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Offender Rehabilitation Bill

Bill No 88 of 2013-14

RESEARCH PAPER 13/61 6 November 2013

This Bill would extend the mandatory supervision of offenders released from custodial sentences to provide that all offenders would be subject to at least 12 months of supervision in the community. It would also introduce new requirements, including drug appointments and residence requirements, which could be applied to offenders subject to such post-release supervision as well as those subject to community and suspended sentence orders.

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Research Paper 13/61

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Summary

The *Offender Rehabilitation Bill [HL Bill 88 2013-14]* seeks to amend the law relating to the release, and supervision after release, of offenders released from short custodial sentences. It would also make some changes to community sentences. The Bill represents the legislative parts of the Ministry of Justice's *Transforming Rehabilitation* strategy (see below). The Bill can be (broadly speaking) separated into three parts:

- **The first part**, which consists of clause 1 alone, concerns the MoJ's controversial proposals for reform of the probation services. Opponents of the proposed reforms have argued, among other things, that they would create perverse incentives for new contracted providers and lead to increased risks to public protection. These were not included in the Bill as introduced, as the MoJ said it would make the changes using existing powers. Clause 1, a non-Government amendment, would require any change to the structure of the "probation service" to be approved by both Houses of Parliament first.

- **The second part**, clauses 2-13, deals with the supervision of offenders released from short custodial sentences. All offenders released from sentences of less than two years would be subject to at least 12 months of mandatory supervision in the community. Many commentators have welcomed the proposals, but some have argued that they could lead to an increase in the use of short custodial sentences and an increase in recalls to prison.

  The Bill would also put on a statutory footing the requirement to have regard to the special needs of female offenders when making supervision arrangements. It would also introduce new drug appointment requirements and expand the categories of drugs that can be tested for.

- **The third part**, clauses 14 -18, would amend the community sentencing framework. It would introduce a new "rehabilitation activity requirement" for community orders and suspended sentence orders and make amendments to allow private providers to be responsible officers for the supervision of offenders subject to such orders. It would also introduce a new mandatory requirement that offenders subject to such orders seek permission from their responsible officer before changing their place of residence.

Territorial extent

Most of the provisions of the Bill consist of amendments to existing legislation which applies to England & Wales only.

1 Introduction

On 9 May 2013, the MoJ published *Transforming Rehabilitation: A Strategy for Reform*,[1] its response to the consultation; *Transforming Rehabilitation: A revolution in the way we manage offenders*.[2]

The strategy set out the MoJ's proposals for the reform of the rehabilitation of offenders and the way in which probation services are commissioned and delivered. The strategy's main proposals fell under five headings:

- Extending supervision to offenders released from short-term sentences
- Opening up probation services to new providers from the voluntary, private and community sectors
- Introducing "Payment by Results" for new providers
- Creating a new public sector National Probation Service
- Introducing a network of "resettlement prisons"

The *Offender Rehabilitation Bill* represents the legislative parts of the *Transforming Rehabilitation* strategy – namely, the extension of mandatory supervision to short-sentence offenders. The other parts of the strategy do not require primary legislation.

The Bill was introduced into the Lords on 9 May 2013 as HL Bill 2 2013-14. Second reading was on 20 May 2013, committee stage on 5 and 11 June 2013 and report stage on 25 June. Third reading was on 9 July 2013, as was first reading in the Commons. The Bill is due to have its second reading in the Commons on 11 November 2013. Lords Library Note 2013/009, *Offender Rehabilitation Bill* (16 May 2013), provides some analysis of the Bill.

This Research Paper broadly follows the order of the clauses of the Bill and discussion is divided into three parts:

- Parliamentary approval for the reform of the probation services (clause 1)
- Extending supervision for offender rehabilitation (clauses 2 -13), and
- Changes to community sentences (clauses 14-18).

The Ministry of Justice has also published Explanatory Notes on the Bill.

2 Reform of the probation services

Although not originally part of the *Offender Rehabilitation Bill*, the controversial changes to the probation services proposed by the MoJ in the *Transforming Rehabilitation* strategy were debated at length during the Bill's stages in the Lords.[3] They became part of the Bill by way of a non-government amendment added to the Bill at report stage.[4] The amendment

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1 Ministry of Justice, *Transforming Rehabilitation - A Strategy for Reform*, Response to Consultation CP(R)16/2013, May 2013

2 Ministry of Justice, *Transforming Rehabilitation: A revolution in the way we manage offenders*, CP1/2013, January 2013

3 Ministry of Justice, *Transforming Rehabilitation - A Strategy for Reform*, Response to Consultation CP(R)16/2013, May 2013

4 HL Deb 25 June 2013 cc658-71

(clause 1 of the Bill as brought from the Lords)[5] would require any change to the structure of the "probation service" to be approved by both Houses of Parliament before it is implemented.

This section of the Research Paper therefore provides some brief background to the current role of the probation services and recent Government policy in this area.

2.1 Labour's reforms

The probation services underwent a series of reforms under the previous Government. In fact, it is through legislation passed by the previous Government (together with common law powers) that the present Government seeks to implement its proposed reforms to the probation services.

In 2003, the review of correctional services by Lord Carter of Coles recommended, among other things, the greater use of competition from private and voluntary providers.[6] The then Government accepted this and other recommendations and passed the *Offender Management Act 2007*.

The *Offender Management Act 2007* transferred the responsibility for arranging the provision of probation services from local probation boards to the Secretary of State (SoS). This allowed the SoS to commission services directly from range of providers, including from the private and voluntary sectors. The Act also provided for the replacement of probation boards with probation trusts, from whom the SoS could commission services alongside providers from the private and voluntary sectors.

In 2011, the Justice Committee described the current Government's proposals as continuing on the "trajectory begun by the *Offender Management Act 2007* by introducing greater contestability into probation".[7]

For further background to Labour's see Library Research Paper RP 06/62, *The Offender Management Bill (Bill 9 of 2006-7)*, 6 December 2006, and Library Research Paper 07/20, *The Offender Management Bill Committee Stage Report*, 26 February 2007.

2.2 Government policy: from *Breaking the Cycle* (2010) to *Transforming Rehabilitation* (2013)

In the 2010 Coalition agreement, the Government said they would introduce a "rehabilitation revolution that will pay independent providers to reduce reoffending".[8] In its first criminal justice consultation; *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (December 2010), the MoJ stated its intention to open up the probation services market to new providers from the private, voluntary and community sectors and to apply the use of Payment by Results (PbR) to all providers by 2015.[9] The MoJ said it would publish a comprehensive competition strategy[10] for probation services and proposed the commissioning of six new PbR pilot schemes to carefully develop and rigorously test PbR for reducing reoffending.[11]

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5 *HC Bill 88 2013-14*
6 Carter, P, *Managing Offenders, Reducing Crime: A new approach*, January 2004
7 Justice Select Committee, *The role of the Probation Service*, 27 July 2011, HC 519-I 2010-12, p66
8 HM Government, *The Coalition: our programme for government*, May 2010, p23
9 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, December 2010, Cm 7972, see paras 36-38 and Chapter 3
10 Ministry of Justice, *Competition Strategy for Offender Services*, July 2011
11 In addition to the existing PbR pilot at HMP Peterborough

In March 2012, the MoJ published the probation services consultation *Punishment and Reform: Effective Probation Services*, in which it reiterated the commitment to open up the market for the supervision of low risk offenders to a range of new providers and to apply PbR to all providers by 2015. The paper also proposed a stronger role for probation trusts as commissioners of probation services and a stronger emphasis on local partnership working.[12]

Following the 2012 Cabinet reshuffle, Chris Grayling, the newly appointed Lord Chancellor and Secretary of State for Justice, announced in October 2012 that the MoJ intended to push ahead with the probation service reforms and apply PbR to the majority of probation services before the final results of the pilots were published.[13] (He had also announced in a letter earlier in the month that he had decided to suspend the PbR pilots due to start in the Wales and Staffordshire & West Midlands probation trusts (among others) while the MoJ reviewed the strategic direction for PbR in probation).[14]

A further consultation was published in January 2013, *Transforming Rehabilitation: a revolution in the way we manage offenders*, and the MoJ's response to this, *Transforming Rehabilitation: a strategy for reform*, was subsequently published in May 2013. The new *Transforming Rehabilitation* strategy proposed opening up the market for the supervision of all medium and low risk offenders released from custodial sentences as well as those subject to community orders and suspended sentence orders and paying providers according to results achieved in reducing reoffending.[15]

2.3 Summary of the "Transforming Rehabilitation" proposals

The MoJ's *Transforming Rehabilitation* strategy set out proposals for the reform of the supervision of offenders and changes in the way in which probation services are commissioned and delivered.

In his statement to the House of Commons announcing the strategy, Chris Grayling said that despite "significant increases in spending under the previous Government, reoffending rates have barely changed over the last decade and are now rising again". He said the proposed reforms would open up probation services to the "best of the public, voluntary and private sectors" and would "use competition to drive greater efficiency, which is vital to free up the resources we need [to] extend rehabilitation to a wider group of offenders." He described PbR as a "cornerstone" of the reforms which would "focus providers relentlessly on rehabilitating offenders and actually driving reoffending down".[16]

The strategy's main proposals fall under five headings:

Extending rehabilitation to offenders released from short-term sentences – the MoJ proposes to extend the mandatory period of supervision in the community to a minimum of 12 months for all offenders release from custodial sentences of up to 2 years.

Introducing a network of "resettlement prisons" – the MoJ is planning to introduce 70 local "resettlement prisons" across England and Wales.

Opening up the probation services market – organisations from the voluntary, private and community sectors, including mutuals, would be commissioned directly by the MoJ to provide the majority of probation services.

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12 Ministry of Justice, *Punishment and Reform: Effective Probation Services*, March 2012, CP7/2012

13 "We will 'push ahead' with prisoner rehabilitation plans before pilot is finished", *Telegraph*, 22 October 2012

14 Ministry of Justice suspends payment-by-results pilots, *Third Sector*, 9 October 2012

15 For a more detailed overview of recent policy developments see Library Standard Note SN/HA/6665, *Introducing "Payment by Results" in Offender Rehabilitation and other reforms*, October 2013.

16 HC Deb 9 May 2013 c149-50

Introducing Payment by Results – a proportion of a service provider's payment would be determined by the reductions in reoffending they achieved.

Creating a new National Probation Service – a new public sector probation service, with direct responsibility for high risk offenders only, would replace the current system of individual probation trusts.

The proposals which, combined, represent the MoJ's proposed reorganisation of the probation services are the opening up of the majority of the probation services workload to new providers, introducing PbR, and the creation of a new National Probation Service. The combination of new contracted providers paid according to results and a smaller public sector probation service would replace the current network of 35 independent public sector probation trusts.

Taking these changes in turn:

- **Opening up the probation services market.** Using powers provided for in the *Offender Management Act 2007*, the MoJ would contract directly with private, voluntary and community sector organisations across 21 geographical contract areas in England and Wales. Contracted providers would be responsible for supervising all low and medium risk offenders.[17]

- **Introducing PbR.** A proportion (yet to be determined) of contracted providers' payment would be dependent on achieving targets for reducing the reoffending rates of allocated cohorts of offenders. The proposed system would be based on individual offenders' complete desistance from crime over a 12 month period (binary measure) and on the total number of re-offences committed by allocated cohorts (frequency measure). The MoJ says its system would create incentives for providers to reduce the reoffending rates of even the hardest to help and prevent providers from "gaming" the system. In June 2013 the MoJ published a draft "straw man" payment mechanism for discussion. Bidding for contracts opened in September 2013.[18] More detail about the proposed PbR mechanism is provided in sections below.

- **Creating a new National Probation Service.** The MoJ would create a new public sector National Probation Service which would retain overall responsibility for assessing the risk of all offenders and direct responsibility for managing high-risk offenders, including those subject to Multi-Agency Public Protection Arrangements (MAPPA).[19] The MoJ estimate a caseload of around 31,000 offenders per year.

The *Transforming Rehabilitation* strategy stated that the MoJ expects to have new contracted providers in place by autumn 2014 and that the savings it expects to generate through competing for the provision of probation services would allow it to extend statutory supervision to all short sentence offenders (as set out in clauses 2-13 of the Bill) within existing budgets. The MoJ has not stated, though, exactly how much it expects to save, on the grounds of commercial confidentiality during contractual negotiations.[20]

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17 Estimated by the MoJ to represent around 236,000 offenders per year – based on 2011/12 data.

18 MoJ, *Search begins to find best organisations to tackle high reoffending rates*, 19 September 2013

19 Offenders with the highest levels of risk of serious reoffending (including violent and sexual offenders) are often managed though MAPPA. For more detail see MoJ, *MAPPA Guidance 2012*.

20 The *Transforming Rehabilitation* proposals are discussed in more detail in Library Standard Note SN/HA/6665, *Introducing "Payment by Results" in Offender Rehabilitation and other reforms*, October 2013.

2.4 Current role and performance of the probation services

Probation trusts were created by the *Offender Management Act 2007* as part of the then Government's policy to open up the provision of probation services to greater competition from the voluntary and private sectors, to encourage innovation and efficiency, as recommended by the 2003 Carter review of correction services.[21] Probation trusts were phased in to replace probation boards,[22] with the first six established in April 2008 and all 35 independent probation trusts across England and Wales in place by April 2010.[23]

The primary work of probation trusts includes:

- Supervising offenders released from prison on licence
- Supervising offenders sentenced to Community Orders or Suspended Sentence Orders
- Preparing pre-sentence reports for judges and magistrates in the courts to help them to choose the most appropriate sentence
- Providing support and information to victims of serious crime[24]

Probation services are currently commissioned and provided by the 35 probation trusts under contract to the MoJ. In 2012-13, probation services received funding of around £1.5 billion.[25] At March 2013 probation trusts were responsible for a caseload of around 222,000 offenders.[26] According to the National Offender Management Service (NOMS) probation trust annual performance ratings for 2012/13, 30 probation trusts were rated as "good" and five were rated as "exceptional".[27]

The annual probation service caseload (court orders and pre and post-release supervision) in 2012 was 224,283 – a fall of 4.1% on 2011 but 12.8% higher than the 2003 caseload:

Table 1: Probation service caseload

	Court orders	All pre and post release supervision	Total caseload
2003	120,734	80,399	199,237
2004	128,217	83,408	209,461
2005	137,377	89,438	224,094
2006	146,532	90,740	235,029
2007	150,179	94,459	242,722
2008	146,725	98,477	243,434
2009	140,951	102,022	241,504
2010	134,746	105,413	238,973
2011	125,444	110,437	234,528
2012	114,234	111,859	224,823

Source: MOJ, Offender management statistics quarterly - anuual tables, table a4.13

21 Carter, P, *Managing Offenders, Reducing Crime: A new approach*, January 2004
22 Established in 2001 by the *Criminal Justice and Court Services Act 2000*
23 Probation Association, *History* [Accessed August 2013]
24 Ministry of Justice, About the Probation service [Accessed August 2013]
25 National Offender Management Service (NOMS), *Annual Report and Accounts 2012-13*
26 MoJ, *Offender management statistics Quarterly Bulletin: January to March 2013*, 25 July 2013
27 NOMS, *Probation trust annual performance ratings 2012/13,* 25 July 2013

In 2012/13, the outturn for the probation service was estimated to be £814 million, a real terms fall of £22 million or 2.6% on 2011/12. However, the estimated figure for 2012/13 was, in real terms £66 million or 8.8% higher than the 2001/02 outturn.

Table 2: Probation boards and trusts outturns

England and Wales, Outturn in 2012/13 prices

	Outturn (£ million)	Estimated cost per case (£)
2002/03	768	3,855
2003/04	839	4,007
2004/05	833	3,715
2005/06	916	3,899
2006/07	934	3,846
2007/08	954	3,917
2008/09	985	4,077
2009/10	960	4,019
2010/11	911	3,884
2011/12	836	3,716
2012/13	814	n/a

Source:

HC Deb 23 Jan 2013 c347-9W

HC Deb 3 Jun 2013 c933-34W

Notes:

1. 2007/08: Outturn figures are the net operating costs recorded in the annual consolidated accounts of local probation boards

2. 2008/09 to 2011/12: Figures taken from the NOMS agency annual accounts and supporting documents

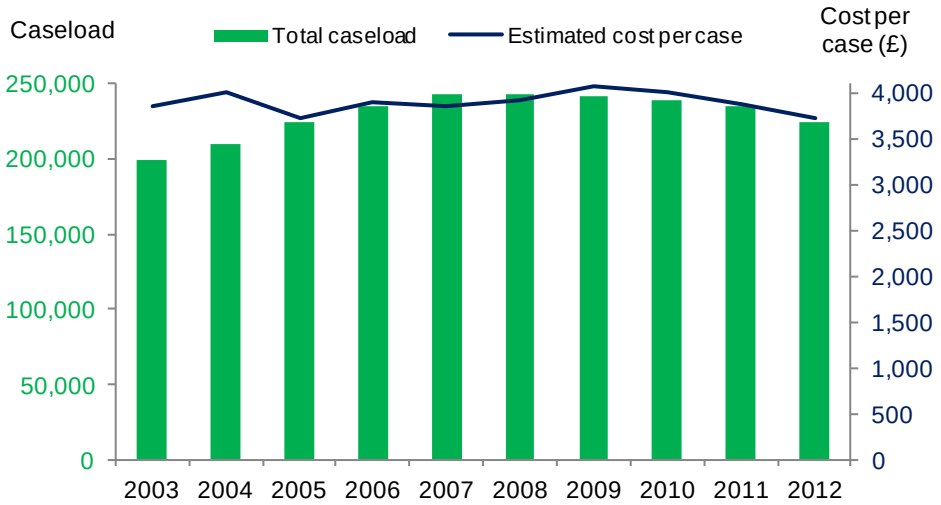
3. 2012/13: The overall contract values agreed w ith Probation Trusts for is £814 million. Inaddition to these amounts, some funds are held centrally for specific offender related initiatives. These are not embedded in the budget and contract values and therefore excluded from the figures given.

4. Allocated budgets may vary thorughout the year and probation trusts may also receive income from elsew here

5. Real terms value calculated usung HM Treasury GDP deflator - accessed 17 Ocotber 2013

The overall outturn of the probation service has tended to increase when the overall caseload increases. Consequently, the estimated cost per case has increased as the caseload has increased:

Chart 1: Probation service caseload and outturns



2.5 Payment by Results (PbR)

The current Government stated its commitment to increasing the use of PbR across public services in the 2010 Spending Review[28] and in the 2010 *Modernising Commissioning* consultation paper.[29] Various forms of PbR have since been adopted across a number of public services, including in the NHS and, notably, the Work Programme in the Department for Work and Pensions.[30]

In the consultation paper, *Punishment and Reform: Effective Probation Services* (March 2012), the MoJ defined PbR as "a mechanism which pays providers of services according to the outcomes they achieve, rather than simply the tasks they may undertake. If a service is ineffective, this is reflected in the price paid."[31]

In his statement to the House of Commons announcing the *Transforming Rehabilitation* strategy, Chris Grayling described PbR as a "cornerstone" of the reforms.[32]

The Justice Select Committee commented on the scope for applying PbR to criminal justice in its 2011 report on the role of the probation service:

> 211. Payment by results provides a potential mechanism for putting the system on a sustainable footing over the longer term by shifting resources away from incarceration towards rehabilitation and towards measures which prevent people becoming criminals in the first place. However, the payment by results models proposed are untested in the field of criminal justice and represent a significant departure from existing commissioning arrangements. Nevertheless, given the problems faced by the sector, there are compelling reasons to test the potential of a radically different approach.[33]

2.6 Draft "straw man" payment mechanism

More detail about the proposed PbR system was provided when the MoJ published its draft "straw man" payment mechanism for market engagement in June 2013. In summary, the draft payment mechanism comprised a "Fee For Service" element and a "Payment by Results" element. The MoJ described the features of each:

> **Fee For Service**
>
> - Annual price paid in twelve equal payments made monthly in arrears
> - Subject to an annual learning curve discount to drive continuous improvement
> - Providers will bid against a predicted baseline volume range, weighted for sentence type & length
> - At the end of each contract year, the payment is reconciled to the actual volumes recorded, with a retrospective payment or clawback applied if actual volume is shown to have been outside the predicted range
> - Deductions made for failure to deliver the orders of the court to specified time and quality

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28 HM Treasury, *Spending Review 2010*, October 2010, Cm 7942, p8

29 Cabinet Office, *Modernising Commissioning: Increasing the role of charities, social enterprises, mutuals and cooperatives in public service delivery*, December 2010

30 For further discussion of these see Library Standard Note SN/HA/6621, *Delivering public services: The growing use of Payment by Results*, April 2013.

31 Ministry of Justice, *Punishment and Reform: Effective Probation Services*, March 2012, CP7/2012, p34

32 HC Deb 9 May 2013 c152

33 Justice Select Committee, *The role of the Probation Service*, 27 July 2011, HC 519-I 2010-12, pp74-75

Payment by Results

- Binary & Frequency measure with a binary "hurdle"
- Quarterly cohorts (to reduce the time lag) with annual top-up payment for genuine improvement against annualised targets
- Monthly 'Foundation Payment' of part of the providers profit component paid upfront for expected achievement of quarterly PbR targets
- Payment only for achieving demonstrable results, with clawback available for underperforming and higher payments for further improvements over minimum requirement
- Large financial deductions / termination for increase in re-offending rates[34]

As suggested in the *Transforming Rehabilitation* strategy, PbR payments would be determined by both the **binary** measure (the percentage of offenders reconvicted of an offence in the 12 months following the end of a sentence) and **frequency** measure of reoffending (the rate of offences committed by a whole cohort of offenders within the same period).[35]

Reaction to the draft "straw man" payment mechanism

Early reaction to the "straw man" revealed some reservations and misgivings.

Commenting on the draft payment mechanism, **Clinks**, an organisation which represents voluntary sector organisations working with offenders, said that it was still unclear how the system would apply to subcontracted organisations (likely to include Voluntary, Community and Social Enterprise (VCSE) organisations). Clinks said more detail was needed about the respective proportions of the Fee for Service and PbR elements and about how lead contractors would be discouraged from passing down large amounts of financial risk to subcontractors.[36] **NCVO**, which also represents voluntary sector organisations, argued that the proposed binary "hurdle" would lead to providers "parking" those offenders who are the most complex and expensive to work with. NCVO said this would also lead to VCSE organisations being squeezed out because the possible PbR financial rewards would not meet the expenses incurred.[37]

In August 2013, the **Social Market Foundation (SMF)** published an analysis of the proposed system, *Paying for results? Rethinking probation reform*. Using financial modelling, the SMF argued that the proposed system would create perverse incentives where "providers risk making losses if they spend money on rehabilitative services". The SMF said that the system would "encourage providers to cut spending on services and allow reoffending to drift marginally upwards" because "providers can only be confident of being rewarded for their efforts if they achieve reductions in reoffending that are larger than the available evidence suggests is achievable".[38]

2.7 Interim results from PbR pilots in Peterborough and Doncaster

In June 2013, due to the high level of public interest created by the *Transforming Rehabilitation* proposals, the MoJ published "interim" re-conviction figures for the PbR pilots

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34 Ministry of Justice, *Rehabilitation Programme – Payment Mechanism Straw Man*, May 2013

35 For a more detailed explanation of the binary and frequency measures see, Russell Webster, *PbR Jargon demystified* [Accessed August 2013]

36 *Clinks response to Ministry of Justice Transforming Rehabilitation Payment Mechanism*, July 2013

37 NCVO, *Response to the Ministry of Justice proposed payment mechanism for the Rehabilitation programme*, June 2013

38 Social Market Foundation (SMF), *Paying for results? Rethinking probation reform*, 8 August 2013

at HMPs Peterborough and Doncaster.[39] (The final results for both pilots are not expected until 2014).[40]

When interpreting the results, it is important to note that the Peterborough and Doncaster pilots differ in a number of ways:

HMP Peterborough

The pilot scheme at **HMP Peterborough**, originally announced by the previous Government in March 2010,[41] was launched by the current Government in September 2010 and is intended to run for 6 years.[42] It is being run by the *ONE service* (an organisation created by Social Finance specifically for the pilot) and is funded by a Social Impact Bond in which 17 social investors have invested £5m. The MoJ has described the scheme as the first of its kind in the world. It involves a number of voluntary organisations, such as St. Giles Trust and Ormiston Trust, providing rehabilitative support to 3,000 prisoners released from sentences of less than 12 months. Prisoners take part voluntarily. Investors receive payments from the MoJ if targets for reductions in reoffending are met: 10% for each individual cohort of 1,000 ex-prisoners or 7.5% across the three cohorts combined. Investors receive an increasing rate of return on their investment the greater the drop in reoffending, up to a maximum of 13% per year. The pilot uses the **frequency** measure of reoffending.[43]

HMP Doncaster

The pilot at **HMP Doncaster** started in October 2011.[44] It was the first of the new PbR pilots announced in the *Breaking the Cycle* consultation paper. HMP Doncaster is a private prison operated by Serco and the pilot is being operated by Serco in "alliance" with the voluntary organisations, Turning Point and Catch 22.[45] It is not financed by Social Impact Bonds, but is run on the more traditional "prime provider model". 10% of the contract revenue is dependent on achieving a 5% reduction in reoffending rates of prisoners released from all sentences (many offenders at HMP Doncaster are in fact serving sentences of 12 months or less). The pilot uses the **binary** measure of reoffending. The pilot offers offenders "through the gate" rehabilitative support including a 24hr helpline and a variety of courses, among other things, and is intended to run for four years.[46]

Headline results

In summary, the MoJ's analysis of the interim figures showed a 6% reduction in reconvictions at Peterborough and a 4.9% reduction at Doncaster.

It is important to note, as the MoJ states, that the 6 month interim results only provide an indication of the progress of the pilots to date and that care should be taken when

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39 Ministry of Justice press release, *Mentoring Scheme reduces reoffending*, 13 June 2013

40 Ministry of Justice, *Interim re-conviction figures for the Peterborough and Doncaster Payment by Results pilots*, 12 June 2013

41 Ministry of Justice, *Scheme launched to reduce reoffending in short term prisoners*, 18 March 2010

42 Ministry of Justice, *Private backers fund scheme to cut prisoner reoffending*, 10 September 2010

43 A more detailed overview of the Peterborough pilot and a redacted version of the original contract can be found on the Social Finance website

44 Ministry of Justice news story, *Innovative rehabilitation - payment by results at Doncaster prison*, 13 October 2011

45 Catch 22, *HMP Doncaster 'payment by result' pilot*, 11 October 2011

46 For further detail see Ministry of Justice, *Findings and lessons learned from the early implementation of the HMP Doncaster payment by results pilot*, November 2012

interpreting these interim figures for a number of reasons.[47] (Further reoffending statistics are provided in the next section of this paper.)

Peterborough (and national equivalent) interim re-conviction figures using a partial (19 month) cohort and a 6 month re-conviction period

	Peterborough			National	
Discharge Period	Cohort Size	Re-conviction rate	Frequency of re-conviction events per 100 offenders	Re-conviction rate	Frequency of re-conviction events per 100 offenders
Sep05-Mar07	725	39.7%	72	36.6%	61
Sep06-Mar08	870	40.3%	81	37.8%	64
Sep07-Mar09	1031	40.7%	84	38.3%	68
Sep08-Mar10	981	41.6%	87	37.3%	69
Sep10 Mar12	844	39.2%	81	39.3%	79

Source: MoJ

The interim figures for **Peterborough** showed, for the 844 prisoners (sentenced to less than 12 months) released between September 2010 and March 2012 (part of the first pilot cohort), that there were an average of 81 reconviction events per 100 offenders. Compared with an average of 87 reconviction events per 100 offenders released between September 2008 and March 2010, this represented a **6% reduction in reconvictions** (based on the frequency measure of reconviction). This was below a national rise in reconvictions of 16% over the same period but also below the target rate of a 7.5% reduction.

Doncaster (and national equivalent) interim re-conviction figures using a partial (6 month) cohort and a 6 month re-conviction period

	Doncaster		National
Discharge Period	Cohort Size	Re-conviction rate	Re-conviction rate
Oct06-Mar07	733	44.1%	31.4%
Oct07-Mar08	632	48.7%	33.0%
Oct08-Mar09	665	46.0%	32.9%
Oct09-Mar10	711	41.6%	32.9%
Oct10-Mar11	661	39.8%	34.3%
Oct11-Mar12	696	41.1%	32.6%

Source: MoJ

The interim figures for **Doncaster** showed, for the 696 prisoners (of all sentences) released between October 2011 and March 2012 (part of first cohort), that there was a re-conviction rate of 41.1%. Compared with a reconviction rate of 46% for prisoners released between October 2008 and March 2009, this represented a **4.9% points reduction in reconvictions** (based on the binary measure of reconviction). This was a greater fall than the national fall in reconvictions of 0.3% points over the same period but below the target rate of 5%.

Reaction to the interim results

While Chris Grayling described the results as "very encouraging", other commentators remarked that the interim results should be treated with caution. Some argued the pilots had

[47] Ministry of Justice, *Interim re-conviction figures for the Peterborough and Doncaster Payment by Results pilots*, 12 June 2013, p3

not been running for a long enough time and others pointed out that there were many differences between the pilot schemes and the PbR system proposed in the *Transforming Rehabilitation* strategy. The media articles below offer further analysis and commentary on the results:

- Prison payment-by-results schemes see reoffending cut, *BBC*, 13 June 2013
- Payment by results in the prison system – challenges of calibrating success and failure, *LSE British Politics and Policy blog*, 22 June 2013
- HM Prison Peterborough social impact bond has led to a fall in reconvictions, official figures show, *Third Sector*, 14 June 2013

2.8 The Bill

Clause 1: Parliamentary approval for probation service reform

Clause 1 would require any change to the "probation service" to be approved by both Houses of Parliament first. It was inserted as a non-Government amendment moved by Lord Ramsbotham (Crossbencher and a former HM Chief Inspector of Prisons) at report stage in the Lords. The Government opposed the amendment but were defeated on division by 215 votes to 186.

The intention of the amendment was to provide parliamentary scrutiny for some of the more controversial proposals in the MoJ's *Transforming Rehabilitation* strategy (such as opening up the probation services workload to private providers) which, because they do not require new primary legislation, did not feature on the face of the Bill (as introduced in the Lords).[48]

Lord Ramsbotham criticised the absence from the Bill of any detail about the proposed reforms to the probation services and suggested the MoJ reassess its plans in such a way that "satisfies full and detailed scrutiny by both Houses of Parliament." Lord Beecham (Labour Spokesperson for Justice) also argued, quoting from a leaked MoJ "risk analysis", that the Bill has been kept "deliberately slim to 'minimise the dependence of the reforms' on the passing of the legislation."[49]

2.9 Debate in the Lords

Reform of the probation services

The proposed reforms to the probation services proved to be particularly contentious and were debated at length during the Bill's passage through the Lords (despite not being part of the Bill as introduced). A number of issues and concerns emerged during the Lords debates. Some of the main concerns included:

- Lack of Parliamentary scrutiny
- The impact on public protection of the division of responsibility between the public sector and contracted providers
- The effects of national commission on local partnership working
- Whether organisations from the VCSE sector would be properly involved
- The loss of existing expertise within the probation service
- The introduction of "Payment by Results" in criminal justice

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48 *Offender Rehabilitation Bill [HL] Bill 2 2013-14 (as introduced)*
49 HL Deb 25 June 2013 c662-3

Lack of Parliamentary scrutiny

A number of Members of the House of Lords criticised the perceived lack of parliamentary scrutiny for such major reforms to the probation services. In committee, Lord Beecham, moved an amendment to require prior parliamentary approval for any change to the probation service and criticised the MoJ's decision to implement the reforms without new primary legislation. Lord Beecham argued that the proposed changes were more "radical" than what was envisaged by the *Offender Management Act 2007* (the 2007 Act) and described them as an "ideological determination to limit the role of a major public service".[50]

Lords Ramsbotham moved an identical amendment at report stage, describing the Bill as "not actually about the proposals" but "about the tools of the proposals". Lord Ramsbotham stressed that he was not opposed to the intentions of the Bill but argued that, if the proposals were implemented without new primary legislation, Parliament would be denied the chance to have its say and offer its expertise. He argued that there were too many doubts about the viability and affordability of the reforms to expect the House to pass the Bill at this stage. He suggested that the MoJ temporarily withdraw the Bill and reassess their proposals in a way which, because public protection was at stake, allowed "full and detailed scrutiny by both Houses of Parliament".[51]

Lord McNally, the Minister of State for Justice, responded to both amendments. At report stage he acknowledged that the Bill was not about the reorganisation of the probation service but pointed out that these powers were already provided for in the 2007 Act.[52] In committee, Lord McNally also argued that the powers provided in the 2007 Act were thoroughly debated at the time.[53]

Lord Beecham withdrew his amendment in committee. At report stage, Lord Ramsbotham pushed his amendment to a vote which the Government lost by 215 votes to 186. The amendment became new clause 1.

The division of supervision between the public sector and contracted providers and the impact on public protection

Some concern was expressed about the impact on public protection of the division of offender supervision responsibilities, based on offender risk, with the public sector responsible for high risk offenders and contracted providers responsible for low and medium risk offenders. Baroness Linklater (Liberal Democrat), for example, argued "continuity of offender supervision would be fractured" and "public protection will become a real concern."[54] Lord Beecham also expressed concern that the medium risk category could include some sexual and violent offenders.[55]

In committee, Lord Beecham argued that the proposed system appeared to ignore the fact that around a quarter of offenders change risk category during their sentence and claimed that it would lead to confusion and the "public lacking the protection that a properly administered probation service can afford".[56] Lord Beecham quoted the Chief Inspector of Probation, Liz Calderbank, who said in her response to the *Transforming Rehabilitation* consultation[57] that, "any lack of contractual or operational clarity between the public and

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50 HL Deb 5 June 2013 cc1251-5
51 HL Deb 25 June 2013 c659-71
52 HL Deb 25 June 2013 c664-5
53 HL Deb 5 June 2013 c1254
54 HL Deb 20 May 2013 c660
55 HL Deb 20 May 2013 c637
56 HL Deb 5 June 2013 c1252
57 *HMI Probation's response to the consultation on Transforming Rehabilitation*, 25 February 2013, p2

private sector providers will (...) lead to systemic failure and an increased risk to the public."[58] Lord Beecham also argued that the division between contracted providers and the public sector would create delays in the sharing of information about changing risk levels and may lead to high risk offenders not receiving the "degree of skilled supervision which is primarily available from the probation service".[59]

In response to amendments moved by Lord Beecham in committee and report to require the definition of offender risk to be set out in legislation, Lord McNally clarified how changing risk levels would be managed. Where there was a "significant change in circumstances" which "indicates an increase in the risk of serious harm" contracted providers would have a contractual obligation to refer the case to the public sector National Probation Service to confirm whether the risk of serious harm was high.[60] If it was decided that risk of harm was high, the responsibility for the management of the case would transfer to the public sector. Lord McNally said "where case transfer happens, this will be achieved in such a way that it does not destabilise the offender. Involvement with the provider could continue, while the case responsibility will be with the National Probation Service."[61]

Lord Beecham pressed Lord McNally in committee and at report stage on what impact a transfer of provider would have on PbR contracts. Lord McNally responded by letter, stating that in cases where an offender's risk of harm had escalated to high and responsibility had subsequently transferred to the public sector, the offender would stay in the provider's PbR cohort for measurement and payment purposes.[62]

Some Members of the House of Lords also queried the decision not to allow probation trusts (in their current form) to tender for contracts for the supervision of low and medium risk offenders. The MoJ has said that providers must be able to bear "financial risk" and, as public bodies, probation trusts cannot.

In committee, Lord Beecham moved an amendment to allow probation trusts (and local authorities) to tender.[63] In response, Lord McNally said although the MoJ did not believe probation trusts should be able to compete, the Government had made support available to help staff within probation trusts form mutuals. Lord McNally drew attention to the Cabinet Office mutual support programme, which was "providing intensive one-to-one support to prepare the first cohort of seven fledging probation mutuals for the competition". Lord Beecham withdrew the amendment.[64]

At report stage, Lord Ponsonby (Labour) also tabled an amendment to make it possible for probation trusts and local authorities to tender for probation contracts. Lord Ponsonby argued that other public bodies take on financial risk, for example, in the health service and local authorities and asked whether the Government was unwilling to take on financial risk because they thought contracts were too risky. Lord Ponsonby also said that probation trusts must be allowed to compete to maintain public sector competence and provide future competition for the private sector.[65]

Lord Ahmad (Conservative), responding for the Government, said that providers must be capable of "bearing the financial and operational risks associated with the delivery of these

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58 HL Deb 5 June 2013 c1262
59 HL Deb 25 June 2013 c687
60 HL Deb 5 June 2013 c1264
61 HL Deb 25 June 2013 c691
62 Letter dated 20/06/2013 from Lord McNally to Lord Beecham, DEP 2013-1038
63 HL Deb 5 June 2013 c1261
64 HL Deb 5 June 2013 c1263
65 HL Deb 25 June 2013 cc710-1

services under payment by results". He said that probation trusts would be "unlikely to meet those criteria given that we have announced that we will be dissolving trusts in their current form (...)". The amendment was withdrawn.[66]

National Commissioning, local partnerships and voluntary sector involvement

The effects of the MoJ's decision to move towards commissioning probation services on a national basis generated much debate. Questions were asked about how existing (and highly regarded) local working partnerships would be maintained (such as Integrated Offender Management arrangements). Questions were also asked about the ability of the VCSE sector to play a meaningful role in a nationally commissioned service over just 21 contract areas. Some Members of the Lords suggested that the proposed contract areas were still (the MoJ initially proposed 16 areas) too large and VCSE organisations would be squeezed out by large private companies with greater capital.

Many of these concerns were raised at second reading. Lord Beecham argued that the 21 contract areas were too large for VCSE organisations, and quoted the NCVO who had stated that "using PbR alone threatens to significantly reduce the potential range of providers".[67] Lord Ponsonby also argued that the greater the number of contract areas, the greater the scope for VCSE involvement.[68] Lord Dholakia (Liberal Democrat) said that some voluntary organisations had expressed fears that they would be squeezed out if contracts were given only to large private sector companies, and added:

> (...) it is important to make sure that any organisation given a contract to provide supervision and rehabilitation services works in partnership with voluntary organisations in arrangements that give the voluntary sector full cost recovery, this is vital if we are to make full use of the voluntary sector's expertise in the resettlement of offenders.[69]

Lord Ramsbotham also asked how current local partnerships between probation trusts and other agencies would be reallocated once probation trusts were abolished.[70] Lord Ponsonby also said that nothing must be done which undermined the co-operation on the ground between various local organisations and welcomed the involvement of Police and Crime Commissioners (PCCs) in the selection of new providers.[71]

In response to the issues raised, Lord McNally said the reforms would open up probation services to a wider range of potential providers and that the MoJ wanted to encourage partnerships between VCSE organisations and the private sector. He went on to explain the steps the Government was taking to ensure the involvement of small providers:

> (...) We intend to put in place market stewardship arrangements so that the smaller voluntary and community sector providers can bid to be a prime provider or to be a partner. We are running a two-part £500,000 grant to support VCS organisations to overcome the barriers to participating in the rehabilitation reforms and, as has been said, this morning my right honourable friend the Deputy Prime Minister announced further funding. [72]

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66 HL Deb 25 June 2013 cc711-2
67 HL Deb 20 May 2013 cc638
68 HL Deb 20 May 2013 cc669
69 HL Deb 20 May 2013 cc651
70 HL Deb 20 May 2013 cc663
71 HL Deb 20 May 2013 cc670
72 HL Deb 20 May 2013 cc672

In committee, Lord Beecham moved an amendment to make it a "duty for all providers of probation services to attend community safety partnership meetings and co-operate with crime and disorder reduction partnerships". In response, Lord McNally explained that, under the *Transforming Rehabilitation* strategy, the MoJ expected new providers to engage with (statutory and non-statutory) local partners because it would be in their interests to do so, to achieve the best results and maximum financial reward under the proposed PbR system. Lord McNally stated that providers would need to demonstrate in their bids how they would build and sustain local partnerships and stressed that "integration at local level works best when it is not mandated centrally".[73]

Loss of existing expertise within the probation service

Some concern was expressed that the expertise of the existing probation profession would be lost as the majority of probation work was transferred to new contracted providers.

At second reading, Lord Marks (Liberal Democrat) said that, while the proposed reorganisation had the worthwhile aims of involving a greater number of providers from the voluntary sectors, it was important that the "expertise and good will of our probation officers are retained in the new system".[74] Lord Dholakia warned of the risk of losing the expertise of probation officers who did not transfer to the new, smaller public sector National Probation Service and asked for assurances that officers who did not would instead transfer to new contracted providers. He also warned that uncertainty about job security would lead to probation officers leaving for other lines of work.[75] The Bishop of Newcastle spoke of the "danger of dissipating the accumulated wisdom and expertise of existing probation teams and services".[76] Lord Ponsonby also argued that, under the proposals, public sector probation professionals, with responsibility for only high risk offenders, would get a narrower range of experience.[77]

Lord McNally said in response that probation professionals would be redeployed across the sector and the skills base would not be lost.[78] He said too that the MoJ was "committed to retaining the skills, expertise and experience of operational staff currently within trusts" and that the MoJ was working with unions to ensure the process of "selecting staff for the new structures is fair and minimised disruption as far as possible." Lord McNally also spoke about proposals to develop a professional body for probation and the MoJ's support of this.[79]

Introduction of Payment by Results (PbR)

The proposed introduction of PbR proved to be particularly controversial. The MoJ's decision to cancel a number of PbR pilots was criticised and doubt was cast on the evidence supporting the use of PbR in criminal justice.

At second reading, Lord Beecham said the "whole question of payment by results raises huge doubts". He questioned the MoJ's decision to cancel the PbR pilots in Staffordshire & the West Midlands and Wales and the refusal of an FOI request for details of their evaluation. Lord Beecham argued that "such a radical change" should be properly piloted and evaluated before being rolled out.[80] Lord Ponsonby said although there was good reason to be encouraged by the PbR pilot at Peterborough, it was early days and he commented

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73 HL Deb 5 June 2013 c1217
74 HL Deb 20 May 2013 c641
75 HL Deb 20 May 2013 c651
76 HL Deb 20 May 2013 c644
77 HL Deb 20 May 2013 c670
78 HL Deb 20 May 2013 c674
79 HL Deb 25 June 2013 c667
80 HL Deb 20 May c638

that the MoJ was introducing a payment system which was "untested anywhere in the criminal justice world".[81]

In committee, Lord Beecham moved an amendment to require the Government to pilot any PbR scheme for three years before implementation and to set out any scheme in statutory instrument to be approved by Parliament. Lord Beecham referred to a number of potential problems with PbR, and drew attention to the potential for "cherry-picking" and "creaming" (with providers concentrating their efforts on offenders least likely to offend and neglecting the most prolific and hardest to reach offenders). Lord Beecham referred to the charity *DrugScope* which advocated a gradual transition and accumulation of evidence. He also argued that such a payment system was likely to favour large organisations with the financial capital to risk non-payment over small local groups, often without such capital.[82]

In response, Lord McNally said that certain pilots were abandoned because there was "nothing significant to be gained from continuing with them" and they already had the feedback from PbR pilots in Doncaster and Peterborough. He said:

> Our experience with initial PbR pilots has increased our confidence about designing robust contracts that drive the required behaviour and help generate improved value for money. We have drawn lessons from pilots about establishing performance targets that will allow us to measure, with confidence, the impact of providers on reoffending rates; of designing payment mechanisms that reward providers only for achieving genuine success.[83]

He also stressed that the MoJ had consulted carefully on the intended payment mechanism and, in the *Transforming Rehabilitation* strategy, explained how it would guard against cherry-picking and "incentivise providers to focus resources on all offenders, including the most prolific and the hardest to help".[84]

At report stage, Lord Beecham again moved an amendment to require piloting and Parliamentary approval of any PbR mechanism. He said that such a radical change to the nature of the probation service must be approved by Parliament, properly piloted and evaluated first. Lord Beecham pushed the amendment to a vote, which the Government won by 209 votes to 188.[85]

2.10 Commentary

The MoJ's proposals also received a significant amount of attention from a number of criminal justice experts and practitioners. Many expressed their views in detailed responses to the consultation paper. Below is a summary of some of those responses.

Howard League for Penal Reform

On the division of supervision responsibility between the public sector and contracted providers, the Howard League welcomed the retention of certain "core elements of probation work" by the public sector probation service, such as risk assessment and determining breaches of licence conditions. But, it said, there was a lack of detail about how the public sector probation service would exercise these responsibilities in practice and it expressed concern that it would be expected to do so at "arm's length" with little or no direct contact. The Howard League also expressed concern about the transfer of offenders between providers when their risk level changed from medium to high, which it said would cause

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81 HL Deb 20 May c671
82 HL Deb 5 June c1256
83 HL Deb 5 June c1259
84 HL Deb 5 June c1260
85 HL Deb 25 June cc674-84

delays, create dangerous gaps in accountability and prevent stable and continuous service provision.

On the introduction of PbR, the Howard League said that it was misleading to describe the proposed payment system as such, because only a small proportion of contracts would be dependent on PbR, and suggested the payment system was more akin to one of "bonus payments" for hitting targets. The Howard League also said that the arrangements could lead to conflicts of interest with providers required to report breaches against their commercial interests and "cherry picking", where only those who were least likely to reoffend were provided with services and worked with.

As an alternative, the Howard League expressed its support for the MoJ's "justice reinvestment" initiative. The Howard League said justice reinvestment represented a better PbR model and was "successful because it operated on a local level and involved not only criminal justice agencies, but also agencies concerned with health, housing, education, addiction and other social factors linked to crime".[86]

Joint Probation Association and Probation Chiefs Association response

The overall response of the Probation Association and Probation Chiefs Association was that the proposals would increase the risk of harm to the public and that they could not be implemented in the timetable envisaged without running an excessive risk of causing serious damage to the delivery of the current service.

The joint response said that splitting offender management between public and private providers would lead to a fragmentation of offender supervision and increase the risk of public protection failures. It said that risk of harm should not be the factor on which to divide probation work between public and contracted providers, stating that risk of harm was dynamic and around 25% of cases would transfer between providers. It argued that, if a division had to be made between public and private, it should be at low risk. The joint response also said that the proposed system would be less flexible and regulated by contract, making information exchange more difficult.

On the introduction of PbR, the joint response said there was no evidence that PbR could work in the way it was intended in probation and that only those who could afford to take the financial risk would enter the market, favouring large organisations over smaller voluntary sector organisations.[87]

Criminal Justice Alliance (CJA)

The CJA, a coalition of organisations involved in criminal justice policy and practice, said that they supported the "shift of focus from processes to outcomes" with the move towards PbR. It warned, though, that the implementation needed to be "given careful consideration to ensure that it is effective in meeting the needs of all offenders and allows a diverse range of providers to participate in the delivery of services, including smaller voluntary sector organisations".

On PbR, the CJA said that there had been little time to build up an evidence base as to the likely costs and effectiveness of different approaches or to explore any perverse incentives or unintended consequence that may be created. The CJA also expressed its support for the

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86 Howard League for Penal Reform, *Response to the Ministry of Justice consultation on Transforming Rehabilitation*, 21 February 2013

87 *Transforming Rehabilitation: Joint response from the Probation Association and The Probation Chiefs Association*, 22 February 2013

MoJ's "justice reinvestment" approach, which it said would "better incentivise local partners to work together to reduce reoffending".[88]

Nacro

In its response to the strategy, Nacro, a crime reduction charity which currently provides a number of offender management programmes said that the proposals presented an "opportunity to change the way we work with offenders and could enable specialist organisations like Nacro to help offenders move away from crime for good".[89]

Below is a selection of some further responses to the MoJ's proposals:

- Prison Reform Trust, *Prison Reform Trust response to Transforming Rehabilitation*, February 2013
- Alliance (Catch 22, Serco and Turning Point), *Alliance Response to the MoJ Consultation on Transforming Rehabilitation*, February 2013
- HM Chief Inspector of Probation, *HMI Probation's response to the consultation on Transforming Rehabilitation*, 25 February 2013
- Nacro, *Nacro's Response to the MOJ's Transforming Rehabilitation Consultation*, 22 February 2013

3 Extending supervision for offender rehabilitation

The extension of mandatory post-release supervision to all short-sentence offenders was one of the central proposals of the *Transforming Rehabilitation* strategy - in particular the supervision, for the first time, of offenders released from custodial sentences of less than 12 months.

The Ministry of Justice intends to extend existing arrangements for release on licence to offenders sentenced to less than 12 months in custody and to create a new "top up" supervision period. Combined, these would provide that all offenders were subject to at least 12 months of supervision in the community after release.

The MoJ plans to implement these changes through a number of amendments to the legislation underlying the existing sentencing framework – primarily in the *Criminal Justice Act 2003*.

This section of the research paper provides some statistics on reoffending, briefly outlines the current arrangements for the release of offenders on licence and provides an overview of the *Transforming Rehabilitation* strategy proposals and the relevant clauses of the Bill. It also provides a summary of the issues raised during debate in the Lords and some reaction from commentators outside Parliament.

3.1 Reoffending statistics

The MoJ publication *proven reoffending statistics* routinely publishes statistics on re-offending in England and Wales. It calculates proven reoffending figures for offenders who were released from custody, received a non-custodial conviction at court, received a caution, reprimand, warning or tested positive for opiates or cocaine in a given twelve month period.

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88 Criminal Justice Alliance, *Response to 'Transforming Rehabilitation: A revolution in the way we manage offenders'*, February 2013

89 Nacro press release, *Nacro welcomes the chance to work with short sentence offenders*, 9 May 2013

Proven reoffending is defined as any offence committed in a one year follow-up period and receiving a court conviction, caution, reprimand or warning in the one year follow-up.

Following this one year period, a further six month waiting period is allowed for cases to progress through the courts.

The table below shows the reoffending rate for offenders who have served a custodial sentence broken down by determinate sentences.

Table 3: Reoffenders by sentence length in England and Wales, 2011

Proportion of offenders who reoffend	
Custody under 12 months	58.5
12 months to 4 years	36.2
4 years to 10 years	30.7
More than 10 years	17.4

Source: Ministry of Justice, Proven reoffending statistics, October 2010-September 2011, Table 19a

The reoffending rates by disposal should not be compared to assess the effectiveness of sentences, as there is no control for known differences in offender characteristics or other factors that affect reoffending and the type of sentence given. The MoJ Chief Statistician has stated that, "the true impact of offender management programmes and probation supervision cannot be reliably established using current Ministry of Justice administrative data".[90]

Of those offenders who served under 12 months in custody, 58.5% reoffended in 2011. As these offenders served a custodial sentence of less than 12 months, they would not have been subject to supervision by the probation service upon release. Those who served over 12 months in prison would have been placed under supervision.

Although the headline reoffending rates should not be compared to assess the effectiveness of sentences, the MoJ have published research on matched offenders. Each offender receiving one sentence is matched exactly to a different offender receiving the comparison sentence on all five of the following offender and offence characteristics:

- gender
- age (in years)
- offence
- ethnicity
- number of previous offences

The research compares the one-year re-offending rates between adult offenders receiving different types of sentences with custodial sentences at courts in England and Wales for each year between 2005 and 2008. The headline results are summarised below:

- Offenders receiving Community Orders (COs) or Suspended Sentence Orders (SSOs) had lower re-offending rates than those given immediate custodial sentences of less than 12 months.

[90] Ministry of Justice, *2011 compendium of reoffending statistics and analysis*, p 4

- Offenders given immediate custodial sentences of 1 year or more but less than 2 years had lower re-offending rates than those who received immediate custodial sentences of less than 12 months.

- Offenders given immediate custodial sentences of 2 years or more but less than 4 years had lower re-offending rates than those who receive immediate custodial sentences of 1 year or more but less than 2 years.

More recent statistics published in the *2013 compendium of reoffending statistics* show that offenders sentenced to less than 12 months in custody had a higher re-offending rate (62.5%) than offenders given an immediate custodial sentence of between 1 and 4 years (50.5%). The difference was 12 percentage points for 2010.

The Ministry of Justice Chief Statistician makes the following assessment of the figures in the 2011 publication's executive summary:[91]

> The findings are not conclusive on whether the deterrent effect of longer custodial sentences is effective at reducing re-offending. Despite higher re-offending rates, offenders receiving sentences of less than 12 months do not have access to offender management programmes and are not subject to supervision by the Probation Service upon release. This latter factor is also likely to explain some of the difference between community sentences/suspended sentence orders and short prison sentences.

3.2 Current arrangements

Under the current sentencing framework, all adult offenders serving fixed term sentences (for offences committed on or after 5 April 2005) are released from custody at the halfway point in their sentence.[92] Offenders serving sentences of more than 12 months are released to serve to remainder of their sentence in the community on licence subject to conditions.[93] Offenders sentenced to less than 12 months are released unconditionally.[94]

All offenders released from fixed term sentences of more than 12 months are subject to "standard licence conditions". If it is assessed that standard conditions are not sufficient to assist the offender's rehabilitation and protect the public, some offenders may also be subject to "additional licence conditions".[95] Both sets of conditions are set out in the *Criminal Justice (Sentencing) (Licence Conditions) Order 2005*.[96]

3.3 The "Transforming Rehabilitation" proposals

The *Transforming Rehabilitation* strategy set out the MoJ's plans to introduce a minimum of 12 months mandatory supervision in the community for all offenders released from custodial sentences of less than two years.

Conditions set by the public sector probation service would be applied during the offender's supervision in the community. Sanctions for breach of conditions would be available to the court, including recall to prison.

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91 Ministry of Justice, *2011 compendium of reoffending statistics and analysis*, p 4

92 The Library standard note SN/HA/5199, *Early release of prisoners in England and Wales*, (May 2013) discusses the early release of prisoners in further detail.

93 As set out in the *Criminal Justice Act 2003*

94 As set out in the *Criminal Justice Act 1991*

95 Guidance on the application of licence conditions is provided by the Ministry of Justice; *Probation Instruction 07/2011 - Licence conditions*, and *Prison Service Instruction 40/2012 - Licences and licence conditions*.

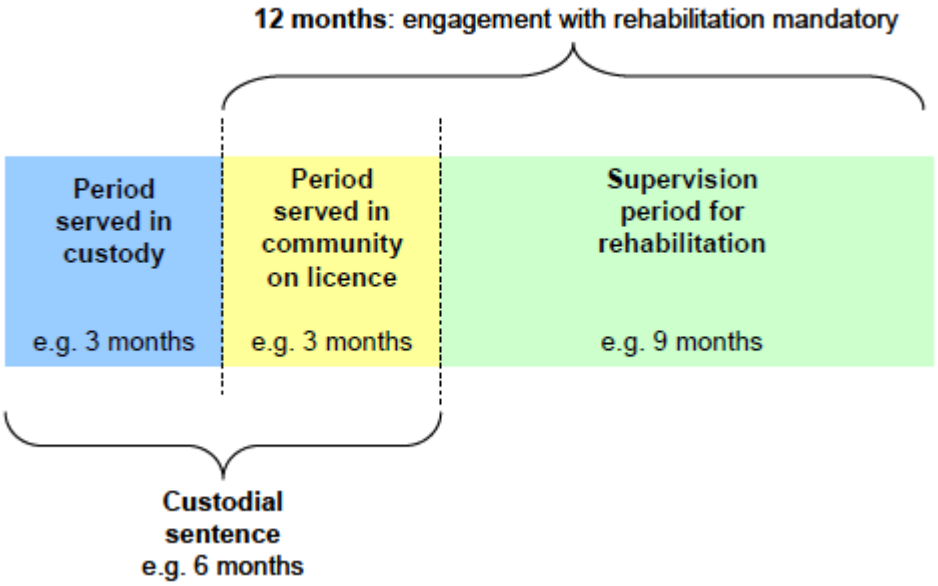
96 SI 2005/648

The proposals comprise:

1. Extending existing arrangements for release on licence to all offenders released from custodial sentences of 12 months or less (who are currently released without any supervision). The MoJ estimated this would extend supervision to an additional 50,000 offenders (based on 2011/12 data). Conditions applied would be the same as existing licence conditions.

2. Introducing a "top-up" supervision period, applied immediately after the licence period, to provide that all offenders released from sentences of less than two years receive a minimum of 12 months supervision in the community. This period would be primarily for the purposes of rehabilitation. The MoJ estimate this would apply to around 15,000 offenders. "Requirements" (conditions) would also be attached during this period (see next bullet point for more detail).

   The diagram below from the *Transforming Rehabilitation* strategy provides an example of how the licence and supervision periods combined would guarantee at least 12 months of supervision.



Source: *Transforming Rehabilitation* strategy, p13

3. Introducing a menu of ten "requirements" that could be applied during the "top up" supervision period. Requirements would be solely for the purposes of rehabilitation and more limited than during the licence period. The ten requirements that could be attached are set out in the box below.

   Sanctions for breach of requirements would also be introduced and would be different to those for breach of licence conditions. Sanctions would include a fine, unpaid work, a curfew, or, ultimately, a return to custody for a period of up to 14 days.

"Top up" supervision period requirements: the menu

- to be of good behaviour and not to behave in a way which undermines the purpose of the supervision period;
- not to commit any offence;
- to keep in touch with the supervisor in accordance with instructions given by the supervisor;
- to receive visits from the supervisor in accordance with instructions given by the supervisor;
- to reside permanently at an address approved by the supervisor and to obtain the prior permission of the supervisor for any stay of one or more nights at a different address;
- not to undertake work, or a particular type of work, unless it is approved by the supervisor and to notify the supervisor in advance of any proposal to undertake work or a particular type of work;
- not to travel outside the British Islands, except with the prior permission of the supervisor or in order to comply with a legal obligation (whether or not arising under the law of any part of the British Islands);
- to participate in activities in accordance with any instructions given by the supervisor;
- a drug testing requirement;
- a drug appointment requirement.

The *Transforming Rehabilitation* strategy also proposed a number of changes to Community Orders and Suspended Sentence Orders, including the introduction a new "rehabilitation activity requirement". These proposals are discussed in the next section of this paper.

MoJ evidence in support of the proposals

In support of the proposed extension of offender supervision, the MoJ pointed to analysis which suggested that such a change would help to reduce reoffending by short-sentence offenders.

- In the *Transforming Rehabilitation* strategy the MoJ referred to analysis of official reoffending statistics for 2011, which showed that "when differences are controlled for, there is up to an 8 percentage point difference in reoffending rates between those on community orders and those who received a short prison sentence – currently without statutory rehabilitation on release".[97]
- In the Impact Assessment for the *Offender Rehabilitation Bill*, the MoJ cited "internal analysis" which suggested that "when differences between certain types of offenders are controlled for, those subject to a supervision licence have lower re-offending rates than those released without support".[98]
- In July 2013, the MoJ published a further analysis of re-offending statistics; *Does Supervision After Release From Prison Reduce Re-offending?* The paper concluded that a period of supervision after release from custody reduced reoffending in the short term, particularly for those with one or no previous convictions sentenced to around a year in custody.

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97 Ministry of Justice, *Transforming Rehabilitation - A Strategy for Reform*, Response to Consultation CP(R)16/2013, May 2013, p45

98 Ministry of Justice, *Updated Impact Assessment for the Offender Rehabilitation Bill*, 20 June 2013, p13

Impact Assessment

The MoJ's updated Impact Assessment identified a number of potential costs, risks and benefits associated with the proposals to extend supervision to all short-sentence prisoners.[99]

Costs:

The MoJ referred to the additional cost of supervising all offenders released from short custodial sentences. However, the MoJ said it would be "inappropriate to release these costs, as they will be dependent on the outcome of competing offender services in the community", and that publishing them "could put contractual negotiations at risk and prejudice the effectiveness of the competition".

The MoJ's best estimate was therefore that, overall, the proposed changes would lead to increased costs of around £33 million per year. £27 million of this would be due to the cost of breach during additional licence and supervision periods. The MoJ estimated the changes could lead to an additional 13,000 offenders recalled or committed to custody each year.

Estimated costs	
Breaches of licence and supervision requirements	£27m
Additional burden on police time	£5m
Extending drug testing requirement	£1m
Total	**£33m**

Risks:

The MoJ also pointed to the risk that the proposed reforms could lead to a change in sentencer behaviour. The MoJ looked at the possible effects of courts "up-tariffing" sentences as they saw the new arrangements as "suitable for a wider group of offenders". The MoJ estimated that this could result in a need for around 800 additional prison places per year.

Benefits:

As well as reducing prison, probation, court and legal aid costs, the MoJ said the changes would reduce the social costs of reoffending, including the physical, emotional and financial impact on victims.

3.4 Commentary

Prison Reform Trust

In its response to the *Transforming Rehabilitation* consultation, the Prison Reform Trust said that it welcomed the focus of the proposals, including the extension of supervision to short-sentence offenders, but warned that the proposals could lead to an increase in the short-sentence prisoner population.[100] The trust described the risk as "two-fold":

- Sentencers might use the new short sentences with statutory supervision more often because they were seen as a "safe" and attractive option by the courts.
- If license conditions were too onerous, large numbers were likely to breach and be recalled to custody.

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[99] Ministry of Justice, *Updated Impact Assessment for the Offender Rehabilitation Bill*, 20 June 2013
[100] Prison Reform Trust, *Response to Transforming Rehabilitation*, February 2013

The Trust noted that many people serving short prison sentences had complex and multiple needs which, in turn, increased the likelihood of breach. The trust stressed, therefore, that if sanctions for breach were too onerous and inflexible that "even the most flexible licence conditions for prisoners serving less than 12 months are likely to result in huge number of recalls."

To help prevent this, the Trust suggested, among other things, that supervision conditions should be proportionate and allow flexibility in dealing with breach, and that the option of recall to custody should remain a "genuine last resort". The Trust also argued that, although the proposals could prove successful, "it will nearly always be cheaper and more effective to impose a community sanction rather than a short prison sentence".

The Trust also reminded the MoJ of the previous Government's experience with the similar "Custody Plus" scheme (see box below), which was passed but never implemented because of concerns about the costs.

Custody Plus

Provisions for the Custody Plus scheme were contained in the *Criminal Justice Act 2003*. The scheme was intended to eventually replace all custodial sentences of up to 12 months. It would have involved a period in custody (between 2 and 13 weeks) and a compulsory period of supervision in the community with conditions attached (at least 26 weeks). Combined, the overall sentence could be up to 12 months (between 28 and 51 weeks).

According to evidence given the Justice Committee in 2008, the Custody Plus scheme was never brought into force because of a lack of resources and the potential increase in prison population. The relevant provisions in the *Criminal Justice Act 2003* were recently repealed by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

For further discussion see the 2008 Justice Committee report; *Towards Effective Sentencing*, HC 184, 22 July 2008

In its briefing for the second reading in the Lords of the *Offender Rehabilitation Bill*, the Prison Reform Trust also expressed some concerns about the impact of the proposals on "young offenders on the cusp of the adult justice system".[101] The Trust criticised the proposal to apply the same arrangements that would apply to adults to young offenders under the age of 18 when sentenced who reached 18 before release from custody. The Trust said it was a well established principle that young offenders should not be subject to the same expectations and demands as adults. The Trust said the proposals would "reinforce rather than address the well documented problem of transition to adulthood between the youth and adult justice systems" and cited evidence which suggested that a phased transition, which accounted for an offender's maturity, would be more effective at reducing reoffending and improving social outcomes.

Howard League for Penal Reform

In its response to the *Transforming Rehabilitation* consultation, the Howard League said that it appreciated the "positive aims" behind the extension of supervision but warned that there were likely to be "negative and costly unintended consequences".[102]

The League said that if supervision was extended to short-sentence offenders a substantial number would likely breach their conditions and be recalled to custody. The League noted that short-sentence offenders often led particularly "chaotic lifestyles", meaning that breach

[101] Prison Reform Trust, *Offender Rehabilitation Bill: Second Reading Stage Briefing*, May 2013
[102] Howard League for Penal Reform, *Response to Transforming Rehabilitation consultation*, February 2013

was even more likely in this group. The League also disagreed that the additional cost of extending supervision would be met through competing for services and other savings, as the MoJ had suggested.

Magistrates Association

The Magistrates Association also welcomed the MoJ's proposals in its response to the consultation, but recommended that supervision should not be mandatory. The Association said it would be expensive and wasteful to enforce supervision where it was not needed, for example, for offenders who were highly unlikely to reoffend.[103]

The Association also warned that the proposals could lead to an increase in short-term prison sentences as courts "up-tariffed" from community orders to short prison sentences. Courts might see the combination of punishment and rehabilitation provided by a period of custody and supervision under new short-sentence proposals as more attractive than a community order alone. The Magistrates Association suggested that courts could instead be given the power to impose both custodial and community sentences consecutively.

3.5 The Bill

Extending post-release support and supervision (clauses 2 – 13)

In summary, clauses 2 – 13 would make a number of amendments to the current sentencing framework (mostly set out in the *Criminal Justice Act 2003*) to provide that all offenders sentenced to less than two years in custody received at least 12 months of mandatory supervision in the community after release. This would be achieved by extending licence conditions to offenders sentenced to less than 12 months and creating a new "top up" supervision period for offenders sentenced to less than two years. The Bill would also introduce requirements that could be applied during a supervision period and sanctions for breach of these.

Other clauses would provide that the new arrangements would apply to all offenders aged over 18 at the halfway point in their sentence (i.e. when they are released from custody), require arrangements for female offenders to be tailored to their specific needs, introduce a new "drug appointment" condition while on licence and expand the categories of drugs that an offender can be tested for to include Class B substances.

Clause 2 would provide that offenders sentenced to more than 1 day but less than 12 months in custody would be released on licence at the halfway point in their sentence to service the remainder of their sentence in the community.

Clause 3 would introduce an additional "top up" supervision period to provide that all offenders sentenced to more than 1 day but less than two years in custody would receive at least 12 months of mandatory supervision after release from custody.

Clause 3 would also introduce **schedule 1**, which sets out the ten requirements that may be attached to the new supervision period. Requirements would be set by the public sector and would be for the purposes of rehabilitation. **Schedule 1** would also make a number of provisions relating to drug testing and drug appointment requirements. It would provide, among other things, that a drug testing requirement could only be imposed for a trigger offence and that a drug appointment requirement could only be imposed where the Secretary of State was satisfied that that the offender's drug misuse contributed to an offence or was likely to cause or contribute to further reoffending. Schedule 1 would also provide that an offender would not be required to submit to medical treatment at a drug appointment and

[103] Magistrates' Association, *Response to Transforming Rehabilitation consultation*, February 2013

would only be in breach of the requirement if he failed to attend or remain at the appointment for the specified time.

Clause 4 would specify the four sanctions that might be imposed for breach of a supervision period requirement; a fine, unpaid work, a curfew, or, ultimately, a return to custody for a period of up to 14 days.

Clause 4 would also introduce **schedule 2**, which would deal with breach of sanctions imposed for a previous breach of a supervision period requirement. Schedule 2 would provide, among other things, that such a breach must be referred to the public sector probation service to decide whether to enforce the breach and lay information before a court.

Clauses 5 and 7 together would provide that the same supervision arrangements that apply to adults would apply to young offenders who reach the age of 18 before their release from custody.

Clauses 6 and 9 together would ensure the same arrangements applied to offenders serving consecutive terms of imprisonment and those sentenced to extended determinate sentences.

Clause 8 would make minor and consequential provisions.

Clause 10 would provide that offenders serving custodial sentences of less than 12 months who were recalled to custody for breach of licence conditions would be released after 14 days. Offenders serving custodial sentences of 12 months or more who were recalled would be released after 28 days.

Clause 11 would require the Secretary of State to ensure that arrangements for the supervision of offenders had regard to the particular needs of female offenders. This would apply to public and private providers.

Clauses 12 and 13 would expand the categories of drugs that an offender could be tested for to include Class B (as well as Class A) and would introduce a new "drug appointment" condition that could be applied during a licence period.

3.6 Debate in the Lords

Although the proposals to extend mandatory supervision for short-sentence offenders were broadly welcomed, some concerns were expressed in the Lords. Peers warned of a number of unintended consequences, including an increase in the use of short custodial sentences as sentencers saw the new supervision periods as more attractive, and an increase in the prison population as offenders were recalled for breaches. Some Members of the House of Lords also queried the arrangements for young offenders and others argued for the recognition of the particular needs of female offenders.

Changes in sentencer behaviour

At the Bill's second reading, whilst welcoming the increased supervision for short-sentence offenders, both Lord Dholakia (Liberal Democrat) and Lord Woolf (Crossbencher and former Lord Chief Justice) warned that the proposals could lead to an increase in the use of short sentences and "undermine the objective of the Bill". They warned that sentencers could see the new arrangements as "justifying short sentences" and as providing the "best of both worlds: both the punitive impact of imprisonment and supervision of the offender when he or she is released".[104]

[104] HL Deb 20 May 2013 cc649-54

Lord Dholakia suggested that, except for very serious offences, no one should be sentenced to custody who had not previously been subject to an intensive community sentence. Lord Woolf also commented that, in his experience, "what can be achieved by a short sentence in prison can always be better achieved (...) by a community sentence".[105] Similarly, Baroness Healy (Labour) warned that, despite the best intentions of the Government, the proposals may "set people up to fail, lead to longer sentences and put more people in prison". She quoted the Howard League, who said the proposals were "likely to result in negative and costly unintended consequences" as a "substantial number of offenders" under supervision would breach the conditions and could return to custody. She also argued that the proposal for a minimum of 12 months of mandatory supervision would create "disproportionate" sentences for minor crimes as "a two-week sentence becomes a year and two weeks trapped in the criminal justice system".[106]

In response, Lord McNally disagreed that the proposals would lead to an increase in short sentences. He mentioned that the MoJ were speaking with magistrates and the Sentencing Council with this in mind and noted that the current "custodial threshold" test set out in section 152 of the *Criminal Justice Act 2003*[107] would still apply.[108]

To address the perceived risk of an increase in the use of short sentences, in committee, Lord Marks (Liberal Democrat) moved an amendment to add to the current custodial threshold test a requirement that there must be "special reasons" to justify a custodial sentence. Lord Marks said it would "strengthen the principle that short sentences are to be avoided unless they are really necessary".

In response, Lord McNally said the amendment was unnecessary as the "special reasons he may have in mind must already be considered when the court decides on the sentence and whether a custodial sentence is merited under section 152".[109]

Arrangements for young offenders

At second reading, Baroness Linklater (Liberal Democrat) raised a number of concerns about the management of young offenders under the proposals and the decision to apply 12 months of mandatory supervision to all offenders who turn 18 before release.

She expressed concern about treating young offenders who turn 18 before release as adults, with the same expectations and demands. She noted that, currently, during a young offenders' transition from the youth to the adult justice system, youth supervision is routinely maintained past the age of 18 to ensure continuity. She argued that without this continuity there was an increased risk of breach and asked the MoJ to clarify how they would handle transfer of supervision to new public/private providers.[110]

Following this, Baroness Linklater moved a number of amendments in committee and at report stage. For example, in committee, she moved an amendment to exclude all young offenders, aged under 21 on release, from "top up" supervision, arguing that young offenders should remain under the specialist supervision provided by Youth Offending Teams (YOTs)

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105 HL Deb 20 May 2013 cc649-54
106 HL Deb 20 May 2013 cc654-57
107 "the court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence"
108 HL Deb 20 May 2013 cc671-6
109 HL Deb 11 June 2012 cc1526-32
110 HL Deb 20 May 2013 c657-61

as managed by the Youth Justice Board (YJB).[111] She moved a similar amendment at report stage.[112]

Responding in committee, Lord McNally noted that young offenders had some of the highest reoffending rates and said that the MoJ saw this as an opportunity to offer them "real support". He said that, for a significant number of young offenders, it may be "the best thing that ever happens in their lives". He stressed that the type and level of supervision would be tailored to the individual young person's needs and that he expected providers to develop specific programmes for this age group.[113] Similarly, responding for the Government at report stage, Lord Ahmad stressed that the MoJ recognised that young offenders had different needs and stated that the MoJ would work with providers to ensure their needs were met. He also pointed out that it would be in providers' financial interests to do so. Lord Ahmad also pointed out that the Bill did allow for "top-up" supervision to be delivered by either YOTs or probation providers.[114]

The needs of female offenders

Throughout the Bill's stages, it was argued that the requirement to have regard to the particular needs of women (such as family and child caring responsibilities) when setting supervision conditions should be set out in legislation. Lord Woolf moved amendments in committee and at report stage, and eventually, at third reading, Lord McNally moved a Government amendment to this effect. The amendment was agreed without division.

In committee, Lord Woolf said that there was a "consensus among all those concerned about the particular needs of female offenders". He urged that the requirement to have regard to their needs should be safeguarded by legislation and moved amendments to require the Secretary of State and providers of probation services to do so when setting "top up" supervision requirements.

Responding for the Government, Lord Ahmad said he agreed with the sentiments expressed but that legislation was unnecessary. He said that in future all offenders sentenced to less than 12 months would have an assessment of their risks and needs and that the information from this would be used to draw up plans for their sentence (in custody and the community) which would account for and address their particular needs. The amendment was withdrawn.[115] Lord McNally also pointed out that the wider *Transforming Rehabilitation* reforms would open up the offender supervision market to organisations which specialised in women's services and that PbR would also provide an incentive.[116]

At report stage, Lord McNally announced his intention to move a Government amendment at third reading to address the concerns expressed. At third reading, Lord McNally described the effect of the proposed Government amendment:

> It requires the Secretary of State to ensure that arrangements for the supervision and rehabilitation of offenders state that, in making those arrangements, he has complied with the public sector duty under Section 149 of the Equality Act 2010 as it relates to female offenders. The arrangements must also identify any provision that is intended to

111 HL Deb 5 June 2013 cc1189-95
112 HL Deb 25 June 2013 cc693-7
113 HL Deb 5 June 2013 cc1192-1195
114 HL Deb 25 June 2013 cc698-701
115 HL Deb 5 June 2013 cc1204-13
116 HL Deb 11 June 2013 cc1548-58

> meet the particular needs of female offenders. It applies both to the contract with private providers and services provided by the public sector probation service.[117]

Lord Woolf said that although the amendment was not as clear as he would have liked, it achieved a purpose. The amendment was agreed without division.[118]

4 Changes to community sentences

As part of the *Transforming Rehabilitation* strategy, the Ministry of Justice also intends to make legislative changes to the community sentencing framework.

Under the *Transforming Rehabilitation* proposals, new contracted providers would be responsible for supervising offenders subject to Community Orders (COs) and Suspended Sentence Orders (SSOs). The Bill would amend the definition of "responsible officer" to provide that the supervision of a community sentence could be the responsibility of a private sector provider as well as public sector provider.

The MoJ also said it wanted to allow contracted providers the flexibility to innovate and to do what they thought worked best to reduce reoffending. As part of this, the Bill would also introduce a new "rehabilitation activity requirement" for COs and SSOs, under which providers would be able to determine the exact activities for offenders.

4.1 Community Orders (COs) and Suspended Sentence Orders (SSOs)

As set out in the *Criminal Justice Act 2003* (as amended), COs and SSOs are sentences served wholly in the community under the supervision of the probation service. Offenders are subject to requirements for the duration of the order, the number and combination of which depends on, among other things, the seriousness of the offence and the risk of reoffending. The possible requirements are:

- an **unpaid work** requirement
- an **activity** requirement
- a **prohibited activity** requirement
- a **curfew** requirement
- an **exclusion** requirement
- a **residence** requirement,
- a **foreign travel prohibition** requirement[119]
- a **mental health treatment** requirement
- a **drug rehabilitation** requirement
- an **alcohol treatment** requirement
- an **alcohol abstinence and monitoring** requirement[120]
- a **supervision** requirement
- in a case where the offender is aged under 25, an **attendance centre** requirement

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117 HL Deb 9 July 2013 cc159-63

118 HL Deb 9 July 2013 cc159-63

119 This requirement was added by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, and came into force on 3 December 2012

120 This requirement was added by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, but has not yet been brought into force.

In addition to any of the above requirements (but not on its own), the court may also include an electronic monitoring requirement as part of a community order.[121]

Responsible officer

The *Criminal Justice Act 2003* also sets out the definition and responsibilities of the responsible officer. The London Probation Trust described the role in a leaflet:

> You will have one person who you must keep in contact with while you are on your Community Order.
>
> This person is called your 'responsible officer'. They may be an officer of the probation service, or the officer in charge of an Attendance Centre, or an electronic monitoring officer (if the court has said you must be tagged). You might be told to keep in contact with other people too.
>
> The court expects your responsible officer to make sure that you stick to the rules of your Requirements and complete your sentence successfully. If you do not do this, the court expects your responsible officer to do something about it.[122]

4.2 Community sentence statistics

In 2012, there 103,759 requirements for COs and 45,275 for SSOs. The most frequently used requirement for both in 2012 was unpaid work - 33% of COs and 23% of SSOs carried out unpaid work:

Most frequently used combinations of requirements for Community Orders and Suspended Sentence Orders
England & Wales, 2012

	Community Orders	Suspended Sentence Orders
Unpaid Work	33,880	10,246
Supervision	10,788	4,136
Supervision & Accredited Programme	6,557	3,443
Supervision & Unpaid Work	6,278	4,189
Supervision & Specified Activity	6,419	2,420
Supervision & Drug Treatment	5,149	2,460
Curfew (1)	4,304	1,404
Supervision & Alcohol Treatment	3,403	1,488
Specified Activity & Unpaid Work	2,175	n/a
Unpaid Work & Curfew	n/a	1,742
Supervision, Unpaid Work & Accredited Programme	2,038	1,446
All other combinations of requirements	22,768	12,301
Total	*103,759*	*45,275*

Source: MOJ, Offender management statistics quarterly - anuual tables, table a4.10

Notes: 1) Does not include all standalone curfews, as most of these are not supervised by the Probation Service.

4.3 The "Transforming Rehabilitation" proposals

In the *Transforming Rehabilitation* strategy, the MoJ said it wanted to free providers from bureaucracy and give them "as much flexibility as possible in their approach to rehabilitating offenders". The MoJ said it would amend the community sentencing framework to provide greater flexibility by combining the existing "supervision" and "activity" requirements into a

[121] For further information about individual requirements see the Community Order leaflets from the London Probation Trust website; *Information for Offenders*. For further information about COs and SSOs see Sentencing Council guidance on, *Community sentences*, and *Suspended sentences*.

[122] London Probation Trust, *Community Order*

new single "rehabilitation activity requirement".[123] According to the MoJ, this change, combined with changes already introduced in the *Crime and Courts Act 2013*, would ensure that community orders "contain both robust punitive requirements and flexibility for providers to tackle rehabilitative needs".[124]

The MoJ has also set out the "technical legislative changes" it would make to the role and responsibilities of the responsible officer so that in the future:

- delivery of an order can be the responsibility of either the public sector probation service or a contracted provider, depending on who is responsible for managing the offender;
- issuing a warning can be the responsibility of either the public sector probation service or contracted provider; but
- laying information before a court to enforce the breach (and the decision in these cases on whether the breach was reasonable) would be reserved to the public sector probation service.[125]

In its assessment of the proposed changes to community sentences, the MoJ did not identify any significant costs or go into detail about potential risks. It did, however, set out the expected benefits:

> We expect that increasing flexibility in the delivery of community orders and suspended sentence orders will give the providers of probation services the opportunity to improve innovation in the delivery of services, leading to reduced re-offending. This has the potential to cut prison and probation costs, reduce court backlogs and allow for savings on legal aid provision. We have not quantified these benefits as we cannot predict the success rate of the providers.[126]

4.4 Commentary

Prison Reform Trust

The Prison Reform Trust commented on many of the provisions of the *Offender Rehabilitation Bill* in their briefing for the second reading in the Lords.[127]

Responsible officer

The Prison Reform Trust argued that all offender management responsibilities should remain with the public sector to ensure a "seamless service". The PRT said the MoJ's proposals failed to understand the complexities of the system and that it was unclear how a private contractor would be held accountable by the court for its responsibility for supervising an order. The PRT also asked, to illustrate their point, who would a judge call before the court if he was concerned about the supervision of a court order where there was more than one organisation involved?

Rehabilitation Activity Requirement

The PRT welcomed the intention to increase flexibility in community sentencing, commenting that many offenders had complex multiple needs and that the courts needed a range of options. However, the PRT also said that the flexibility sought seemed "at odds with the more

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123 Ministry of Justice, *Transforming Rehabilitation - A Strategy for Reform*, Response to Consultation CP(R)16/2013, May 2013, pp13-14
124 For further information see Library Research Paper RP13/4, *Crime and Courts Bill [HL]*, January 2013, p49
125 Ministry of Justice, *Transforming Rehabilitation - A Strategy for Reform*, Response to Consultation CP(R)16/2013, May 2013, pp23
126 Ministry of Justice, *Updated Impact Assessment for the Offender Rehabilitation Bill*, 20 June 2013
127 Prison Reform Trust, *Second Reading Stage Briefing*, 20 May 2013, pp7-10

rigid and centralised approach" adopted in the *Crime and Courts Act 2013* (which introduced a mandatory punitive element to every CO), which the PRT said would limit the courts' discretion.

Permission to change residence

The PRT said it hoped the residence permission requirement did not result in unnecessary and unworkable restrictions which increased the likelihood of breach and recall to custody.

Criminal Justice Alliance

In their response to the *Transforming Rehabilitation* consultation, the CJA (which includes, among others, Catch 22, Drugscope, Justice and Nacro) said they welcomed the intention to provide greater flexibility in community sentencing, but they also commented that it appeared at odds with the less flexible approach of mandatory punitive elements adopted in the *Crime and Courts Act 2013*.[128]

4.5 The Bill

Clause 14 would amend the meaning of the responsible officer (the officer responsible for implementing COs and SSOs) so that, among other things, delivery of an order could be by a public or private sector provider.

Clause 14 would also introduce **schedule 4**. Part 1 of schedule 4 would provide that certain functions, such as the laying of information before a court to enforce a breach, would remain the responsibility of the public sector probation service.

Clause 15 would create a new "rehabilitation activity requirement" for COs and SSOs and repeal the existing "activity" and "supervision" requirements. It would require instructions given under this requirement to be given with a view to promoting the rehabilitation of the offender and would state that activities under the requirement may include reparative activities such as restorative justice.

Clauses 16 and 17 would make small changes to the existing "programme requirement" and "attendance centre requirement" for COs and SSOs.

Clause 18 would introduce a new requirement for offenders subject to COs or SSOs (which do not already include a "residence requirement") to seek the permission of the responsible officer or the court before changing their place of residence. An offender would be able to apply to the court to reconsider a decision by the responsible officer to refuse permission. The grounds for refusing permission to change residence would be if it:

- was likely to prevent the offender from complying with a requirement imposed by the relevant order, or
- would hinder the offender's rehabilitation.

4.6 Debate in the Lords

Responsible officer

In committee, Lord Beecham moved an amendment to require the responsible officer to be a public sector provider or a person commissioned by a public sector provider. (Lord Beecham moved a similar amendment earlier in committee in regard to responsibility for the supervision of offenders released from custody).

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[128] Criminal Justice Alliance, *Response to 'Transforming Rehabilitation: A revolution in the way we manage offenders'*, February 2013

In response, Lord McNally referred to his comments on the previous amendment, arguing that the overall cost of supervising offenders needed to be reduced to afford the extension to all short-sentence offenders released from custody. The amendment was withdrawn.[129]

Rehabilitation activity requirement

In committee, Lord Woolf spoke of the benefits of restorative justice in reducing reoffending and moved amendments to ensure that the new "rehabilitation activity requirement" could include restorative justice activities.

In response, Lord McNally said it was "absolutely" the intention of the MoJ that restorative justice should be delivered under the new rehabilitation activity requirement. He said clause 13 already gave scope for this and argued that, given the evidence in support of restorative justice in reducing reoffending, it was likely that new contracted providers would want to make greater use of such activities.[130]

Speaking to a later amendment, Lord Ahmad further explained the purpose of the new rehabilitation activity requirement:

> (..) Under the new requirement, offenders must comply with any instructions given by their responsible officer to attend appointments, participate in activities, or both. These instructions must be given with a view to promoting the offender's rehabilitation, although they can serve other purposes as well. **The effect of the clause is to allow the probation provider who is the responsible officer, rather than the court, to decide the exact details of what appointments or activities the offender should take part in to maximise their chances of turning away from crime**. [Emphasis added][131]

Permission to change residence

In committee, Baroness Hamwee (Liberal Democrat) moved a number of amendments to clause 16. One amendment would have provided that the two grounds for refusal of permission set out in clause 16 would be the only possible grounds for refusal. Baroness Hamwee expressed some concern about the possible influence of commercial interests in making such a decision and said she felt that the clause was "a little close to what might be for convenience of the provider rather than benefit of the offender".

In response, Lord Ahmad confirmed that the two stated grounds for refusing a request would be the only grounds. He explained that the requirement to seek permission, which would replace the current duty to notify, was intended to deal with cases where moving from one probation trust area to another put the offender's rehabilitation at risk, for example, by ending an established relationship with a supervisor. Lord Ahmad also pointed out that, as a safeguard, offenders would be able to apply to the court to review a responsible officer's refusal.[132]

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129 HC Deb 11 June 2013 cc1532-3
130 HC Deb 11 June 2013 cc1533-9
131 HC Deb 11 June 2013 c1541
132 HC Deb 11 June 2013 cc1545-8