Centre for Justice Innovation

Report

Smarter Community Sentences

Summary

Effective community sentences are a vital part of a justice system in which crime is proportionately punished, the harms it has caused repaired and the underlying factors that lead to offending addressed. Moreover, the evidence is clear that community sentences reduce re-offending more than short custodial sentences. Those who advocate for offenders to receive short custodial sentences as opposed to community sentences are, in short, recommending that communities and victims suffer from more crime, not less.

Yet, there has been an 46% decline in the use of community sentences over the past ten years in England and Wales. At the same time, the quality of supervision delivered by our probation services has deteriorated. We believe it is time to reform community sentences. In doing so, we need to move away from the clichés of the past about tough or soft justice. Instead, the unification of the management of offenders within the National Probation Service and the forthcoming Sentencing White Paper are real opportunities for this Government to make community sentencing smarter.

Smarter community sentences mean giving probation practitioners the powers, the freedom and the flexibility to do their jobs. Smarter community sentences mean ensuring victims and communities who suffer from crime have more of a voice to see reparation done. Smarter community sentences mean leveraging the full resources of the Government, from the police, the courts, through to drug treatment and employment services and others to work with probation to deliver punishment and to give offenders the chance to turn around their lives.

Specifically, we urge the Government to create smarter community sentences by:

- **Improving the delivery of unpaid work** by giving victims and communities a stronger voice in choosing what work is completed so they can see that justice is done, and by delivering standalone unpaid work orders swiftly, so probationers get the punishment done and can move on with their lives, and so judges can see their rulings carried out.

- **Improving the delivery of supervision** by working briskly with low-risk probationers, thereby freeing up probation to both deliver high-quality community sentences and to work with police in the management of probationers who pose a higher risk of re-offending, through a reinvigorated Integrated Offender Management (IOM) strategy.

- **Improving rehabilitation so that people have the best shot at turning their lives around**, by increasing the overall level of funding available for drug and mental health treatment for probationers in the community in the next Spending Review.

- **Improving information to victims about community sentences** via the court reform programme so victims are informed about what is being done in their case.

- **Improving tagging of probationers** by giving probation officers powers to flexibly vary the monitoring of tags without having to go back to court and by giving victims of domestic abuse a voice in setting the restrictions on perpetrators to better guarantee their safety and the safety of their children.

- **Improving collaboration between the court and probation** to divert vulnerable offenders away from court where necessary, to use judges to monitor repeat offenders and be more responsive to their behaviour, and to change the enforcement system so it responds more swiftly to failure and better rewards compliance.

Toward smarter community sentences

The value of community sentences

Criminal justice systems around the world use community sentences[1] to deliver punishment, reparation and rehabilitation. Punishment - inflicting some form of pain or loss ('harsh treatment') and the communication of disapproval ('censure'),[2] because doing so gives voice to the standards we honour as a community.[3] Reparation to ensure that victims and communities that suffer see and experience offenders' atonement for their wrongs. Rehabilitation because it embodies our belief in the possibility of redemption for rule-breakers and our commitment to keep communities safer by reducing reoffending.

Community sentences play a vital role in keeping the public safe. There is considerable evidence that community sentences are an effective means of reducing re-offending. Previous studies by the Ministry of Justice in England and Wales, which control for the differences in the offender characteristics of those on community sentences and those receiving short prison sentences (those that are less than 12 months), show that the proven reoffending rate of offenders on community sentences is consistently lower than for those who had served short-term prison sentences.[4] A 2019 study found that "sentencing offenders to short term custody with supervision on release was associated with higher proven reoffending than if they had instead received community orders and/or suspended sentence orders." It also found that "the average number of re-offences per sentencing occasion was also higher following short term custodial sentences of less than 12 months than if a court order had instead been given (by around 65 re-offences more per 100 sentencing occasions)."[5] Those who advocate for offenders to receive short custodial sentences as opposed to community sentences are, in short, recommending that communities and victims suffer from more crime, not less.

The deterioration of community sentences

However, in England and Wales, the quality of the supervision of community sentences has deteriorated over the past decade. In 2018, the Chief Inspector of Probation found that, due to the Coalition Government's Transforming Rehabilitation reforms, which split probation provision into a public-sector National Probation Service (NPS) and privately-owned Community Rehabilitation Companies (CRCs), probation services "are failing to meet some of their performance targets… In too many cases, there is not enough purposeful activity… the probation profession has been diminished… There is a national shortage of qualified probation professionals, and too much reliance on unqualified or agency staff…. in the day-to-day work of probation professionals, there has been a drift away from practice informed by evidence."[6]

Moreover, there are fewer community sentences being given out by courts. There has been a 46% decrease in the number of community sentences in England and Wales over the past ten years.[7] Our research into why this has found that it is, in part, because the relationship between courts and probation has been buffeted by a number of reforms in the past six years, most notably the split of probation, the underinvestment in probation by the CRCs,[8] and the disruptions caused by court closures and court service efficiency reforms.[9]

The reality of community sentences

Community sentences provide proportionate punishment for lower level offending through restrictions of liberty like curfews and electronic monitoring. They can provide reparation through things like unpaid work and restorative justice. They can also address the underlying issues behind offending, like drug addiction, through supervised community drug treatment.

Yet these purposes of punishment, reparation and rehabilitation are not clean and separable: in practice, community sentences are a mixture of all three. Probationers can often feel that parts of community sentences that are intended to be rehabilitative are intrusive, even painful, while others experience 'punitive' sanctions such as unpaid work as motivating and even enjoyable.[10] It is also worth

remembering, for example, that individuals serving a community sentence can experience additional pains, such as restrictions on their ability to travel abroad, or the impact on their lives of a criminal record on their employment. These punishments, which often get forgotten in discussions about "the toughness" of community sentences, can often be experienced as far greater hardships than the terms of the court order itself.

This means that the reality of community sentences *as experienced by probationers is often different from what is intended by judges and lawmakers, and what is expected and imagined by the public. Moreover, probationers are not a homogenous group: community sentences are given to a wide spectrum of individuals, from affluent motorists who repeatedly speed to homeless people with complex substance abuse and mental health needs. Strengthening community sentences, therefore, requires us to grapple with the complex realities of how probation functions in practice.*

The future of smarter community sentences

In the Queen's Speech on 19th December 2019, the Government said it wants to strengthen community sentences so that "...they deliver an appropriate level of punishment, but also address probationers' behaviour...."[11] Furthermore, the bold decisions to unify the management of offenders within the National Probation Service and do away with the failed Transforming Rehabilitation reforms presents policy makes with a once in a generation opportunity.

We believe this is the moment in which we need to make community sentencing smarter. This means we must first resist some temptations and avoid mistakes of the past. Over the last three decades, efforts to strengthen community sentences have often arrived at the same answer: more. More hours of unpaid work, more months on an order, more punishment. But research into the experience of probationers on community supervision suggests this injunction for more is far too simplistic.[12] The weight of a community sentence (how much one has to do) and its duration (how long the sentence is) are only two dimensions of a community sentence. And there is little evidence that increasing these dimensions will reduce re-offending or satisfy the desire from the public (or the media) for a more punitive approach. We need to move away from the clichés of the past about tough or soft justice.

Principles for smarter community sentences

In this paper, we focus on how to make community sentences smarter. From our discussions with probation practitioners and judges over the past five years, a number of key principles have arisen which would make for smarter community sentences:

- **Community sentences should be delivered swiftly:** The way we deliver community sentences is often too slow. Practitioners intuitively know that getting probationers started on their orders and getting many of them over as swiftly as possible is what probationers desire, and yet often this fails to happen. Moreover, in our discussions with judges, we know that one of the frustrations they have with community sentences is when they hear of unpaid work not started, of rehabilitative services ordered and then delayed.

- **Community sentences should be rehabilitative:** If we want less crime, probationers should be helped to overcome the issues driving their offending. Research has consistently shown that there are a range of factors – like poverty, trauma and substance misuse - which make an individual more likely to offend in the first place and, then, to offend again,[13] and that many probationers have overlapping, complex needs. But the evidence suggests if we can identify these factors and address them, we have a real chance to reduce re-offending and make communities safer.[14]

- **Community sentences should be reparative to communities and victims: Reparation – material and emotional - should be a central part of all community sentences, helping probationers understand the impact of their crimes on victims and local communities.**

- **Community sentences should be collaborative:** Community sentences are not just for probation to deliver. They involve working with the court to better assess who should be receiving them

in the first place and who and how offenders are breached if they do not comply. They involve working with the police, to ensure the public are kept safe. They involve working with treatment providers and other organisations to rehabilitate.

- **Community sentences should be responsive:** In our discussions with probation, judicial and court staff, we are constantly struck by how various rules, procedures and regulations constrain their ability to work in more individual and responsive ways with probationers. Our view is that we must liberate frontline practitioners to use their skills and training and exercise greater professional discretion.

This paper sets out 13 recommendations to make community sentences smarter.

Improving the delivery of unpaid work

Unpaid work is the backbone on the community sentence. The latest statistics show that the most common form of community sentences is a community order with unpaid work as the only requirement. This type of straight-forward, 'standalone' unpaid work is often used with the least risky probationers in the probation caseload—over 15,000 probationers last year received a community sentence who had either no or one previous conviction (representing around 23% of the community sentence caseload), with most receiving unpaid work as their only requirement.

However, unpaid work is not always being swiftly delivered. Her Majesty's Inspectorate of Probation (HMIP) found, in 2016, that 35% of probationers had not started their unpaid work within two weeks of sentence.[15] We also know that some areas still struggle to avoid having to 'stand down' probationers who have turned up for their work but are told there is nothing for them to do.[16] For these reasons unpaid work orders can stretch out over many months.

Unsurprisingly, many probationers would much rather get their unpaid work done quickly in one block of days and get the sentence done and behind them, rather than it dragging along. An increase in the speed of unpaid work is also likely to be seen as more credible to the court than a simplistic attempt to assume that more hours equals better punishment. This is achievable. For example, in Scotland, reforms to unpaid work within their Community Payback Orders have focused on improving the speed with which placements are both commenced and also completed.

So instead of dragging unpaid work out across a year-long order, unpaid work could be delivered swiftly. Probationers could be required to complete very short sentences of unpaid work swiftly, so probationers get the punishment done and can move on with their lives and judges can see their rulings carried out. Once they have completed the work, the order will end. And where probationers on standalone unpaid work need access to rehabilitative services, they could be referred to voluntary rehabilitation services through community advice and support clinics such as run at Highbury Corner and Plymouth magistrates' courts or other services (such as women's centres) where appropriate.

Moreover, Government could place a statutory duty on the NPS to use a percentage of its funding to commission the voluntary sector to deliver this standalone unpaid work, requiring them to deliver an increase in the speed and intensity of unpaid work so it is completed swiftly.

Recommendation 1: The Ministry of Justice should direct HMPPS to deliver a short, swift standalone unpaid work orders in which probationers get their unpaid work and the sentence done quickly. They should legislate so courts can set time limits on how quickly unpaid work needs to start and be completed by.

Unpaid work is also the primary way in which probationers can make amends to their communities and to victims of crime. It is clear from inspections that some areas provide effective and meaningful work.[17] But, in our discussions with practitioners, we hear that some unpaid work is of little value— both to probationers in terms of developing their readiness for employment but, more importantly, to the community. We have been told by probation officers in London that there are often not the placements available to make best use of probationers' skills: for example, we heard of a trained carpenter who was nonetheless used to clear a community garden.

All unpaid work should be meaningful, reparative and responsive to community need. We could, for example, again learn from Scotland, where Criminal Justice Social Work (the Scottish equivalent of probation) is part of the local authority. This leads to some variation – for example some areas have women-only activities, while others don't – but it does facilitate the development of placements embedded in the local community. They are required by legislation to consult specific people and organisations on the types of unpaid work activity that should be carried out in their area— including the police, the judiciary, organisations representing victims of crime, voluntary organisations, and public housing authorities. Some areas go beyond this minimum standard incorporating other forms public

outreach, such as via social media.[18]

Unpaid work should also be reparative for victims. It is important that victims of crime are more informed and engaged about unpaid work. There should be more opportunities for victims to be informed about how they can be involved in the nomination of suitable unpaid work activities in their locality and greater awareness among victims of local unpaid work activities completed locally.

Recommendation 2: The Ministry of Justice should require, via legislation, that unpaid work providers to regularly engage and respond to a range of local voices, especially victim's organisations, to ensure unpaid work is delivered in and for the community.

Improving supervision

For cases that are more complex than stand-alone unpaid work, many probationers on community sentences are made subject to supervision. Probationers have to attend regular supervision appointments with their probation supervisor. The purpose of these sessions is to assist probationers to identify the things in their life that need to change and then get support to help them change. It can also be an opportunity for probation officers to refer probationers to other services for help and support to address their needs such as education and training, housing or help for drug and alcohol misuse. Moreover, some probationers are required, as part of their community sentences, to participate in rehabilitative interventions— for example, thinking skills courses, and alcohol and drug treatment.

Yet there is evidence that probation officers are being hamstrung by the way this is currently structured. Over 65,000 community orders in 2017/18 were over 12 months long and it is likely that over 50,000 of these are either low to medium risk. Again, from our conversations with probation officers in the field, the reality of supervision for many of these probationers toward the end of their sentences is relatively light— other requirements have been discharged and the probation officers have made all the referrals they can. We get the distinct impression that the tail end of supervision in community sentences represents unnecessary work for probation officers, in low risk cases.

This concern is accentuated when we recognise the evidence that shows that reduced caseloads can have a positive impact on overall re-offending.[19] The Government recently published 'Draft Target Operating model', which states that, "There is considerable evidence on reducing reoffending that confirms the importance of the quality of the face-to-face relationship that sits at the heart of sentence management."[20] We therefore suggest a crucial shift, reducing the burden of supervising low risk probationers by shortening the length of these community sentences, thereby freeing up probation staff resource for more complex and higher risk cases.

Recommendation 3: The Ministry of Justice and HMPPS should work to shorten the overall community sentence length given to low risk probationers and free up probation staff time.

With resources freed up, we can improve the supervision of higher risk groups. The evidence around desistance and high-quality supervision is clear and in many ways obvious: probationers value direction and also help in assisting them with practical issues. Probationers tend also to report that they want to be listened to, want to see the same officer each time, to have home visits and for their probation officer to take the time to recognise them as individuals and to develop a relationship with them.[21]

An example of this is already in operation in Northern Ireland. Since October 2015, the Probation Board for Northern Ireland has been delivering a community sentence called 'The Enhanced Combination Order' (ECO), and the results are very promising so far. The ECO is focused on higher risk probationers and focuses on rehabilitation, exploring the impact of participants' behaviour on victims and desistance. All participants are offered an assessment by psychologists in respect of any mental health issues and parenting/family support work is also included. A Probation Support officer acts as a link worker, without supervision responsibilities, supporting probationers by navigating complicated access points to services, acting as persistent advocates for their clients, and providing a continuous source of support. Evaluations of this programme have found that the offending rate of ECO participants in the six months following being sentenced was 17.3%, compared to a re-offending rate of 57.7%, in the six months pre-sentencing.[22]

Recommendation 4: Once resources are freed up, the Ministry of Justice and HMPPS should trial the use of enhanced community sentences for high risk of re-offending cohorts of probationers, learning the lessons from Northern Ireland's Enhanced Combination Order.

This enhanced approach can, where applicable, be joined with better joint working with the police

in the management of high risk, repeat offenders. Originally launched in 2008, Integrated Offender Management (IOM) is a cross-agency response to the threat of crime and reoffending faced by local communities, based crucially on partnership between the police and probation (with other agencies playing a supportive role). The most persistent and problematic offenders are identified and managed jointly by partner agencies working together.

Yet, IOM was undermined by the spilt in the probation service. A recent joint inspection of IOM clearly found that "Transforming Rehabilitation had a negative impact on partnership working... It has taken considerable energy and commitment for partnerships to navigate their way through the challenges of the probation changes and make sense of the differing priorities and delivery models of providers."[23] The unification of the management of offenders gives the Ministry of Justice just the opportunity it needs to re-invigorate IOM with the Home Office.

In doing so, it would provide the Ministry with the chance to engage other Government Departments in 'offender management 'in the community, and harness the resources of bodies like Mayors and Police and Crime Commissioners locally to ensure better offender supervision. An increase in police numbers may also create the potential for a higher profile for IOM and an increased level of cross-agency collaboration to deal with the greater numbers of offenders likely to find their way into the system. While not all offenders within IOM schemes are on community sentences, the reinvigoration of IOM would no doubt benefit those offenders supervised under IOM arrangements who receive community sentences, especially those benefitting from enhanced community sentences (see above).

Recommendation 5: The Ministry of Justice should, in collaboration with the Home Office, identify which cohorts of offenders benefit most from the IOM approach.

Recommendation 6: The Ministry of Justice should, in collaboration with the Home Office, refresh the joint IOM strategy and support for the delivery of IOM by sharing best practice. The strategy should be clear about who should provide leadership and governance for IOM within local areas.

Improving rehabilitation

Ministry of Justice analysis finds[24] that, of the probationers on community sentences:

- 13% identified as being in transient accommodation, including having no fixed abode, with just over one-third (36%) having problems with the permanence of their accommodation;
- Over 50% were assessed as out of work, with over 66% having problems in their employment history;
- 20% were assessed as misusing Class A drugs at the time of the assessment;
- 45% had problems with alcohol misuse;
- 29% were in financial difficulties, with a further 51% 'just getting by';
- 49% in the cohort had problems related to childhood relationships;
- 40% had problems with being easily influenced by criminal associates, and a further 20% had significant problems with risk-taking behaviour and over 80% had problems with recognising the consequences of their actions.
- In addition, nearly one-third had mental health conditions (29%), which are particularly prevalent among women (46%) and older individuals (40% of those aged 40 and over) and a formal diagnosis of a mental health condition was reported by 35%. [25]

These factors often occur together, and there are a disproportionate number of probationers with overlapping, complex needs.

Community sentences ought to provide people with the best shot they have at turning their lives around. Moreover, smarter community sentences would not only make sure 'punishments' like unpaid work (see chapter 1) are more delivered more swiftly but so are rehabilitative services. Sentencers need to be reassured that all the sentencing options provided to them by law are actually available. When they order someone to participate in drug treatment, for example, it is understandable if they are then left feeling let down when they find that the probationer can't access those services quickly. This has increasingly happened, however, as drug and alcohol treatment funding in England has fallen by £105m over the last four years (since the government removed the ring fence which prevented councils from cutting treatment to fund other areas),[26] while community-based mental health treatment has also faced real terms cuts in funding from 2011-12 to 2016-17.[27]

The Government has, in the more recent past, invested in the Community Sentence Treatment Requirement programme, developing test beds that where the offender has consented to complete treatment for mental health problems, drug and/or alcohol misuse problems. The early findings are encouraging. Rolling out this programme requires commitment from the Government in terms of funding, including supporting the growth of dedicated ATR/DRR assessors in court and work to ensure CSTRs are adequately supporting neuro-diverse individuals. Moreover, there needs to be a clear commitment to expanding the availability of treatment.

Recommendation 7: The Ministry of Justice and the Department of Health should roll the CSTR Programme out across the country and urgently prioritise increasing the overall level of funding available for drug and mental health treatment for probationers in the community in the next Spending Review, and reconsider whether the funding should be re-ring fenced.

Improving information to victims

Alongside making community sentences better at delivering punishment and rehabilitation, smarter community sentences should also be more reparative, and not just when it comes to unpaid work. A 2012 study found that victims are open to the value of community sentences— victims “do not see any contradiction in valuing both retribution and rehabilitation”.[28] Yet, along with the wider public, they have doubts about them in practice, in large part because they have little information about them.[29]

This lack of information is not, it must be said, confined just to the lack of feedback loops between victims and probation. While the value of the services provided by victims’ organisations is often valued by victims, this does not compensate for the failure of the criminal justice authorities to treat victims with due seriousness and consideration. Sentences are meant to be explained to victims of crime, but in practice victims are often left unclear.

This can be changed. With the mechanisms being delivered under court modernisation, with increasing use of online platforms connecting the system to the citizen, we must provide victims with clear, understandable information about what community sentences are. Explanations of community sentences should include a breakdown of what the sentence in that victim’s case involves and the consequences for the probationer if they fail to comply. This information should be presented clearly and victims should have the opportunity to ask questions.

Recommendation 8: The Ministry of Justice should ensure that the HMCTS court modernisation programme provides victims with clear, understandable information about what the community sentence ordered in their case means in practice and gives them the opportunity to ask questions.

Improving tagging

Last year, around 5,000 probationers were subject to some form of electronic monitoring.[30] The majority of these are subject to Radio Frequency tagging (where probationers are tagged with an ankle bracelet and obliged to stay at a specific location at specific times, linked to a court-mandated curfew). Since 2018, courts have been able to deploy near real-time tracking of an probationer's location by Global Positioning Satellite (GPS) and, in some places, courts can order sobriety monitoring, using transdermal tags to measure alcohol levels of probationers.[31]

As community sentences are re-thought, it can be easy to assume that these types of technology are the answer to 'fixing' community sentences. While our research has previously found strong public support for the wider application of new tagging technologies,[32] even welcoming them as an alternative to short prison sentences, we recognize that new technologies don't deliver results on their own. Rather they offer the means to get better outcomes when deployed intelligently by trained professionals. Leveraging technology to enhance rather than replace professional roles is the key to getting the most from these new tools.

And yet probation's role in shaping how electronic monitoring is deployed is currently constrained by how it is commissioned. Electronic monitoring practice is determined between private companies and a remote headquarters which commissions it. Operationally, this mean that it is private companies who not only supply the technology but also supervise these tagging compliance systems. Some probationers, for example, on standalone electronic monitoring requirement never see a probation officer. At present, when a court orders a probationer to be monitored electronically, the supervision of the tag is in the hands of the private companies who deliver the technology, while everything else is in the hands of their probation officer. Even where the information about compliance is efficiently transferred between the tagging company and the probation provider (not always a given), adjusting the terms of the tagging requires going back to court, even when this could be for a positive reason (such as the fact that the probationer is now in work and needs to leave their house earlier than a curfew allows).

Other jurisdictions provide electronic monitoring in a much more responsive way. In the Netherlands, for example, monitoring regimes are much more closely integrated into probation supervision. The private sector provides the monitoring equipment but responsibility for installation, maintenance and, crucially, decision-making is held by public sector agencies. can changed to reflect a probationers' progress. Probation officers can gradually relax curfew conditions as the individual makes progress. Where probationers are non-compliant initial decisions about how to respond to violations are taken by probation officers on the basis of the individual's risk and priority level relating to individuals. Electronic monitoring reports are used in supervision sessions with monitored individuals to discuss their compliance.[33]

A more responsive system, along the lines of the Dutch model, would also complement the roll out of different types of tagging, including wider use of GPS and transdermal tags, as well as future technologies. By ensuring that more local probation services have a role in what electronic monitoring is commissioned, they can be more involved in shaping emerging forms of electronic monitoring, rather than, as is now the case, simply acting as one of its consumers. The danger is that continuing with the existing arrangements, remote surveillance "could become the overriding norm in offender supervision, to which optional probation is merely added in when necessary," instead of being "shaped by humanistic, people-centred interests" of probation.[34]

Recommendation 9: The Ministry of Justice should legislate to give probation officers the powers to deliver more responsive monitoring of tags, as part of their supervision of community sentences, including the ability to vary hours without the need to go back to court and to receive direct access to tagging data.

A smarter approach to tagging would also provide opportunities to involve victims in tailoring the monitoring to respond to their needs. In many circumstances, especially in domestic abuse cases, tagging should take into account victims' needs, giving them a voice in setting the restrictions on perpetrators to better guarantee their safety and the safety of their children. For example, in the US, GPS tagging technology has been used to give victims of domestic violence more control over their own safety, enabling them to have a voice in what restrictions are placed on suspected perpetrators while the trial process is ongoing. [35] Tailoring electronic monitoring to victims' needs, for both bail supervision and community sentences in domestic abuse cases, is another way of making punishment more responsive.

Recommendation 10: Ministry of Justice should legislate to give victims of domestic abuse a role in setting the restrictions of probationers who are perpetrators on both bail supervision and on community sentences.

Improving collaboration between court and probation

Research indicates that probationers must have a practical incentive to complete court orders. Moreover, probationers need to be able to understand the requirements they are being asked to complete and have a clarity about what the rules, incentives and sanctions are. **Extensive research suggests coordinated, collaborative work between courts and community services, including through graduated sanctions, judicial monitoring and improving compliance processes, can provide a powerful mechanism to deliver these aims.**[36]

Improving diversion at court

Yet there are clear instances where we are not doing a good enough job in ensuring that courts and probation (and other community services) work better together. For example, an evaluation of liaison and diversion schemes in 2016 (which identify people who have mental health, learning disability, substance misuse or other vulnerabilities and refer them into services at police stations and court) was unable to detect whether they had led to reduced use of remand or custodial sentences nor whether they had made a material difference to longer term re-offending rates.[37] In part, this is because these services have no overall mechanism to change the decisions of the court. Providing better access to treatment, without a parallel commitment from the courts to change a probationers' path ahead within the criminal justice system, is a missed opportunity.

Yet, when we look at other jurisdictions, we can see a different way of doing things. For example, in Victoria, Australia, the Assessment and Referral Court works with individuals due to go to court on bail who have been diagnosed with a range of mental health illnesses or other vulnerabilities.[38] Sentencing is deferred while the accused participates in an individual support plan, while also meeting regularly with their case manager and being brought back monthly before the same judge, to check on their progress. If the individual's progress is to the satisfaction of the Court, the Court may discharge the accused without any finding of guilt. The findings into the Assessment and Referral Court are positive: 82% of participants successfully completed the program and 43% of participants did not re-offend in the two years' post-completion.[39]

Crucial to this model is the clear expectation that the accessing services will materially change the court's decision, giving probationers an incentive to comply in order to receive a better sentence. Evidence from the use of Structured Deferred Sentences in Scotland (in which Sheriffs, if satisfied with compliance, can discharge individuals from the court case altogether) indicates that the prospect of a better sentence may act as an incentive to compliance.[40]

By using existing legislation on deferred sentences, and existing services such as liaison and diversion and community advice and support services, we could use the court's authority to deliver more effective routes for people into services and materially changing their justice pathway, especially vulnerable women who are likely to benefit from referral to a women's centre.[41] The majority of women sentenced to custody receive sentences of less than 12 months, often for persistent low-level offences, and there is a higher prevalence of reported needs among women in custody, including around substance misuse, trauma and mental health.[42] Regarding drug use specifically, we know that short sentences such as for drug use and individual possession are disruptive and costly to society more widely.[43]

The greater use of deferred sentencing would also provide space for restorative justice practices to be deployed. Again, this could be an area where the Ministry and Home Office could work with PCCs to ensure restorative justice services are resourced to accept more referrals from court via deferred sentences, while the overall envelope of funding for victims as commissioned by PCCs remains the same.

To develop a similar system in England and Wales would not require a significant change to legislation. The ability of judges to defer sentencing exists: it's just seldom used. We understand deferring sentences is not used much as they complicate HMCTS's statistics on timeliness and efficiency — when public safety is on the line, this is the tail wagging the dog.

Recommendation 11: The Ministry of Justice should direct HMPPS and HMCTS to trial deferred sentencing for vulnerable probationers to improve routes into services and out of the criminal justice system.

Using the authority of the court

Following a similar pattern, the evidence suggests that when we combine the expertise of multi-agency service providers with the authority of the court, we can create positive behaviour change and make a real impact on reoffending.[44] A number of other jurisdictions, including Scotland, Northern Ireland, Australia, Canada, New Zealand and the USA, actively involve the courts in efforts to both strengthen the accountability of community sentences but also to promote rehabilitation. England and Wales is significantly behind other jurisdictions, including in Scotland and Northern Ireland, in using this type of approach. This type of 'problem-solving' has recently been endorsed by the independent Welsh Commission on Justice. It is an approach already successfully used in Family Drug and Alcohol Courts in public family law, which are being funded and rolled out by this Government, and would fit with the Government's commitment for piloting a problem-solving integrated domestic abuse court.

Problem-solving court approaches combine judicially led accountability with a multi-agency supervision team to motivate change. Notably, they achieve this enhanced approach while operating out of existing court buildings and using the same sentencing options as traditional courts. The key objective of adopting such an approach would be to reducing re-offending through avoidance of short-medium custodial sentences.

We therefore suggest that the Government could implement a problem-solving suspended sentence for probationers with substance misuse issues as an alternative to longer prison sentences. The court could pass a new type of suspended sentence order, as an alternative to up to four-year custodial sentence. Probationers would be required to participate in and comply with a demanding order of treatment, supervision, monitoring and reparation and failure to do so would mean the automatic imposition of the specified custodial sentence.

The court would regularly review the probationer's progress. The review would deploy consistent judicial monitoring, with the same judge reviewing progress on a regular basis, to hold probationers to account. The multi-agency supervision team[45] would use these reviews to report on progress at the review hearings and adjustments could be made more flexibly, either to reward progress or to provide additional restrictions. The reviews would be used as a way of clearly communicating, and deploying, a set of graduated sanctions and incentives, including the ability to 'step up' and 'step down' the frequency of reviews or drug tests, as well as incentives like verbal or written praise, vouchers, certificates and 'graduation' ceremonies on successful completion.

To avoid sentencers using this for probationers who would otherwise have received lesser penalties, the model should be reserved for cases bound for Crown Court in which the offence(s) would otherwise merit a custodial sentence of up to four years.

Recommendation 12: The Ministry of Justice should legislate for a new 'problem-solving' suspended sentence for probationers with complex substance abuse issues in which they are regularly monitored by the same judge.

Smarter compliance

Compliance with community sentences has emerged as an area of particular concern since the Transforming Rehabilitation reforms. A case file review by HMI Probation indicated that non-compliance with community sentences was a growing issue, undermining public protection and impacting on community sentences' ability to reduce re-offending.[46]

These issues stem, in part, from the sclerotic way in which enforcement processes have developed

over time. Once breaches of a community sentence reach a certain level, probationers have to be sent back into a lengthy court process for the breach and re-sentencing to be considered, even though the reasons for the original breach may be widely different. We still, moreover, labour under an archaic set of rules, where, for example, a breach is not a formal breach until a letter is sent to a probationer's address. This all leads to delay and a system that takes weeks to respond.

Our discussions with probation staff suggest that the current enforcement process unnecessarily limits the professional discretion of probation officers (who often try and work around the system anyway) and is too focused on the drawn-out process of instituting a formal court hearing. The current enforcement process can also seem arbitrary and opaque to probationers. How do we really expect probationers to comply when the rules of what they have to do and what the consequences are, at times, so unclear, and rest as they do on the possibility that, one day, they may go back to court, days and weeks after the infraction they committed, and then they only may receive a significant sanction?

A smarter system would also help practitioners identify quicker and more appropriate responses to people who do not comply with the conditions of their community sentences. Our review of the evidence suggests that an effective system for responding to non-compliance should offer timely, responsive and proportionate sanctions[47], use "problem-solving" techniques to address the issues driving non-compliance[48] and, crucially, feel fair and transparent to probationers[49]. For example, probation officers could have the power to respond to breaches without going back to court by extending the number of unpaid work hours to be served (within an acceptable range) or increasing the intensity with which they will be completed.

Or we could adopt practices like the informal 'compliance meetings' developed by Jersey's probation services. There, they use these as an initial response to non-compliance.[50] These meetings, which are initiated after two unacceptable absences, are attended by the probationer, their probation officer and the officer's manager. The meeting is intended to help people complete their order successfully if possible, providing a warning of the consequences of non-compliance but also exploring factors which might be impeding compliance.

Moreover, we have a system that focuses on failure and does little to reward success. Given community sentences are used as a punishment for wrongdoing where the punishment 'fits' the crime, it follows that once the punishment is over, we need to provide a way for wrongdoers to earn redemption and gain re-acceptance into the community of citizens. And yet, when probationers do complete their ceremonies, we currently do very little to mark this. In other jurisdictions, we have witnessed events such as 'graduation' ceremonies, where probationers are brought together in court and a ceremony is held to congratulate them on getting off drugs and finishing their sentence. In England and Wales, we have seen small examples of probationers' achievements being recognised with letters or certificates. For a number of probationers, who have experienced difficult relationships with the state, for example, through the education system or the care system, it may be the first time anyone in authority has ever said well done.

Recommendation 13: The Ministry of Justice should provide new powers to probation officers to manage compliance in a more dynamic and responsive way, and ensuring that successful completion of community sentences is recognised.

Conclusion

We believe it is time to reform community sentences. In doing so, we need to move away from the clichés of the past about tough or soft justice. Instead, the unification of the management of offenders within the National Probation Service and the forthcoming Sentencing White Paper are real opportunities for this Government to make community sentencing smarter.

From our discussions with probation practitioners and judges over the past five years, we believe community sentences should be delivered swiftly, should provide probationers willing to change the help they need, and should be reparative to communities and victims. We do so recognising that, in many places, practitioners strive to do these things every day. As we have set out, we see it as vital to give probation practitioners greater powers, freedom, discretion and flexibility to do their jobs. Only then will we have smarter community sentences.

Endnotes

1. In this document, we refer to community sentences to refer to both community orders (CO) and suspended sentence orders (SSO). We recognise that technically an SSO is a custodial sentence but the fact that it is primarily served in the community and overseen by probation makes it much more akin to a community order.

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14. ibid

15. Her Majesty's Inspectorate of Probation. (2016). *A Thematic Inspection of the Delivery of Unpaid Work.* Available at: https://www.justiceinspectorates.gov.uk/hmiprobation/inspections/deliveryofunpaidwork/

16. Her Majesty's Inspectorate of Probation. (2019). *Report of the Chief Inspector of Probation.* Available at: https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2019/03/HMI-Probation-Chief-Inspectors-Report.pdf

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[24.] Ministry of Justice. (2013). *Transforming Rehabilitation: a summary of evidence on reducing reoffending.*

[25.] While mental health problems may be linked to offending behaviour, and there is evidence of a specific link between psychopathy and violent reoffending, any such relationship is likely to be complex and mediated by other factors, such as poverty, poor social environments and difficult family and interpersonal relationships.

[26.] Centre for Social Justice (2019). *Road To Recovery. Addiction in our society – the case for reform.* Available at: https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2019/08/Road-to-Recovery-CSJ.pdf

[27.] Trade Union Congress. (2019). *Breaking Point: the crisis in mental health funding.* Available at: https://www.tuc.org.uk/sites/default/files/Mentalhealthfundingreport2_0.pdf

[28.] Victim Support (2012). *Out in the open: What victims really think about community sentencing.*

[29.] Ibid.

[30.] Ministry of Justice (2019). *Electronic monitoring caseload.* Available at: https://data.justice.gov.uk/contracts/electronic-monitoring

[31.] Court-ordered sobriety monitoring, using transdermal tags to measure alcohol levels of probationers, was first piloted in London in 2014 after legislation created the Alcohol Abstinence Monitoring Requirement (AAMR) which courts in designated areas could use for those whose offending was drink-related. An evaluation of the pilot cautiously suggested that compliance appeared "higher than for some other orders and the approached was extended across London in 2016 and is being trialled in other areas.

[32.] ibid

[33.] Bowen & Gibbs. (2018). *Just Technology: Emergent technologies and the justice system... And what the public thinks about it.* (London: Centre for Justice Innovation). Available at: https://www.justiceinnovation.org/publications/just-technology-emergent-technologies-and-justice-system-and-what-public-thinks-about

[34.] http://probation-institute.org/wp-content/uploads/2017/12/Briefing-Paper-117-Nellis.pdf

[35.] Erez, Ibarra, Bales, & Gur. (2012). *GPS Monitoring Technologies and Domestic Violence: An Evaluation Study.* National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Accessible at: https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf

[36.] Bowen, P. & Whitehead, S. (2015) *Problem-Solving Practice: An Evidence Review.* Centre for Justice Innovation: London.

[37.] Disley et al (2016) *Evaluation of the Probationer Liaison and Diversion Trial Schemes.* RAND Corporation. Available at: https://www.rand.org/pubs/research_reports/RR1283.html

[38.] The accused person must be diagnosed with one or more of the following: a mental illness; an intellectual disability; an acquired brain injury; an autism spectrum disorder; a neurological impairment, including but not limited to dementia. The diagnosis listed above must cause a substantially reduced capacity in at least one of the areas of: self-care; self-management; social interaction; communication.

[39.] Rutter et al (2017). *The Assessment and Referral Court (ARC) list & Borderline Personality Disorder (BPD) – are they compatible?*, Australian Catholic University. Available at: https://aija.org.au/wp-content/uploads/2017/05/Rutter-Chesser-Hardy.pdf

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[41.] Ministry of Justice. (2018). *Female Offender Strategy.* Available at: https://assets.publishing.service.gov.uk/

government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf

42. MoJ Analytical Services (2013) 'Gender differences in substance misuse and mental health amongst prisoners'

43. Dame Carol Black is currently undertaking an Independent Review of Drugs, looking at vulnerable drug users, including within prisons.

44. Bowen & Whitehead. (2015). *Problem-Solving Practice: An Evidence Review.* Centre for Justice Innovation: London.

45. The probationer themselves are likely to be supervised within one of the many pre-existing Integrated Offender Management schemes (IOM). This team would report on progress at the review hearings and adjustments could be made more flexibly, either to reward progress or to provide additional restrictions.

46. Dame Glenys Stacey (2017) *Probation services - getting back on track*, 2017 Portal Lecture delivered at the Institute of Probation 2nd Annual Practitioners Conference, Sheffield, 13 June 2017

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48. Andrews, D. A. and Bonta, J. (2010) *The Psychology of Criminal Conduct*, 5th ed. New Providence, NJ: LexisNexis/ Matthew Bender.

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About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK's justice systems. We are a registered UK charity.

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