

# Fitting the Crime



Reforming community sentences:  
Mending the weak link in the sentencing chain

Robert Kaye

Edited by Blair Gibbs

Foreword by Louise Casey CB



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# Glossary

**ASBO (Anti Social Behaviour Order):** contractual sanction for anti-social behaviour created by the Crime and Disorder Act 1998.

**CAFCASS:** the Children and Family Court Advisory and Support Service is a body set up to safeguard and promote the welfare of children involved in family court proceedings. It was created in 2001.

**Carter Review:** Lord Carter's review of prisons made recommendations on how to improve the prison and probation systems. It recommended that NOMS be established.

**Caution:** a formal sanction applied by the police where a crime is detected and the suspect admits guilt, but the offence does not warrant a prosecution in court.

**Community Payback:** launched in 2003, this is a scheme operating under the Unpaid Work element of community sentences. With this requirement, offenders must undertake between 40 – 300 hours of unpaid labour.

**Community Sentence:** this is a non-custodial sentence issued by the courts as a formal sanction for a proven offence. There are normally several components to a community sentence, including curfew, supervision, accredited programmes and Unpaid Work.

**CPS (Crown Prosecution Service):** established in 1986, the agency responsible for bringing criminal prosecutions in England and Wales, headed by the Director of Public Prosecutions.

**Criminal Justice Act 2003:** this Act introduced major reforms to criminal law and sentencing including the current form of community sentence: Community Orders. These have been in force since 2005.

**Custodial Sentence:** this is a sentence handed down by a court that requires the imprisonment of an offender for a determinate or in some cases, indeterminate, period.

**Fine:** any monetary penalty imposed by a court as a sanction for a proven offence.

**FPN (Fixed Penalty Notice):** a monetary penalty issued by the police in response to minor offences where a charge and summons is not warranted.

**HM Chief Inspector of Probation:** an independent Inspectorate that reviews the effectiveness of the probation of adults and juveniles. It was founded in 1936 and granted independence in 1993.

**Home Detention Curfew (HDC):** this scheme applies to offenders serving sentences of between three months and four years. These curfews are normally enforced with the use of electronic tags.

**Home Office:** Whitehall department that, until the creation of the MoJ in 2007, was responsible for prisons and probation.

**IPP (Indeterminate Sentence of imprisonment for Public Protection):** a sentence of imprisonment with a minimum tariff beyond which an offender can be detained indefinitely unless and until they satisfy sentence requirements and the Parole Board that they are safe to be released.

**MoJ (Ministry of Justice):** Whitehall department responsible for criminal justice policy, the administration of prisons and probation with oversight of HM Courts Service. Established in 2007.

**Multi-Agency Public Protection Arrangements (MAPPA):** name given to those arrangements that are tasked with the management of sex offenders, violent offenders and those offenders who otherwise pose a serious threat to the public. These were introduced by the Criminal Justice and Court Services Act 2000 and have been in force since 2001.

**NOMS (National Offender Management Service):** executive agency of the MoJ, established in 2004 to bring together prisons and probation following the report by Lord Carter.

**Offences:** crimes categorised in law and eligible for a court imposed sanction. These can be indictable offences (tried in the Crown Court) or summary offences (tried in the magistrates' court). Some offences can be tried either way: at Crown Court or magistrates'.

**Parole Board:** the independent body responsible for adjudicating on the release of offenders from custody and supervision.

**Priority Prolific Offenders (PPOs):** offenders that pose the greatest threat to the public. Repeat offenders are responsible for approximately half of all crime.

**Probation:** is a sentence issued which is not a custodial sentence. It may take effect from the initial sentencing or alongside a custodial sentence, as is the case with Release on Temporary License.

**Probation Trust:** this is the smallest constituent of the probation system in England and Wales. They form part of NOMS and are

divided into regions, i.e. the London Probation Trust. It is through Probation Trusts that the day-to-day management of offender probation takes place. They were introduced in 2008 by the Offender Management Act 2007.

**Release on Temporary License (ROTL):** is leave granted to offenders for a limited time. This could be for compassionate reasons or in order for the offender in question to undertake job training.

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## Foreword

This rigorous and common sense report from Policy Exchange is a breath of fresh air. I said in my Cabinet Office review on crime in 2008 that the public want the basics right: a clear acknowledgement of the difference between right and wrong and a strong sense that when someone breaks the law they face appropriate consequences. This does not seem a lot to ask of our criminal justice system.

Prisons are full and the new Coalition Government has pledged to reduce numbers of offenders sent there. This means more community sentences – and possibly for more serious crimes. Therefore it is imperative that community sentences are given the radical overhaul this report outlines.

Central to this is the need to ensure that one of the foremost tenets of sentencing is no longer ignored in community sentences – and that is punishment. How on earth can we expect victims of crime and the public at large to back such reforms if they, rightly, have little confidence that community sentences actually punish wrongdoers?

In a civilised society, the law demands that when someone becomes a victim of crime, they do not take the law into their own hands. They step aside and let the State deal with that perpetrator on their behalf. But the victim should be able to expect that when the State catches and prosecutes a criminal on their behalf, punishment should be part of that deal. That's not to say that victims don't support rehabilitation – they do, as they don't want a crime to happen to anybody else. But it's not an either or; and at the moment punishment in community sentences is an optional extra when it should be at the forefront.

I represent victims and I need to be able to look them in the eye when an offender is given a community sentence – often for a serious crime – and say that the sentence will adequately punish the offender for what they have done and thus deter them from doing it again. At present can I really say that making costumes for the Notting Hill Carnival, working in a charity shop or making tea for the elderly is a punishment? No – it’s what civic-minded volunteers choose to do.

We need to change who will be in charge of overseeing these sentences, removing it from the Probation Service, some of whom see punishment at best as an optional extra and at worst as a dirty word. But punishment is not a dirty word for victims and the public as a whole – and nor should it be. And it’s not good enough that when offenders don’t turn up, excuses such as ‘I forgot’ or ‘I slept in’ are accepted or that there is a blind eye turned towards breaches. That is a slap in the face for a victim expecting proper punishment.

When even 50% of magistrates see community sentences as a soft option what hope have we of convincing the public that anything short of prison fits the bill for serious crime? And if magistrates believe prison to be the only credible punishment, then why wouldn’t we expect them to sentence accordingly?

I have called time and again for community sentences to be tough, to be intensive, and to be visible to local communities against which harm has been done. But I have come up against if not political reluctance, then institutional cultural reluctance and even outright hostility from many in the criminal justice sector. It’s as if the legal principle of punishment in sentencing is somehow unseemly – rather than a legitimate and correct response to those who step outside society’s agreed rules. To have the confidence of those who pass sentence, the public, and of victims in particular, this must change. Turning this report’s recommendations into action would, I believe, go a long way towards achieving this.

**Louise Casey CB**  
**Commissioner for Victims and Witnesses**

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## Executive Summary

- Community sentences are the most commonly used sanction by the courts in England and Wales and there has been an unprecedented growth in their use in the last twenty years. The pressure of budget cuts and the Coalition government's plans to reduce the prison population (partly by diverting offenders from short-term prison sentences) is likely to mean that community sentences will play an even bigger role in the criminal justice system in the years ahead.
- At present, courts impose and legislation defines two basic sentencing outcomes: a fine or a custodial term. Both are necessary but what exists in between is neither fish nor fowl: a sentencing order that does not work as a punishment and is applied too late and to too many serial offenders to work as a rehabilitative disposal.
- The public generally believe that the Prison Service is effective at protecting the public but generally ineffective at reducing reoffending (-27%). However, they believe that the Probation Service is both ineffective at protecting the public (-9%) and at reducing reoffending (-23%). It is community sentences – not prison – that are the weak link in the sentencing chain.
- Public confidence in community sentences is low, with many believing them to be a 'soft option'. Although people see a role for them, they are generally not respected by the public who question their effectiveness as a punishment and their record at stopping further offending.
- New polling commissioned for this report illustrates the scale of the challenge in turning around public opinion of community sentences. Half of the public (49%) are opposed to community

sentences being used as an alternative to short-term prison sentences, which reinforces the case for community sentences to be justified on their own terms, rather than always pitched as a more effective and/or cheaper alternative to short spells in custody.

- The overall public view of current community sentences is also strongly negative. More than a third (38%) think the best phrase to describe them is “a soft option”, followed by a fifth (22%) who think they are “weak and undemanding”. However, a further 22% do think that community sentences are “good for first time offenders”. The public’s preference for community sentences is also revealing. When asked what community sentences should be primarily designed to do, half (51%) said “Make criminals pay something back to communities affected by crime”, followed by a fifth (22%) who thought they should “punish criminals and deter crime”.
- Even sentencers have their doubts: a 2008 survey of magistrates by the Probation Service found that almost 50% agreed that community sentences were a ‘soft option.’
- Previous attempts to win over the public did not involve systemic reform of the sentences themselves, largely because previous governments were blind to their failings and backed them as disposals because they were comparatively cheap.
- Instead of accepting their shortcomings and working to fix their flaws, Ministers attempted to build public confidence via numerous attempts to re-brand community sentences, with the most punitive type, Unpaid Work, badged as “Community Payback”. None of these attempts have worked to address public concerns.
- Unless community sentences become respected, then the public will not support the policy shift now underway to expand their use and apply them to more offenders in lieu of a short custodial sentence.

- To be respected, politicians and policymakers need to resolve existential issues around the purpose of these sentences; address internal flaws in sentencing design; improve the administration of the sentences themselves and change the nature of the activities that form part of the order.

**This report finds that:**

- Current community orders are now a major category of disposal in the criminal justice system, used more frequently than ever before.
- Whilst the number of community orders issued has increased by almost 10% in the last four years, the sentences have also become less drawn-out, with an increase in the number of offenders given orders lasting one year or under and a big fall in the number of orders lasting more than two years. The average order now lasts for just over a year.
- There are also many more restorative and rehabilitative components available to the courts to apply disposals with multiple conditions to take account of offending characteristics and circumstance. This has made them more attractive as sentencing options for young offenders, who receive proportionately more community sentences now than 15 years ago.
- However, community sentences do not reflect the priority that the principles of sentencing – enshrined in legislation – afford to punishment. Sentencing in criminal cases is designed to perform a number of inter-related functions. First, it is intended to punish a wrongful act. The prospect of punishment is, in turn, intended to deter offending. Third, imprisonment and, to a lesser extent, other penalties, incapacitate offenders by depriving them of their liberty. Fourth, some sentencing options provide the opportunity of rehabilitation to tackle the causes of an offender’s behaviour. Finally, sentences may offer the prospect of reparation to individuals or communities by requiring offenders to make amends for their

crimes. The 2003 Criminal Justice Act sets out these principles clearly, with punishment as the first of the four principles.

- The diminished role of punishment in community sentences is due to existential tensions that have never been addressed and the cultural reluctance of the Probation Service to operate the principle, favouring instead a treatment-model centred on rehabilitation. Because of this long-standing ‘philosophical confusion’ about the role of community sentences, throughout the evolution of the sanction it has never been clear whether it was primarily intended to be punitive or rehabilitative. Nor was it clear for which offenders and which offences it was appropriate.
- This existential flaw has gone unaddressed while community sentences have expanded rapidly, applying now to many more offenders. Community sentences are now applied to more hardened offenders with longer criminal records and in response to more serious offences.
- Community sentences are applied now to more cases of violence: the proportion of violent offences resulting in a community sentence (or suspended sentence) has risen over the past decade from 40% to 57%. Even among the more serious offences tried in Crown Court, the number of cases resulting in a community sentence has risen from a third in 1999 to over 40% in 2009, and on current trends community sentences will outstrip custody for serious violent offences by 2015.
- While those disposals with a punitive element, like Unpaid Work, appear more successful at preventing reoffending, the regime as a whole is underperforming, with low completion rates and high rates of breach. More offenders are receiving new community sentences despite a history of multiple previous sentences.

“For those serving such a sentence in 2008, reoffending rates suggest they committed almost a quarter of a million crimes in the following 12 months”

- The underperformance of community sentences can be illustrated by reference to completion rates and reoffending. Completion rates have improved but in 2009 only 52% of community orders were completed successfully and in full. A third were not completed satisfactorily with one in ten terminated early because of a reconviction.
- Community sentences are also not working to prevent future offending. Reoffending rates – although not directly comparable with headline rates for those leaving custodial sentences – do show high rates of reoffending for those given community sentences. For those serving such a sentence in 2008, reoffending rates suggest they committed almost a quarter of a million crimes in the following 12 months of which over 1,500 will be very serious offences such as murder, rape and robbery.
- The chronic underperformance of community sentences is due to failures of design and operation. They are an inconsistent mix of both punitive and rehabilitative interventions, given for different offences, applied to different offender groups and at all stages of a criminal career. Even Community Payback, the most punitive of orders, is insufficiently demanding as a punishment in many cases. Too many hours worked by offenders on Community Payback involve light duties that ordinary people undertake for charitable reasons and are by definition, not a real punishment.
- Such activity does not reflect public views of what an appropriate punishment is: people support offenders cleaning streets, removing graffiti and maintaining parks, but none of these activities dominate the work that offenders on Unpaid Work schemes actually do. A large proportion of hours worked in the probation areas examined for this report were individual placements in charity shops.
- Community sentences are not intensive: The Criminal Justice Act 2003 defined the minimum and maximum number of hours of

Unpaid Work that courts could impose, stipulating a person may work no less than 40 hours and no more than 300 hours. Therefore, the minimum requirement is for six hours Community Payback per week, meaning that an Unpaid Work requirement may take as much as a year or even longer to complete. A 90-hour Unpaid Work requirement has been described as “intensive”, even though it applies over two years. Even where unemployed offenders are eligible for ‘intensive’ delivery of Community Payback – currently applied only to knife crime offenders – this equates to a requirement of only 18 hours per week over a period of three days.

- Visibility of these sentences is improving but remains poor. Many hours worked on Community Payback are on individual placements, out of public view – often in charity shops or luncheon clubs. Visible groupwork placements remain the exception, and even with these, while there have been a number of successful measures to ‘sell’ local Community Payback initiatives in local media, similar moves to publicise Community Payback projects at a national level have been much less pronounced.
- Supervision and enforcement of conditions is also inadequate. A 2008 report revealed that the Probation Service turned a blind eye to breaches, which were reported officially in around 34% of cases. However, with a documented reluctance to enforce conditions and notify breaches, the true rate of non-compliance is probably far higher.
- The government’s reforms to bring probation and prisons together in the National Offender Management Service (NOMS) has not delivered the diversity of providers that was expected, and the Probation Service’s monopoly on the administration of community sentences remains largely unchallenged. Aside from other shortcomings (see: *Carter But Smarter: Transforming offender management, reducing reoffending*, Policy Exchange, 2010), NOMS has had no meaningful impact on improving the operation of community sentences.

- Certain features of community sentences are more likely to punish appropriately, engender compliance and reduce reoffending. Evidence of what works suggests that a focus on punishment, with intensive orders that involve purposeful work with a regime of smart sanctions applied for non-compliance can deliver effective community disposals.
- Examples of better practice at home and alternative schemes abroad illustrate what features and practices might be integrated into a new model of successful community sentences in England and Wales. Schemes in the United States involve offenders working on manual labour projects with a clear public benefit – such as social housing construction and cleaning services for police vehicles. Community sentences in Holland are more rigorously supervised and have higher completion rates.

**This report recommends:**

- In order to mend the weak link in the sentencing chain, radical reform of community sentences is required to define their core purpose, fix the design of the sentence, and improve the operation and delivery of the orders themselves.
- For community sentences to be respected, and therefore in a position to be upscaled as a sanction, they must become effective as punishments. Given that the Probation Service is increasingly working with serial offenders, whose offending is related to criminogenic factors such as drug addiction, the need for supervision is all the greater, as is the need for intensive rehabilitative work. However, the argument for going easy on the offender by way of punishment is much weaker. It is not what the public expect, and neglecting the punishment element is no longer a proportionate response to the type of offending that is now dealt with by way of a community disposal. Moves to expand even further the use of community sentences will inevitably involve them being applied to a growing number of serious offenders who will warrant a punishment that fits the crime.

- More emphasis on punishment will help convince the public of the value of these sentences, but punishment makes sense empirically too: community sentences with a punitive element show better results and are more likely to arrest the escalation of an offender's criminal activity – a vital crime prevention objective.
- Rehabilitation is important – especially for young and first-time offenders – and should remain a key concern for both sentencers and supervisors. However, it is misguided to allow rehabilitation to take precedence in a sentence to the point of excluding any real punishment for the original offence. Doing so dilutes the deterrent effect of the sanction and weakens it in the eyes of the public.
- Rehabilitation should remain a vital complementary feature of many of these orders, with many existing elements (accredited programmes, treatment for addiction etc) necessary and appropriate too, but community sentences must have punishment as their principal *raison d'être*.
- To reflect this, a clear and discreet sentencing option should be introduced. The generic Community Order should be abolished and Community Payback radically reformed. Rather than another ill-fated rebranding effort, or a renewed attempt to tighten up certain conditions, the existing disposal should be replaced entirely with a new form of community punishment that is bigger in scope and more focused in purpose.
- The new punishment should be a distinct sentencing option, sitting between a fine and a custodial sentence, and should be known as a “Work Order”. When legislation creating new offences is introduced, in addition to setting out the maximum financial and, where applicable, custodial penalty, the legislation should also set out the maximum length of a Work Order.

- Work Orders should be more intensive, more visible and more closely supervised. They should also incorporate new incentives for compliance, new sanctions for breach and more worthwhile work activities.
- When resources allow, there should be an assumption that offenders not in employment, education or training should normally undertake at least five full days of work a week. Work Orders – even those for the maximum of 300 hours – should be completed within weeks and months, rather than years. For unemployed offenders, no Work Order should exceed one year in duration.
- To enhance visibility, details should be published of all projects after the event, including the nature of the work and the number of hours undertaken, in a publicly accessible online register. Such a tool could be linked to the roll-out of detailed local crime maps, so the sentence arising as a punishment for an offence was as clear to local residents as the nature and location of the offence itself.
- More use of modern satellite tagging of higher-risk offenders or those most likely to abscond while serving a Work Order should be considered. Supervisors should be given the ability to impose tagging or supervision requirements on offenders who miss scheduled work placements.
- Currently, probation officers have no flexibility to modify the conditions of an order to reward engagement so Work Orders should incorporate new incentives for compliance, including variation in work hours dependent on conduct, initiated by the supervisor and within an envelope laid out by the court at point of sentence.
- Work Orders should also incorporate new sanctions for non-compliance, including benefit withdrawal activated automatically when breach episodes occur, with further non-compliance potentially triggering forfeiture of an offender's assets, seized by private sector agents in accordance with pre-determined court conditions outlined at time of sentence.

- Work Orders should involve a revised and expanded range of work options with an emphasis on: physical labour conducted outside and in groups; projects with a clear public benefit; and projects linked to national public occasions or with a symbolic value. Overseas examples of schemes that provide a direct public benefit – such as work teams building social housing for low-income families in Minnesota and Maryland – should be replicated.
- Equally, some existing activities undertaken by offenders on “Community Payback”, like placements in charity shops and luncheon clubs, and light recycling work such as sorting costume jewellery – are insufficiently demanding and with exceptions for a minority of offenders for whom outdoor groupwork is genuinely inappropriate, such activities should be discontinued under the new Work Order regime.
- The number of potential work sites should be expanded and the current bar on work schemes taking place on private property – ruling out roads, railways and other public spaces now operated by private companies – should be lifted.
- To be delivered cost-effectively and in line with public priorities locally, contracts should be outsourced, with Work Orders managed and delivered by organisations other than the Probation Service and commissioned at a local level where responsibility for ensuring availability and suitability of schemes could reside with Police & Crime Commissioners after 2012.
- Such reforms would help build public support. In the same poll referenced earlier, respondents were asked to say what changes they thought would make community sentences more effective. Of those changes that were strongly supported, the survey showed a clear preference for stronger sanctions, greater intensity and more emphasis on work. The reform supported by half of the public (52%) was “more sanctions for rule-breaking, including withdrawal of benefits”. Almost as many (49%)

supported “more manual work projects over more hours each week” and 41% backed “more visible work projects linked to skills training and job opportunities”. The public therefore see a place for community sentences and are willing to see them reformed. But for politicians and other decision-makers interested in building public confidence, the implications are clear: a new regime of community sanctions must have the two principles that matter most to people – payback and punishment – at its heart.

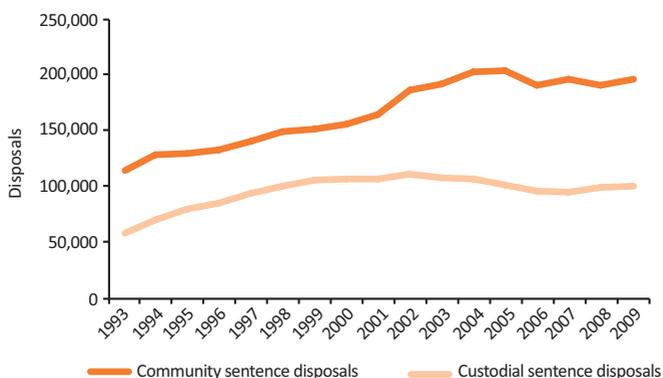
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# 1. Introduction

The formal sanction applied to those convicted of most serious crimes in England and Wales is typically one type of community sentence. While custody remains a key feature of the criminal justice system, despite the policy and media attention they receive prison sentences are much less commonly used than either fines, or some form of community disposal.

Not only are community sentences far more common disposals than a custodial sentence, they are also far more readily applied now than in the years before 1990. For every age group and for almost all offences, the use of community sentences has increased and they have become more diverse in scope, and wider in application.

**Figure 1: Community and custodial sentence disposals**



Source: Sentencing Statistics 2003-2009, Ministry of Justice

The unprecedented expansion of community sentences is the untold story of the criminal justice system over the last twenty years.<sup>1</sup> Furthermore, recent political developments strongly suggest that community sentences are set to play an even greater role in the criminal justice system over the next decade.

### Urgency of reform: the political context

The Comprehensive Spending Review (CSR) settlement for the Ministry of Justice announced on 20 October 2010 is likely to have profound consequences for the future of criminal justice policy in England and Wales. Over the course of the Spending Review period (2010/11-2014/15), the Ministry of Justice (MoJ) is obliged to make a 23% reduction in its resource budget, and a 50% reduction in capital spending. The prisons budget will be hit harder than many people expected, meaning that to deliver the required savings, Ministers must not only seek to arrest the projected growth in the prison population but actually reduce it by the end of the CSR period. In the wake of the settlement and as a reversal of the preceding policy, the MoJ pledged to reform sentencing and cut the prison population:

*“We will reform sentencing to rehabilitate offenders more effectively. The reforms will stabilise the prison population and then start to reduce it by 2014-15. We expect that by the end of the SR period the number of prisoners will be around 3,000 lower than it is today.”<sup>2</sup>*

Reforms to reduce the prison population on this scale will need to be radical and far-reaching. On the sentencing side, reforms may seek to alter arrangements for prisoners sentenced to indeterminate sentences for public protection (IPPs), change Parole Board arrangements and amend legislation for specific offences to reduce minimum terms. However, these reforms require primary legislation (not pre-allotted for the current parliamentary session) and will anyway take many years to

<sup>1</sup> CCJS, Community Sentences Digest, November 2008

<sup>2</sup> HM Treasury, Comprehensive Spending Review 2010/11-2014/15, 20 October 2010

filter through. To achieve the reduction in the prison population in such a short space of time will undoubtedly require reform of short prison sentences. And motivated by a need to find alternatives, the MoJ signalled its intention to make greater use of community sentences where possible, especially in respect of those currently given short-term prison sentences. In June 2010 the Justice Secretary Rt Hon Kenneth Clarke QC MP made a speech which was taken to herald an increased use of community sentences and less use of prison:

*“Just banging up more and more people for longer without actively seeking to change them is, in my opinion, what you would expect of Victorian England. It is time we focused on what is right for today’s communities. Too often prison has proved a costly and ineffectual approach that fails to turn criminals into law-abiding citizens...”*

*“[Community penalties] are a crucial part of the sentencing framework. They can be a tough, effective way of making offenders turn away from crime and protecting the public. I am aware that for years successive Governments have tried to make community penalties more tough and effective. I’m also aware that the public are still not convinced that they are as effective as prison.”*

*“It is not a new problem at all. It was a problem when I was at the Home Office all those years ago. But we really have to address this. We also have to ensure that the form of community penalties we’re using are doing the job, and that they are as effective as prison and more effective if used in the right cases.”<sup>3</sup>*

The consequence of reducing the number of short-term prison sentences is that there will inevitably be greater use of sanctions in the community. This could mean that tens of thousands of offenders who currently receive a prison sentence will no longer do so. Later this year, the MoJ plans to outline these reforms to sentencing and the justice system in a departmental green paper. It is expected that this will propose changes to both the design and administration of community sentences and a renewed attempt to correct their flaws and address public concerns about their efficacy.

### The challenge: community sentences and public confidence

If the government is to make greater use of community sentences as a means of arresting or reversing the enormous growth in the prison population over the past decade, communities will need to have confidence that these sentences are both tough and effective as punishments. Yet the evidence is that at present community sentences are not sufficiently tough or effective in this regard. These sentences are badly enforced and insufficiently demanding, with poor attendance and high breach rates. They are not effective enough at preventing an escalation of offending behaviour, particularly in young offenders. Community sentences also suffer another major handicap – poor levels of public confidence.

The importance of public opinion in law and order is clear, as is the scale of the challenge that the Government faces in trying to convince a sceptical public to support more use of community sentences. Three months after Ken Clarke’s speech, an ITV television documentary showed a huge gap between the rhetoric of ‘tough, effective’ community sentences and the reality: offenders on a court-ordered community sentence, fitted with hidden video cameras, filmed fellow offenders sitting around drinking tea, playing games and smoking cannabis while ostensibly performing Unpaid Work. Even when the offenders were filmed working, the work was far from tough and demanding – involving tasks such as moving chairs, taking down a tent and sorting reclaimed jewellery.

In response, the Minister for Policing and Criminal Justice, Rt Hon Nick Herbert MP, said the Government was planning to reform the system to “ensure consistent standards of Community Payback across the country, with robust supervision, due punishment and meaningful work”, adding:

*“We are looking at how private and voluntary sector providers can be involved in running community sentences to make them more rigorous, ensure proper compliance, and deliver better value for the taxpayer.”<sup>4</sup>*

<sup>4</sup> <http://www.express.co.uk/posts/view/197028/Community-service-%27a-holiday-camp%27/Community-service-a-holiday-camp->

However, this recent exposé has reinforced common perceptions of community sentences, defined by lax supervision, weak conditions and non-arduous activity branded as ‘punishment’. And the evidence justifies the widespread lack of public trust in these types of sentences. In 2009 only 52% of community orders were completed successfully and in full. A third were not completed satisfactorily with one in ten terminated early because of a reconviction.<sup>5</sup>

Faced with this ongoing confidence gap, the previous government attempted to re-brand community sentences several times, while maintaining that “Community sentences are tough, effective and efficient”.<sup>6</sup> With the exception of the introduction of high-visibility jackets for offenders on Community Payback, championed by Louise Casey, these PR efforts were not accompanied by reforms to fix systemic flaws and were largely unsuccessful.

Improving public confidence in these disposals, like other parts of the criminal justice system, is an important long-term objective. In order to upscale the use of such disposals, sentencers and the public more widely must have confidence that they work. But the single best way to ensure this is by fixing the faults in the current system and making the punishments truly effective, rather than simply attempting to rebrand them.

Part of the answer to the problem of short-term prison sentences is an effective regime of community punishments that provide courts with a real alternative and which reduce, over time, the flow into the prison system. But unless these community punishments actually work and are shown to work, any reforms to restrict the use of short-term prison sentences would be arbitrary and unlikely to command public support.

“Unless community punishments actually work and are shown to work, any reforms to restrict the use of short-term prison sentences would be unlikely to command public support”

<sup>5</sup> Ministry of Justice, Offender Management Caseload Statistics 2009, Table 5.1

<sup>6</sup> Rt Hon David Hanson MP, Community Sentencing: Reducing Reoffending, Changing Lives, Ministry of Justice, 2008

### The opportunity: crime prevention and young offenders

The shortcomings of current community sentences are especially important in respect of young offenders for whom these sanctions are most often applied. Each year, judges and magistrates hand down almost 200,000 community orders, disproportionately to younger offenders: 10% of offenders aged 21 or more receive a community sentence, but this rises to 18% for the 18-20 age group, and to 69% for offenders aged 10-17.<sup>7</sup> Four in ten offenders starting a community order in 2009 were aged 18-24 (44,000 young people).<sup>8</sup> In 2009, more than a quarter (29%) of all community sentences are given to juveniles (aged 10-17), although juveniles account for only 6% of all offenders sentenced.<sup>9</sup>

Given the offending profile of this age group and the criminogenic trend towards increased frequency and severity of offending, it is vital that courts apply effective interventions that punish adequately and deter future offending, combined with appropriate rehabilitation, and thereby prevent the progression towards a prison sentence. To this end, community sentences could be crucial crime prevention tools that when used properly, divert young offenders from crime and ease the long-term inflationary pressure on the prison population at the lower end.

However, at present, these sentences are failing in this crime prevention role. As the former Justice Secretary Jack Straw conceded: “Most people who end up in prison go there because community punishments have failed.”<sup>10</sup> This report argues that unless the system of community disposals is urgently reformed, they will not live up to their potential as effective sentences that work to reduce crime and the flow into the prison system and, as a result, the public are unlikely to accept the major shift in policy that is now being attempted.

Radical reform of sentencing and the way community sentences are delivered is necessary if they are to stand alongside fines and custody as a discrete and effective punishment for offenders. How to improve community sentences, and in particular, those community disposals with a punishment element – usually Unpaid Work, presently known as Community Payback – is the focus of this report.

7 Ministry of Justice, Sentencing Statistics 2006, Tables 1.5-1.7

8 Offender Management Caseload Statistics 2009, Ministry of Justice Statistical Bulletin, 22 July 2010

9 Ministry of Justice, Sentencing Statistics, 2009

10 Interview, BBC Sunday AM, 18 June 2006

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## 2. History and Purpose of Community Sentences

Financial penalties and imprisonment have been the two key disposals applied in criminal courts in England and Wales for centuries. In contrast, sentences served in the community are a comparatively recent invention. The history of contemporary community sentencing in the twentieth century is instructive in understanding their place in the criminal justice system today and the principles of sentencing they reflect.

### The development of community sentences

The Probation Service which administers community sentences has its roots in the late Victorian period. The first proto-probation officers were not employees within the criminal justice system, but ‘missionaries’ appointed by the Church of England Temperance Society and some other religious institutions to various London police courts in the late nineteenth century. The practice developed of courts releasing some offenders subject to a condition that they be supervised by the missionary. Their role was recognised in the Probation of First Offenders Act 1887, under which juveniles and those accused of less serious offences could thereby avoid committal for a first offence. Twenty years later, the Probation of Offenders Act 1907 put the Probation Service on a statutory footing.

The 1907 Act introduced the phrase ‘advise, assist and befriend’ to describe the role of the Probation Service in relation to offenders, terminology which remained the mantra of the

Probation Service until 2001, when the National Probation Service was created under the slogan ‘punishment, rehabilitation and public protection’. For almost a century therefore, probation thus came to be a branch of social work, with probation officers’ “origins and working methods ... rooted in a different view of social work that was focused on counselling juveniles and working with their families”.<sup>11</sup> Indeed, it is worth noting at this stage that the National Association of Probation Officers (NAPO) is the union not just for probation officers but also CAF/CASS<sup>12</sup> court officials. The Diploma in Social Work was the standard qualification for probation officers until the early 1990s, when the then Home Secretary Michael Howard very deliberately sought to re-orientate probation away from this approach.

These developments and the cultural emphasis on social work has had a profound impact on the development of community sentences. Although probation officers have assumed responsibility for the delivery of sanctions in the community, they have tended to be intellectually hostile to punishment, preferring to mentor and counsel offenders to address the causes of their offending.<sup>13</sup> The result has been that punishment has been sidelined – and in some cases actively undermined – by probation staff.

The Community Service Order was introduced in the Criminal Justice Act 1972 following the recommendations of the Advisory Committee on the Penal System (the Wootton Committee) in 1970. The Probation Service was chosen to deliver it:

*“The Probation Service’s involvement was thus an act of careful choice. As justice and welfare skilfully blend into the ethos of the service, its involvement in the administration of the new order made political sense: few people, if any, would have objected to the service’s new responsibility.”<sup>14</sup>*

11 R. Gard, 2007, ‘The First Probation Officers in England and Wales, 1906-14’, *British Journal of Criminology*, 47(6)

12 Children and Families Court Advisory and Support Service

13 Duff, 2003, ‘Probation, punishment and restorative justice: should altruism be engaged in punishment?’, *Howard Journal of Criminal Justice*, 42 (2), pp. 181-97

14 A. Vass and K. Menzies, 1989, ‘The Community Service Order as a Public and Private Enterprise’, *British Journal of Criminology*, 29(3)

### The history of community sentences

- 1907:** The Probation Order. Became available through the Probation of Offenders Act 1907, its original purpose was to “advise, assist and befriend”. In 2001 Probation Orders were renamed Community Rehabilitation Orders (CROs) by the Criminal Justice and Court Services Act 2000.
- 1972:** The Community Service Order (CSO). Introduced under the Powers of Criminal Courts Act 1973, it required offenders to carry out 40 – 240 hours of useful work for the community. CSOs also underwent a name change in 2001, when they became known as Community Punishment Orders (CPOs).
- 1991:** The Combination Order. Introduced by the Criminal Justice Act 1991. It combined probation supervision with community service. It too was re-branded by the 2001 Act; after which they were known as Community Punishment and Rehabilitation Orders (CPROs).
- 2000:** The Drug Treatment and Testing Order (DTTO). These were brought in following the Crime and Disorder Act 1998. They were tailored towards drug usage and related offending. DTTOs could last between six months and three years.
- 2003:** The Community Order. The generic community sentence currently used by Crown and Magistrates courts. Created by the Criminal Justice Act 2003, they have been issued since 2005 and are a combination of – and a replacement for – DTTOs, CPROs, CPOs and CROs.

However, there has always been a “philosophical confusion”<sup>15</sup> about the role of community service, arising largely because the Wootton Committee never resolved whether community service was intended to be punitive or rehabilitative. Because it was intended simultaneously to appeal to those who wanted a cheaper alternative

<sup>15</sup> Mair, G., 1997, 'Community penalties and the Probation Service', in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford handbook of criminology*, 2nd edn

to prison, to those who wanted reparation and a punishment which would fit the crime, and to those who wanted a 'reintegrative' form of treatment for offenders, it was never clear for which offences and which offenders community service was envisaged. Was it, as probation had been, intended as a second chance for offenders who were not yet established in their criminal careers? Or was it intended as a cheap alternative to prison for career criminals as well?

Two changes in the 1990s sought to address this uncertainty, and make community punishments a third sentencing option alongside fines and custody. First, the Criminal Justice Act 1991 abolished the probation order as an alternative to sentencing. The requirement for the offender to consent to a community order was abolished in the Crime (Sentences) Act 1997. Effectively, therefore, probation and community punishments became sentences in their own right, although legislation continued to define sentencing maxima solely in terms of financial and custodial penalties.

The 2003 Criminal Justice Act replaced the three community sentences (the Community Punishment Order – effectively Unpaid Work; the Community Rehabilitation Order; and the combined Community Punishment and Rehabilitation Order) with a single generic Community Order. The Criminal Justice and Immigration Act 2008 made similar changes to youth sentencing, with a generic Youth Rehabilitation Order, incorporating 18 possible interventions, including Unpaid Work for 16 and 17 year olds. This order allows judges and magistrates to pick from a toolbox of components.

The intention was to simplify sentencing, providing clarity and making it easier for sentencers to craft an appropriate intervention for a particular offender. However, the result has been the very opposite. Without knowing the details of a particular community order, it is impossible to say whether an offender has been punished for his crime at all. It may be unclear whether a component such as a curfew or prohibited activity requirement is supposed to amount to a punishment in itself or, like an ASBO or a restraining order, a

device to keep the offender away from situations likely to result in trouble. Without a clear punitive element, such disposals understandably fuel the impression that offenders are being let off without any real punishment for their crimes.

The creation, following the review by Lord Carter, of the National Offender Management Service (NOMS) in 2004 was designed to bring probation and prisons together so that each service could deliver “end-to-end” offender management throughout the course of an offender’s sentence, both in prison and the community. However, this reform had little impact on the operation or design of community sentences and although NOMS had clear aims to diversify the market and introduce new providers to deliver probation services, this has not been achieved. The Probation Service remains the monopoly supervisor of all community sentences in England and Wales, delivering accredited programmes, supervision, enforcing court orders and managing Unpaid Work placements. Other voluntary sector providers, where they exist, are small in number and serve to assist rather than replace the local probation agency.<sup>16</sup>

### Punishment and the principles of sentencing

Sentencing in criminal cases is designed to perform a number of inter-related functions. First, it is intended to punish a wrongful act. The prospect of punishment is, in turn, intended to deter offending. Third, imprisonment and, to a lesser extent, other penalties, incapacitate offenders by depriving them of their liberty.<sup>17</sup> Fourth, some sentencing options provide the opportunity of rehabilitation to tackle the causes of an offender’s behaviour. Finally, sentences may offer the prospect of reparation to individuals or communities by requiring offenders to make amends for their crimes. The 2003 Criminal Justice Act sets out these principles clearly, with punishment as the first of the four principles.

16 See: Carter But Smarter: Transforming offender management, reducing reoffending, Policy Exchange, 2010

17 Partially, in the case of curfews or electronic tagging.

One of the purposes of punishment is to ensure that offending is not a rational course of action given the likelihood of avoiding detection: if the punishment fits the crime, but the risk of detection is low, it may be a rational calculation to break the law. For at least some categories of offence, research indicates that there is a link between the propensity of being caught and then punished, and the commission of an offence: offenders typically estimate the probability of being caught and punished as being lower than non-offenders (although in this regard, the offender's estimate borne of experience is probably more accurate).<sup>18</sup> Thus criminologists have concluded that offences which involve pre-meditation, such as burglary, retail theft and drug trafficking, may be particularly responsive to deterrent sanctions.<sup>19</sup>

However, deterrent punishments not only seek to deter the offender in advance, and *discourager les autres* if they fail in this regard, but there is evidence that they can also deter reoffending by a particular individual because they shape that offender's own view of the risk of being punished: those who are caught and punished come to believe that they are more likely to be caught and punished in the future.<sup>20</sup> Indeed, one explanation as to why a proportion of offenders cease to offend after they have been dealt with by the courts is that the punishment snaps them out of the perception of a 'magical immunity mechanism' identified by psychologists. The objective should be to maximise the number of first-time (convicted) offenders who – after experiencing their first formal sanction – are deterred from offending again. Current community sentences do not have this effect with enough offenders – particularly with younger age-cohorts.

In accordance with these declared principles – enshrined in legislation in the 2003 Act – the use of prison remains the right sentence for dangerous offenders who need to be incapacitated to protect the public from harm. It will also often be the only intervention which offers punishment sufficiently commensurate

18 Horney and Marshall, 2006, 'Risk Perceptions among Serious Offenders: the role of crime and punishment', *Criminology* 30(4), pp. 575ff

19 Paternoster and Iovanni, 1986, 'The deterrence effect of perceived severity: a re-examination', *Social Forces* 64, pp. 769-770

20 Horney and Marshall, 2006, 'Risk Perceptions among Serious Offenders: the role of crime and punishment', *Criminology* 30(4), pp. 575ff

with a crime. Thus not only must the most serious violent and sexual crimes result in lengthy prison sentences, but deterrent sentences will often be necessary for crimes such as drug trafficking and serious fraud, in which fewer culprits are apprehended and where offenders may make an economic decision to offend based on the potential rewards, the likelihood of detection and conviction, and the severity of any sanction.

Equally, for minor infractions, most obviously in the case of less serious motoring offences, where the main purpose is simply to punish crime in order to ensure compliance (not least by making it economically worthwhile to obey the law) fines are an appropriate sanction. Conversely, fines do nothing to incapacitate or rehabilitate offenders, and so are inappropriate against dangerous offenders and ineffective against those whose offending is driven by addiction or mental health problems. They are also limited in other ways. For many offenders on low incomes or dependent on welfare benefits, it is impossible to impose a fine of a magnitude which reflects the seriousness of an offence, but which can be collected over a realistic timescale. Financial penalties however, when well administered, are cheaper to impose – in fact they raise revenue, even once collection costs are taken into account.

A major difficulty in recent years, however, has been the rationale for and the performance of, the disposals that lie in between a fine and custody. Community sentences may appeal because they offer the prospect of a sentence which combines punishment (Unpaid Work) with measures to discourage reoffending (supervision, curfews and monitoring) and interventions to rehabilitate offenders (drug and alcohol treatment, accredited courses and mental health treatment). Research commissioned by the Sentencing Advisory Panel<sup>21</sup> has challenged

“The absence of a clearly defined punishment within community sentences makes it harder for the public to see the case for rehabilitative elements within those same sentences”

21 Now replaced, along with the Sentencing Guidelines Council, by the Sentencing Council.

the 'stereotypical view of the public as punitive sentencers concerned almost exclusively with punishment'. In fact, asked to rank five principles of sentencing, respondents tended to place 'public protection' first, followed by 'preventing crime' and 'punishment', followed by 'reformation' and 'reparation'.

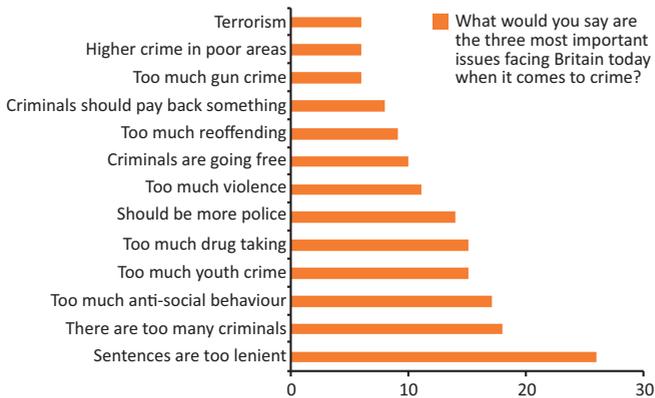
However, one of the reasons why the public tend to support rehabilitation measures for serving prisoners and those recently released is that the prison sentence itself is the punishment, and that takes priority. The absence of a clearly defined punishment within community sentences makes it harder for the public to see the case for rehabilitative elements within those same sentences. When the only sanction applied against an offender is a requirement to avoid the people and places with which his offence were associated, or to desist from activities such as drug-taking that are already illegal, this understandably leaves the impression that offenders are getting away unpunished.

Consequently, while fines (particularly at the upper end of the scale), and a custodial sentence (of almost any length), are commonly accepted as representing punishment, the disposal most readily applied by judges and magistrates – a community sentence – is not linked in the public mind with punishment. This is principally because community sentences were not really designed to fulfil this role, instead other sentencing principles, namely rehabilitation (and to a lesser extent reparation), have been the guiding objectives.

The Ministry of Justice often points to research indicating that victims of crime 'want offenders to be punished, but do not believe that prison is always the answer' and 'would be in favour of community sentences if they prevent an offender from re-offending'.<sup>22</sup> MoJ research has found that 81% of victims would prefer an effective sentence rather than a harsh one. However, this survey needs to be understood in context. It is implicit in the question that a punishment must be either harsh or effective: in practice, respondents are forced into either supporting community

sentences (as described by the MoJ data) or supporting ineffective punishments. Moreover, even though reducing reoffending is a positive objective, it is not the public's priority for sentencing. This is very clear from MORI surveys in 2007 which found that only 9% thought that 'too much re-offending' was one of the three most important crime-related issues. Overwhelmingly the major concern was that sentences are too lenient and punishment doesn't fit the crime (26% of respondents, outpolling even the concern that crime is too high).<sup>23</sup>

**Figure 2: Public perceptions to sentencing (%)**



Source: Ipsos MORI, the Future for Criminal Justice, 2010

### Judicial attitudes to community sentences

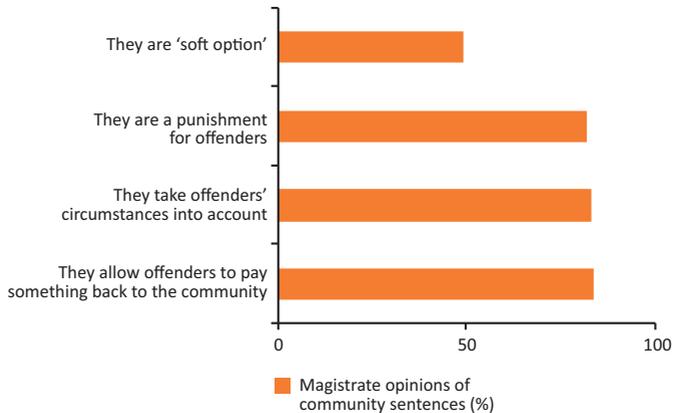
When looking at sentencers' attitudes, it is important to note that magistrates are generally positive about community sentences, with a MORI survey of magistrates in 2006 finding 77% saying that it has some effect on reducing crime in an area (compared with only 63% saying the same of prison). However, while magistrates believed that community sentences were generally

<sup>23</sup> <http://www.ipsos-mori.com/Assets/Docs/Events/SRI - Crime - The Future of Criminal Justice - May 2010.pdf#page=26>

more effective for drug users involved in acquisitive crime, they believed that custodial sentences were generally more effective for persistent offenders (there is of course a tension here since drug-related acquisitive crime is a particularly prevalent form of persistent offending) and were predominantly negative when asked if community sentences reduce reoffending or deter crime.<sup>24</sup>

A 2008 survey of magistrates by the Probation Service also found that almost 50% agreed that community sentences were a ‘soft option’, although larger majorities acknowledged their wider potential by agreeing with the statement that community sentences “allow offenders to pay something back to the community”. Where magistrates appeared most out of step with the public was on whether they agreed that community sentences are “a punishment for offenders”. More than three in four magistrates surveyed said they were – in marked contrast to wider public opinion.

**Figure 3: Magistrate opinions of community sentences (%)**



Source: National Probation Service Magistrates' Perceptions of the Probation Service, 2003

24 MORI / Home Office, 'Magistrates' perceptions of the Probation Service', p. 18 : <http://www.probation.home-office.gov.uk/files/pdf/Mori%20Questionnaire.pdf>

## Public attitudes to community sentences

Public doubts over the efficacy of community sentences is widely recognised by pollsters. While the public can be enticed to endorse community sentences if asked to compare their various features with the alternative of prison, they are less complementary when judging community sentences on their own terms. The widespread view consistently noted by surveys marks community sentences down for being ineffective at both punishment and rehabilitation. One poll asked: “To what extent do you agree or disagree that... Sentences served in the community rather than in prison work well to prevent re-offending”. A third (32%) agreed, but a half (48%) did not.<sup>25</sup> And the latest survey of public opinion, commissioned by Policy Exchange for this report, confirms these views (see Appendix).

New polling commissioned for this report illustrates the scale of the challenge in turning around public opinion of community sentences. Half of the public (49%) are opposed to community sentences being used as an alternative to short-term prison sentences, which reinforces the case for community sentences to be justified on their own terms, rather than always pitched as a more effective and/or cheaper alternative to short spells in custody. The overall public view of current community sentences is also strongly negative. More than a third (38%) think the best phrase to describe them is “a soft option”, followed by a fifth (22%) who think they are “weak and undemanding”. However, a further 22% do think that community sentences are “good for first time offenders” – even when the reality is that these are not the only offenders who receive such sentences anymore.

The public’s preference for community sentences is also revealing. When asked what community sentences should be primarily designed to do, half (51%) said “Make criminals pay something back to communities affected by crime”, followed by a fifth (22%) who thought they should “punish criminals and deter crime”. The least popular purpose of community sentences was to “rehabilitate criminals

and address their offending behaviour”, supported by 20% of respondents to the poll, falling to just 17% for the section of the population most likely to be victims of crime (C2DE). The emphasis that Community Payback places on work is therefore a vital and necessary precondition of public confidence for such sentences, as Unpaid Work schemes represent more clearly both a reparative activity that benefits a local community, and also embodies punishment. As a governing principle of community sentencing, rehabilitation is at best a third-order preference in the eyes of the public.

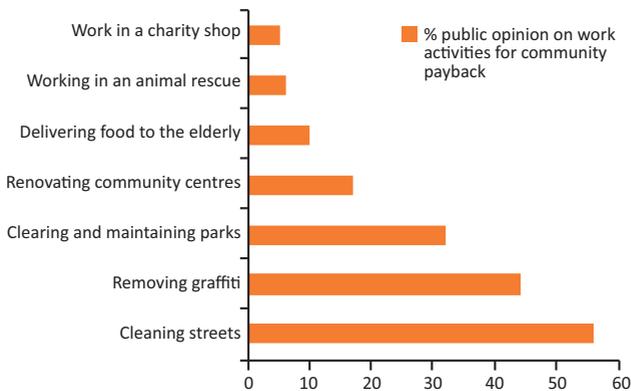
The general lack of public acceptance of community sentences arises not because of popular ignorance, which is often over-stated, but because of the widely-held public view of the weakness of community sentences as a punishment, and their inadequacy at preventing further crime. The public generally believe that the Prison Service is effective at protecting the public (those who say that they agree with this proposition outweigh those who disagree by 19%) but generally ineffective at reducing reoffending (-27%). However, they believe that the Probation Service is both ineffective at protecting the public (-9%) and at reducing reoffending (-23%). This view is reflected in surveys and other qualitative research which continues to record widespread scepticism towards “soft”, “namby-pamby” community sentences that do not properly punish crime or address offending behaviour.<sup>26</sup>

Public awareness of community sentences is also an issue. So while the public have a long association with both custody and fines as two main types of sentencing options available to courts, since they were introduced nearly 40 years ago, the public have been less familiar with community sentences. Of those who are familiar with them, the community sentence with a punitive element focused on work was the most commonly endorsed. An Ipsos-MORI survey in November 2008 found that 67% of people are very or fairly favourable to the idea of Community Payback (with only 16% unfavourable). The research also found a strong preference towards

<sup>26</sup> Taken from focus groups debating spending cuts and criminal justice, run by Britain Thinks, Coventry, July 2010

tough, physical work such as cleaning streets, removing graffiti or maintaining parks, with little support for projects such as working in charity shops or delivering food to the elderly.<sup>27</sup> These latter placements are the least popular of all current Community Payback projects, no doubt because they are not deemed by the public to amount to a punishment:<sup>28</sup>

**Figure 4: Public opinion on work activities for community payback**



Source: National Probation Service Magistrates' Perceptions of the Probation Service, 2003

The public are also concerned that community sentences should be used for the right offenders. Research demonstrates that public opinion is relatively forgiving of the first time offender; far less so of the repeat offender. In a survey of public attitudes towards sentencing, academics found that 'even a relatively short criminal record (i.e. two prior convictions) had a dramatic impact on public sentencing preferences. When confronted with a hypothetical sentencing decision, the custody rate rose from 11% for the first offender to 65% for the offender with two prior convictions, and then to 83% for the offender with four related priors'.<sup>29</sup>

27 Ipsos-MORI / Home Office, 12-14 November 2008

28 Polling supplied by the Home Office. Survey question: "Which one or two (of these examples) would you most prefer offenders to be doing as part of Community Payback?"

29 J.V. Roberts, M. Hough, J. Jacobson, and N. Moon, 2009, 'Public Attitudes to Sentencing Purposes and Sentencing Factors: an Empirical Analysis', *Criminal Law Review*, p. 772

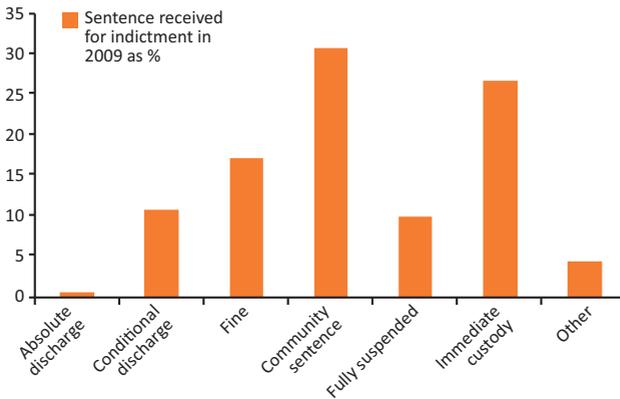
The public seems relatively accustomed to the idea of probation as a means of keeping first-time offenders away from crime. They do not yet see community sentences as a way of dealing with repeat offenders. This is perhaps unsurprising if probation – the service that oversees community sentences – is primarily conceived as a way of addressing the causes of offending and monitoring an offenders' willingness to 'go straight'. However, public opinion in this respect will become increasingly important if community sentences continue to be applied to serial offenders and expanded more widely in future.

Thus the public seem open to new ways of punishing offenders in a non-custodial setting, but believe that current community sentences are too soft. It follows that if greater use of community sentences is to be sold to the public, they will need to be convinced that these are a genuinely tough option, with punishment as the core element. Furthermore, as community sanctions come increasingly to be used for serial reoffenders, public confidence will require appropriately tough punishments distinct from probation and rehabilitation services.

### 3. Community Sentences Today

Almost 200,000 community sentences are given annually in England and Wales,<sup>30</sup> of which around half include a Community Payback requirement.<sup>31</sup> Between 1998 and 2009, the number of offenders jailed or fined fell,<sup>32</sup> while the number of offenders given a community sentence or suspended sentence rose by almost 70%. In 2009, 195,765 community sentences were imposed for offenders of all ages, and a community sentence is now the most common sentence for serious (indictable) offences, accounting for 30.8% of all sentences.<sup>33</sup>

**Figure 5: Sentences received for indictable offences in 2009 as %**



Source: Sentencing Statistics 2009, Ministry of Justice

30 Ministry of Justice, Sentencing Statistics 2008, table 1.2

31 Ministry of Justice: <http://www.justice.gov.uk/announcement020910a.htm>

32 Ministry of Justice research indicates that longer sentences and increasing recall rates (and increased times served on recall) account for the rise in the prison population since 2002. Although the number sentenced to jail rose to 2002, they have since fallen back to below the 1998 level.

33 Ministry of Justice, Sentencing Statistics 2009, table 6.2

#### Current types of community sentence

The generic Community Order introduced in the Criminal Justice Act 2003 includes a blend of requirements which allow for

punishment (Unpaid Work and curfews), rehabilitation (offending behaviour programmes, training requirements, drug treatment orders, alcohol treatment orders, education and training orders, mental health treatment), incapacitation (exclusion, residence requirements, supervision, prohibited activity, curfew and, to an extent, Unpaid Work), and reparation (Unpaid Work and specified activities, which can include reparation to victims).

A different regime applies to juvenile offenders; under the new Youth Rehabilitation Order additional requirements are available, including intensive fostering, but Unpaid Work requirements are only available for offenders aged 16 or 17.

### **Community Orders**

These were introduced in April 2005 under the Criminal Justice Act 2003 and have now replaced all pre-2003 community sentences.

All other community sentences were combined under the one Order so that magistrates and judges could issue tailor-made community sentences to each offender. This purported flexibility is imposed via 12 sentence requirements.

These requirements are intentionally varied. A single requirement can form the sole intent of a Community Order or, alternatively, a requirement can be used in conjunction with other requirements. The 12 requirements that can constitute a Community Order are:

- Unpaid Work (40–300 hours)
- Supervision (up to 36 months) – typically requiring attendance at a pre-appointed time to meet a probation officer on a regular basis

- Accredited programme (length to be expressed as the number of sessions; must be combined with a supervision requirement)
- Drug rehabilitation (6–36 months; offender’s consent is required)
- Alcohol treatment (6–36 months; offender’s consent is required)
- Mental health treatment (up to 36 months; offender’s consent is required)
- Residence (up to 36 months)
- Specified activity (up to 60 days)
- Prohibited activity (up to 36 months)
- Exclusion (up to 24 months)
- Curfew (up to 6 months and for between 2–12 hours in any one day; if a stand-alone curfew order is made, there is no probation involvement)
- Attendance centre (12–36 hours with a maximum of 3 hours per attendance)

Three requirements – supervision, Unpaid Work, and accredited programmes – account for three-quarters of all requirements imposed. The most common requirement is supervision, although among orders containing a single requirement, the most common is Unpaid Work.

Little use is currently being made of drug rehabilitation (5% of orders), curfews, specified activity requirements (5%), or alcohol treatment (3%). There is negligible use of attendance centre, mental health treatment, prohibited activity, exclusion or residence requirements (each less than 1% of orders). Only 1% of orders include four or more requirements.<sup>34</sup>

The four principles of sentencing are embodied in a menu of components that sentencers can apply. The diverse nature of

<sup>34</sup> National Offender Management Service, Offender Management Caseload Statistics, table 3.9

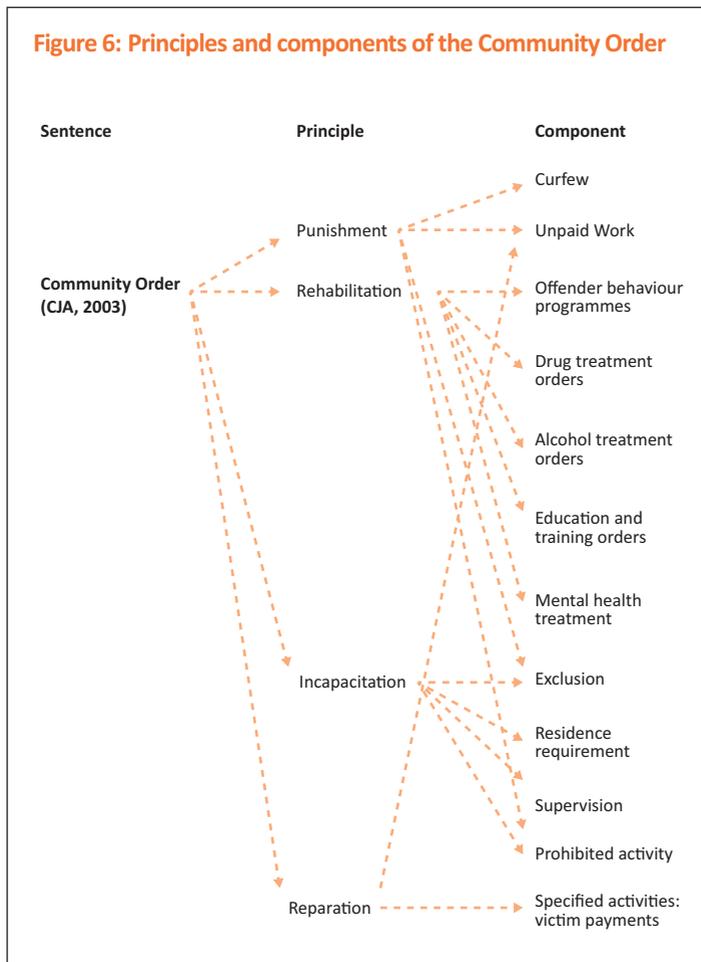
these elements allows sentencers to design bespoke disposals that take account of the nature of the offence, the characteristics of the offender and the interests of justice. Rehabilitation is the predominant feature, and what is available by way of punishment, namely curfews and Unpaid Work, though they are commonly used, make up only 2 of the 12 components. Other elements such as a residence requirement, supervision, an exclusion notice or prohibited activity, while they may restrict the offender's liberty to a degree, are principally about incapacitation and monitoring in the interests of public safety, not punishment:

**Table 1: Components of community and suspended sentences issued in 2008**

	Community Order requirements	Suspended sentence requirements
All requirements	231,444	90,374
Supervision	77,769	33,481
Unpaid Work	76,699	23,318
Accredited Programme	23,442	12,457
Curfew	16,479	7,120
Drug Treatment	12,087	4,120
Specified Activity	13,476	4,090
Alcohol Treatment	6,485	2,763
Residential	929	914
Prohibited Activity	1,376	1,010
Exclusion	1,106	697
Mental Health	809	281
Attendance Centre	787	69

Source: Offender Management Caseload Statistics 2009, NOMS

**Figure 6: Principles and components of the Community Order**



Whilst the number of Community Orders issued has increased by almost 10% in the last four years, the sentences have also become less drawn-out, with an increase in the number of offenders given orders lasting one year or under and a big fall in the number of orders lasting more than two years. The average order now lasts for just over a year:

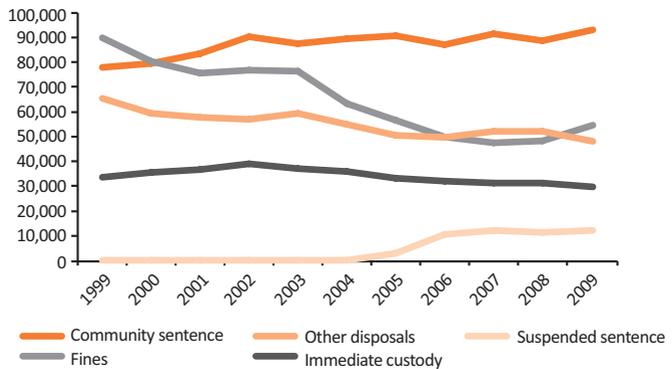
**Table 2: Adult Community Sentence Orders issued and duration**

	2006	2007	2008	2009	Change
<b>Community Orders started</b>	<b>111,752</b>	<b>117,860</b>	<b>120,743</b>	<b>122,796</b>	<b>9.88%</b>
Under 1 year	8,474	11,009	13,329	14,405	69.99%
1 year	71,972	79,330	82,219	87,922	22.16%
2 years	26,118	23,525	21,722	18,994	-27.28%
3 years	5,188	3,996	3,473	1,475	-71.57%
Average duration (months)	17.6	15.7	14.9	13.0	-26.1%

Source: Offender Management Caseload Statistics 2009, NOMS)

### The increasing use of community sentences

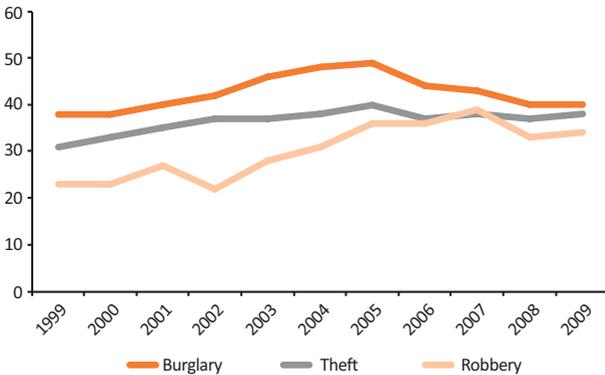
**Figure 7: Total disposals for indictable offences at magistrates court**



Source: Ministry of Justice Sentencing Statistics 2009

While the use of community disposals has increased in recent years, the use of fines has dramatically fallen and the use of custody has remained broadly stable. The number of fines given by magistrates for indictable offences has fallen by 40% over the past decade, with the steepest falls for theft and criminal damage. In 1999, fines outnumbered community sentences for indictable offences in the magistrates' courts; ten years later, community sentences outnumber fines by around 70%. Similarly, custody as a proportion of all disposals has also decreased, although the use of suspended sentences has increased in the last five years.<sup>35</sup>

**Figure 8: Community sentences issued for selected offences as % of total**



Source: Ministry of Justice Sentencing Statistics 2009

### Changing profile of offenders receiving community sentences

Changes in the nature of crime have created a stark bifurcation between probation's public protection work – focused today on the Multi-Agency Public Protection Arrangements (MAPPA) and supervision of Priority Prolific Offenders (PPOs) – and the routine punishment of lower level offenders. But because no sustained

<sup>35</sup> Ministry of Justice, Sentencing Statistics 2009, Table 1.3

public dialogue preceded these legislative changes, community sentences were put on a collision course with public opinion. As the Probation Service itself admits:

*“In probation’s early years the majority of the caseload consisted of low-risk first-time offenders. Now the reverse is true. The service is increasingly supervising serial offenders who have the potential to cause considerable public harm”.*<sup>36</sup>

A recent compendium of reoffending statistics released by the Ministry of Justice reveals that the average offender who received a community sentence had 17.5 previous convictions, indicating that community sentences are used primarily for serial recidivists, rather than first time offenders. Offenders receiving a stand-alone Community Payback requirement had an average of 9.9 previous convictions, while some community sentence requirements were given to offenders with an average of 52 previous convictions.

Furthermore, it was recently revealed that the vast majority of persistent offenders, with scores of previous convictions or cautions, do not receive an immediate custodial sentence (and instead are likely to receive a community sentence). This is even true for offenders who have more than 100 previous convictions or cautions. In fact, as the number of previous offences increases, the less likely it is that an offender will be sent to prison. This further strengthens the argument for ensuring that community sentences are made tougher and more effective.

This sentencing creep has resulted in community sentences becoming an increasingly common disposal for violent offenders. The proportion of violent offences resulting in a community sentence (or suspended sentence) has risen over the past decade from 40% to 57%. Even among the more serious offences tried in Crown Court, the number of cases resulting in a community sentence has risen from a third in 1999 to over 40% in 2009, and on current trends community sentences will outstrip custody for serious violent offences by 2015.<sup>37</sup>

<sup>36</sup> National Probation Service, 'A Century of Cutting Crime', 2007, p. 11

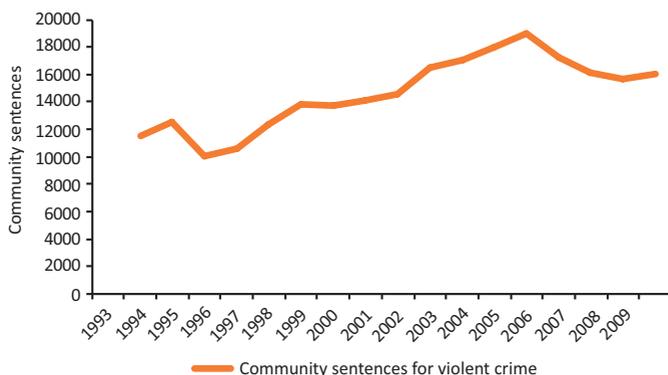
<sup>37</sup> Ministry of Justice, Sentencing Statistics 2003, Table 1.2; Sentencing Statistics 2009, Table 3.1

**Table 3: Percentage of offenders who do not receive an immediate custodial sentence**

Number of previous convictions/cautions	%
0 to 15	77.4
16 to 25	62.8
26 to 50	61.4
51 to 75	60.6
76 to 100	55.7
101 or more	51.5
All offenders	73.3

Source: Commons Hansard, House of Commons debate, 4 November 2010, column 888W

**Figure 9: Community sentences issued for convictions for violent offences**



Source: Sentencing Statistics 2003-2009, Ministry of Justice

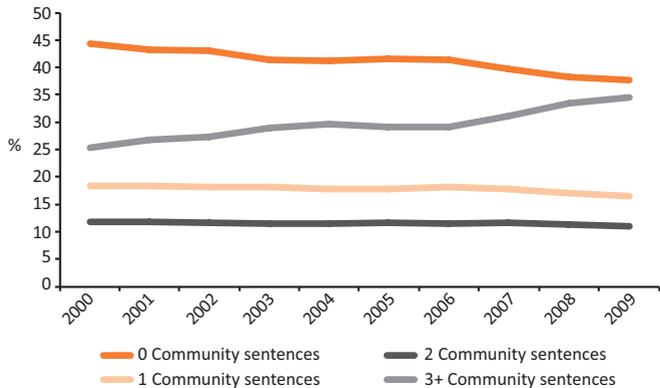
As evidence of their increasing use, but also of the failure of community sentences to prevent further offending, statistics show that community sentences remain the most common disposal even for serial

recidivists who have already received numerous community sentences. In 2009, almost two-thirds (62%) of those offenders handed a community sentence had already received a community sentence. Recent data also illustrates that the number of offenders who have already received 3 or more community sentences is on the increase:

**Table 4: Offenders receiving community sentences for indictable offences by the number of previous community sentences**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
0 community sentences	44.4	43.1	43.1	41.4	41.2	41.6	41.4	39.7	38.2	37.8
1 community sentences	18.3	18.4	18.1	18.2	17.8	17.7	18.1	17.8	17.1	16.6
2 community sentences	11.8	11.9	11.6	11.5	11.5	11.6	11.5	11.5	11.3	11.1
3+ community sentences	25.4	26.6	27.2	28.9	29.5	29.1	29.0	30.9	33.4	34.6
Total with one or more community sentences	55.6	56.9	56.9	58.6	58.8	58.4	58.6	60.3	61.8	62.2

**Figure 10: Offenders who received a community sentence by previous community sentences**



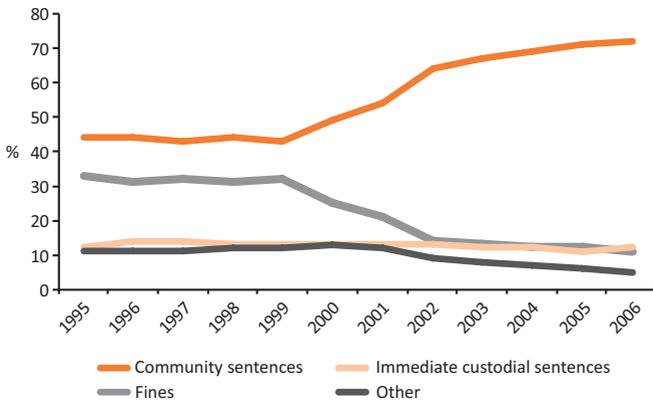
Source: Sentencing Statistics 2009, Ministry of Justice

Given that the Probation Service is increasingly working with serial offenders, whose offending is related to criminogenic factors such as drug addiction, the need for supervision is all the greater, as is the need for intensive rehabilitative work, but the argument for going easy on the offender by way of punishment is much weaker. It is not what the public expect, and neglecting the punishment element is no longer a proportionate response to the type of offending that is now dealt with by way of a community disposal.

### Young people and community sentences

Community sentences are the most common disposal for young offenders – becoming less common as teenagers grow up and in response to more serious offending. However, the trend for young offenders over the last 15 years has mirrored the trend more widely – a general decline in the use of fines, an increased use of community disposals (especially between 1999-2005), and a broadly similar proportion of custodial sentences:

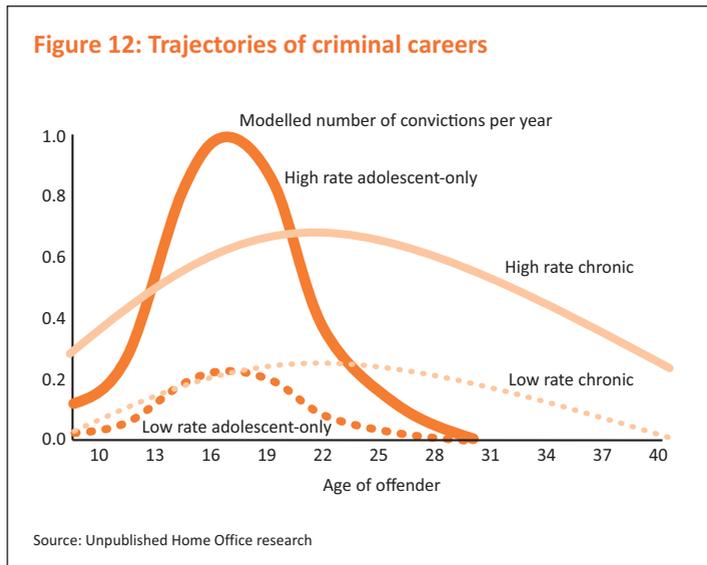
**Figure 11: Persons aged 10-17 by sentence type as %**



Source: Sentencing Statistics 2006, Ministry of Justice

Community sentences, when they work effectively, should provide a vital opportunity to turn young offenders away from crime and prevent their progression towards more serious offending and eventually a prison sentence. Evidence shows that a complex mix of interventions is needed to address the offending of chronic offenders, who have generally had very difficult life circumstances which need to be addressed to prevent the onset of further criminality. However, young offenders whose criminality is limited to a short period in adolescence are different. The most interesting difference between the two groups is that adolescent-limited offenders rationally weigh costs and benefits in deciding whether to engage in a particular type of behaviour. Early experience of prosecution followed by a sanction where the punishment is undesirable can divert a proportion of young offenders from a criminal lifestyle. A tough, effective sanction designed to halt the offending of adolescent-only offenders and deter other would-be young people from committing crime has the potential to make a huge impact on young offenders who commit such a large proportion of total crime.<sup>38</sup>

**Figure 12: Trajectories of criminal careers**



38 Moffitt, T.E., Caspi, A., Harrington, H., Milne, B. (2002). Males on the life-course persistent and adolescence-limited antisocial pathways: Follow-up at age 26. *Development & Psychopathology*, 14, pp.179-206

## Women and community sentences

It has been increasingly recognised that women offenders often have different needs to the male majority. Firstly, there are far fewer women in the criminal justice system and they are generally much younger: there were only 32,396 women sentenced to community sentences in 2009 (16% of the total).<sup>39</sup> Women's criminal careers tend to come to an end earlier than men's and consequently the average age of a female offender is just 16, whereas for males it is 19.<sup>40</sup> Almost a third of women given community sentences (28%) are under 18.<sup>41</sup>

Women offenders are more likely to have issues with self-harm, drug abuse and victimisation: as one paper put it, they are more likely to be 'troubled' than 'troublesome'.<sup>42</sup> Furthermore, as one study noted, "it is possible that unless community provision for women offenders can be improved, accessed and altogether better co-ordinated, then sentencers may think that the only place where a woman's needs will be met is in prison".<sup>43</sup>

Female offenders are required to complete all current varieties of community sentences, and a network of 50 sites, established with £10 million of funding following the Corston Review in 2009, provides supervision and Unpaid Work across England and Wales. Mixed work groups are generally prohibited, and where there is sufficient scale (for instance in Birmingham), there are single-sex placements for female offenders sentenced to Unpaid Work.

39 Ministry of Justice, Sentencing Statistics 2009, table 3.2

40 Ministry of Justice, Criminal Statistics 2009, Annex A, Table 14

41 Ministry of Justice, Sentences Statistics 2009, Supplementary Tables, Table 3a

42 Worrall, A., 1999, 'Troubled or troublesome? Justice for girls and young women' in Goldson, B. (ed), Youth Justice: Contemporary Policy and Practice, Aldershot: Ashgate Publishing

43 Gelsthorpe, Sharpe & Roberts, Provision for women offenders in the community, Fawcett Society, 2007, p.13

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## 4. Performance of Current Community Sentences

The benefits of punishing crime are not limited to the impact on the offender himself; the prospect of punishment has a wider deterrent effect on others. For this reason it is vital that community sentences should include a punitive component, distinct from rehabilitative and prophylactic elements, and that to be effective, this sentence should be tough, intensive and visible. However, the current regime of community sentences, and in particular, the Unpaid Work requirement or Community Payback, is falling short on all of these fronts. These failings are costly in themselves, but they also undermine the wider aim of ensuring a criminal justice system that adequately prevents crime and deters future criminality. In this regard, it is community sentences – not prison – that are the weak link in the sentencing chain.

### Completion rates

There is a large gap between the numbers given community sentences and the number of community sentences completed. Only two out of three Community Payback orders are completed satisfactorily – in line with other community sentences.<sup>44</sup> Although directly comparable figures for other types of sentence are not available, the ‘payment rate’ for fines (which includes compensation orders and legal costs imposed in a criminal trial) is 85%,<sup>45</sup> while the number of offenders who successfully escape or abscond from a prison sentence is in the region of 0.5%.<sup>46</sup> Only a tiny minority of prison sentences go uncompleted and a relatively small number of fines go unpaid. The community sentences rate of one in three sentences not completed must be

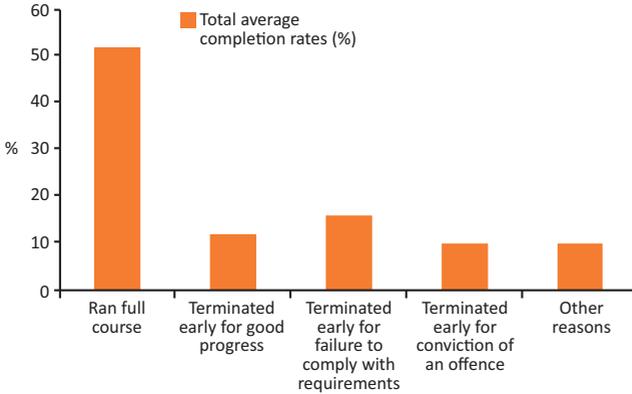
44 Ministry of Justice:  
<http://www.justice.gov.uk/announcement020910a.htm>

45 Hansard, 20 July 2010, Col. 228w

46 In 2007-08, 513 prisoners escaped or absconded, out of a total of some 90-95,000 sentenced

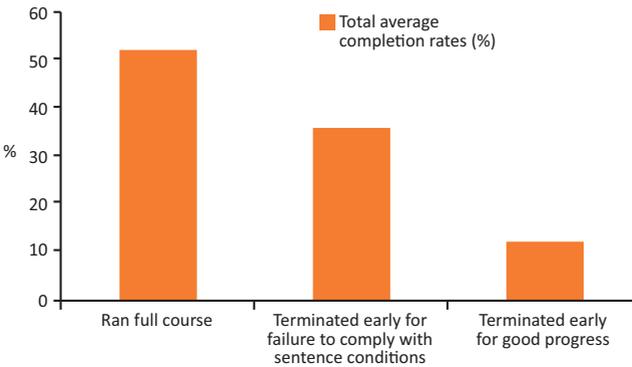
considered a failure – even before consideration of whether these sentences help to rehabilitate offenders or deter new offences.

**Figure 13: Total average completion rates**



Ministry of Justice, Offender Management Caseload Statistics 2009, Table 5.1.

**Figure 14: Total average completion rates for community sentences (%)**



Source: Ministry of Justice, Offender Management Caseload Statistics 2009, Table 5.1.

These failures put pressure on other parts of the criminal justice system, in particular courts – which must re-sentence when probation officers commence breach proceedings – and prisons – which end up taking in offenders who break the terms of their

suspended sentence or are given a custodial sentence because they have failed to comply with a community order.

“A report in 2008 found that probation officers regularly turned a blind eye to offenders’ absences from probation appointments, even though national standards require all absences to be treated as unacceptable unless proven otherwise”

This ‘one in three’ failure rate carries through to Community Payback projects. Ministry of Justice planning documents assume that there will be a 34% non-attendance rate for groupwork placements, although this figure is considerably lower for individual placements,<sup>47</sup> and the average offender will miss six Unpaid Work group placements.<sup>48</sup> Each breach creates around half an hour’s work for the supervisor,<sup>49</sup>

and consultants have estimated the cost of a simple uncontested breach at £96, rising to £640 for a complex, contested breach. This is the cost borne by both probation and courts, although with overheads included, the costs for probation locally could be higher.<sup>50</sup>

This creates pressure for supervisors and offender managers to avoid instigating breach proceedings: a National Audit Office (NAO) report in 2008 found that probation officers regularly turned a blind eye to offenders’ absences from probation appointments, even though national standards require all absences to be treated as unacceptable unless proven otherwise. The NAO found that probation officers were accepting excuses such as work and family issues without further evidence, and allowing offenders to self-certify sickness. Amazingly, almost one in ten of *accepted* excuses fell into the category ‘forgot / confusion / slept in’.<sup>51</sup> Moreover, if supervisors are turning a blind eye to breaches and the official breach rate is running at around 34%, this suggests that the true rate of non-compliance is actually far higher.

47 Ministry of Justice, Community Payback handbook, p. 21

48 Ibid

49 Ibid

50 NAO/Accenture, Costing of Community Order Requirements, 2007, p.4

51 National Audit Office, The supervision of community orders in England and Wales, 2008, p. 21

Nevertheless, the Probation Service has had little incentive to improve compliance because of misplaced targets. The Probation Service's target for the delivery of Unpaid Work relates solely to the number of Unpaid Work requirements delivered; it owes nothing to the number that go uncompleted. As HM Chief Inspector of Probation (HMCIP) has noted, 'Due to the continued popularity of Unpaid Work as a sentence, most areas had little difficulty in exceeding the national target which was around order completions'. Moreover, since offenders receive credit for turning up if no work is available, these completion figures might not even reflect work actually done. The same HMCIP report said: 'we had found areas where the target was achieved but where this masked the routine need to stand offenders down due to a lack of supervisors'.

## Reoffending

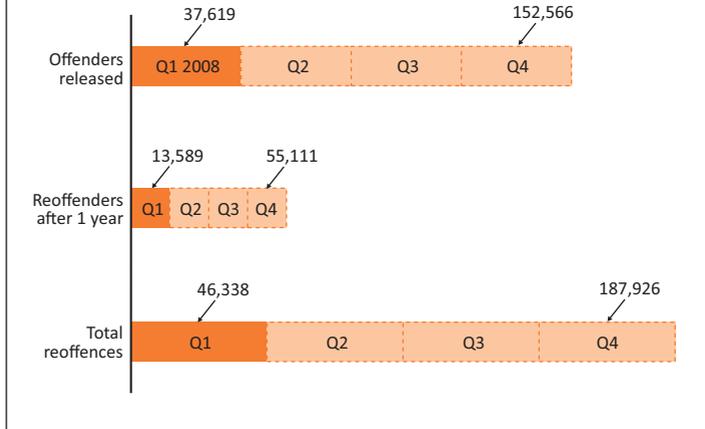
While offenders continue to adopt a cavalier approach to compliance with Community Orders, it is hardly surprising that they continue to reoffend. Adult offenders given a sentence containing an Unpaid Work requirement in Q1 2008 were found to have committed 13,361 offences in the following 12 months, including at least 74 'most serious' crimes. Adult offenders given a community sentence or suspended sentence in Q1 2008 committed a total of 46,338 crimes in the following year, of which 289 were in the 'severe' category<sup>52</sup> involving death, serious violence or sexual assault.<sup>53</sup> The corresponding figures for juveniles were 16,910 and 114.<sup>54</sup> Assuming that these are representative of all offenders (and there is no reason to believe that offenders convicted in a particular quarter are significantly different to those convicted in the rest of the year) this equates to over a quarter of a million crimes every year being committed by offenders (both adult and juvenile) recently given a community or suspended sentence, of which over 1,500 will be very serious offences such as murder, rape and robbery.

52 Ministry of Justice, Re-offending of adults: results from the 2008 cohort, Table A5

53 A complete list of 'severe' offences is found at Appendix G of Ministry of Justice, Re-offending of adults: results from the 2008 cohort, 2009

54 Ministry of Justice, 'Re-offending of juveniles: results from the 2008 cohort', Table A5

**Figure 15: Reoffences committed by adult offenders given a community sentence in Q1 2008**



### Comparing reoffending rates

Comparisons are commonly made between the reoffending rates for community sentences with much higher rates of reoffending for custodial sentences. Superficially, community sentences appear to offer reduced reoffending rates: while half of those sentenced to prison reoffend within a year of release, the corresponding figure for those given Community Payback is less than one quarter. However, simply comparing raw reoffending rates (or their proxy, reconviction rates) between community sentences and custodial sentences is misleading. Offenders given custodial sentences are precisely those more likely to reoffend – not least because when probation officers provide a pre-sentence recommendation, one of the factors they will consider is whether the offender is likely to reoffend if given a community sentence – and conversely, those on community sentences are a self-selecting cohort of those less likely to reoffend in the first

place. In fact, when actual reoffending rates are compared with predicted rates that take into account an offender's likelihood of reoffending (based on age, previous offences, and criminal history) community sentences are no better than prison at reducing reoffending, and some interventions are less successful.

When reoffending data is used to compare apparent "success" rates of community sentences, as against prison, not only is public debate distorted, but energy and focus is wasted on promoting the current flawed model, instead of acknowledging the shortcomings and working to improve them. As Professor Ken Pease has argued:

*"[T]he characterisation of community sentences as better than prison, and the misleading way in which reconviction rates are compared, reduces the motivation of practitioners and supportive academics to resource and innovate in making community sanctions more effective in truncating criminal careers. Success in doing so is much to be desired but while political expediency and shortrun cost considerations conspire to depict community sanctions as effective when they are not, the task of making them work is neglected."*

Source: Prison, Community Sentencing and Crime, Prof. Ken Pease, Manchester Business School, 2010

Reoffending will occur in any model of community sentence which grants offenders liberty while they are serving their sentence. However, reoffending alone should not be the only gauge of success or failure. Many of the shortcomings that afflict current community sentences make reoffending more likely, but they are also undesirable for other reasons. Community sentences that go uncompleted, or involve breaches that require proof leading to revocation impose a large cost – larger in fact than the cost that would have been incurred if the offender had been jailed. If offenders commit crime while

-serving their sentence in the community, the costs are bigger still. But beyond the economics, flawed practices that allow and encourage reoffending have other implications too. Poor supervision and the failure to apply sanctions creates the opportunity for reoffending to occur, but it is also likely to discredit the sentence in the eyes of the person serving it – teaching offenders that the sentences are weak and the rules can be flouted. Undemanding work placements send a strong signal to offenders that the consequences of crime – when they arise – are tolerable. Some of the flaws in the current model arise from the legislation and design of the Community Order, while other faults arise from the way they are administered and the type of activity involved.

### Failure of design

The first obstacle to the delivery of tough, effective, community penalties has been the choice of the Probation Service to deliver them. The ethos of the Probation Service in England and Wales remains antithetical to punishment. Over 25 years ago, academics pointed to probation hostility to Community Service Orders:

*“Despite public pronouncements made by the higher echelons of the Probation Service, the truth is that the scheme has never been popular with basic-grade probation officers because it is equated with practical tasks, policing, and not ‘real social work’. As a result, those few who are involved in community service wish to cease their involvement as soon as possible, and while they are there, the personal, organizational, and legal constraints on them doing so lead them to negotiate their differences with offenders. The consequence is a regular and consistent output of offenders completing their CSOs despite consistent violations of the terms of their orders. This engagement and negotiation takes the form of a number of informal and administrative procedures engineered and adopted by probation officers which ‘legitimate’ violations of order through special*

concessions made to offenders in return for the latter's co-operation. This protracted process of negotiation (which limits show-downs in courts to only a few exceptional cases) allows a continuous flow of successful completions of orders and gives the impression that the scheme is a highly successful and organized enterprise where all parties concerned give their best for the promotion of community work. This is far from the truth."<sup>55</sup>

More recently, Rex and Gelsthorpe<sup>56</sup> found that within the Probation Service, community service had been the 'poor relation' of probation work, with supervisors typically paid on a sessional basis, for contact time alone, unlike 'real' salaried probation officers. This was confirmed in a thematic review by HM Chief Inspector of Probation in 2007, which found that:

"UPW [Unpaid Work] schemes and staff were often not well integrated into the work of the service as a whole and were often perceived by themselves and others as quite separate... It was disturbing that in a number of areas we found strong evidence of an 'us and them' culture in relation to UPW staff and other staff of the Probation Service. This was most pronounced where one group of UPW staff referred to the service as if it was a separate organisation."<sup>57</sup>

Further design flaws arise from the sentence itself. The creation of the generic Community Order was intended to give sentencers the ability to choose from a 'menu' of interventions, some rehabilitative, some punitive. In practice, it has put the principles of sentencing in conflict and undermined public confidence. For this reason, the design of the combination order has tended to mean that the majority of community orders include no punitive element. In effect, offenders are too often treated simply as patients with a criminogenic disorder to be treated, while their crime itself goes unpunished. This understandably can leave the public, and victims of crime in particular, with the impression that the offender has 'got away with it'.

55 Vass, Antony A. (1989) 'The Community Service Order as a Public and Private Enterprise', *British Journal of Criminology* 29(3) 255-72.

56 Rex, S. and Gelsthorpe, L. (2002) The role of community service in reducing offending: Evaluating Pathfinder projects in the UK, *The Howard Journal*, 41(4) 311-32.

57 HM Inspectorate of Probation, *An inspection of the Delivery of Enhanced Community Punishment and Unpaid Work by the National Probation Service*, 2006

Indeed, policymakers and probation officers too often make the conceptual error of assuming that because an intervention such as drug treatment is demanding of the offender – which for an addict who has never encountered treatment it certainly will be – it amounts to a punishment. Such activity may be unpleasant, but it is not a punishment in and of itself. The first sentencing guidelines on the generic community order thus conflated rehabilitation and prophylaxis with punishment, in suggesting that a demanding intervention, or even a prohibited activity or exclusion requirement could effectively be a punishment that alone discharged an offender’s debt to society:

*“If a court is to reflect the seriousness of an offence, there is little value in setting requirements as part of a community sentence that are not demanding enough for an offender... persistent petty offenders whose offences only merit a community sentence by virtue of failing to respond to the previous imposition of fines. Such offenders would merit a ‘light touch’ approach, for example, normally a single requirement such as a short period of Unpaid Work, or a curfew, or a prohibited activity requirement or an exclusion requirement’.*

Community Payback work should be immediate, intensive and demanding. The Criminal Justice Act 2003 defined the minimum and maximum number of hours of Unpaid Work that courts could impose, stipulating a person may work no less than 40 hours and no more than 300 hours.<sup>58</sup> Therefore, the minimum requirement is for six hours Community Payback per week, meaning that an Unpaid Work requirement may take as much as a year to complete. A 90 hour Unpaid Work requirement has been described as “intensive”, even though it applies over two years. The maximum sentence of 300 hours could be applied over one year (25 hours a month, or six hours a week), but is more likely to be drawn out over two or even three years. There is a danger that for some offenders, Community Payback ceases to be a

<sup>58</sup> Criminal Justice Act 2003, s.199 (2)

punishment clearly related to a particular offence, and instead becomes a routine part of life, and therefore more optional in the offender's eyes.

Around half of offenders on Community Payback are in employment, and others will be in training. However, a large number, possibly almost half, are unemployed. Ministry of Justice Unpaid Work standards recognise that employed and unemployed offenders have different needs. However, even where unemployed offenders are eligible for 'intensive' delivery of Community Payback – currently applied only to knife crime offenders – this equates to a requirement of only 18 hours per week over a period of three days. Even this is not an intensive sentence.

Current poor levels of intensity are made worse by overly-bureaucratic processes that take up valuable time and reduce the resources available to closely supervise offenders on Unpaid Work orders and make them more intensive. Probation officers spend only 24% of their time dealing with offenders, compared with 41% on computer-related activity, and the remaining 35% on non-computer activity such as dealing with correspondence, travel and meetings. Nowhere is NOMS' 'tick-box' approach more apparent than the recent requirement for Community Payback supervisors to be observed at least four times a year by managers against a 'pro-social modelling' checklist, asking whether the supervisor greeted each offender individually, addressed offenders politely, used appropriate eye contact, body language, and tone of voice, and reinforced 'anti sexist attitudes and socially inclusive values'. Offenders are invited to complete an 'exit survey', which must be supervised by someone other than the placement supervisor.

One of the main design flaws of community sentences is the lack of available sanctions and incentives for supervisors on the ground to use to ensure compliance. Discretion is a vital component of a probation officer's role, but the design of these sentences restricts what actions supervisors can opt to take in response to poor behaviour or non-attendance. The sanction,

when it is imposed, is typically a new court hearing or if a suspended sentence condition applies, a return to custody if deemed appropriate by a judge. Less onerous sanctions that might be more appropriate early on to punish non-compliance and to enforce good habits do not exist. Consequently, supervisors ignore too many breaches – thereby inadvertently sending a signal to offenders that disobeying the order has no real consequences. It is the lack of smart sanctions short of custody, combined with any proper flexibility in the management of the orders that inhibits attempts to improve compliance rates.

### Failure of operation

The reality of current community sentences does not match the design laid out by regulations. It is an inevitable consequence of the top-down supply-led way that Community Payback is delivered that they can result in ‘stand-downs’, in which offenders are sent home because there is no work to undertake or, more typically, no one available to supervise them. A thematic review of the delivery of unpaid work by HMCIP found that 23% of offenders had been ‘stood down’ at least once, most of these having been stood down more than twice. In one case, an offender had been stood down eighteen times. Since that report, rules on stand-downs have been amended so that offenders get only one hour’s credit for turning up if they are not needed. However, the damage that they can do goes much deeper. Stand-downs undermine the sentence, because offenders are given credit for work not done. They irritate and send a negative signal to offenders: after all, if supervisors do not turn up for the appointment, why should offenders?

The Unpaid Work/Community Payback Service Specification and Operating Manual (hereafter referred to as the ‘Community Payback Manual’) states that the work undertaken by offenders should be ‘rigorous and demanding to meet the public expectations of

punishment and provide payback to the community'.<sup>59</sup> However, much of the work that is actually undertaken by offenders is far from rigorous and demanding, and would fall short of the 'public expectations of punishment' test.

For instance, some 13% of Community Payback hours are worked in charity shops; as we have seen, the public's least favoured option.<sup>60</sup> Similar work, such as helping with old peoples' luncheon clubs or working with animals account for a further 2% of Community Payback hours worked.<sup>61</sup> HM Chief Inspector of Probation found that offenders in London had been given work 'making costumes for the Notting Hill carnival'.<sup>62</sup> 90% of contracted-out Community Payback in Kent involves working in charity shops, an approach explicitly criticized by HMCIP in his thematic review of Unpaid Work.<sup>63</sup>

Only around half of Community Payback projects are made visible to the public, and this visibility is skewed so that the public get a distorted view of the work undertaken by offenders. Around 80% of environmental, community safety or graffiti removal projects are made visible, but only around 10% of charity shop placements.<sup>64</sup> Indeed, the Community Payback Manual appears to suggest that probation should seek to manipulate public conceptions of the work being undertaken through 'high profile but low volume projects (e.g. graffiti removal)'.<sup>65</sup> This means that members of the public are more likely to see that Community Payback is being undertaken on a graffiti removal or recycling project than in a charity shop – even though in fact more Community Payback is done in charity shops than removing graffiti or recycling put together.

This also helps to put public attitudes to Community Payback into context. If members of the public consider Community Payback to be a soft option when the visible side of Community Payback is an environmental project or graffiti removal, this confidence would be diminished further, not improved, were they presented with a fuller, more accurate picture of the work undertaken by offenders. For this reason, simply increasing visibility alone is unlikely to enhance

59 Ministry of Justice, Unpaid Work/Community Payback Service Specification & Operating Manual, 2010, p.10

60 Ministry of Justice, Snapshot of Community Payback 2009, Table 4

61 Ibid.

62 HM Inspectorate of Probation, An inspection of the Delivery of Enhanced Community Punishment and Unpaid Work by the National Probation Service, 2006, p.24

63 FOI request made by Policy Exchange

64 Ministry of Justice, Snapshot of Community Payback 2009, table 3

65 Op. Cit., n.39

support for community sentences, and may well damage it, without changes to the nature of the work undertaken by offenders.

The operation of these sentences has also been undermined by the continued monopoly of provision that the Probation Service enjoys. The Offender Management Act 2007 heralded the creation of Probation Trusts and was intended to pave the way for a multiplicity of providers from the private and third sectors, with Offender Managers responsible for commissioning services. The Probation Service would retain a monopoly only on the preparation of court reports.<sup>66</sup> However, Policy Exchange has found<sup>67</sup> that this vision has not been realised and community sentences remain dominated by the Probation Service.

Freedom of information requests to Probation Trusts reveal that there are no contracts with private or voluntary providers for the supervision of Unpaid Work requirements in London or Merseyside. Greater Manchester Probation Trust refused to reply, citing commercial confidentiality. Kent Probation Trust had 37 contracts for Unpaid Work supervision with public bodies and voluntary organisations, but these together accounted for less than 9% of all Community Payback worked in the county, and 90% of the work in question was in charity shops. Of the Probation Trusts that replied, the only significant use of outside organisations to supervise groupwork placements was in West Mercia, where almost 2,500 placements were monitored by third sector providers, including almost 2,000 offenders sent to work on community farms.

This ongoing monopoly brings with it other problems as the attitudes of many probation officers remains dominated by concern for offenders, and hostility to punishment. As already noted, probation officers routinely turn a blind eye to breaches by their supervisees, in part because of the administrative inconvenience of initiating breach proceedings, but in large measure because a breach simply results in more punishment (the court can increase the number of hours Unpaid Work or sentence the offender to jail), to which the service is largely antipathetic.

<sup>66</sup> Strictly speaking, the Act only requires that this core function is reserved to the public sector, and not specifically the Probation Service.

<sup>67</sup> Carter But Smarter: Transforming offender management, reducing reoffending, Policy Exchange, 2010

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## 5. What Works in Community Sentencing

Community punishments take many forms and they have been used in other countries as a non-custodial sentencing option for several decades. Experience abroad as well as some more recent innovations at home provide examples of better ways to operate community sentences as well as more effective work options for offenders on such sentences.

Evidence shows that several features are common to successful community orders. Schemes that utilise these features have higher completion rates and better outcomes for both the community and the offenders concerned:

- **Punishment.** Community orders that involve a punishment element, either on their own or as part of a range of requirements, are more effective at preventing reoffending than those focused on rehabilitation alone.
- **Intensity.** Community sentences that are less intense show higher rates of non-completion. Orders dragged out over years rather than weeks and months are less likely to fulfil punishment objectives and more likely to be terminated early, with requirements abandoned by the offender. Completion rates rise when the same number of hours is required to be completed in less time.
- **Purposeful work.** Schemes that involve purposeful work fulfil more of the objectives of sentencing and have higher rates of public satisfaction. Work schemes that are of a clear public benefit are more rewarding and help engage offenders, thus reducing non-compliance. Such schemes also provide more opportunities to develop basic skills and thus enhance routes into the job market for the offender upon completion.

- **Smart enforcement.** Sanctions are more effective when based on principles of certainty (imposed in response to every infraction), celerity (administered soon after the infraction occurs), and severity (sufficiently severe to be perceived as undesirable).<sup>68</sup>

## Punishment

Punishment is defined in legislation as the first of the four principles of sentencing. There are natural justice arguments to support the role of punishment in response to criminal behaviour, in particular with reference to the rights of victims and wider society. However, the importance of punishment is also established by reference to its utility as a crime prevention principle. Are sentences that are punitive more successful because punishment is effective at deterring future crime?

Although the Ministry of Justice publishes reoffending rates for different components of community sentences, there are no published predicted rates for individual components. This makes it impossible to state whether differences in reoffending rates between the predicted rate and the actual outcome for any particular component are attributable to differences in offender mix. So, for instance, the high rate of reoffending for those given drug rehabilitation and supervision requirements (two-thirds of whom reoffend within a year) probably reflects the fact that their offending and their sentence are both attributable to an addiction. However, in 2007, the Home Office attempted to produce comparisons of reoffending rates which control for differences in offender characteristics:

*“[T]he relationship between disposal and re-offending is complex and the effect of disposals on re-offending can only be properly assessed by using experimental designs that can control for all factors that may influence re-offending... However, a separate statistical model was built for the purposes of this section of the report to allow some limited understanding of the relationship between sentence and reoffending rates.*

68 Pogarsky, G., 2009, Deterrence and Decision-Making: Research Questions and Theoretical Refinements. Chapter 13 in Handbook on Crime and Deviance, eds. Krohn, MD, Lizotte, AJ, and Hall, GP. Springer

“Adding disposals into the statistical model produces an odds ratio of proven re-offending for each disposal compared with one other disposal (the reference category), which in this case is custody. If the odds ratio is above 1 then the offender given a particular disposal is more likely to re-offend than an offender released from custody, providing that all other characteristics included in the model are identical (the technical annex provides further details). Conversely, an odds ratio of less than 1 indicates that an offender given a particular disposal is less likely to re-offend than an offender released from custody. . . . CPRO [community punishment and rehabilitation orders] and CPO [community punishment orders] disposals are associated with lower rates of re-offending than prison, while DTTO [drug treatment and testing orders] and CRO [community rehabilitation orders] are associated with higher rates of reoffending than prison.”<sup>69</sup>

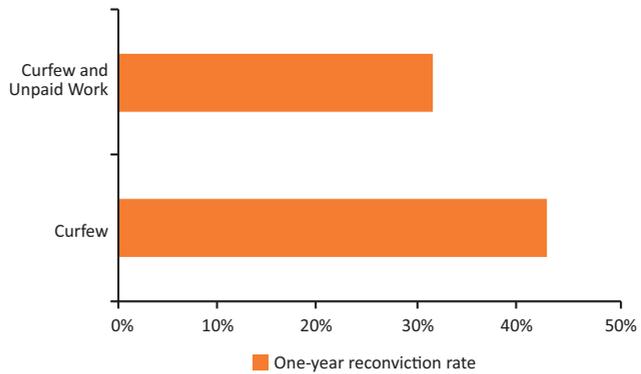
This research, while limited, does reveal an important implication: punishment works. The two orders which include Unpaid Work requirements do better than prison; the two orders which involve only rehabilitation do worse. The data suggests that an offender given a punitive Community Payback requirement is almost 20% less likely to reoffend than a similar offender given a custodial sentence.<sup>70</sup>

A compendium of reoffending statistics released by the Ministry of Justice in November 2010 outlined the one-year reconviction rate for every different community sentence requirement. This allows the relative effectiveness of different combinations of requirements to be examined. Though direct comparison is not entirely possible (due to the different criminal histories of offenders and different offences they are sentenced for), the statistics strongly indicate that the most effective community sentences are those which include a punitive element, especially an Unpaid Work requirement. For example, stand-alone curfew orders are less effective than curfew orders combined with Unpaid Work. Likewise, a simple supervision order would appear to be more effective when combined with Unpaid Work:

69 Home Office, *Re-offending of adults: results from the 2004 cohort*, 2007, p.12

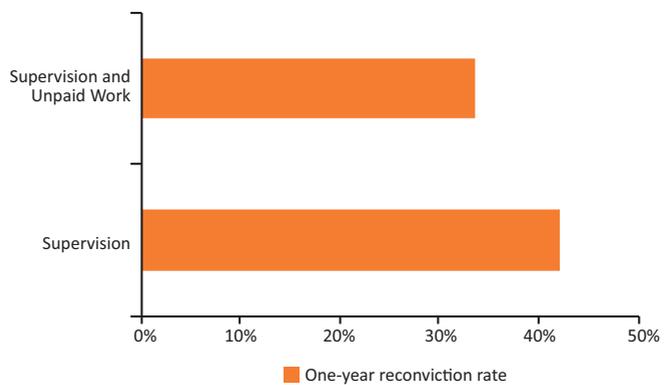
70 *Ibid*, p.13 – Taken from odds ratio of reoffending compared with custody, 2000, 2002, 2003, 2004

**Figure 16: Curfew versus curfew and Unpaid Work**



Source: Compendium of reoffending statistics and analysis, Ministry of Justice statistics bulletin, 4 November 2010

**Figure 17: Supervision versus supervision and Unpaid Work**



Source: Compendium of reoffending statistics and analysis, Ministry of Justice statistics bulletin, 4 November 2010

Furthermore, a stand-alone Unpaid Work requirement appears to be the most effective of all the different types of community sentence requirements, with the lowest one-year reconviction rate (25.3%).<sup>71</sup> Taken together, these new statistics undoubtedly strengthen the case for including a tough, effective Unpaid Work requirement as the central component of a sentence in the community.

### Intensity

Community sentences need to provide offenders with a sense of achievement if they are to be effective in preventing future reoffending. This, in turn, makes it important that work is completed quickly. If offenders are moved from project to project over extended periods of time, they are unlikely to see any substantial work project through to completion.

The government is currently piloting an intensive alternative to custody scheme in Derbyshire Probation Area. The sentence, which is aimed at offenders who would otherwise receive a custodial sentence, consists of a four month curfew, supervision, weekly mentoring and intensively delivered unpaid work. Although the pilots have not yet been formally evaluated, given that the offenders who receive these orders are on the cusp of receiving a short prison sentence, we would expect them to have a reoffending rate somewhere between that for a community sentence and that for a prison sentence. In fact, 80% of those who have completed the scheme have not reoffended.<sup>72</sup>

Increasing the intensity of Unpaid Work has a number of advantages. For unemployed offenders, it gives a structure to the offender's time that may otherwise be lacking, and makes it less likely that an offender will inadvertently breach their order by forgetting an appointment than where these are less regular. It makes it viable to stage requirements, so that an offender may, for

71 Ministry of Justice, Compendium of reoffending statistics and analysis, 4 November 2010

72 [http://www.dpsonline.org.uk/assets/userfiles/derbyshire/derbyshire\\_news/IAC\\_pilot\\_study\\_update.pdf](http://www.dpsonline.org.uk/assets/userfiles/derbyshire/derbyshire_news/IAC_pilot_study_update.pdf)

instance, undertake all their Unpaid Work before moving on to a requirement to undertake a rehabilitative course, rather than be ‘set up to fail’ by an over-complex or over-demanding order. It makes it possible for offenders to see a particular project through to completion, and in a relatively short space of time, creating a sense of achievement. Crucially, it offers the offender fewer opportunities to reoffend, by placing them under a form of supervision (arguably a more credible one) for a solid chunk of time.

### Purposeful work

There is a tension at the heart of Community Payback work: often work that is most demanding will have little capacity to engage offenders, while some work that may be more attractive, such as

working in charity shops may, in truth, not really punish at all. One answer adopted by probation officers has been to make sure that offenders work on a mix of unpopular boring schemes (‘grot-spots’) and on constructive placements. Ultimately, however, the aim should be to resolve this tension by finding

“ The aim should be to resolve tension by finding more placements that are both physically demanding and rewarding ”

more placements that are both physically demanding and rewarding. For instance, on more intensive groupwork environmental placements, offenders are able to see the transformative effect of their work on the local environment. A project in West Mercia involves offenders collecting, repairing and distributing furniture – a mix of demanding physical work and constructive restorative work which offenders rate highly.

Research has found that community sentences need to provide offenders with a sense of achievement if they are to be effective in preventing future reoffending, and that ‘worthwhile’ community service – whether because it can be seen by offenders to

benefit the community or because offenders learn a useful skill – is associated with reduced reoffending.<sup>73</sup> International evidence also shows how it is possible to reconcile the ‘tough, demanding’ requirement of Unpaid Work with the aim of providing offenders with a sense of achievement.

Providing work that is demanding but constructive can help to address the causes of offending. In 2009, the innovative Liverpool Community Justice Centre launched an Intensive Community Payback scheme on the Fountains Close estate. The estate had been plagued by drug offending and the main social landlord, Liverpool Mutual Homes, was in the process of refurbishing properties, improving communal and green spaces, and removing the product of years of neglect, fly-tipping and graffiti.

The programme takes offenders who are fit and healthy, but not in training or employment, who need the challenge and motivation of full-time work to complete their sentence and break the cycle of offending. The offenders work five days a week with Registered Social Landlords and tenants’ groups to renovate social housing estates, with each placement beginning within two days of sentencing. During a twelve-month pilot phase, 93% of placements were completed successfully, with only 14% of offenders breaching part of their order. Six of the offenders have gone on to secure work experience with the furniture resource scheme which supplies the project, while four others have secured places on a paid training scheme.<sup>74</sup>

The scheme has also led to demonstrable improvements for the community. During the project, no new graffiti appeared on the estate and there was a 50% reduction in anti-social behaviour.<sup>75</sup> Clearing the area has deterred prostitution.<sup>76</sup> The project has also helped to foster a sense of community. At a public meeting to discuss the proposed project, only two people were prepared to talk to the police, but 40 residents turned up for a celebration of the completion

73 G. McIvor, ‘Sentenced to Serve’, 1992

74 Private briefing from Liverpool Community Justice Centre

75 Ibid.

76 Ibid.

of the project. Locals have planted flowers in the cleared green spaces.<sup>77</sup> Following completion of the Fountains Estate project, the scheme has moved to the Westminster Estate in Kirkdale.

A key difficulty with this approach, however, lies in the ability of the Probation Service to provide sufficient capacity. The Liverpool Intensive Community Payback Scheme can accommodate only six or seven offenders at a time. Supply of offenders for whom such a scheme would be appropriate outstrips the capacity of the Probation Service to co-ordinate and supervise the work concerned.

However, the North Liverpool scheme demonstrates that it is possible to deliver an intensive Unpaid Work requirement that achieves the twin aims of punishing crime and giving unemployed offenders the sense of routine and achievement that work can provide.

### **Case study 1: Social housing schemes in Minnesota and Maryland**

In Minnesota, under the 'ICWC Affordable Housebuilding program' offenders work, supervised, on construction sites building affordable housing for low-income families. Over 300 houses have now been built under this programme, and five work crews constructed 35 new homes in the 2008-09 season. The scheme is also tied to a skills provider:

*"A vocational training program for ICWC/AHP crews has been developed in consultation with Associated General Contractors of Minnesota. This partnership with the construction industry provides crew members with practical industry training and an opportunity for a career in construction upon release."*

A similar scheme operates in Maryland. Social enterprises – such as the Caroline County Habitat for Humanity – acquire land, individual

<sup>77</sup> Ibid.

and corporate donors provide the money and materials and volunteers and offenders on community service from the Division of Corrections' Eastern Pre-release Unit build houses for low income families. Recipients themselves provide hundreds of hours of their own labour – “sweat equity” – and the houses are sold at no profit, and on zero interest mortgages.

Source:<http://www.corr.state.mn.us/org/communityserv/documents/01-08ICWCAHP.pdf>  
[http://www.dpssc.state.md.us/publicinfo/features/restoring\\_history.shtml](http://www.dpssc.state.md.us/publicinfo/features/restoring_history.shtml); [http://www.caroline-habitat.org/Caroline\\_Habitat\\_for\\_Humanity/Home.html](http://www.caroline-habitat.org/Caroline_Habitat_for_Humanity/Home.html)

### **Case study 2: Work for a community benefit in Indiana**

In the state of Indiana, community work projects involving offenders are directly linked to schemes that have a clear public benefit – where possible to those agencies whose resources are devoted to public safety. Many local police departments, for instance, do not contract with private sector suppliers to clean their patrol vehicles. Instead, these cars and vans are cleaned regularly by offenders on work programmes. The scheme directly benefits the agencies concerned while saving them the expense of contracts with cleaning companies.

Community corrections in Indiana, which is organised at the local county level, also manage their work crews in partnership with the community and non-profit organisations. Offenders are often tasked with keeping in repair elderly care homes, clearing snow in winter and keeping public parks and open spaces clean. It is State policy to ensure that community service is both meaningful and visible. Project staff in Steuben County, for example, regularly upload pictures to a public website that illustrate the type of work their crews engage in, along with a day-by-day account of work completed.

Source: Steuben County Community Corrections – <http://www.sccommunitycorrections.com>

### Case study 3: Community Cleanup in New York City

NYC Community Cleanup is targeted to address neighbourhood hot spots and eyesores, putting low-level offenders (convicted of minor offenses such as vandalism, shoplifting, and public drunkenness) to work repairing conditions of disorder throughout New York City. The goal of NYC Community Cleanup is to promote accountability for minor crime, and ensure that community service is meaningful, immediate, and visible, while helping to enhance quality of life in those neighborhoods it impacts.

NYC Community Cleanup began operations October 19, 2009. In Year 1 of operations, Cleanup worked with 2,144 clients ensuring that 86% (1,858) fully completed their mandate. Across the city, Cleanup crews were responsible for maintaining 176 graffiti free locations, and donating nearly 6,000 hours worth of labor to assist local charities. As a non-profit operating outside the city government harnessing and leveraging the extra manpower of people who are paying back their community, Cleanup is geared to be highly responsive to community concerns, tackle eyesores that are difficult and expensive for the city to address, and be a visible example of justice being done.

Working in partnership with multiple police precincts as well New York City's "311" system for reporting quality of life complaints, NYC Community Cleanup has conducted an anti-graffiti campaign that tackled graffiti at over 150 locations in the northern Manhattan. In addition, the commuter railroad operated by a regional authority separate from the city government, Long Island Railroad, received numerous complaints about graffiti on its property in the Jamaica neighbourhood of Queens, New York. Thanks to a new partnership between the MTA/Long Island Railroad and NYC Community Cleanup, work crews composed of

offenders sentenced to community service will perform restitution by repairing vandalism at a number of graffiti tagged properties in the LIRR. The program will respond quickly to make sure that any new tagging is quickly painted over, in order to ensure that the area remains graffiti free.

Via the project's website, residents can report eyesores such as trash or graffiti. Response times to most requests are within less than 48 hours (such requests typically take weeks or months to be addressed by city agencies). Cleanup's flexibility also allows it to assist with cleanups after natural disasters such as severe storms or flooding, when Cleanup crews are able to help neighborhoods clear debris and repair damage.

Source: Centre for Court Innovation

### Smart enforcement

Home Office research from 2001 confirms a positive link between enforcement of community penalties and improved outcomes as measured by reconviction. Stricter enforcement, rather than leading to more failures to comply actually improved engagement and led to lower rates of reoffending after the disposal. The study cited an 'unambiguous' result: a 9% average reduction in reconviction rates for offenders on community sentences where enforcement was rigorous and sanctions consistently applied in response to breaches.<sup>78</sup>

Equally importantly, where enforcement action was not taken, the result was reconviction rates some 13% higher than predicted. At first glance it may be surprising that the mere absence of an intervention can actually cause offenders to commit more new offences. However, this ignores the signalling effect of supervisors failing to take action against breaches of which they are aware. If the Probation Service – the very agency

78 Home Office, RDS Findings 155: Enforcing community penalties – the relationship between enforcement and re-conviction, 2001

which is supposed to monitor an offender to ensure that they obey the law – sends out a signal that breaches will be ignored, offenders can be forgiven for thinking that they can break the law with impunity.

This paper has already pointed to the way that effective detection and punishment can erode an offender's sense of invulnerability, and that this in turn is correlated with lower offending. The reverse of this is equally likely to be true: that complicity in ignoring an offender's failure to comply with probation conditions sends out a signal that the offender can 'get away with it', which leads to an escalation in non-compliant behaviour that eventually results in reoffending.

However, the threat of imposing a custodial sentence for non-compliance (typically some type of suspended sentence) is not always effective – it is too distant and infrequently applied to serve as a useful sanction. Academic research has found that the threat of a suspended sentence being activated has no impact on whether the offender offends during the currency of the sentence.<sup>79</sup> Furthermore, where it is applied, and then activated in response to a proven breach, the resultant spell in custody imposes high costs on an already costly intervention. The back-door sentencing implications from widespread use of custody as the preferred sanction for breach of a community sentence are also well known.

More immediate sanctions, falling short of imprisonment, applied routinely and without delay can produce greater rates of compliance. They can also be imposed more swiftly, with less cost to the criminal justice system. Severity should be about what punishments are really meaningful to the offender, rather than what the system deems the most severe (custody). A smart system of enforcement would have a more diverse and imaginative range of sanctions for courts and supervisors to impose than simply the threat of imprisonment.

<sup>79</sup> Weatherburn and Bartells, 2008

## Effective delivery

The organisation responsible for operating community sentences can affect how they are applied, and whether the conditions are enforced. The record of the Probation Service in England and Wales is not commendable in this regard. Outsourcing the delivery of these sentences could reduce costs while improving completion rates and general performance.

### Case study 4: Outsourced delivery in the Netherlands

The experience of community sentences in the Netherlands shows many similarities with England and Wales. In the mid-1970s community service was proposed as a way of reducing the prison population amid a widespread belief that custody only worsened an already bad situation. Experiments with community sentences were introduced in the 1980s. Probation officers, mostly trained in social work, were initially reluctant to oversee community sentences. They were won over because they could see that community sentences could operate as an alternative to custody; although many probation officers refused to enforce Unpaid Work requirements or report on failures<sup>80</sup>.

In the Netherlands, however, three private organisations are now responsible for the delivery of Probation Services: *Reclassering Nederland*, formed in 1995 from the Dutch Association of Probation Institutions, which receives 63% of probation funding; *SVG*, which deals with offenders whose behaviour is related to drug or alcohol addiction, receives 28% of the probation budget and the *Salvation Army* receives the remainder to work with homeless and juvenile offenders. *Reclassering Nederland* is responsible for administering community service, and unlike the other services has a dedicated unit for implementation of community orders: it places offenders with government or private organisations involved in healthcare,

80 Boone, 2005, 'Community Justice in a safety culture: Probation Service and community justice in the Netherlands', in: Jane Winstone and Francis Pakes, *Community Justice, Issues for probation and criminal justice*, Devon: Willan Publishing, p. 283-301, and, 2006, 'Only for minor offences: community service in the Netherlands', *European Journal of Probation Research*, 2(1), pp. 22-40

environmental, social and cultural work. A distinction is drawn between weekday projects for unemployed offenders and weekend projects for those with jobs. The notion of 'community work' is widely drawn.

In the Netherlands, the Prosecution Service (which is responsible for ensuring the execution of community services) can change the content of a community order and can demand detention in the case of default.<sup>81</sup> Although offenders may appeal against detention, this is not suspended while the appeal is pending. Effectively, therefore each operates rather like a suspended prison sentence, with the likelihood of immediate custody for those who fail to comply. In the Netherlands, between 75 and 87% of community sentences are completed satisfactorily. This rate rises to 96% for first-time offenders, those in regular employment and those who receive a community sentence as an out of court settlement.

Source: Reclasering Nederlands website: [www.reclassering.nl](http://www.reclassering.nl)

81 Boone, Miranda (2010) 'Only for Minor Offences: Community Service in the Netherlands', *European Journal of Probation* 2(1) 22-40.

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## 6. A New Model: Work Orders

Current community sentences fail because they are fundamentally flawed, poorly administered and confused in their purpose. To be made better, community sentences first need to be refocused back to their core function of punishment and then radically reformed to improve compliance and administration. There is no contradiction between being “tough” and being “effective”.

The systemic flaw in sentencing arrangements is the shortcomings of those sentences that sit between a fine and a prison sentence. But ensuring that community sentences are tough, demanding, credible and maintain public support is no easy task. It requires changes in the sentencing framework, strengthened enforcement of community punishment requirements, a redoubling of efforts to communicate the benefits of these requirements to the public, and changes to the nature of work undertaken by offenders.

A new sentencing model must involve the creation of a clear, distinct, and widely-applied (and equally widely understood) disposal that serves first and foremost as a punishment. This disposal must be established formally in law and credible enough to sentencers so that it becomes a new third pillar of sentencing. The result would mean the punishment sanction available to courts for most summary and indictable offences would be one of three broad sentencing options – with the new community punishment serving as more punitive than a financial penalty, but less punitive than custody. This new model of community punishment that fulfils these conditions should be explored – hereafter referred to as a “Work Order”.

### The Work Order

This innovation would see Community Payback substantially reformed, and the new expanded Work Order applying instead. The new Work Order, sitting alongside a fine and a custodial sentence, would be centred on punishment, and would reflect those elements that are vital to an effective sentence that could command public confidence. Namely, the Work Order would be tough, visible, intensive and demanding.

To achieve this, the generic Community Order should be abolished and Community Payback radically reformed. Rather than another ill-fated rebranding effort to sell Unpaid Work, or a renewed attempt to tighten up certain conditions, the existing disposal should be replaced entirely. The Work Order would be bigger in scope and more focused in purpose.

Replacing the generic community order with a Work Order (to which a separate rehabilitation component could be applied) would ensure that every sentence included a punitive element, with judges able to bolt on interventions designed to address the causes of offending and requirements designed to keep the offenders from places, activities and people likely to result in them committing further offences.

Work Orders would not, alone, be appropriate for all offenders, especially those whose offending is driven by addiction or mental health problems. However, where the choice is between giving a short prison sentence for the first time (which is too short to offer rehabilitation support, but will most likely be damaging to work, family and accommodation links – all factors which are negatively correlated with offending), then a tough Work Order requirement will often be preferable.

### The place of rehabilitation

Rehabilitation is crucially important – especially for young and first-time offenders – and should remain a key concern of both sentencers and supervisors. However, it would be misguided to allow rehabilitation to take precedence in a sentence to the point of

excluding any real punishment for the original offence. Doing so dilutes the deterrent effect of the sanction, and weakens it in the eyes of the public, which is what has happened with current community orders. Instead, the proper place of rehabilitation should be guided by the sentencing approach that applies now to custody.

Rehabilitation services for inmates are provided by a range of public, private and voluntary sector providers, large and small, inside prisons and through-the-gate. These services are offered to inmates to opt-in to if they choose or sometimes – for instance to earn in-cell privileges or to be eligible for parole – they are set down as a requirement, either of the court, the Parole Board, or the governor of the prison itself. However, these rehabilitation services always run concurrently with the custodial sentence and it is the imprisonment – by depriving an offender of his or her liberty – that represents the punishment. Furthermore, Release On Temporary Licence (ROTL) and Home Detention Curfew (HDC) in the custodial system are two features explicitly designed to aid rehabilitation, but they do not precede the punishment which is the time in prison itself – they are applied towards the end of a sentence to aid, amongst other things, resettlement and re-integration.

Rehabilitation should have a similar place where an offender has committed a crime that warrants a community sentence. And while rehabilitation should remain a vital complementary feature of these orders, with many existing elements (accredited programmes, treatment for addiction etc) necessary and appropriate too, community sentences must have punishment as their principal *raison d'être*.

Rehabilitation services, such as they are deemed necessary by the court, should follow or run concurrently to the punishment in each case, and never supersede or substitute it. In order that offenders

“It would be misguided to allow rehabilitation to take precedence in a sentence to the point of excluding any real punishment for the original offence”

are not set up to fail, by combining Work Orders with rehabilitation requirements, judges should have the power to stage or stagger requirements. For instance, an offender might be required to perform a set number of hours of a Work Order, followed by a requirement to attend an alcohol awareness course or a drug detoxification programme.

In those cases where access to rehabilitation services (housing, employment, training, counselling) was not deemed necessary by the sentence report, and was therefore not required by the court, such services could nonetheless be offered to offenders by their direct supervisors as an incentive to comply with the order. Offenders would earn no credit for engaging, and where it was not required it would not be expected of everyone, but it would be on hand to follow the punishment if the offender chose it.

### **Creating the Work Order**

To facilitate this change, the sentencing framework for England and Wales should be modified via primary legislation to create a new category of punishment, independent of any existing rehabilitative element. The new punishment – the Work Order – should be a distinct sentencing option, sitting between a fine and a custodial sentence, applicable in both Crown and Magistrates courts. When legislation creating new offences is introduced, in addition to setting out the maximum financial and, where applicable, custodial penalty, the legislation should also set out the maximum length of a Work Order.

Primary legislation to amend or build upon the 2003 Act may be required to enable some of the proposed changes. Other suggested changes to enhance the visibility and improve the scheme activities undertaken on Work Orders could be enacted via new Ministry of Justice circulars, and other rules laid down to govern community sanctions.

## Improved compliance

One of the key objectives of the new Work Order should be improved compliance via more effective enforcement. Reforms to minimise breaches where possible, and process them more efficiently where they do occur, will make the sanction more cost-effective. The 2007 report by the National Audit Office and Accenture found that: “Probation areas stand to gain most by improving the efficiency of breach processes given this majority share of costs.”<sup>82</sup>

Some new ways of achieving this might include new powers for supervisors to vary the length of a Work Order by reference to the conduct of the offender, and new ways to supervise offenders and sanction non-compliance, for instance the introduction of satellite monitoring for some offenders, the roll out of benefit withdrawal for unemployed offenders who breach the terms of their sentence, and in the last resort new powers for courts to dispose of offender’s assets.

Work Orders should entail new provisions for incentivising attendance and completion of the sentence. Currently, probation officers have no flexibility to modify the conditions of an order – typically the hours to be served – to reflect the conduct of the offender. This limits their ability to reward engagement and increase the completion of orders in an efficient and speedy manner.

Under a Work Order regime, supervisors should have much greater discretion over what projects are undertaken, which rehabilitation schemes apply to complement the punishment and when they start, and what counts as good progress on an order. Supervisors should also be granted the power in law to alter the requirements to encourage compliance. Instead of the community punishment provider being required to go back to court in the event of some breaches, supervisors should have powers to vary the sentence according to attendance and compliance in line with the court’s instructions. In Opposition, the Conservative Party favoured a shift in sentencing to a “Min-Max” arrangement whereby courts would specify an envelope of time to be served, which would vary

<sup>82</sup> Costing of Community Order Requirements, NAO/Accenture, 2007

in practice according to the conduct of the offender. To provide greater flexibility, Work Orders could include a minimum and maximum envelope which could then be varied by supervisors, without resort to a judicial authorisation.

For example, a Work Order requirement might have a minimum of 80 hours and a maximum of 120 hours to be completed over four weeks (between 20-30 hours per week). If the unemployed offender makes good progress they may only have to complete 80 hours, and could be released from the Order after two and a half weeks. In contrast, if their conduct is unsatisfactory, they may be required to work six hours a day, five days a week, for four weeks (totalling 120 hours). A sentencing envelope along these lines would give supervisors greater discretion and the flexibility to fit the circumstances of each offender and placement, while giving the offender a powerful incentive to comply with the order and complete it as quickly as possible.

Other incentives could be made available. With punishment established as the principal and primary *raison d'être* of Work Orders, rehabilitation components, such as they are deemed necessary by the court, would follow completion of an Order, or sit alongside it where this did not interfere with the working requirement during the days of the Order. Where specific rehabilitative interventions are not specified, supervisors could offer as an additional incentive, access to rehabilitation service providers on completion of the Work Order.

Powers enshrined in the 2003 Criminal Justice Act allow courts to apply a tag to an offender serving a curfew or community order, but existing schemes rely on an ankle tag linked to a location device installed at a single location (usually an offender's permanent address). Recent technological advancements have made tagging of offenders serving a sentence in the community a more realistic option with the use of satellite monitoring. In 2004, the Home Office piloted a satellite monitoring programme heralded by the

then Home Secretary David Blunkett as offering the possibility of ‘prison without bars’, with offenders capable of being pinpointed to within two metres of their location. Four groups of offenders were selected for the pilot: prolific and priority offenders, sex offenders, violent offenders, and domestic violence offenders. The vast majority (96%) of the offenders were considered ‘high risk’.

As an exercise in identifying an alternative to prison for dangerous offenders, the pilot was a failure. Over half of the offenders were recalled to custody for breaching the terms of their release, and a quarter committed a further offence while they were being tracked, including one very serious offence which resulted in a life sentence, and two very serious offences which resulted in indeterminate sentences.

However, the results were more encouraging in respect of non-dangerous offenders. As part of the pilot, twenty offenders were tracked during a community sentence. Magistrates and District Judges considered tracking a helpful sentencing option, and indicated that the availability of satellite monitoring, if it could be shown to be reliable, might make the difference between jailing an offender and giving a community sentence:

*“Interviews with magistrates and District Judges suggested that courts might be encouraged to make greater use of satellite tracking if, in addition to having the power to order satellite tracking to monitor an offender’s compliance with an exclusion zone, they were given the power to order the satellite tracking of an offender’s general whereabouts as a requirement of a community order”.*

The average cost of satellite monitoring was £42 per offender per day, but there would be considerable economies of scale available if satellite monitoring were to be rolled out nationwide. Services such as ‘active tracking’ – in which real-time data is made available on offenders in breach – would become economically viable, allowing

for the speedy location of offenders who fail to turn up to Community Payback requirements. Supervisors should be given the ability to impose tagging or supervision requirements on offenders who miss scheduled work placements.

Around half of offenders on community sentences are unemployed. In 2001, the Home Office and Department for Work and Pensions ran pilots of a 'community sentences sanctions policy', under which offenders on community sentences could lose 100% of Jobseeker's Allowance and up to 40% of income support if they failed to comply with the terms of their community sentence.

It is hard to judge the success of this pilot as hostility from probation officers and disinterest among JobcentrePlus staff resulted in a lack of enforcement actions, but it is clear that it did motivate some offenders. Researchers found that the policy led to a 1.8% increase in compliance among those on the relevant benefits, meaning that for every 50 sentences one fewer resulted in a breach. The researchers found that the policy's impact 'was constrained by limited consciousness of it'. There was 'no evidence of widespread change in enforcement among Probation Service staff':

*"Among staff involved in the qualitative research from both the Probation Service and Jobcentre Plus, the objectives of the policy were broadly understood to be to increase compliance with community sentences, and this was generally supported. However, there were some concerns about the 'fit' of the policy within the work of each agency, in Jobcentre Plus because it was seen as a criminal justice penalty rather than one related to labour market or benefits behaviour, and in the Probation Service because of concerns that the policy would impede the rehabilitation of offenders".*

The issue was not a shortage of breaches, but referrals by probation: breaches were not notified even when breach proceedings had been initiated. On occasion, probation officers admitted to having accepted excuses that they would have rejected previously. Breach

notices were reportedly found piled up on the desks of probation officers who had refused to submit them. That the policy led to increased compliance in these circumstances was therefore an achievement against the odds: it has to be concluded that benefit withdrawal could be an even more effective tool for ensuring compliance were it actually explained to offenders and were supervisors to enforce breaches.

It should also be possible to consider other financial penalties to encourage compliance, including the forfeiture of an offender's assets for persistent breaches. Where an offender's income makes the application of a fine unrealistic, and where benefit withdrawal fails to improve behaviour, the threat of immediate disposal of previously identified assets could be an important tool. To reduce the complexity of a court issuing a separate order, the Work Order could have provision in law to allow a judge or magistrate to cite certain identified assets of an offender as worthy of forfeit should they fail to comply with the sentence.

To expedite the process and to enhance the utility of the sanction, those assets of value could be seized in advance (using existing court bailiff procedures) and held in trust by the court (or a designated authority), only to be returned when an offender successfully completes an order. The removal of a television, motorbike or stereo system would be a powerful incentive to abide by the order, and the threat of losing such assets would give supervisors an additional financial penalty to invoke to punish non-compliance. There would be a modest revenue stream from disposal of assets that could help offset some of the cost of a Work Order that was breached.

### Greater visibility

Visibility aids public understanding and raises community awareness of the nature of the punishment and reparative benefit that such work provides. Work Orders should be very visible, both by the

nature of the projects and the clothing worn by those serving on the orders.

When Community Payback was launched, Home Office rules required that offenders undertaking the requirement should be visible to the public.<sup>83</sup> However, many hours worked on Community Payback are on individual placements, out of public view – often in charity shops or luncheon clubs. Visible group work placements remain the exception.

Public understanding of the term ‘Community Payback’ is now relatively strong: over 90% of those who have heard of Community Payback understand that it refers to Unpaid Work by offenders. However, understanding of the nature of work undertaken, the type of offenders who receive community sentences and specific details of the work to be undertaken is much lower. Ministry of Justice research on local Community Payback projects has found that just over half of those who are aware that a project is being delivered are aware that it is being delivered by offenders on Community Payback.<sup>84</sup> There is therefore scope to make Work Orders more visible still.

Despite some objections from probation officers in recent years and concerns about a stigmatising effect, there is no empirical evidence that making offenders conduct work schemes in public, while wearing an identifiable piece of clothing (orange tabards in the case of Community Payback), causes undue disruption, reduces completion rates or increases reoffending. While there have been a number of successful attempts to ‘sell’ local Community Payback initiatives in local media, similar moves to publicise Community Payback projects at a national level have been less pronounced. This could be redressed by the identification of some national initiatives using large-scale projects of work which offenders could undertake which would be of benefit to the community. National initiatives to highlight the new Work Orders could include:

83 Home Office Circular  
PC19/2008

84 Ministry of Justice,  
Research Summary 3/10:  
Community Payback and local  
criminal justice engagement  
initiatives – public  
perceptions and awareness,  
March 2010

- the collection of litter and its sorting for recycling at the 2012 Olympic and Paralympic Games<sup>85</sup> and at celebrations for the Queen's Diamond Jubilee;
- the mobilisation of offenders on Work Orders to clear snow during winter, as has been done effectively in Scotland;
- a national clean-up of war memorials in time for the centenary of the outbreak of the Great War in 2014.

Not infrequently, motorway restrictions remain in place at times when no work is being carried out. On such occasions, using teams of offenders on Work Orders to clean the verges at the sides of motorways, or central reservations, would be an appropriate and productive use of offenders' time. And it is hard to see how using offenders to clean closed stretches of motorways in this way would give rise to any risk of vigilante action (as some probation officers have claimed). Similar schemes could apply on railway stations and track-side where graffiti and foliage need regular clearance.

Offenders on Work Orders should continue to be identified by being required to wear distinctive orange tabards. The current rule<sup>86</sup> which states that if anyone working on a Community Payback project is exempt from the requirement to wear distinctive clothing – for instance, because they are under 18 or are in breach of a family court order, but have committed no offence – then no one on the project should wear distinctive clothing, should be scrapped.

In addition to strengthening the rules to ensure that all Work Order schemes were genuinely tough and demanding, publishing details of all projects after the event, including the nature of the work and the number of hours undertaken, in a publicly accessible online register would also give local residents a convenient way of seeing what work offenders had done locally – helping to build public confidence. Such a tool could be linked to the roll-out of detailed local crime maps, so the sentence arising as a punishment for an offence was as clear to local residents as the nature and location of the offence itself.

85 Subject to any applicable IOC regulations

86 Ministry of Justice Circular PI02/2009

### Intensive and demanding

Work Orders should be more intensive and demanding than current Community Payback requirements. When the legislation is considered, the lower and upper limits for hours worked should be examined to ensure they are appropriate – particularly at the top end – for the type of offences that can be dealt with by way of a sanction in the community. Even if the maximum number of hours that can be worked is not increased, the time over which that requirement can be fulfilled should be reduced. When resources allow, there should be an assumption that offenders not in employment, education or training should normally undertake at least five full days of a Work Order per week. Most Work Orders,

“ We have come across too many examples of work which is neither physically demanding, nor even intellectually challenging: offenders making tea for senior citizens or working in charity shops ”

even those applied as a sanction for more serious offences, could be completed within a matter of months rather than years. Work Orders – even those with a maximum of 300 hours – should be completed within weeks and months and no Work Order should therefore exceed 12-18 months (dependent on circumstances).

The Probation Service currently lacks capacity to deliver intensive Community Payback for all offenders. However, the intensity of a requirement does not of itself mean any additional hours of work undertaken and therefore no additional supervision: indeed, lower breach rates should mean less work for probation officers. We acknowledge that extending intensive payback would create a temporary ‘hump’ in the amount of supervision required. Effectively, community punishments are currently being strung out because supervision is supply-led and resource-constrained.

We have come across too many examples of work which is neither physically demanding, nor even intellectually challenging: offenders sorting out costume jewellery; making tea for senior citizens; or

working in charity shops. An ITV exposé of Community Payback placements showed offenders spending the majority of their time on some placements doing literally nothing, either because they were waiting in vain for customers, or were given extended breaks, or because supervisors failed to give them sufficient work while they went to another worksite.

We have also seen that Probation Service chooses to highlight tough, demanding work to ‘sell’ Community Payback, even where this is atypical. New transparency tools (with sentence mapping and an online database as outlined above) would ensure that all work could be publicly justified and would expose projects that were either insufficiently demanding or where the outcome was not commensurate with number of hours ostensibly worked.

### Expanded work opportunities

As the examples in Maryland and Minnesota show, work can be both demanding and productive. The Ministry of Justice should explore with construction companies the possibility of a scheme to involve offenders on Community Payback in construction of social housing. Construction companies would be encouraged to provide the necessary basic safety and equipment training in return for being allowed to hire offenders on Community Payback at preferential rates to provide labour on projects to construct social housing, and perhaps other community facilities. This could also provide unemployed offenders with the skills and experience necessary – such as the Construction Skills Certification Scheme Green Card – to find employment in the construction industry upon completion of their sentence.

There are, however, obstacles to extending the range of providers. One key difficulty lies in Ministry of Justice requirements<sup>87</sup> which state that Unpaid Work ‘must not replace paid employment, or provide any organisation with a commercial or competitive

advantage as a result of the provision of free labour'. This severely limits the work that offenders can take on. Where, for instance, work is undertaken for a local authority, the authority is required to certify that the contribution is 'adding capacity'; that is, that it is work that would not have been undertaken by paid staff. Social enterprises and voluntary organisations, likewise, cannot gain an advantage as a result of using Community Payback labour.

The privatization of large public spaces such as railway stations and sports centres, and the contracting-out of much local authority work has effectively taken these areas out of scope for Community Payback. A defaced railway station or goods yard is no longer a public space, it is the private property of Network Rail or a train operating company, and the Community Payback rules would prevent offenders' labour being used to give a benefit to the company, even if the project would improve the environment for members of the travelling public.

A consequence of this rule is to limit the valuable process by which some offenders who undertake Community Payback are subsequently offered paid work by beneficiaries. HM Chief Inspector of Probation has spoken approvingly of the way in which some Community Payback placements have provided direct routes into work for unemployed offenders, who have secured employment with the beneficiary organisation. However, if beneficiaries are limited to public bodies (with rigid recruitment processes) and charitable enterprises (who rely on volunteers), then the scope for offenders to secure paid employment afterwards will be limited. If the market for Community Payback were to be widened, so too would possibilities for employment for ex-offenders.

The rule is intended to secure compliance with the Forced Labour Convention, but goes further than is necessary to secure compliance with the Convention. The Convention does not cover work exacted as judicially-imposed punishment provided:

- that the said work or service is carried out under the supervision and control of a public authority, and
- that the said person is not hired to or placed at the disposal of private individuals, companies or associations

The International Labour Organisation has accepted that the first criteria can be met if there is effective, systematic and regular supervision of penal labour requirements and (in analogous rulings on work in private prisons) that the second element can be met provided that the offender freely consents to be placed at the disposal of a private organisation. This suggests that offenders on community sentences could undertake work for private companies provided they retain the option of working for a non-profit or governmental agency as an alternative.

Opening up the supervision of Work Orders to private sector beneficiaries providing services to the community would lower costs, create the necessary capacity to enable Work Orders to be delivered intensively, and also create opportunities for offenders to develop skills that could help them acquire jobs with the provider or other local employers in the future.

The current restrictive rule could be replaced with a simple requirement that any Unpaid Work could be accredited as suitable for a Work Order, provided it was appropriately safe, visible, physically demanding, and for public benefit. For instance, a company with the contract to maintain a stretch of motorway could use offender hours to clean litter; another company with the contract to maintain stations for Network Rail could use offenders to clear graffiti. Offenders would be free to undertake additional Work Order hours on accredited placements in order to complete their required hours more quickly.

While there would remain costs involved in supervising offenders, transporting them to worksites, and providing equipment where necessary, opening up the market in this way should lead to savings as these costs would be offset against the value of the labour to the provider. Instead of the current perverse situation in which it costs

£10 per hour to supervise each offender (far exceeding the value that the Ministry of Justice places on the work they do) it is possible to conceive of organisations paying for the benefit of offenders' unpaid labour, providing work for offenders, savings for government and improved amenity for the public.

### Local commissioning

The introduction of Probation Trusts has not led to any increase in local accountability, in that while they have more freedoms, these boards are not accountable to local communities. The Coalition Agreement includes a commitment to make the police accountable to a directly elected individual. Vesting responsibility for the provision of Work Order projects in this Police & Crime Commissioner would ensure that community punishments genuinely involved work valued by the local community. It would also improve rates of compliance: currently, there is a disjoint between the Probation Service, which commences breach proceedings where an offender fails to comply with the requirements of his community sentence, and the police, who may be the only agency able to locate and apprehend the offender.

In time, as new providers enter the market, we envisage a move from a 'commissioning' model to a dynamic 'supply-side' market, and the role of the directly elected individual would be to certify placements as suitable for offenders. Because there will be a need for some individual placements for the minority of offenders for whom outdoor groupwork would not be appropriate, it may be that the commissioner should be able to give a restricted certification to some projects to indicate that they are suitable only for specified offenders.

In order to comply with the Forced Labour Convention, it may be necessary to ensure that a small number of placements are available under public sector supervision. Local authorities could be required to ensure that placements are made available on local public works programmes if necessary.

## Outsourced delivery

Once the flaws in the design of community punishments are addressed, it will be possible to consider reforming the delivery of the new sentences.

If community sentences, reformed to become Work Orders, are to win public acceptance as a third leg of sentencing, alongside custody and fines, the Probation Service's stranglehold on delivery needs to be broken. It is clear that simply allowing Probation Trusts to contract with outside providers has not happened, and as a result, new providers have not emerged that might be able to deliver the culture shift required.

The Secretary of State did not even have the power to tender probation services until the 2007 Offender Management Act. It was only then that the private and voluntary sectors were theoretically enabled to participate more fully in the market for probation services. The government had set probation boards a non-mandatory subcontracting target (5% in 2006/07 and 10% in 2007/08). Few probation boards met this figure, and the target was abandoned without public explanation. Through the 2007 Act, and by creating new organisations to replace Probation Boards - Probation Trusts - to deliver services on behalf of the Justice Secretary, the intention was to deliver high quality probation services from a range of providers, which would, in turn, drive efficiency and innovation. However, the eight Probation Trusts that were in existence in 2009/10 (i.e. all of them) had delivered just 3.2% of £190 million worth of expenditure through the voluntary or private sector – far less than even the 10% target for Probation Boards. This clearly illustrates that Probation Trusts are not delivering the step-change required in efficiency and innovation that was intended.<sup>88</sup>

The problem is that in probation there is still no real purchaser/provider split. Acting as both provider and commissioner, Trusts that are run by the Probation Service are incentivised to protect the public sector Probation Service's position. The Ministry of Justice

<sup>88</sup> House of Commons Hansard, 6th July 2010, column 176W

is currently encouraging Trusts and Boards to focus on 'best value'. But this should include commissioning services rather than providing them directly.

The Secretary of State has the power, under the 2007 Offender Management Act, to compete Probation Trusts and contract them out. Merely creating them does not appear to have delivered anything like the changes required and a more radical and ambitious plan is clearly needed. As a consequence, some form of mandating is necessary and given the historic reluctance of the Probation Service to enforce Community Payback, there is good reason for saying that this aspect of probation work should be entirely contracted out.

The Ministry of Justice has admitted that agency placements, where offenders are supervised by the organisation benefitting from the work, are less costly than probation service supervision. Contracting out supervision of Work Orders would therefore additionally save resources, even if the orders were more intense and completed more quickly.

The government is currently exploring the potential to use private sector providers to deliver Community Payback, based on contracts linked to a payment-by-results measure, so costs are reduced and good performance rewarded. This approach should be pursued as it will focus supervisors on delivering an outcome, and will reduce supervision costs. However, we are dubious of the value of linking such outcome payments to reduced reoffending. The declared purpose of most standalone Unpaid Work at present is to punish, and only a minority of those given standalone Unpaid Work requirements are expected to reoffend in the one-year follow-up period. If the principle of payment-by-results is to be introduced, it should be linked to narrower metrics that reduce programme failure rates, such as successful completion of the required hours of work, with the necessary contractual considerations to ensure supervisors were not able to game the performance measure.

## Work Orders for women

Baroness Corston's review of women in the criminal justice system in 2007 acknowledged the need for gender appropriate community orders:

*"I am convinced that many women would benefit from community orders provided that the package of measures is tailored to meet their needs... The problems that lead to offending – drug addiction, unemployment, unsuitable accommodation, debt – are all far more likely to be resolved through casework, support and treatment than by being incarcerated in prison".*

However, Corston also recognised that it was important that there should be gender-appropriate community punishments available, arguing that 'Women offenders should not be excluded either from fines or Unpaid Work schemes because of stereotyping or assumptions'. She recognised that if women were assumed to be incapable of paying fines and incapable of performing community work, then those whose crimes demanded punishment would invariably end up in jail.

She noted, however, that this required suitable placements that took into account women's needs, such as childcare. She went on to suggest that a suitable project might involve placements painting and decorating properties to be used as supported accommodation for women on bail or release from prison, and endorsed the use of charity shop placements for some women offenders.

Given that most Work Order groups will be overwhelmingly male, mixed-sex workgroups will remain inappropriate as they risk a hostile environment for women offenders. Given the relatively low number of women given community sentences in some areas, there is likely to be a need for some individual placements to be retained to provide suitable capacity. However, the experience of

Kent shows that this need can be fulfilled using contracted-out supervision. Nevertheless, where demand is higher in urban areas, female-only schemes should be available for women sentenced to Work Orders, with the same conditions applied as for male offenders.

### The prize

If community sentences are strengthened in this way, and a new regime of Work Orders is introduced, the prize would come from diverting offenders – particularly those still in their teenage years – from a cycle of increasingly severe offending that leads to the drift into custody. Work Orders would not be an alternative to custody, any more than a fine is a straight-forward alternative to custody. They would instead be a sanction that is prior to custody, but one that punishes appropriately. They could then be judged as effective or not based on how many offenders who have served Work Orders then go on to commit new crimes that warrant a custodial sentence.

If this was achieved, such sentences could begin to gain the public acceptance needed to complement fines and custody as an effective and respected punishment by the State. In the longer-term, the flip side of this point is that if once they are so accepted, the public may well question the rationale for some offences attracting custodial sentences at all. If community sentences can be sufficiently strengthened, and their credibility established, some low-level offences which can (though rarely do) currently result in a prison sentence – for instance, taking alcohol into a football stadium, driving without insurance, or failing to secure a child's attendance at school – could be removed from the ambit of custodial sentences altogether. In time, it is even conceivable that it will become exceptional for magistrates to give a prison sentence for crimes such as shoplifting or criminal damage.

However, this will not happen while community sentences are seen as a soft option, while a ‘one in three’ failure rate continues to be tolerated, and while community punishments are delivered by a Probation Service that is sceptical at best, and hostile at worst, to the notion of punishment. The creation of a standalone punishment between a fine and custody and opening up opportunities for offenders to undertake tough, but meaningful, community work would both send out a strong signal about the unacceptability of crime and help build public confidence, but it would also offer the opportunity to give offenders a sense of achievement, purpose and structure, and reduce the likelihood of their reoffending.

Indeed, early indications are that the reforms outlined in this chapter would help build public support. In the same poll conducted by YouGov and referenced earlier in this report, respondents were also asked to say what changes they thought would make community sentences more effective. Firstly, the results show that the public are not defeatist – only 6% think that none of the proposed changes would make community sentences more effective. Secondly, of those changes that were strongly supported, the survey showed a clear preference across the board for the sort of reforms outlined in this report, including the stronger sanctions, greater intensity and more emphasis on work – precisely the elements that might underpin any regime of Work Orders. The reform supported by half of the public (52%) is “more sanctions for rule-breaking, including withdrawal of benefits”. Almost as many (49%) supported “more manual work projects over more hours each week” and 41% backed “more visible work projects linked to skills training and job opportunities”. The changes that receive the least support are “more advice, treatment and therapy” (22%) and more emphasis on restorative justice approaches, with only 21% backing “more focus on making offenders apologise to victims”. The public see a place for

community sentences and are willing to see them reformed. Aside from the strong evidence base for these reforms referenced earlier, they will also be popular, the implications for politicians and other decision-makers interested in building public confidence are clear: a new regime of community sanctions must have the two principles that matter most to people – payback and punishment – at its heart.

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## 7. Recommendations

Current community punishments are failing and must be reformed to increase completion rates, and enhance the punishment element to make them more effective and proportionate sentencing options; only then will the public begin to have confidence in them.

The following are the key recommendations to achieve this objective:

- 1. The generic Community Order should be abolished and Community Payback radically reformed.** Rather than another ill-fated rebranding effort, or a renewed attempt to tighten up certain conditions, the existing disposal should be replaced entirely with a new form of community punishment that is bigger in scope and more focused in purpose.
- 2. The sentencing framework for England & Wales should be modified to create a new category of punishment, distinct from a fine and custody and independent of any rehabilitative element.** The new punishment should be a distinct sentencing option, sitting between a fine and a custodial sentence, and should be known as a “Work Order”. When legislation creating new offences is introduced, in addition to setting out the maximum financial and, where applicable, custodial penalty, the legislation should also set out the maximum length of a Work Order.
- 3. Work Orders should be focused on punishment.** These new disposals will be primarily about punishment for offending behaviour. Other elements could apply, and any rehabilitative measures (treatment for alcohol addiction, skills training, housing or employment support, prophylactic measures, exclusion requirements or prohibited activities) that courts deem

worthwhile should be in addition to the Work Order, and never substitute it. Targeted rehabilitation, where it is deemed necessary and appropriate would supplement the punishment, and follow or run concurrently.

**4. Rehabilitation on Work Orders should supplement and never substitute the punishment element of the sentence.**

Rehabilitation services, such as they are deemed necessary by the court, should follow or run concurrently with the punishment in each case, and never supersede or substitute it. In order that offenders are not set up to fail, by combining Work Orders with rehabilitation requirements, judges should have the power to stage or stagger requirements. For instance, an offender might be required to perform a set number of hours of a Work Order, followed by a requirement to attend an alcohol awareness course. There would also be access to rehabilitation service providers on completion of a Work Order – offenders would earn no credit for engaging, and where it was not required it would not be expected of everyone, but it would be on hand to follow the punishment if the offender so chose.

Work Orders should be more **intensive**, more **visible** and more **closely supervised**.

- **Intensive.** When resources allow, there should be an assumption that offenders not in employment, education or training should normally undertake at least five full days of work a week. Work Orders – even those for the maximum of 300 hours – should be completed within weeks and months, rather than years. For unemployed offenders, no Work Order should exceed one year in duration.
- **Visible.** Work Orders should be linked to high-profile projects of local and national significance. Current rules that limit the number of placements that involve all offenders wearing distinctive orange jackets should be scrapped. In addition to strengthening the rules

to ensure that all Work Order schemes were genuinely tough and demanding, publishing details of all projects after the event, including the nature of the work and the number of hours undertaken, in a publicly accessible online register would also give local residents a convenient way of seeing what work offenders had done locally – helping to build public confidence. Such a tool could be linked to the roll-out of detailed local crime maps, so the sentence arising as a punishment for an offence was as clear to local residents as the nature and location of the offence itself.

- **Closely supervised.** More use of modern satellite tagging of higher-risk offenders or those most likely to abscond while serving a Work Order should be considered. Supervisors should be given the ability to impose tagging or supervision requirements on offenders who miss scheduled work placements.

Work Orders should incorporate new **incentives for compliance**, including:

- **Variation in work hours** dependent on conduct, initiated by the supervisor and within an envelope laid out by the court at point of sentence.
- **Access to rehabilitation service** providers throughout a work order, or on completion, where those elements have not been mandated by the sentencing authority.

Work Orders should also incorporate **new sanctions for non-compliance**, including:

- **Benefit withdrawal** activated automatically when breach episodes occur, with further non-compliance triggering;
- **Forfeiture of an offender's assets**, seized by private sector agents in accordance with pre-determined court conditions outlined at time of sentence.

Work Orders should have an emphasis on:

- **Physical labour, conducted outside, and in groups** – individual placements should be limited to the minority of offenders for whom outdoor groupwork would be unsuitable; this might include some women offenders.
- **Projects with a clear public benefit** – the international schemes cited in this report could be replicated in England and Wales, such as social housing construction projects and cleaning services for police vehicles.
- **Projects linked to national public occasions or with a symbolic value** – offenders on Work Orders could be involved in projects for the Diamond Jubilee, 2012 London Olympic Games, and the ongoing maintenance of war memorials in towns and cities.

Work Orders should involve **a revised and expanded range of work options**, to include:

- Projects on **private sector premises** – including motorways and stations and trackside on railways.
- Projects undertaken with **corporate sponsors**.
- Projects undertaken to help boost **civil contingency arrangements** – for instance flood clean-up, gritting duties and snow-clearance on roads during severe winter weather.

Some existing activities undertaken by offenders on “Community Payback” are insufficiently demanding and with the exception of those minority of offenders for whom outdoor groupwork is inappropriate, such activities should be discontinued under the new Work Order regime, including:

- Placements in charity shops
- Non-arduous environmental work with no clear benefit

- Light recycling, such as sorting costume jewellery
- Work in luncheon clubs.

To be delivered cost-effectively and in line with public priorities locally, Work Orders should be **managed and delivered by organisations other than the Probation Service and commissioned at a local level:**

- **Outsourced delivery:** The Probation Service should not generally be responsible for the supervision of Work Order placements, and some form of mandating from the Ministry of Justice will be necessary in order to ensure that Probation Trusts contract out supervision to the voluntary and private sectors in this area, with providers paid by results based on how successful they are at driving up programme completion rates.
- **Local commissioning:** After their establishment in 2012, Police & Crime Commissioners could assume responsibility for ensuring the availability of Work Order projects in their area, and for devising suitable work placements consistent with the features outlined above. The Home Office and Ministry of Justice should begin to devise the mechanisms to enable Commissioners to take on this role.

# Appendix: Public Attitudes to Community Sentences

**YouGov/Policy Exchange Poll:** All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 2,082 adults. Fieldwork was undertaken between 16 – 17 November 2010. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

	VOTING INTENTION				GENDER		AGE			
	Total	Con	Lab	Lib Dem	Male	Female	18-24	25-39	40-59	60+
	%	%	%	%	%	%	%	%	%	%
<b>Would you support or oppose the courts handing out fewer short-term prison sentences and using more community sentences instead?</b>										
Support	35	35	36	54	37	34	48	35	33	33
Oppose	49	57	49	31	52	47	32	45	54	54
Don't know	16	8	15	15	11	19	20	19	13	13
<b>In your view, which of the following phrases best describes current community sentences?</b>										
A soft option	38	45	35	32	37	39	31	34	42	41
Weak and undemanding	22	24	22	18	26	19	17	20	22	27
Good for first time offenders	22	21	26	25	21	24	23	26	20	23
Good for rehabilitation	5	4	6	12	5	6	7	5	6	4
Tough and demanding	1	1	2	4	2	1	4	1	1	0
Effective as a deterrent	1	1	1	0	1	1	2	1	0	1
None of them	2	1	3	1	2	2	1	2	2	1
Don't know	8	4	6	8	6	9	14	11	6	4

	VOTING INTENTION						GENDER		AGE				
	Con		Lab		Dem		Male	Female	18-24	25-39	40-59	60+	
	%	%	%	%	%	%	%	%	%	%	%	%	
<b>What do you think community sentences should be primarily designed to do?</b>	<b>Total</b>												
Make criminals pay something back to communities affected by crime	51	55	50	48	48	54	54	51	48	55	49		
Punish criminals and deter crime	22	24	21	15	26	19	15	23	22	26			
Rehabilitate criminals and address their offending behaviour	20	16	25	33	22	19	21	20	19	22			
Some other purpose	2	2	1	1	1	2	3	2	1	1			
Don't know	4	3	2	2	3	5	10	7	2	2			
<b>Which of the following changes do you think would be most likely to make community sentences more effective? Please tick up to three.</b>													
More sanctions for rule-breaking, including withdrawal of benefits	52	58	51	54	51	53	45	54	52	51			
More manual work projects over more hours each week	49	54	48	47	53	45	50	50	46	49			
More visible work projects for a clear public benefit	41	47	39	42	43	39	34	38	43	45			
More projects linked to skills training and job opportunities	30	29	32	37	29	31	29	29	30	31			
More advice, treatment and therapy to help offenders address their criminal behaviour	22	17	27	30	21	23	29	26	21	17			
More focus on making offenders apologise to victims	21	19	22	20	20	22	16	18	24	21			
None of these would make community sentences more effective	6	7	5	1	6	6	4	4	6	8			
Don't know	5	2	4	4	4	6	11	8	3	2			

Community sentences are the focus of renewed attention from politicians faced with unsustainable demand for prison places and the perceived cost and ineffectiveness of short-term prison sentences. Successions of Ministers in recent years have attempted to reform community disposals to make them more effective and to address legitimate public concern that they do not prevent reoffending and are not appropriate punishments.

Before the mid 1990s, community sentences in England and Wales were focused on rehabilitation and designed for first time, less serious offenders. They are now a much more common form of disposal and are routinely used in response to serial recidivists. This mission creep has not been accompanied by systemic reform of community sentences to create a clearly defined and credible punishment. Instead, these sentences continue to suffer from a historic handicap that keeps them linked with rehabilitation instead of punishment, undermining them in the eyes of sentencers and the public.

Current community sentences fail because they are fundamentally flawed, poorly administered and confused in their purpose. There is no contradiction between being “tough” and being “effective”. To be made better, community sentences first need to be refocused back to their core function of punishment and then radically reformed to improve compliance and reduce reoffending.

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