experiencing mental health and substance misuse problems, the use of treatment requirements as part of a Community Order (CO) or Suspended Sentence Order (SSO) has reduced. Use of the DRR has reduced from being included in 8.5% of orders in 2014-15 to 4% (7,624) in 2019 and the MHTR from 0.6% of orders in 2014-15 to 0.4% (781) in 2019. Alcohol Treatment Requirements represent 3% (5,553) of all the requirements commenced under COs or SSOs:⁴⁹

"I have 138 previous convictions. Mainly shoplifting and a few assaults. I would wake up and go robbing, buy drugs, and then be back out and do it all again. I think it's mad how shoplifters get thrown in prison. I think they should get help. When they go to court they should put them into rehab instead of putting them into a cell. They come back out of prison with nowhere to live, no money, no help and they are back to square one again."

[Offender, female, 37]

The cost of drug-fuelled crime is significant. In 2014 the National Treatment Agency estimated that the overall annual cost of drug misuse was around £15.4 billion. £13.9 billion was due to drug-related crime, while around £0.5 billion was NHS costs for treating drug misuse.⁵⁰ Alongside these figures is the immeasurable damage caused to families and communities.

"Until you fix the addiction issues, they're going to just carry on shoplifting through necessity."

[Magistrate]

"It's become a hopeless quest of fixing the supply end of the equation rather than the demand. We're just chasing our tails."

[Magistrate]

"Drug addiction is a medical issue so it should be treated as a medical issue. Although there has been a crime committed, nine times out of ten it's only committed because of the addiction. So, you need to treat the addiction. Putting addicts in prison might help a particular retailer and safeguard them for a week or two but they'll just come back out and do it again, so it's not solving the problems that causes the crime."

[Police Officer]

There has been a fundamental change in how drug treatment services are organised. Prior to 2012, the NHS and local authorities jointly commissioned services, but the Health and Social Care Act changed this. The passing of this new law made local authorities solely responsible for commissioning drug treatment and their spending was no longer ring-fenced.^{xiv} There is, however, a compelling long-term financial argument for better drug services. A 2014 report from Public Health England estimated that every pound spent on drug treatment saves £2.50 in costs to society.⁵¹

There has been a 13% reduction in the number of adults in contact with drug and alcohol services between 2010-11 and 2017-18.⁵² Drug rehabilitation has become so scarce that some offenders with serious drug addictions described not being aware that it was a service that could be accessed at all. Gary, age 44, had been using class A drugs for almost twenty years and yet was unaware of drug rehabilitation services.

"I'm 44 and I never knew that I could come into a rehab centre and have help with my addictions. I never knew that until this year when I came into treatment. I thought it was just for celebrities. I never knew it was available."

[Offender, male, 44]

Given the large number of offenders with drug and alcohol problems, it is disappointing that so few of these requirements are sentenced in court. It appears that the reason is threefold:

- (i) challenges in obtaining the necessary assessments and consent prior to sentencing,
- (ii) the falling availability of both drug and mental health treatment services in the community. Drug and alcohol treatment funding in England has fallen by £161 million (more than 18%) - from £877 million in 2013-14 to £716 million in 2017-18, while community-based mental health treatment has also faced real-term cuts in funding from 2011-12 to 2016-17. Sentencers need to be reassured that all the sentencing options provided to them by law are actually available.⁵³
- (iii) the decline in PSRs means that probation are not assessing individuals for their needs and suitability for a drug, alcohol or mental health requirement.



^{xiv} The Advisory Council on the Misuse of Drugs (ACMD) (2017) has claimed that moving drug and alcohol misuse treatment into local authority public health structures appears to have been detrimental to treatment in the context of the financial challenges faced by local authorities. <https://www.gov.uk/government/publications/commissioning-impact-on-drug-treatment>.

Michelle's Story: A Life Lost to Drugs

Michelle was introduced to drugs and crime by her boyfriend. She became a prolific offender and heroin user. Successive prison sentences and community orders did nothing to break the cycle of offending. It was only when she was offered a residential rehabilitation place 16 years later at the age of 38 that she finally stopped using heroin and desisted from crime. She would have benefited from Liaison and Diversion services to divert her from the justice pathway and into treatment and rehabilitation. This would have potentially reduced police, court and prison time and, most likely, reduced reoffending.

"I didn't commit my first offence until I was 22. I was working full time up until that point. I'd got in with the wrong crowd that I'd met through my ex-boyfriend who was a well-known shoplifter. He'd been to jail numerous times and I suppose in a way that sort of excited me. I'd probably shoplifted about ten times before getting caught for the first time. The police were called and I got a caution, but that didn't deter me. I thought, oh, a little slap on the wrist is nothing really. And then my offences escalated because I'd developed a habit to feed. I was still committing shop theft, but it became more regular. It was probably about six, seven times a day.

I was given community orders which didn't work. I'd turn up to my appointment and tell them I was fine and I'd go. There was no help. There was no talking to me about why I was doing it. It was just a tick on the piece of paper to say that I'd turned up. I had a drug worker that I'd go and see once a week and be drug tested. She'd ask me how I am and I'd say "fine". Then she'd tell me to keep up the good work. And I'd be thinking, keep up what good work? I'm still using and I'm still stealing. I used to blag the drug tests by taking someone else with me who wasn't using. And that's how it continued. The drug workers that I had been using didn't have a clue. They'd never been in my situation. They never used, so in my eyes how could they help me if they didn't know what I was going through or how I was feeling?

Then in 2002 I got sent to custody and that was scary. I'd never been to prison before and it was really tough. There was no methadone so I had to do basically a bareback withdrawal. All they'd give you was Paracetamol. I didn't sleep for three weeks. In a way that first time was a deterrent but I came out with the same problems so nothing changed.

About four months after I was released I was on heroin again and I started committing more offences. I was sent to Foston Hall women's prison three times in one year. It was just little sentences like two months or three months. I'd come straight back out and start using again. It just didn't stop me. I had three meals a day, a bed, a duvet, Freeview, and of course all my mates were there, so I'd say it was like a little respite from the outside. In 2012, I got arrested again for another shop theft. This time the magistrate gave me a 12-month prison sentence - straight back to the same jail. Straight back to the same faces. I couldn't find a way out of what I was doing so it was easier to carry on and do it. I think I probably got about 60-odd offences for shop theft. The custodial sentences that I've had were just a little breakaway from my reality of being homeless and reliant on crime to get through the day. Prison didn't deter me in any way and it definitely didn't stop me committing more crimes.

The thing that helped me in the end was going into residential rehab. I did a 12-step Narcotics Anonymous programme. I learned about my behaviours and I learned about why I did what I did. It was a lot of work but I think it actually saved my life. Sending addicts to rehab instead of custody would benefit that person more than any custodial sentences or community sentences would.

Looking back, I'm embarrassed that I've wasted so many years of my life doing nothing. I wasn't living life like I should have been, I was just a sorry existence. Over twenty years of using, a life wasted. It's horrendous."

Criminal justice practitioners were unanimous in identifying a lack of service provision as a factor in sentencing decisions, with several commenting that despite their desire to dispose an ATR or DRR, the required treatment was not available, with some describing it as 'sentence by geography.'

If the Government is to fulfil its policy pledge to make greater use of mental health, alcohol and drug treatment requirements (MHTR/ATR/DRR) as part of community sentences, they first need to ensure that the necessary treatment pathways are in place to meet demand.

"Funding is a big issue for drug and alcohol rehabilitation. About 80% of criminal cases that we see have drugs or drink involved. It's enormous. What you often find is acquisitive crimes, like shoplifting and theft, are drug related, whereas violent crimes are often alcohol related. But giving those kinds of people rehab is difficult because there's not enough places for them."

[Magistrate]

"We're often in situations where we think this person needs help with their drug addiction issues, but there's just not the capacity or the funding to offer it."

[Magistrate]

"It's 'sentence by geography' – in a few parts of the country there is still a reasonable amount of drug and alcohol services available so you can sentence someone to a requirement, but across most of the country the services aren't there."

[Senior Probation Officer]

Co-production of Services

Rehabilitation is often presented in policy documents as if there is one homogenous approach. Yet models of 'rehabilitation' can be very different. Individuals that have successfully completed rehabilitation programmes for drug or alcohol dependencies hold important insights about the type of service that works. In particular, having individuals who have suffered addiction themselves in support roles is regarded as a crucial factor in being able to reach those seeking treatment.

"My probation officer had been to college and she was nice but she didn't have a clue about addiction and stuff like that. Unless someone's really clued up around the subject, you can run ribbons around them. Addicts are devious people."

[Offender, male, 40]

It would be beneficial to ensure that drug and alcohol services are designed using a co-production approach alongside people with lived experience.

ASATS WHITE PAPER PROPOSAL: Increase the availability and usage of community sentence treatment requirements.

RESPONSE: The increased use of CSTRs as an alternative to short custodial sentences (as well as to other community sentences), when assessed as appropriate, is a welcome one. Increasing take up will not only require significant investment in treatment services but also the availability of staff at court to conduct assessments, gain the informed consent of offenders, and draft a pre-sentence report with the CSTR as a sentencing option. As with any sentence proposal, ensuring that sentencers are aware of the disposal, familiar with what it entails, and are confident in its delivery is key to it being used.

Electronic Monitoring of Offenders

Electronic monitoring (EM) of offenders is used when a Community Order (CO) or Suspended Sentence Order (SSO) with a curfew or exclusion requirement is sentenced in court. Currently, the court may specify a maximum of 16 hours curfew per day, providing in practice a weekly maximum of 112 hours of curfew. The maximum duration is 12 months.

The PCSC Bill enables the court to impose longer curfews, up to 20 hours a day (an increase from the daily maximum of 16 curfew hours), as well as increasing the maximum period of electronically monitored curfew from 12 months to two years. It is stated in the White Paper that the rationale is to bolster the 'punitive weight' (p.44) of the order by extending its duration in addition to supporting rehabilitation by providing longer for the positive effects of curfew to be established, such as deterring criminal associates. There is some evidence to suggest that the use of electronic monitoring can support a reduction in violations of curfews during the monitored period.⁵⁴ However, no evidence is given to support the efficacy of longer periods of curfew in assisting rehabilitation.

"It makes a great headline but doesn't think through the wider implications of extending the length of curfews."

[Senior Probation Officer]

There is concern amongst some sentencers and probation officers that a lengthy curfew would likely result in those sentenced to it eventually breaking the restriction and ultimately breaching their sentence. In addition to establishing how longer, more restrictive, curfews could translate into more custodial sentences following breach, serious thought needs to be given to how curfews – and particularly breaking them – is effectively managed. The police are currently severely under-resourced and are unlikely to have the capacity to monitor compliance issues or pursue breaches.

"When someone breaches their tag, it comes up on our system and it falls to the already minimal police officers that we have to go out and arrest them for breaching their conditions. A lot of the time it gets overlooked because we're so short-staffed. We don't have enough people to go and deal with the thousands of tag breaches that come in every day across London. So, upping the tariff to two years is pointless if we're just going to continue letting people breach. What's the point in having the tag on in the first place?"

[Police Officer]

"I have to deal with tag breaches on a daily basis. When someone breaches their tag, we get a notification come through and they need to be arrested for it. But there's people that come up that have been arrested 100 plus times for breaching their tag - they go to court, the court lets them go and then they're straight back out. All that happens is the police are tied up with dealing with it. The following evening, we get another notification saying they've breached their tag again. So, will it make a difference doubling their duration? Definitely not."

[Police Officer]

Furthermore, it was suggested that the 'punitive weight' being sought might be more appropriately achieved via an alternative sentence.

"Two years is an awfully long time. It's a bit like being in lockdown and I am thinking at the moment, 'God, it's been a year. I'm beginning to think I might start flouting the rules soon if they don't change them'. I think two years is too long. Managing it will be very difficult, because people aren't going to abide by it for that long."

[Magistrate]

"If a crime warrants wearing a tag for two years, surely there's a more appropriate alternative sentence."

[Magistrate]

"Two years is a hefty length of time to be on curfew - a lot of offenders will struggle with even three months."

[Probation Officer]

There is the real possibility that a proportion of offenders who would not have received a custodial sentence for their offence will inevitably end up in prison having violated the EM conditions placed on their Community Order, resulting in sentence inflation and defeating any ambition to divert offenders from custodial sentences.

PCSC BILL PROPOSAL: Increase the maximum length of time a curfew can be imposed for to two years (from 12 months) and increase the daily maximum to 20 curfew hours per day, whilst maintaining the seven-day period maximum of 112 hours.

RESPONSE: In the absence of evidence, it is not possible to determine the impact that an extended period of curfew will have on those subjected to it. Further research is needed to examine whether the positive impacts of curfew outweigh any counterproductive or negative ones, e.g. reducing the likelihood that those subject to it will access services, find employment or if they are more likely to breach the order.

Flexible Use of Curfews

An electronically monitored curfew is often set by the courts for a standard 12-hour curfew pattern of 7pm to 7am at the offender's home address, but it is not legislated that it must adopt this pattern. In fact, for the cohort of prolific retail offenders involved in this study, the imposition of these hours was absurd and did nothing to curtail their offending behaviour.

"My curfew was 7p.m. until 7a.m. which didn't make any sense. I didn't commit crime in the night, I committed crime in the day when the shops were open. So I was stealing all day and then going back home just before seven o'clock and staying in all night. I completed the tag but I still committed offences whilst I had it."

[Offender, female, 40]

"The curfew affected my dog more than me because I couldn't take him for his evening walk. That's about it. I had to be in at about seven o'clock and couldn't go out till seven in the morning. I didn't really get the point of it because in the daytime, that's when you go out robbing, isn't it, and in the night, you're just sat there watching TV and getting high, so it had no effect on me."

[Offender, male, 44]

The Bill provides for a more creative use of curfews to better reflect the punishment intended, better support rehabilitation, and provide better protection for victims. For example, setting several curfew periods throughout a 24-hour period (subject to the daily maximum) to restrict behaviour and movements (currently a curfew cannot specify periods which amount to less than 2 hours or more than 16 hours on any day and are for a maximum period of 12 months). The Bill introduces the ability to impose longer curfews, up to 20 hours a day (an increase from the daily maximum of 16 curfew hours). The intention is that the maximum of 20 hours would be used on 'leisure' days and fewer or no curfew hours could be set on 'working' days. This could allow an offender to fulfil responsibilities such as employment, training or caring for dependents at specified times but be subject to a curfew at other times.

It is clear from the offender feedback, that sentencers need to tailor the curfew to the offending pattern of the recipient if it is going to serve as a credible punishment and deterrent.

PCSC BILL PROPOSAL: Allow and support more flexible use of curfews.

RESPONSE: The proposal to encourage the flexible use of curfews is welcome. Tailoring the restrictions to the times most likely to limit re-offending or other problematic behaviours must surely be more effective than standardised hours. Individuals must be able to fulfil caring responsibilities, to access services, and to undertake other activities that will assist with their determination not to reoffend (e.g. training or employment).

Variations to Curfews

Currently, all variations to EM curfews imposed by the court as a requirement of a Community Order or Suspended Sentence Order may only be made by the court. This means that to make even minor adjustments to a curfew start or end time or an appropriate change of address, probation must take the request to the court in order for the variation to be approved.

The Bill introduces a new power for a responsible officer to vary a curfew requirement made under a Community Order. The scope of variations are currently limited to a shift in curfew timings but not a change in the number of hours, and changes to address where it is identified as necessary for risk management and/or rehabilitation and within the geographical range managed by the probation team responsible for the offender.

The court system is currently under acute strain as the backlog of cases continues to exert pressure, and these variations only add to that. In addition, there might also be a tendency for appropriate variations not to be applied for because of the burden of doing so. This might result in positive and rehabilitative opportunities being missed, e.g. gaining employment for hours that the curfew includes, as outlined by a Senior Probation Officer:

"The curfew is helpful as a punishment but it needs to be used more imaginatively. Because the system just wants to churn people out, there's no time to reflect and tailor the curfew to the offender. It also means that some positive opportunities are being missed. For example, if someone on a tag had a work opportunity that clashes with their curfew, it'll often not be possible because it's just too much of a faff to go back to court and have it changed."

[Senior Probation Officer]

While the proposal might appear a simple means of cutting bureaucracy, there are some concerns raised by probation officers and magistrates that must be addressed if this power is to be enacted. For example, the deliberations of the sentencer/s in imposing specific hours might not be available to probation staff and important considerations therefore missed. Allowing the curfew to be altered could potentially undermine the sentencers' intentions and result in reduced confidence amongst magistrates and the judiciary that their wishes have not been upheld. In addition, there is concern that the discretionary power could result in inconsistent and unfair amendments being made to court orders. However, it is overall a positive step, particularly in relation to the proposed extended two-year curfew which will in all likelihood require some variation over such a prolonged period.

PCSC BILL PROPOSAL: Introducing a new power for a responsible officer to vary a curfew requirement made under a Community Order or Suspended Sentence Order.

RESPONSE: Empowering responsible officers to manage variations to the curfew without requiring a return to court is positive. However, this must be within clearly defined and specific parameters or could risk contributing to sentencers' already low confidence in the enforcement of community sentences if they feel that their judgment is being undermined.

House Detention Order

The White Paper proposes the introduction of a new form of house detention. It is comprised of a highly restrictive and lengthy curfew managed with GPS tracking and is intended to be used as part of a Community Order for 'repeat low level' offenders. The MoJ claims 'such orders will be more effective at ensuring compliance and deterring crime and therefore preventing the conveyor belt that leads too many offenders on a path towards repeated short spells in prison' (p.49). However, there is no evidence offered to support this claim.

House Detention Orders could potentially be an effective means of diverting more serious offenders from custody and punishing them in the community. However, as it currently stands, the targeting of the order doesn't appear to be evidenced-based or strategic. It is specified in the White Paper that it could not be used for offenders who have served a custodial sentence in the past. Yet if its introduction is to provide an alternative to short custodial sentences, it should not include this limitation. There is currently no limitation on a community sentence being used for those who have previously received a custodial sentence and so it is unnecessary (and counterproductive) to add this limitation to house detention orders. Furthermore, targeting such a highly punitive and restrictive curfew at repeat low-level offenders runs the risk of backfiring. Without providing the required support for offenders to tackle the causes of their offending, the house detention is likely to increase rates of breach. Lastly, it is proposed that the pilot group is young adults aged 18-20 without any rationale as to why this cohort of offenders is appropriate or strategic.

Regardless of the cohort, the pilots should pay especial attention to the likelihood of up-tariffing offenders, i.e. giving offenders a harsher penalty than they would have otherwise received, levels of breach, and the impact on other parties, i.e. people also residing at the same address, particularly children and vulnerable adults.

ASATS WHITE PAPER PROPOSAL:
Introduce a new form of house detention that severely restricts liberty.

RESPONSE: The White Paper outlines plans to trial a highly restrictive house detention order with young adults. Without a clear rationale, there is no reason to target the 'house' detention order at young adults (aged 18-20). The MoJ should carefully review evidence to determine whether low-level offenders are the appropriate cohort for house detention. Pilot studies should also consider the impact on those with whom the offender lives, the impact on opportunities to undertake education, training and work, and the rates of, and reasons for, breach (compared to other orders).

From 'Tick Box' Supervision to 'Robust and Responsive' Community Sentences

Community penalties have gained the reputation of being an easy option, a view which has been attributed to a perception of under-enforcement amongst sentencers.^{xv} Impossibly large caseloads and minimal contact between offenders and their supervisors (particularly when managed by the CRCs) will have done nothing to alleviate concerns. Offenders described their experiences of a disengaged 'tick box' approach to offender management that fails to target the causes of offending or prevent future engagement in crime.

"For me, supervision was just a box-ticking exercise. I'd show my face and get out of there as quickly as I could."

[Offender, male, 41]

"As part of my Community Order I had to see a probation officer. I'd be in there about five minutes, if that. They'd give me the money back for my bus fare and then I'd leave. It was the same every week for 12 months. At the end of the order I went back to court again and they asked how I'd done. The reports were always good but I never understood how they could be because I'd never done any work with them: I was still using and I was still stealing."

[Offender, female, 40]

"I don't know if it's because of funding but probation has really changed. Now it's just a case of going to your appointment, showing your face and ticking the box that you have turned up. That's all it is, ticking boxes. That's my experience the last few times I've been at probation."

[Offender, male, 43]

There have been recurrent calls for 'tougher' community sentences to punish offenders while simultaneously reducing the burden and economic strain on the prison system (including in the current White Paper). However, it's important to consider the possibility that any changes to community sentences could potentially increase the prison population through net-widening and up-tariffing. For example, subjecting those serving community sentences to multiple requirements or overly onerous conditions can be counterproductive if it increases breach proceedings, thereby potentially undermining any reduction in the use of custody.

"Community sentences are not a soft option in the slightest. They can be very challenging for offenders. If they are given a good quality supervision and the right requirements, it should address their criminogenic factors. We want them to look at what they've done and particularly the impact they've had on other people and that can be challenging for someone to hear. A lot of offenders will tell you that it's easier to get a short sentence and be in and out of prison than it is to do community sentences. A year long supervision package getting to the crux of their issues is far more challenging than a 30-day prison sentence. I've had people say to me they'd rather do prison sentences than a community order because they're not challenged or confronted about their behaviour."

[Probation Officer]

^{xv} In terms of public perceptions, research has found that the public viewed community orders as lenient because of a misconception of what they entailed; most respondents thought they consisted only of unpaid work. Gelb, K. (2006) *Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing*. Melbourne: Sentencing Advisory Council.

The politically driven insistence on making community sentences more punitive may also make them less effective at getting offenders to confront the root causes of their offending, and therefore have higher breach and reoffending rates. Overloading community sentences with 'demanding' requirements can ultimately set the offender up to fail. The more onerous Community Orders become, the more likely they are to result in technical breach and thereby present the very real risk of up-tariffing offenders who otherwise would not have received a custodial sentence. For example, research has shown in the past that the Community Rehabilitation Order (CRO), the Community Punishment Order (CPO), and the Community Punishment and Rehabilitation Order (CPRO) all began as alternatives to short custodial sentences but over time they all 'slipped down-tariff' to deal with less serious offenders than previously.⁵⁵

"The probation service is completely stretched and it's very frustrating that they don't have the time or the resources to really monitor a lot of the people on community sentences."

[Magistrate]

Chapter Conclusion

The MoJ White Paper indicates that underlying the reforms to community sentencing is an aim to ensure that 'probation practitioners to have the time, support and tools to develop productive relationships with those they supervise, to deliver interventions directly, and to place offenders with other rehabilitative services' (p.8). In many ways it can be argued that community sentences do not need to be made more punitive (by increasing the number of hours or the duration of sentences); adequate resourcing for the probation service to effectively manage community sentences as they currently stand may be equally, if not more, effective. It is imperative for the NPS to be properly resourced in order to be able to manage offenders in the community and address their criminogenic needs if community sentences are to be robust and responsive.



5. Prison

The White Paper outlines a vision in which more low-level offenders can serve their sentences in the community rather than prison.^{xvi} The prison population doubled (from around 44,000 to 86,000) between 1993 and 2012.^{xvii} This dramatic growth was not driven by increases in crime, but rather by national and local policy decisions which resulted in sentencers becoming more likely to imprison offenders who in the early 1990s would have received a community penalty or a fine. It is clear to see that sentencing legislation has the power to influence the size of the prison population as well as the type of offender it is deemed appropriate to incarcerate, and for how long.

Short Custodial Sentences

In 2019, sentences less than, or equal to, 6 months accounted for 46% of sentenced admissions to custody (25,131 admissions) and sentences of between 6-12 months, 10% (5,569 admissions).^{xviii} As such, over half of sentenced admissions to prison in 2019 (56%) were individuals serving sentences of less than 12 months. Yet offenders serving sentences of less than 12 months constituted just 5% of the prison population at the end of 2020. This means that a large proportion of offenders cycle through the prison estate, sometimes several times in one year.⁵⁶

"I've had various jail sentences; two-months, three-months, five-months, six-months. Yes, they were fair but what's the point? You go in there with little time to do any work, you come straight back out and you continue to do what you were doing. There's no help in prison when you get a few months. They just put you on a script and you just carry on doing what you were doing when you come out."

[Offender, female, 40]

Many magistrates report having exhausted non-custodial options when sentencing prolific offenders to a short stay in prison. The frustration is understandable: those sentenced to short custody (6 months or less) have an average of 65 previous offences, with community sentences having been tried multiple times and having failed to prevent future offending. There is a strong need to improve community-based orders in order to end the number of low-level offenders cycling through the system.

"It's a punishment for some to go to prison for a short space of time, but it's very expensive. The prisons are very overcrowded and they do nothing to rehabilitate. Six months in prison isn't time for any kind of rehabilitation."

[Magistrate]

"With all the will in the world you cannot address a retail offender's drug addiction on a short custodial sentence. You just can't."

[Police Officer]

The average custodial sentence for a shop theft is 1.7 months, which, when automatic release is factored in, is equivalent to 26 days, at most.⁵⁷ This is enough time to do irreparable damage to any protective and pro-social factors that might be present in the offender's life (e.g. stable accommodation, employment, relationships) but not long enough to initiate any programmes to target their criminogenic needs. In other words, custodial sentences of less than 6 months are long enough to cause significant damage to the positive aspects of an offender's life, but not long enough to do any meaningful rehabilitative work.

xvi As at 31st December 2020, the prison population in England and Wales was 78,180; 6% lower than at the same point in the previous year. This is largely attributable to the effects of COVID-19. In particular, more individuals are being held on remand due to delays in court hearings. At this stage it is difficult to determine with certainty what the post-pandemic prison population will be as courts catch up with the backlog, and changes in the offence type committed over the period are taken into account. However, it is likely that there will be some increase in prison numbers bringing them closer to pre-pandemic levels in due course.

xvii There has since been a period of stability. The prison population remained at around 83,000 until March 2020 when the impact of the COVID-19 pandemic became clearly apparent with a significant drop in cases being dealt with by the courts.

xviii As at 31st December 2020, there were 2010 individuals serving sentences of less than or equal to 6 months (3% of all sentenced inmates) and a further 1400 serving greater than 6 months to less than 12 months (2% of all sentenced inmates).

It is unsurprising then that adults discharged from short custodial sentences have the highest reconviction rates compared to any other sentence type: adults released from custodial sentences of less than 12 months have a proven reoffending rate of 61% and those released from custodial sentences of less than or equal to 6 months have a proven reoffending rate of 63.6%.⁵⁸

"Basically, you are just sending somebody out of the prison gate with the same problems they had when they walked in. It's not addressing the issues whatsoever. So, they are leaving with the same problems - probably more problems - and inevitably they are going to end up committing offences again."

[Offender, male, 43]

In addition to resulting in higher rates of reoffending than community sentences, prison is also expensive. In 2019/20, the average cost of a prison place in England and Wales was £44,640.⁵⁹ To put this into context, it is almost three times more expensive to send someone to prison for 12 months than it is to pay them a full-time salary at the National Minimum Wage for the same period of time.

Given the high reoffending rates that short custodial sentences return, it is clear that prison is not an effective solution for drug-affected criminals. It does, of course, give shops much needed respite from prolific offenders. However, there are likely other sentences that could provide longer-term solutions.

A Presumption Against the Use of Short Custodial Sentences

Although it is acknowledged in the MoJ White Paper that short custodial sentences often fail to rehabilitate the offender, stop reoffending, and are less effective than community sentences, the Government proposals do not go so far as to set out a presumption against the use of short custodial sentences. A presumption against short sentences could bring cost savings and lower prison populations in line with the Government's ambition to 'help to relieve demand on prison places' (ASATS, p.40).

Under Scottish legislation, the court 'must not pass' a custodial sentence of less than 12 months unless it is considered that no other method of dealing with the person is appropriate. The presumption against short sentences (PASS) was extended from three months or less to twelve months or less by the *Presumption Against Short Periods of Imprisonment (Scotland) Order 2019*.

A presumption against short custodial sentences could fulfil the Government's ambition to relieve demand on prison places through greater use of community sentences. In the absence of a presumption against short sentences, more needs to be done to educate sentencers about the negative effects of short sentences.

Apart from the ineffectiveness of short custodial sentences and the exorbitant cost of prison, there are other reasons why offenders report that prison fails to rehabilitate. Many prolific low-level offenders describe their first experience of prison as a rite of passage that changes their mindset and prompts a reidentification of themselves as a 'criminal' who has been written off by society. This paves the way for more offending and a hardened view of the world, particularly amongst those coming from traumatic backgrounds. The prison setting becomes a 'crime school' where newly initiated inmates meet future criminal acquaintances and learn, not only the tricks of their trade, but a culture that normalises crime.

"Prisons are not a nice place, they are violent places. People get hurt over nothing, over stupid things. When you grow up in that situation, you learn the behaviour. Prison just breeds a mentality and your thinking gets all messed up."

[Offender, male, 41]

"If you put a bunch of criminals together, they're going to talk, aren't they? They make acquaintances in there, and, yes, they learn their tricks and new ways to earn money."

[Offender, male, 44]

"It's like an apprenticeship; they just go in quite green and come out knowing loads."

[Police Officer]

The sorry state of some of these individuals' lives means that far from being a deterrent, prison serves as a welcome respite from the fear and freneticism of street life.

"I'd get to a point where I was that unwell, that under-nourished and that exhausted, that I'd wake up and go, 'you know what? I can't do this anymore', so I'd go out and I'd commit an offence knowing I was going to get arrested. And then actually be grateful and relieved that it was all over, and I was actually in prison, safe. It sounds a bit back to front, but that's the way it became. I used to go to prison to get a break. There was a bed, so I got to actually sit down for a minute and then I was fed, and then I got to go to the gym. I used to go to prison to have a rest."

[Offender, male, 41]

*"You're living somewhere, okay it's prison and its sh*t. Shi**y people, shi**y environment, but it's a bit of stability in a twisted sort of way. Then you get turfed out on the street with forty quid in your pocket or whatever. Where do you go from there? You're back to square one."*

[Offender, male, 40]



Tim's Story: Childhood Trauma and the Revolving Door of Prison

The violent death of Tim's father spearheaded his involvement with crime and drugs to which he says he was exposed at a young age. Having lost his father in horrific circumstances, Tim was not offered any counselling or support. He soon became influenced by older men on the estate where he lived who were involved in crime. With more than one hundred convictions for shop theft, common assault, car theft and robbery, he estimates he has served at least 35 custodial sentences.

"My father passed away when I was only nine years old, in quite bad circumstances. He was kicked down some stairs in a block of flats. There had been an argument with a couple of lads in the stairwell in the block of flats where we lived. One of them kicked him, he fell down the stairs, banged his head, and was knocked unconscious. He got sick while he was unconscious and choked on his vomit. The lad who did it was arrested but there wasn't enough evidence to charge him so they had to release him.

My mum did the best she could to raise me and my two sisters. She did a brilliant job, but she was coping with the death of her husband and trying to bring up three young kids at the same time. She worked every hour God sends to let things go on the same as it was when my dad was alive for Christmases and birthdays. She did the best job that she could.

I was lost and started hanging around with the older lads on the estate looking for a bit of guidance. And a lot of my family were drug users - uncles, cousins - so it was around me quite a lot when I was growing up. I first saw someone taking heroin when I was 16 and, out of curiosity at first, I started using when I was 17. Dealers used to pull up alongside you on the street and say "try this". They'd give you a phone number and say, "phone me when you want some more." That's how they get you. I've been battling addiction ever since, for over 20 years.

I wasn't offered any counselling when my dad died and I think that's played a big part over the years. The drugs stopped me from hurting and so I guess I thought I had found a friend in heroin.

A big proportion of my offences are shoplifting, all to fund my drug addiction. When I was growing up, at the height of my addiction, there wasn't really any help. There were rehabs but you had to pay to get into them and I didn't have the money for it.

I've had loads of Community Orders over the years. I think I've had every type that the judge had available to give me at the time. It's never really worked because I have a heroin addiction and he gives me a Community Order and tells me I must go to all these appointments. The drugs have to come first if I am ill [withdrawing]. I have to go out and get my drugs to stop me being ill so then I am missing appointments and I'm ending up breaching the orders. I have breached every order that has been given to me. So, it hasn't really worked. Then because I breached every community order, I started getting prison sentences all the time. I've probably been to prison 35 to 40 times. The shortest sentence I received was six weeks and I served three weeks. There is no help and no real rehabilitation in prison. You just go to prison, spend your three weeks there and then you get kicked out with a £50 discharge note in your pocket. So, you carry on doing what you were doing before you went to prison.

I needed a sentence to stop the drug use - residential rehab or a treatment centre. You need a sentence that focuses on solving the addiction problem and includes some consequences as deterrents to dropping out of rehab."

Drug Rehabilitation and Therapeutic Communities

Prison is typically not a place conducive to drug rehabilitation. Any amount of illicit drugs in the prison estate is unacceptable, but by the Prime Minister's own admission, prisons are 'awash with drugs'.⁶⁰ Putting aside the fact that the emergence of 'Drug Recovery Wings' (DRWs) present an acceptance of the failure to keep prisons safe and secure for inmates, they have shown some promise. DRWs were piloted in two phases over 2011 to 2012 in eight men's and two women's prisons in England and Wales, with the intention of delivering wing-based abstinence-focused drug recovery services. They aimed to provide dedicated prison accommodation to inmates who were dependent on drugs/alcohol while in custody and connect them with community support on release. In particular, the aim was to target those serving short sentences of 3-12 months and encourage engagement with support and treatment at the earliest opportunity.

All prisoners should have the opportunity to live in a drug-free environment, with suitable treatment and support. If the Government is not going to introduce a presumption against short sentences, it must focus on how meaningful work can be completed in the time that offenders are in custody in order to reduce the exceptionally high likelihood of reoffending.

Criminal justice practitioners and offenders who participated in this study stated that the key to rehabilitation is vulnerability, and it is almost impossible to allow oneself to be vulnerable in the context of prison. As such, any therapeutic intervention in prison would be limited in its effectiveness unless it could achieve a supportive environment.

"You need to be able to get very vulnerable if you're a drug addict in recovery. And you're certainly not going to let yourself be vulnerable in prison. So, it doesn't work. They'll come out and use drugs straightaway. And drugs are readily available in prison, of course."

[Police Officer]

Drug Recovery Wings (DRWs), previously piloted, could provide one such option. They initially showed great promise but were marred by the ready availability of drugs in the prisons and the lack of preparation for, and support on, release, in particular a lack of suitable accommodation.⁶¹ Any prison-based intervention must be in conjunction with a throughcare programme that ensures individuals have suitable accommodation upon release (that is similarly drug free) and a continuation of therapeutic support, as well as access to, and pathways to training and employment.

"If there were more resources within prison to deliver programmes, education, employment skills, and there were better links between prison agencies and the community, then potentially a six-month sentence could have a positive impact on rehabilitation. But the prison service is massively understaffed, and it's overstretched in every aspect. It is very difficult for people to be able to do the meaningful work that should be going on in there."

[Probation Officer]

"There aren't any instant cures. Changing people takes time and sticking somebody in prison for a few weeks just doesn't make a lot of difference to the way they view their lives when they come out."

[Senior Probation Officer]

Learning the lessons from the DRW's evaluation and developing similar Therapeutic Communities (TCs) where prisoners live in a separate wing of the prison as part of a community working towards recovery could offer a way forward. A number of systematic reviews have produced strong evidence for the effectiveness of prison-based TCs in reducing illicit drug use and recidivism, although these are mostly based on studies conducted in the USA.⁶² However, their success hinges on ensuring that there is suitable accommodation and a continuation of rehabilitation services upon release.

Chapter Conclusion

Although offenders serving sentences of less than 12 months constituted just 5% of the prison population at the end of 2020, due to their rapid flow through the prison, individuals serving short-term custodial sentences account for the majority of prison receptions. Short custodial sentences are not only ineffective in terms of proven reoffending rates, but they are also very expensive. A presumption against short custodial sentences could send a strong message that Community Orders should be considered instead of a short prison sentence, and ideally ones that will address the root causes of criminal behaviour. If the Government is not going to introduce a presumption against short sentences, policy must focus on how meaningful work can be completed in the time that offenders are in custody and ensure there is a continuation of support upon release, particularly suitable accommodation, in order to reduce the exceptionally high likelihood of reoffending.

Conclusion: Time to Change

Issues of time and timing characterise many of the problems that currently undermine the operation of the criminal justice system in England and Wales. At one end of the spectrum, the system is moving too slowly; huge backlogs of cases have built up as more than half of magistrates' courts have been closed and the coronavirus pandemic has further delayed hearings. There is now a backlog of more than 450,000 cases. As a result, victims of crime are waiting much longer for cases to be heard and more defendants are spending longer on remand awaiting trial which is placing an additional burden on the already crowded prison service.

The criminal justice system is also too slow to identify and respond to the issues that underscore many offenders' criminal behaviours. These often relate to drug and alcohol misuse or a mental health problem, at times entwined with issues such as homelessness, historical trauma, a lack of training and skills, and unemployment. Many offenders describe missed opportunities to address their issues and a lack of services which ultimately results in an endless cycle of crime and prison, both of which come at great expense to society.

At the other end of the spectrum, aspects of the sentencing process are moving too fast. Often introduced in the name of efficiency, important processes have been sped up much to the detriment of effective sentencing practice. The NPS national target to predominantly deliver short format court reports, and the increasing trend to sentence in the absence of any form of pre-sentence report at all, provides one such example. Not only is there little time to assess the offender's circumstances and verify the information, but there is also insufficient time to identify the availability of suitable services should they be required. Although a shift to fast delivery reports might expedite court outcomes, there is the very real chance that important factors are missed, unsuitable sentencing options proposed, and inappropriate sentence plans produced. The use of templates and 'copy and paste' in order to speed up the collation of a report will further undermine its efficacy as well as reduce confidence in the sentencing proposal amongst sentencers. Similarly, the power to defer passing sentence for up to six months is seldom used, with anecdotal evidence suggesting that it is discouraged as deferred sentences impact negatively on the HMCTS court timeliness targets. Yet deferred sentences can provide an opportunity for offenders to engage in treatment services that could potentially address the root causes of their offending behaviour and change their criminal justice pathway. It could also facilitate greater use of restorative justice, where appropriate.

Swiftness is desirable in many ways, but it should not come at the expense of effective sentencing. Fast judgements made on incomplete information create inefficiencies in the long run if opportunities to engage offenders in treatment and break their cycle of reoffending are routinely missed.

The White Paper, *A Smarter Approach to Sentencing*, outlines the future policy direction of the criminal justice system. It adopts a bifurcated stance to sentencing: on the one hand, the proposals focus on making penalties tougher and more robust (e.g. mandatory sentencing, a cessation of automatic halfway release, more restrictive community curfews and an emphasis on community sentences becoming 'tighter' and more onerous), whereas on the other hand, there is a recognition that the Government hasn't 'done nearly enough to tackle the causes of offending.' There is a commitment to address the criminogenic needs of repeat offenders through treatment and rehabilitation. These policy pledges will require significant investment in services; most notably housing, mental health treatment, and drug and alcohol treatment if they are to work.

The *Police, Crime, Sentencing and Courts Bill*, introduced in the House of Commons in March 2021, presents specific legislative changes. This report has scrutinised the proposals most relevant to individuals committing offences in a retail setting, predominantly theft and assaults against shop workers. The perpetrators of these crimes are often repeat offenders, and some have received and served a considerable number of community and custodial sentences.

Overall, while a review of sentencing practice and outcomes is undoubtedly a welcome one, any change in legislation must only occur following: (i) a full and proper consultation period with stakeholders across the criminal justice system, (ii) the successful piloting of new initiatives before they are rolled out, allowing sufficient time for outcomes to become known, and (iii) the adoption of a co-production approach to designing and commissioning of services with end-users.

References

- 1 Ministry of Justice (2020) *A Smarter Approach to Sentencing* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf. p.7.
- 2 Chalkley and Chalkley (2020) *Small Change for Justice: Funding for Justice in England and Wales 2010-2019*. The Bar Council. <https://www.barcouncil.org.uk/uploads/assets/c84a796e-ad5b-4398-bbe4b5a04063bee2/Small-Change-for-Justice-report-2020.pdf>
- 3 UK Parliament (2020) *Constituency data: Magistrates' court closures*. <https://commonslibrary.parliament.uk/constituency-data-magistrates-court-closures/>
- 4 House of Commons Committee of Public Accounts (2019) *Transforming Rehabilitation: Progress Review Ninety-Fourth Report of Session 2017-19* <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/1747/1747.pdf>
- 5 Above cite. p.3.
- 6 MoJ (2019) *Criminal Justice System Statistics Quarterly: March 2019*.
- 7 House of Commons Justice Committee (2016) *The treatment of young adults in the criminal justice system. Seventh report of Session 2016-17*. <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>
- 8 MoJ (2019) *Economic and Social Costs of Reoffending*. <https://www.gov.uk/government/publications/economic-and-social-costs-of-reoffending>
- 9 Ministry of Justice (2020) *A Smarter Approach to Sentencing* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf
- 10 Centre for Social Justice (CSJ) (2018) *Desperate for a Fix: Using shop theft and a Second Chance Programme to get tough on the causes of prolific drug-addicted offending*. <https://www.centreforsocialjustice.org.uk/library/desperate-for-a-fix-using-shop-theft-and-a-second-chance-programme-to-get-tough-on-the-causes-of-prolific-drug-addicted-offending>
- 11 British Retail Consortium (2020) *2020 Retail Crime Survey*. <https://brc.org.uk/news/corporate-affairs/violence-and-abuse-against-shop-workers-spirals/>
- 12 ACS (2020) *The Crime Report 2020*. https://www.acs.org.uk/sites/default/files/acs_crime_report_2020_online_versionb_spreads.pdf
- 13 Usdaw (2020) *The Impact of Coronavirus on the Workforce*. <https://www.usdaw.org.uk/CMSPages/GetFile.aspx?guid=575d4419-a739-432b-ab54-10e84ad56e26>
- 14 MoJ (2018) *Out of Court Disposals Pilot: Cautions Reoffending Analysis*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720700/out-of-court-disposals-pilot-cautions-reoffending-analysis.pdf
- 15 Brown, J., Sturge, G. and McInnes, R. (2021) *Police, Crime, Sentencing and Courts Bill: Part 6, Cautions*. Briefing Paper Number 9165. House of Commons Library. <https://commonslibrary.parliament.uk/research-briefings/cbp-9165/>
- 16 MOJ (2018) *Adult Out of Court Disposal Pilot Evaluation – Final Report*. <https://www.gov.uk/government/publications/adult-out-of-court-disposal-pilot-evaluation-final-report>
- 17 Centre for Justice Innovation (2020) *Delivering a Smarter Approach: Deferred Sentencing*. <https://justiceinnovation.org/sites/default/files/media/document/2021/Deferred%20sentencing.pdf>
- 18 Disley et al (2016) *Evaluation of the Probationer Liaison and Diversion Trial Schemes*. RAND Corporation.
- 19 Strang, H. et al (2013) *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*. <https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf>
- 20 CPS (2019) *Restorative Justice*. <https://www.cps.gov.uk/legal-guidance/restorative-justice>
- 21 MoJ (2013). *Transforming Rehabilitation: a summary of evidence on reducing reoffending*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243718/evidence-reduce-reoffending.pdf
- 22 Home Office (2020) *Call for Evidence – Violence and Abuse Toward Shop Staff*. Government Response. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903433/260620_Violence_and_assaults_against_shopworkers_-_Publication_of_Call_for_Evidence_Response.pdf. p.5
- 23 Strang et al. (2013) 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review', *Campbell Systematic Reviews*, 9(1):1-59.
- 24 MoJ (2010) *Green Paper Evidence Report: Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185947/green-paper-evidence-a.pdf
- 25 Strang et al. (2013) 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review', *Campbell Systematic Reviews*, 9(1):1-59.
- 26 MoJ (2021) *Criminal Justice Statistics quarterly, England and Wales, October 2019 to September 2020*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962357/criminal-justice-statistics-quarterly-sept-2020.pdf
- 27 MoJ (2020) *A Smarter Approach to Sentencing* p.3.
- 28 GOV.UK (2021) *Criminal Courts*. <https://data.justice.gov.uk/courts/criminal-courts/#courts-magistrates-receipts>

-
- 29 MoJ (2019) *Government Response to the Justice Committee's Eighteenth Report of Session 2017-19: The Role of the Magistracy*. P.4. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843110/role-magistracy-govt-response.pdf
- 30 GOV.UK (2020) Criminal Justice System Statistics Quarterly: December 2019. Table Q5.1a. <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019>
- 31 The Centre for Justice Innovation (2018) *Renewing Trust: How we can improve the relationship between probation and the courts*. <https://justiceinnovation.org/publications/renewing-trust-how-we-can-improve-relationship-between-probation-and-courts>
- 32 Whitehead P (2010) *Exploring Modern Probation: Social Theory and Organisational Complexity*. Bristol: The Policy Press.
- 33 NPS (2016) *NPS Operating Model*. Version 1.0. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/555747/NPS-Operating-Model.pdf
- 34 MoJ (2020) *Offender management statistics quarterly: October to December 2019 and annual 2019*. <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2019/offender-management-statistics-quarterly-october-to-december-2019-and-annual-2019>
- 35 The Centre for Justice Innovation (2018) *The changing use of pre-sentence reports*. https://justiceinnovation.org/sites/default/files/media/documents/2019-04/cji-changing-use-psr-briefing_wip-1.pdf
- 36 Taylor, E., Clarke, R. and McArt, D. (2014) 'The Intensive Alternative to Custody: 'Selling' Sentences and satisfying Judicial Concerns', *Probation Journal*, 61 (1): 44-59.
- 37 Centre for Justice Innovation (2018) *Renewing Trust: How we can improve the relationship between probation and the courts*. https://justiceinnovation.org/sites/default/files/media/documents/2019-02/cji-renewing-trust_2018-d-sw_1.pdf
- 38 HM Inspectorate of Probation (2017) *2017 Annual Report*. <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2017/12/HMI-Probation-Annual-Report-2017-2.pdf>
- 39 Alkon, C. (2020) 'Have Problem Solving Courts Changed the Practice of Law?', *Cardozo Journal of Conflict Resolution*, Vol. 21, pp. 597-624.
- 40 UK Government and Parliament (2020) Government response to the 'Protect Retail Workers from Abuse, Threats and Violence' petition. <https://petition.parliament.uk/petitions/328621>
- 41 The *Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill* <https://beta.parliament.scot/bills-and-laws/bills/protection-of-workers-retail-and-age-restricted-goods-and-services-scotland-bill>
- 42 von Hirsch et al. (1999) *Criminal Deterrence and Sentencing Severity*. Hart Publishing: London.
- 43 Home Office (2019) *Crime Against Businesses: findings from the 2018 Commercial Victimisation Survey*. Statistical Bulletin 17/19. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829399/crime-against-businesses-2018-hosb1719.pdf
- 45 MoJ (2013), *Transforming Rehabilitation: A Strategy for Reform*, Cm 8619
- 46 House of Commons Committee of Public Accounts (2019) *Transforming Rehabilitation: Progress Review Ninety-Fourth Report of Session 2017-19*. <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/1747/1747.pdf>
- 47 GOV.UK (2020) *Criminal justice system statistics quarterly: December 2019*. <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019>
- 48 MoJ (2018) *Vulnerable offenders steered towards treatment*. <https://www.gov.uk/government/news/vulnerable-offenders-steered-towards-treatment>
- 49 MoJ (2020) *Offender Management Statistics Quarterly: October to December 2019*
- 50 National treatment Agency for substance misuse (2014) *Why invest?* <http://www.nta.nhs.uk/uploads/whyinvest2final.pdf>
- 51 Public Health England (2014), *Alcohol and Drugs Prevention, Treatment and Recovery: why invest?* [file:///hpap03f/DIS_Rdf\\$/sutcliffeh/Documents/Drug%20Misuse/PHE%20publications%20gateway%20number:%202013-190](file:///hpap03f/DIS_Rdf$/sutcliffeh/Documents/Drug%20Misuse/PHE%20publications%20gateway%20number:%202013-190)
- 52 Public Health England, *Substance misuse treatment for adults: statistics 2017 to 2018*, table 7.1.1
- 53 Rhodes, D (2018) 'Drug and alcohol services cut by £162m as deaths increase, BBC News. <https://www.bbc.co.uk/news/uk-england-44039996>
- 54 Danielsson, P. and Makipaa, L. (2012). *A Systematic Literature Review Of Electronic Monitoring Of Offenders*. National Research Institute of Legal Policy Research Communications no. 114.
- 55 Mair G (2004) 'Diversionary and non-supervisory approaches to dealing with offenders'. In: Bottoms A, Rex S and Robinson G, *Alternatives to Prison; Options for an Insecure Society*. Cullompton: Willan Publishing. P.136.
- 56 GOV.UK (2020) *Prison Receptions: October to December 2019*. Table 2.5a. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882179/Receptions_Q42019.ods
- 57 Centre for Social Justice (CSJ) (2018) *Desperate for a Fix: Using shop theft and a Second Chance Programme to get tough on the causes of prolific drug-addicted offending*. <https://www.centreforsocialjustice.org.uk/library/desperate-for-a-fix-using-shop-theft-and-a-second-chance-programme-to-get-tough-on-the-causes-of-prolific-drug-addicted-offending>

-
- 58 MoJ (2020) *Proven reoffending statistics quarterly bulletin, October 2018 to December 2018*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/930446/Proven_reoffending_stats_bulletin_OctDec18.pdf
- 59 Ministry of Justice (2020) *Costs per place and costs per prisoner by individual prison*. HMPPS Annual Report and Accounts 2019-20. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929417/costs-prison-place-costs-prisoner-2019-2020-summary.pdf
- 60 Johnson, Boris. (10 August, 2019) 'Left wingers will howl. But it's time to make criminals afraid - not the public: PM Boris Johnson on his pledge to come down hard on crime and reverse the balance of fear', in *Daily Mail Online*. <https://www.dailymail.co.uk/news/article-7345031/PM-BORIS-JOHNSON-pledge-come-hard-crime.html>
- 61 Lloyd et al. (2017) *The Evaluation of the Drug Recovery Wing Pilots*. <https://www.york.ac.uk/media/healthsciences/documents/research/mentalhealthresearch/DRWsFinalPublishedReport.pdf>
- 62 Aos, S., Miller, M. & Drake, E. (2006). 'Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates'. Olympia: Washington State Institute for Public Policy. Mitchell, O., Wilson, D.B. & MacKenzie, D.L. (2006), 'The effectiveness of incarceration-based drug treatment on criminal behaviour'. Campbell Systematic Reviews 2006, no. 11.

