

# SENTENCING IN THE DOCK

The case for a new sentence in the  
criminal courts of England and Wales

October 2020



Sentencing in the Dock  
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# About the CSJ

Established in 2004, the Centre for Social Justice (CSJ) is an independent think tank that studies the root causes of Britain's social problems and addresses them by recommending practical, workable policy interventions. The CSJ's vision is to give people in the UK who are experiencing the worst disadvantage and injustice every possible opportunity to reach their full potential.

Since its inception, the CSJ has changed the landscape of our political discourse by putting social justice at the heart of British politics. This has led to a transformation in Government thinking and policy. The majority of the CSJ's work is organised around five 'pathways to poverty', first identified in our ground-breaking 2007 report, *Breakthrough Britain*. These are: family breakdown; educational failure; worklessness; addiction to drugs and alcohol; and severe personal debt.

Recognising that the poorest and most vulnerable are disproportionately more likely to find themselves in touch with our criminal justice system, the CSJ created a new policy unit for Criminal Justice in 2017. Indeed, when we consider the social characteristics of those passing through our criminal justice system against those of the general population, the levels of disadvantage and trauma are stark. It is also the case that our most vulnerable members of society are often most susceptible to the impact of crime.

The CSJ delivers empirical, practical, fully funded policy solutions to address the scale of the social justice problems facing the UK. Our research is informed by expert working groups comprising prominent academics, practitioners and policy-makers. Furthermore, the CSJ Alliance is a unique group of charities, social enterprises and other grass-roots organisations that have a proven track record of reversing social breakdown across the UK.

The 16 years since the CSJ was founded has brought with it much success. But the social justice challenges facing Britain remain as pressing as ever. In 2020 and beyond, we will continue to advance the cause of social justice in this nation.

# Acknowledgements

Numerous organisations and individuals have fed into this report. They have offered welcome encouragement and challenge, their expert advice and time. We are enormously grateful for their support and contributions.

Particular thanks must be paid to the following organisations and individuals: The Bar Council, West Midlands PCC, Tempus Novo, Key4Life, Action on Addiction, Cheshire Without Abuse, Changing Lives, CAIS, Switchback, Trevi House, Professor Julian Roberts, Judge David Cole, Baroness Sater, Sandra Paul, Dr Shona Minson, Dr Samantha Callan, Alan Reiss, Beverley Thompson-Brown, Jo Easton, Martin Copsey, Matthew Bolt and the many members of the independent Bar who gave up their time.

We are especially grateful to those who gave their time to talk to us about their experience of the criminal justice system – be it as a victim or a perpetrator of crime. Their stories have helped shape this report and we owe them our thanks.

Please note that recommendations or statements of opinion made in this report should not be construed as representative of all those named in all instances.

This report is an innovative approach to custodial sentences for non-dangerous offenders. Keeping appropriate offenders within their homes and communities can have substantial benefits in retaining family ties and positive relationships, especially since many, and in particular women, lose the care of their children and homes when they enter prison.

This has the opportunity to be a welcome addition to the existing range of sentencing options, and could, in turn, help to reduce the stubbornly high rate of reoffending amongst those that leave prison.

**Baroness Amanda Sater, House of Lords**

The Centre for Social Justice's report proposes a timely and innovative new sanction which international experience suggests has great potential for England and Wales.

**Professor Julian Roberts, University of Oxford and Sentencing Academy**

We all must be committed to tackling the root causes of crime, and I think this report provides a solid and credible focus on some of the fair ways of doing this. If we truly want to break the cycle of crime we need to ensure that we give people the opportunities they need to thrive and positively contribute to society. Part of this requires a recognition of the power of community-based solutions, and an acknowledgment that prison often struggles to achieve the desired end. By doing so we will reduce crime and turn people's lives around. Individuals will no longer be burdens on the taxpayer, but will become taxpayers themselves.

**David Jamieson, West Midlands Police and Crime Commissioner**

This report describes so clearly the damage done by pulling people into a volatile prison system that is harmful to their rehabilitation. To those of us supporting people in the criminal justice system, we see every day that people get well, healthy and desist from crime when they have a sense of belonging and hope. This is most likely to occur in the community rather than a prison cell. This report by the Centre for Social Justice provides a refreshed approach to sentencing by providing a genuine alternative to the existing system of repeated short prison sentences.

**Laura Seebohm, Changing Lives**

With hundreds of thousands of children facing the trauma of parental imprisonment and some 80,000 people, many of whom are not dangerous, currently in prison, there has never been a more important time for a fundamental rethink of who prison is for and how it is used. This report from the Centre for Social Justice aims to do precisely that. As well as promoting a new form of sentence – the ICRO – the report also asks us to consider prisoners’ strengths, talents and skills, which can be encouraged and developed through time and intervention, as well as examining the negative impact that imprisonment has on families, especially when it is associated with separation, poor mental health and addiction. This is an important and far-reaching report for policy makers, as well as for anyone who works with those who offend and their families. As we look forward to a time when the letter ‘R’ is associated more with ‘Rehabilitation’ than with ‘Covid-19’, the evidence from this report is clear – systemic change is sorely needed.

**Graham Beech, Action on Addiction**

This is another considered and evidence-based report from the Centre for Social Justice. But as always, it is much more than just a report, as it offers the hope of rehabilitation for those passing through our criminal justice system. Together, we have spent 70 years working in the criminal justice system, and our experience tells us that innovation of this kind is needed more than ever, while guaranteeing the safety of our citizens. By doing something more innovative we can keep thousands of families together, thousands more people in employment, all while saving the taxpayer billions of pounds.

**Steve Freer and Val Wawrozs, Tempus Novo**

I applaud the Centre for Social Justice for addressing the crucial question of what constitutes effective rehabilitation. Our experience at Key4Life is that once young men are caught up in the prison system, there is little hope of significant change. There are some prisons, such as HMP Brixton, that have an excellent rehabilitative culture. However, in the main, when young men come out of prison, we find ourselves spending significant time working to overcome behaviours, and in some cases addictions, they have picked up in prison. It is vitally important therefore that the Government redresses its sentencing options, and community rehabilitation must be at the forefront of change.

**Eva Hamilton MBE, Key4Life**

# Foreword

Prison works. It punishes offenders by depriving them of their liberty. It protects the public by keeping dangerous individuals off the streets.

But prison doesn't work when it comes to the purposes of sentencing beyond punishment and protection: reduction of crime, reparation, reform & rehabilitation. Indeed, nearly 50 per cent of prisoners reoffend after release.

And prison carries a heavy cost – a financial cost to the taxpayer and an opportunity cost to prisoners whose loss of family ties, employment and accommodation drastically reduce their chances of leading a crime-free life once they are released.

That is not to question the dedication and commitment of prison officers and staff, but they are hamstrung by an estate that is simply not fit for purpose. More than a quarter of the prisons in use today were built before 1900 and some date back much further – for instance, construction began at HMP Pentonville in 1840. This was far from the digital age: that year, cutting-edge communication came thanks to the introduction of the Penny Black; today it's from instant messaging and SatNav. But while technology has revolutionised our lives in myriad ways, such advances have, thus far, not reached anything like their full potential in the criminal justice system, let alone the prison estate. Indeed, even the introduction of electronic kiosks for prisoners to order their weekly canteen is still afforded great fanfare, despite their very basic nature.

So, is prison as we know it the right place for all offenders currently sentenced to custody?

This report suggests not, highlighting the many challenges in our prison estate, and proposing an innovative – and cheaper – alternative for non-dangerous offenders.

The proposal stems from my strong belief, following 15 years involved in the criminal justice system, that we are missing a critical sentencing option. Starting at the Independent Monitoring Board of HMP YOI Feltham and as a magistrate, through membership of the Youth Justice Board and Sentencing Council, a non-executive directorship of HMPPS, and culminating on the House of Commons Justice Select Committee, I have been able to experience both the frontline operations of prisons and the courts, as well as national, strategic decision-making.

Throughout that time, I have been struck time and again by the scope for greater innovation and imagination. It has long been clear that there is huge, untapped potential to use digital technology, not least GPS tags, which provide the opportunity for radical improvement to the management of offenders. "Blue sky thinking" conversations with colleagues occasionally considered whether we could have "virtual prisons". But the imperatives of the everyday pushed such ponderings aside. Then came the opportunity to



discuss the idea with the CSJ, who saw its potential and, with many conversations over many months, developed and adapted it into something concrete, thoroughly researched and tested, compared and contrasted with similar concepts in other jurisdictions, and built into a robust and workable proposal.

The result is a new custodial sentence. But rather than being served in a prison, it maximises the rapid progress of technology and instead effectively deprives the offender of their liberty by essentially putting them under house arrest in the community. Rather than being restricted to the rehabilitation courses available in any individual jail, this enables offenders to have access to the full range of interventions and programmes available in their local area. Rather than surrounding the individual with countless other offenders, it enables them to be influenced by positive role models and family. And rather than solely being a burden on the taxpayer, in many circumstances it enables people to continue working during their sentences, and so to pay taxes themselves.

In turn, this will allow prisons to focus their efforts much more intensively and constructively on those offenders who absolutely do need to be held behind bars topped with barbed wire. It will also mean we can truly put victims at the heart of the justice system – with stronger reparation during the sentence, and lower reoffending after it.

Britain is rebuilding. The Coronavirus pandemic has forced change throughout our economy and across our society. Initiatives that would have taken years have been introduced in weeks. We are at a unique moment to rethink almost every aspect of the way we live our lives. We should not ignore the criminal justice system when we do so. Instead, let's seize the moment to reimagine the role of prisons, and create a new form of custody that is as effective at rehabilitation and reform as it is at punishment and protection of the public.

**Rob Butler MP**

# Executive summary

We look to custody because it carries penal weight that is currently unmatched in existing community-based sentences. It also offers a decisive means of removing perpetrators of crime from our streets. For many, custody in the prison estate is necessary for the exercise of justice, for the protection of the public and the prevention of future victims of crime.

The jurisdiction of England & Wales does not shy away from custody – in fact, we imprison people at a higher rate than most other jurisdictions in western Europe. Our prison population has increased by over 80 per cent in 30 years, and the sentencing landscape of recent years has been marked by the gradual and consistent inflation of sentence lengths across a broad range of offence categories.

Before the Covid-19 lockdown, the prison population stood at 83,709.<sup>1</sup> Approximately 60 per cent of prisons were overcrowded with some operating at between 147 per cent and 163 per cent of their uncrowded capacity.<sup>2</sup> For those in prison, overcrowding means having to live in close proximity to other inmates, sometimes sharing a single cell that has been designed to accommodate only one person, often with an open, unscreened toilet – a situation that is compounded by the high levels of violence and drug misuse that have become the norm across much of the estate.

It is a fair expectation that our prisons will, at the very least, halt an individual's engagement in criminal activity during their prison sentence. But this is far from the case. All too often, prison serves as a catalyst for the causes of crime, rather than as a means of remedying them. The consequence is that cycles of criminality fail to be broken and reoffending continues to blight our streets and our homes.

Close to half of those leaving custody go on to reoffend within a year of their release, while the same is true for nearly two thirds of those sentenced to less than 12 months in custody.<sup>3</sup> The social and economic cost of this level of reoffending is £18 billion per annum,<sup>4</sup> while the cost to the communities and victims who suffer the effects of crime is immeasurable. According to a 2019 government study, a reduction of only 10 per cent in recidivism would lead to an economic benefit of £490 million.<sup>5</sup>

Our failure to rehabilitate those passing through our justice system is not inevitable. Alongside those for whom prison is a necessary response to their crimes, there also exists a large cohort of individuals who pass through our prison estate every year who

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1 MOJ, Prison and Population Briefing for Friday 20 March 2020

2 National Audit Office, Improving the Prison Estate, January 2020. Page 18

3 Ministry of Justice, Proven reoffending statistics: January to March 2018. 30 January 2020. Table C2a: Adult proven reoffending data, by disposal (annual average)

4 Ministry of Justice, Economic and social costs of reoffending: Analytical report. 2019. Page 10

5 Ministry of Justice, Economic and social costs of reoffending: Analytical report. 2019. Page 6

are not dangerous, nor do they present a material threat to society. They have strengths, talents, skills, and relationships that could be encouraged and developed through time and intervention.

Through the course of this paper we will make the case for the introduction of a new custodial sentence for the criminal courts, the Intensive Control and Rehabilitation Order (ICRO). This new sentence would be served wholly in the community using Electronic Monitoring, curfew requirements and regular periodic reviews before the court. The availability of new technology in the market means that we can go further than ever before in seeking new alternatives to custody, while safeguarding the public and commanding the confidence of sentencers. We consider that it is only by enabling individuals to remain in the community, that meaningful rehabilitation can be achieved.

The ICRO presents an opportunity for individuals to serve their sentence without ever being separated from their families – saving thousands of children from the trauma of parental imprisonment. It would also allow for individuals to engage in work and education programmes in the community, where 92 per cent of community learning and skills providers have been rated as “good” or “outstanding”.<sup>6</sup> In contrast, 71 per cent of prisons inspected in 2018–19 were rated as “requires improvement” or “inadequate” for the overall effectiveness of their education, skills, and work provision.”<sup>7</sup>

Those sentenced to an ICRO, who already live in settled accommodation, will not be required to give up their tenancy but will carry out their custodial sentence in the confines of their home. Out of the 71,656 individuals released from custody in 2017–18, fewer than half found settled accommodation on release.<sup>8</sup> And for those battling addictions to drugs and alcohol, they will be able to receive treatment in the community, away from the black market of illicit drugs within the prison estate.

By combining a robust package of monitoring requirements, alongside meaningful opportunities for rehabilitation, the ICRO presents a unique opportunity for justice to be served while offering a realistic prospect of rehabilitation for those caught in the revolving door of crime.

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6 Ofsted, Annual report from Her Majesty's Chief Inspector, 2018–19. Page 96

7 HM Inspectorate of Prisons for England & Wales, Annual Report 2018–19. Page 35

8 Ministry of Justice, Community Performance Quarterly Statistics release, Accommodation Circumstance tables (April 2017 to March 2019)

# The recommendation

## Recommendation

A proposed alternative sentence for the adult criminal courts of England and Wales: the 'Intensive Control and Rehabilitation Order', hereafter the ICRO.

The ICRO is a new custodial sentence for the adult criminal courts. It is wider in scope than any pre-existing community-based order – applicable to a cohort of individuals who would otherwise serve a sentence of immediate custody in the prison estate.

To allow for this to happen, Electronic Monitoring, together with curfew requirements, would be used to achieve the restraint of liberty necessary to satisfy the punitive element of the sentence, while offering sufficient protection for the public.

At the same time, and because of the environment in which it is served, the sentence would enable those candidates deemed eligible to maintain stabilising relationships and engage in rehabilitative activities and requirements in the community.

Those sentenced to an ICRO will attend periodic reviews before the court, in the form of a problem-solving court, to monitor progress and to enable the court to make necessary adjustments to the conditions of the order as the sentence progresses.



## Eligibility

Those sentenced to an ICRO will be subject to a strict eligibility test set out below:

1. There will be a presumption against the ICRO being imposed in cases involving a custodial sentence of three years or more, unless the court finds exceptional reasons to do so. It is a matter for the court to decide what it recognises as being an exceptional reason. The court will not, under any circumstances, be able to impose an ICRO in cases exceeding four years;
2. A Suspended Sentence Order is of insufficient punitive or rehabilitative effect or is unavailable in law;
3. The court is satisfied that there are no substantial grounds to believe that the defendant, if granted the order with conditions, would commit a further offence;

**and**

4. The court is satisfied that the defendant has demonstrated sufficient will to comply with the conditions of the sentence.

## Conditions

1. **Primary conditions:** These requirements are mandatory for everyone on the ICRO. Electronic monitoring and curfew requirements are necessary to achieve the restraint of liberty needed to satisfy the punitive element of the sentence, while offering sufficient protection for the public. Periodic reviews before the court, in the form of a problem-solving court, will be focused on the rehabilitation of the individual and will also allow for the court to make necessary adjustments to the conditions of the order as the sentence progresses. It will also be necessary for the court to impose one other requirement from the list of secondary conditions detailed below. It is a matter for the court to decide the length, duration and frequency of the requirements imposed on the order;

**and**

2. **Secondary conditions:** These requirements can be issued according to the needs of the individual, forming a flexible, tailored package of support. They include a number of rehabilitative requirements and non-mandatory enforcement measures.

### **Primary conditions (mandatory):**

- The individual must not commit any other offence during the period of the ICRO.
- GPS Electronic Monitoring with;
  - i. Curfew (tantamount to 'house arrest')
  - ii. Extended periods of curfew duration (not exceeding 24 months)
- Periodic reviews before the court (in the form of a problem-solving court)

**Secondary conditions** (tailored to the needs of the individual):

- Supervision
- Minimum hours of work (this could take the form of both paid, unpaid or both)
- Minimum hours of education
- Programmes (accredited programmes aimed at changing offender behaviour)
- Drug rehabilitation requirement
- Mandatory drug testing
- Alcohol treatment
- Rehabilitation activity requirement or specified activity (for example, skills training or education to help an individual obtain qualifications)
- Mental health treatment
- Financial restraint orders
- Excluded activities (such as going to pubs, clubs etc)
- Excluded associations
- Restorative justice programmes
- Prohibition from leaving certain areas (a residence or street) and/or entering certain areas
- Alcohol abstinence monitoring

# Introduction

Years of dependence on custody as a response to crime, alongside high reoffending rates, has shown us that the prison estate is not equipped to meaningfully rehabilitate those passing through the criminal justice system. All too often, prison only serves to further entrench criminal behaviour – which ultimately makes our communities less safe.

Research from the Ministry of Justice shows that, even when controlling for background variables, including offending histories, rates of reoffending were significantly higher amongst those sentenced to immediate custody than those sentenced to a Community Order or Suspended Sentence Order.<sup>9</sup> Recidivism is the real enemy, and if the Government is serious about reducing future victims of crime then it must radically reassess its use of custody and bring rehabilitation back to the fore of sentencing.

This report makes the case for a new custodial sentence served in the community. We consider that using Electronic Monitoring and curfew requirements, alongside regular reviews before the court, it is possible to offer a proportionate and robust punishment commensurate with the crime committed, while keeping our communities safe. By allowing for this integral restriction of movement to be achieved outside the prison walls, there is an opportunity to maintain, encourage and develop pro-social behaviours in the individual's life that will ultimately lead to lasting rehabilitation and reform.

Through the course of researching and writing this piece, the CSJ has consulted widely with a plethora of stakeholders and key players in the criminal justice space. We have met with academics, politicians, solicitors, barristers, policemen and women, representatives from our prison and probation services, private providers of enforcement technology, the voluntary sector, specialist providers of rehabilitative interventions, individuals who have suffered the effects of prison, and those who have been the victims of crime. There has been overwhelming agreement for the need for a meaningful, rehabilitative, additional alternative to immediate custody.

Overcrowded prisons, high reoffending rates and a lack of rehabilitation have been the narrative of our criminal justice system for too long. While a welcome programme of reform and investment is underway across the prison estate, the scale of the challenge facing our prisons is seemingly insurmountable, and many years may pass before the fruit of government investment is felt. The ICRO has the potential to deliver, for many, an alternative to custody in

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<sup>9</sup> Ministry of Justice, Georgina Eaton and Aidan Mews, *The impact of short custodial sentences, community orders and suspended sentence orders on reoffending*, 2019. Page 10

the prison estate – offering a far more productive environment for reform, while freeing up vital resources for those for whom prison is a necessary response to their crimes.

As we look to recover from the Covid-19 crisis and build a fairer and safer society, we need a new and brave response to crime, one that believes in the hope of rehabilitation for those in our criminal justice system and seeks a safer society for all.



## chapter one

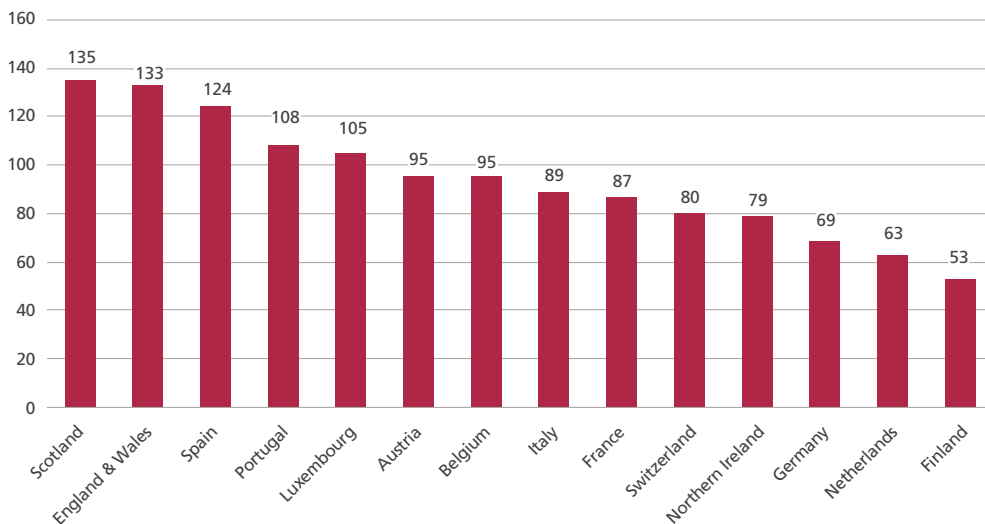
# The use of custody in the UK

## The UK uses custody to a greater extent than many Western jurisdictions

Prison in its traditional form dominates the penal landscape of jurisdictions around the world. Despite falling crime rates in many western jurisdictions, the use of custody as a sanction has not declined over the decades. Rather, in many jurisdictions, imprisonment rates have increased.<sup>10</sup>

In the United Kingdom, sentencing an individual to custody in the prison estate for a prolonged period of time is the greatest sanction the state can impose, and one we do not shy away from.

Figure 1: Prison population rate (per 100,000 of national population)



Source: World Prison Brief, Institute for Crime & Justice Policy Research, June 2020

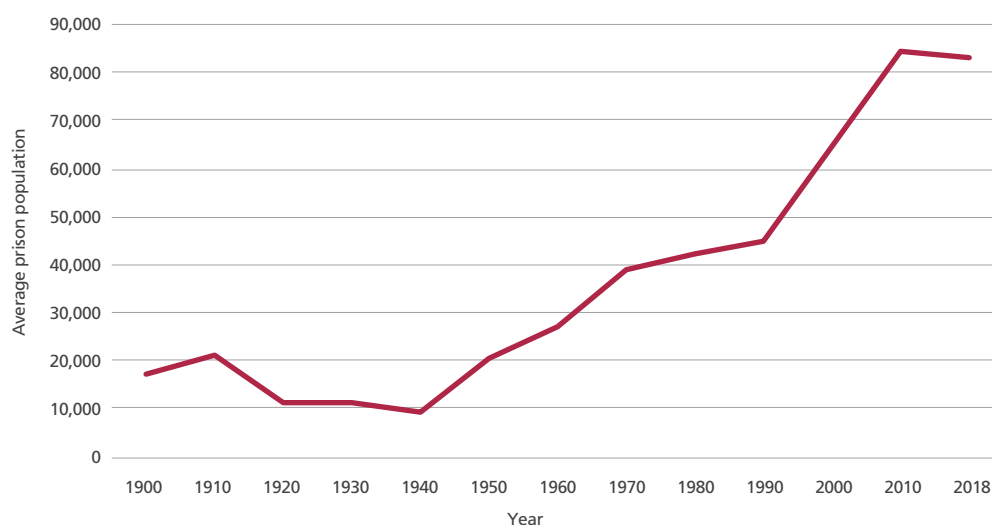
<sup>10</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, 2004. Page 23

The UK has some of the highest imprisonment rates in Western Europe, with a prison population rate of 133 per 100,000 inhabitants.<sup>11</sup>

The UK has some of the highest imprisonment rates in Western Europe. England and Wales have a prison population rate of 133 per 100,000 inhabitants.<sup>11</sup> In contrast, the median prison population rate across all EU Member States for which data is available, is 106 inmates per 100,000 inhabitants,<sup>12</sup> and the arguably comparable jurisdiction of France is lower still, with a rate of 87 per 100,000 inhabitants. Germany has an imprisonment rate of 69 per 100,000 inhabitants.<sup>13</sup>

Our prison population has seen an overall and consistent increase since the end of the Second World War. The rise has been most pronounced, however, over the past thirty years.

Figure 2: Average prison population in England and Wales 1900–2018



Source: Ministry of Justice FOI response 200617019

There are a range of factors that have contributed to the long-term growth of our prison population. Some are external and relate to the changing nature of crime and advancements in our ability to detect crime, while others relate to the introduction of tougher sentencing policies. There is evidence of a lack of confidence in some non-custodial sentences and there has also been a substantial increase in the number of recalled offenders returning to custody after breaches of their licences and Community Orders.

A comprehensive analysis of the complex interplay of variables that drive prison population growth is beyond the scope of this paper. We will, however, consider both the substantial increase in the length of time individuals spend in custody, and the demographic of those we sentence to immediate custody.

11 World Prison Brief, Institute for Crime & Justice Policy Research, June 2020

12 Council of Europe, Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report. Marcelo F. Aebi and Melanie M Tiago. 2019. Page 2

13 World Prison Brief, Institute for Crime & Justice Policy Research, June 2020

## Sentence inflation

In recent years, the time individuals have spent in custody has increased, as too has the number of people serving longer sentences. There has been a general tendency to increase statutory maximum sentences, or to introduce minimum terms for certain offences. In 2010, the average custodial sentence length across all offence groups was 13.7 months. By 2020 it had risen to 19.6 months.<sup>14</sup> In the ten years from 2009 to 2019, the average custodial sentence length across each of the following offence categories has seen a substantial increase:

- Fraud saw a percentage increase of 90 per cent, from 12.4 months in 2010 to 23.6 months in 2019;
- Criminal damage and arson saw a percentage increase of 76 per cent, from 19.3 months in 2010 to 33.9 months in 2020;
- Robbery saw a percentage increase of 61 per cent, from 33.6 months in 2010 to 54 months in 2020;
- Sexual offences saw a percentage increase of 21 per cent, from 48.4 months in 2010 to 58.8 months in 2020; and
- Drug offences saw a percentage increase of 29 per cent, from 31.7 months in 2010 to 41 months in 2020.<sup>15</sup>

Where this has happened for higher tariff offences, such as murder, the impact can be felt across other offence categories – resulting in an upward drift in sentencing:

[w]hen the tariff for the most serious of offences increased so significantly, inevitably over time there has been some recalibration of the sentencing of those offences closest to it in gravity, in particular, sentences for manslaughter have risen as a result of the changes brought about by CJA 2003.<sup>16</sup>

The Sentencing Council

While we cannot say whether increases in sentence lengths for the most serious crimes has had a trickle-down effect across the full range of sentence categories, there is some evidence of sentence inflation across almost every offence category – from the highest to the lowest tariff offences. Theft, for example, saw a percentage increase of 22 per cent, from 9 months in 2010 to 11 months in 2020.<sup>17</sup>

The move to increased sentence lengths is not, it seems, a result of increases in crime rates. Indeed, there has been a long-term reduction in police recorded crime since the mid-1990s. In December 1995, the Crime Survey for England and Wales estimated that

<sup>14</sup> Ministry of Justice, Criminal Justice System Statistics publication: Outcomes by Offence, 12 months ending December 2009 to 12 months ending December 2019. 28 May 2020

<sup>15</sup> Ministry of Justice, Criminal Justice Statistics: Quarterly update: the year ending March 2020. Table 5.2c – Average custodial sentence length (months) at all courts to immediate custody, by offence group, year ending March 2010 to year ending March 2020

<sup>16</sup> Justice Select Committee, Prison Population 2022: planning for the future. Chapter 3, Explaining the growth in the prison population. April 2019: Written Evidence from the Sentencing Council of England and Wales. Page 36

<sup>17</sup> Ministry of Justice, Criminal Justice Statistics: Quarterly update: the year ending March 2020. Table 5.2c – Average custodial sentence length (months) at all courts to immediate custody, by offence group, year ending March 2010 to year ending March 2020

19.8 million offences (excluding fraud and computer misuse<sup>18</sup>) were experienced by adults aged 16 years and over. By December 2019, this figure had decreased to 5.8 million<sup>19</sup> (excluding fraud and computer misuse).<sup>20</sup> In more recent years, the overall picture of crime rates has remained relatively stable.

Where there have been variations amongst certain crime types that have contributed to prison population growth, the reasons are complex and multi-faceted and not necessarily because of an increase in criminal activity on our streets.

For example, between 2013 and 2018, the number of police recorded sexual offences almost tripled from 53,599 in 2013 to 150,847 in 2018,<sup>21</sup> and as of 31 March 2020, 18 per cent of the sentenced population – some 12,774 prisoners – were serving sentences for sexual offences.<sup>22</sup> This is likely to have been driven by both improvements in police recording, and a greater willingness amongst victims to report on recent and historic sexual offences – possibly as a result of high-profile media coverage of sexual offences in recent years.<sup>23</sup>

There is also little evidence to suggest that there is any causal link between the decreasing crime rates and the inflation of sentence lengths and prison population growth. The Netherlands, for example, recorded decreasing crime rates alongside a decrease in the size of their prison population. Furthermore, jurisdictions such as the Republic of Ireland and New Zealand, showed an increase in crime rates alongside an increase in the size of their prison populations.<sup>24</sup>

### Who do we send to prison?

Sentence inflation has seen individuals sentenced to significantly longer periods in custody – something that has driven prison population growth. But there is also a compelling case to make that we overuse custody for certain groups of people, such as women and non-violent offenders.

There are a significant number of individuals who enter custody each year who are not dangerous or violent. It has been estimated by the Prison Reform Trust that over two thirds (67 per cent) of prisoners are in prison for a non-violent offence, and when we consider women alone, this figure rises to 80 per cent.<sup>25</sup> Many are in custody for only short periods of time – almost half (46 per cent) of all custodial sentences, and 62 per cent of custodial sentences given to women, are for six months or less.<sup>26</sup>

Almost half (46 per cent) of all custodial sentences, and 62 per cent of custodial sentences given to women, are for six months or less.<sup>26</sup>

18 Offences related to fraud and computer misuse are excluded as victimisation questions on these offences were only added to the CSEW from October 2015. Initially, questions were only asked of half the survey sample. The questions were asked of the full sample from October 2017 onwards.

19 Or 10.4 million offences including fraud and computer misuse.

20 Office for National Statistics – Crime Survey for England and Wales. Crime in England and Wales: year ending December 2019, 23 April 2020.

21 Police recorded Crime, Home Office. Office for National Statistics, Sexual offending: victimisation and the path through the criminal justice system, 13 December 2018

22 Ministry of Justice, Offender Management Statistics Bulletin, England and Wales, 30 April 2020

23 Office for National Statistics, Sexual offending: victimisation and the path through the criminal justice system, 13 December 2018

24 National Audit Office, Comparing International Criminal Justice Systems, 2012. Page 26

25 Ministry of Justice, Offender Management Statistics, 2019. Table 2.5b: Sentenced admissions into prison by offence group and sex. Cited in Prison Reform Trust Winter Bromley Briefings 2019

26 Ministry of Justice, Offender Management Statistics, 2019. Table 2.5a: Sentenced admissions into prison by sentence length, age group and sex. Cited in Prison Reform Trust, Winter Bromley Briefings 2019

While each individual case will be heard and sentenced by an independent court, the legislative framework on which our laws are set is decided by Parliament. A large volume of sentencing legislation has been enacted over the past 30 years<sup>27</sup> which has coincided with the sharp increase in the size of our prison population over the same period. The impact of our overuse of custody can be tangibly felt within our prisons, many of whom house some of society's most complex and traumatised individuals.

## The impact on prison efficacy

There were women in there who were dead behind the eyes. Their souls had been lost to the jail system. There was a lot of violence. Self-harm was prolific. The women had become accustomed to it being their life.

Zoe

Our overuse of custody has resulted in an overcrowded prison system that is limited in its ability to rehabilitate individuals and tackle the criminogenic needs of those sentenced to immediate custody. Prisoners are often kept in overcrowded and dilapidated buildings, in unsafe and unsanitary conditions. Despite recent efforts, there exists a prolific drugs trade within the prison estate, with high levels of violence, intimidation, and verbal abuse.

As of March 2020, the total prison population stood at 83,709,<sup>28</sup> which equates to 98 per cent of the usable operational capacity of the estate. With the uneven distribution of prisoners across the estate, 60 per cent of prisons are overcrowded, with some operating at between 147 per cent and 163 per cent of their uncrowded capacity.<sup>29</sup> The remainder remain at or close to capacity. This level of overcrowding has changed little in 15 years.

A consequence of overcrowding is that, in many prisons, there are simply not enough places to provide purposeful activity for every prisoner. A quarter (24 per cent) of male prisoners surveyed reported being locked in their cells for at least 22 hours a day on a weekday,<sup>30</sup> with few opportunities for work and training. In the most recent annual report, Her Majesty's Inspectorate of Prisons considered the impact of overcrowding on purposeful work in prisons:

If the purpose of prison, after fulfilling the sentence of the court, is to rehabilitate, how can that be achieved if prisoners are unable to access education or training because there are not enough places? At present 'overcrowding' in prisons is assessed by the prison service based on how many prisoners can be crammed into the available cells. Perhaps we should think about describing prisons as being overcrowded if, among other things, there are not enough meaningful education or workplaces for the prisoners being held in them?<sup>31</sup>

Our prisons exist to do more than simply warehouse individuals for the duration of their sentence. They should be preparing and equipping individuals for a life after release. Education, drug treatment, mental health support, and work opportunities should be at

A quarter (24 per cent) of male prisoners surveyed reported being locked in their cells for at least 22 hours a day on a typical weekday.<sup>30</sup>

27 Justice Select Committee, Prison Population 2022: planning for the future. Chapter 3, Explaining the growth in the prison population. April 2019: Written Evidence from the Sentencing Council of England and Wales (ppp038)

28 Ministry of Justice, Prison and Population Briefing for Friday 20 March 2020

29 National Audit Office, Improving the Prison Estate, January 2020. Page 18

30 HM Chief Inspector of Prisons for England and Wales, Annual Report 2018–19. Page 118

31 HM Chief Inspectorate of Prisons, Annual Report 2018/19. Page 12

the heart of every prison and central to the experience of each individual passing through the estate. But too often, rather than being places of rehabilitation and reform, the prison environment serves to further entrench criminal behaviour.

While a welcome programme of reform and investment is underway across the prison estate, the scale of the challenge facing our prisons is seemingly insurmountable, and many years may pass before the fruit of government investment is felt. The ICRO has the potential to deliver, for many, an alternative to custody in the prison estate – offering a far more productive environment for reform, while freeing up vital resources for those for whom prison is a necessary response to their crimes.

## A probation service ready for reform

This is a service that is unsung. Its work is vitally important, but often goes unnoticed, unheard and unobserved.

Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Managing around a quarter of a million individuals each year, the probation service is the backbone of our criminal justice system. It provides essential through-the-gate support for those leaving custody to ensure effective resettlement at what is a crucial moment in an individual's journey through the criminal justice system. It also provides supervision for those on Community Orders and for individuals on licence – working to keep our communities safe while offering opportunities for reform.

Under the Transforming Rehabilitation reforms of 2014, probation was split between the National Probation Service managing 'high-risk offenders', and private sector Community Rehabilitation Companies (CRCs) managing 'low and medium risk offenders.' The challenges posed by the reforms are well-documented and are likely to have impacted the court's use of custody in recent years.

As prison numbers have increased, there has been a dramatic fall in the use of Community Orders over the past ten years. In 2009, some 196,000 individuals were sentenced to a Community Order; by 2019, this figure had dropped to 87,000.<sup>32</sup>

This can be explained, at least in part, by a loss of confidence among sentencers in the ability of probation to manage individuals in the community – resulting in more individuals receiving custodial sentences than would have previously been the case. Research has shown there are concerns among magistrates regarding the practical effectiveness of existing community-based sentences, despite an acknowledgement of their importance in principle.<sup>33</sup> A survey commissioned by the Magistrates Association found that over a third of magistrates<sup>34</sup> (37 per cent) are not confident that community sentences in their current form are an effective alternative to custody.<sup>35</sup>

**In 2009, some 196,000 individuals were sentenced to a Community Order; by 2019, this figure had dropped to 87,000.<sup>32</sup>**

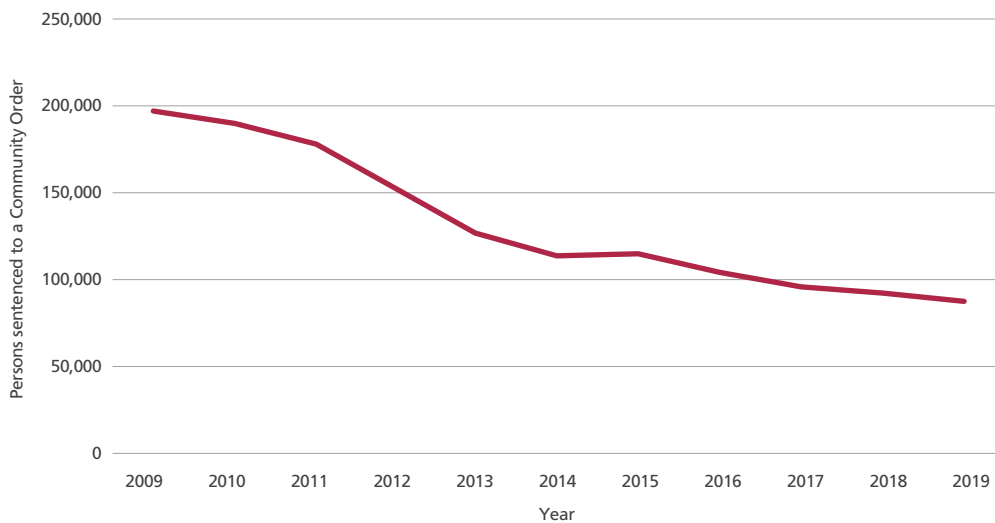
32 Ministry of Justice, Court Proceedings Data, Criminal Justice Statistics quarterly: December 2019. Overview tables, Table 5.1b: Persons sentenced at all courts by offence group, 12 months ending December 2009 to 12 months ending December 2019.

33 Crest Advisory, du Mont, Sophie and Redgrave, Harvey. Where did it all go wrong? A study into the use of community sentences in England and Wales. 2017. Page 38

34 582 magistrates in England and Wales were surveyed

35 Crest Advisory, du Mont, Sophie and Redgrave, Harvey. Where did it all go wrong? A study into the use of community sentences in England and Wales. 2017. Page 38

Figure 3: Total persons sentenced at all courts to a Community Order, 12 months ending December 2009 to 2019



Source: Ministry of Justice, Court Proceedings Data, Criminal Justice Statistics quarterly: December 2019

This lack of confidence in Community Orders has likely been exacerbated by perceived failings in the quality of provision across our probation system. Dame Glenys Stacey deemed the Transforming Rehabilitation model of probation ‘irredeemably flawed’, as eight out of the ten privately-owned CRCs were given the lowest possible rating of ‘inadequate’ in her final report as Chief Inspector of Probation.<sup>36</sup> Often, concerns held by sentencers stem from a lack of information about the services provided by CRCs, a lack of clarity regarding the efficacy of Rehabilitation Activity Requirements, and questions over the availability of treatment provision.<sup>37</sup>

Since Dame Glenys Stacey’s report calling for root and branch reform of probation, all offender management has been brought under the National Probation Service signalling the end of CRC contracts.<sup>38</sup> As our National Probation Service goes through a period of necessary change, there is an opportunity to strengthen our community-based approach to rehabilitation, and in so doing, bring it back to the fore of sentencing.

## What do we seek to achieve through sentencing?

There is a compelling case to make that we overuse custody. While this is in large part driven by sentence inflation for higher tariff crimes, its effects are felt across the broad spectrum of offences. Each year, a large cohort of individuals are sentenced to prison who would face a far greater prospect of rehabilitation outside the prison estate.

<sup>36</sup> Her Majesty’s Inspector of Probation, Report of the Chief Inspector of Probation, March 2019. Page 3

<sup>37</sup> Her Majesty’s Inspector of Probation, Report of the Chief Inspector of Probation, March 2019. Page 84

<sup>38</sup> Gov.uk, Ministry of Justice, Justice Secretary announces new model for probation: National Probation Service to take over responsibility for all offender management. 16 May 2019

The consequence of this is not just felt by those having to endure the harsh realities of prison life, but also by their communities, who suffer the effects of a system that fails to see meaningful rehabilitation achieved. We will come to see that reoffending rates for those leaving custody are significantly higher than those sentenced to community-based sentences, even when controlling for other variables.

When sentencing an individual, the court is required to consider the five purposes of sentencing, as laid down in section 142 of the Criminal Justice Act 2003. In addition to the punishment of offenders and the protection of the public, the statute also lists the reduction of crime, the reform and rehabilitation of offenders, and the making of reparations by offenders to victims and others affected by the offence. Significantly, the statute does not specify a hierarchy.

There is evidence to suggest that our criminal justice system could substantially improve its delivery of the non-punitive functions of sentencing. We consider that, alongside punishment, it is incumbent on our justice system to make our communities safer in the long-term. It is only through meaningful rehabilitation – access to treatment, education, work, settled accommodation and family, that reform will take place and reoffending rates will fall.

Through the course of this document, we will explore the potential for the introduction of a new custodial sentence for the criminal courts, served in the community. It would be an additional and distinct alternative to the Community Order, Suspended Sentence Order and sentence of immediate custody. A sentence of this kind will improve the prospect of delivering lasting behavioural change, avoid the often-damaging impact of prison sentences, make our communities safer and reduce costs for the taxpayer. Our primary aim is to offer a greater prospect of rehabilitation for those passing through our criminal justice system – while recognising the clear need to protect the public and impose a proportionate and robust punishment commensurate with the seriousness of the offending behaviour. The best place to see this achieved is within the community.



## chapter two

# Addressing criminogenic needs in the community

### Pathways to reform

When I was released from prison, I got myself a flat, and I went round charity shops and bought bits of furniture. Then I got a gas bill, but I didn't know how to pay a gas bill. Direct debit, I didn't know what it was. The same for electricity. I was completely shocked that you had to pay for water. TV licence – I was like, for what? And then I had to go shopping, I didn't know how to shop. I have never budgeted money; I have never filled a freezer and a fridge or cooked meals.

But I was quite fortunate in the people around me from [Narcotics Anonymous], I could ring them. And it wasn't a case of 'let me see when it's convenient for me to see you', it was like, 'Trevor it's ok, do you want me to come round and show you?' Not just tell me what to do but show me what to do.

Trevor

It should be incumbent on our criminal justice system to make rehabilitation possible and provide opportunity for genuine re-integration back into society on release. But too often this is not the case, a failing which is starkly revealed in the prison estate.

There are a range of factors that might influence the likelihood that an individual will go on to reoffend. Some risk factors are unlikely to be amenable to any specific intervention, such as an individual's age, gender, and history of offending.<sup>39</sup> But there are those that, through effective intervention and access to the relevant services, can change over time.<sup>40</sup> Of particular relevance are the nine criminogenic needs that are commonly associated with offender behaviour. They include unstable accommodation, a lack of employment, a lack of recreational activities, poor personal relationships, alcohol misuse and drug misuse, impulsivity and poor emotional control, anti-social peers, and attitudes that support crime.<sup>41</sup>

39 HM Inspectorate of Probation and HM Inspectorate of Prisons, *An Inspection of Through the Gate Resettlement Services for Short Term Prisoners* [2016] Page 13; HMPPS, *Risk assessment of offenders: A summary of evidence relating to offender risk assessment, risk of reoffending and risk of serious harm* [2019]

40 HM Inspectorate of Probation and HM Inspectorate of Prisons, *An Inspection of Through the Gate Resettlement Services for Short Term Prisoners* [2016] Page 13; HMPPS, *Risk assessment of offenders: A summary of evidence relating to offender risk assessment, risk of reoffending and risk of serious harm* [2019]

41 HMPPS, *Risk assessment of offenders: A summary of evidence relating to offender risk assessment, risk of reoffending and risk of serious harm* [2019]

We know that drug misuse, for example, is associated with acquisitive crime: up to 50 per cent of all acquisitive crime is committed by those with a heroin or crack cocaine problem.<sup>42</sup> And alcohol misuse is associated with violent crime: 39 per cent of incidents of violent crime involve an offender under the influence of alcohol.<sup>43</sup> Lord Farmer's review showed that an individual is 39 per cent less likely to reoffend if they maintain family ties while in prison,<sup>44</sup> and studies show that those leaving custody are approximately ten per cent less likely to reoffend if they are in employment.<sup>45</sup> We will also come to see that the chances of an individual being recalled or resentenced to custody within 12 months of release doubles for those without settled accommodation.<sup>46</sup>

While there is always more that we can and must be doing to intervene early in the lives of those who face multiple disadvantages, we cannot retrospectively remove the trauma an individual may have experienced in their childhood. We can, however, offer them treatment to help them on the road to recovery from trauma or addiction, find them stable and affordable housing, contact with their family and opportunities for employment. Desistance from crime is not a linear process and involves a complex interplay of factors. It is commonly understood as a journey, with no one-size-fits-all, quick fix solution. Interventions must, therefore, be proportionate and targeted to the specific needs of the individual. A trauma-informed approach is crucial to addressing the complex interplay of risk factors that an individual might present with.

There are a number of excellent interventions in place across our criminal Justice system designed to assist people on the road to desistance. The New Futures Network (NFN), for example, works with employers to offer opportunities of employment for those leaving prison, and now has employment brokers in place in every prison group in England and Wales.<sup>47</sup> There is also a growing recognition that we need effective means of addressing mental health and addiction problems. The Community Sentence Treatment Requirement (CSTR) ensures that individuals with vulnerabilities are identified early in their journey through the criminal justice system, and diverted into treatment when appropriate.<sup>48</sup> Interventions of this kind are critical, and more should be done to facilitate access to rehabilitative interventions for those passing through our criminal justice system. Through the course of this chapter we will come to see that the best, and sometimes the only place to carry out effective intervention, and so help individuals on the road to desistance, is in the community.

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42 Centre for Social Justice, *Desperate for a Fix*, 2018. Page 7

43 Gov.uk, Ministry of Justice, *Sobriety tags' come into force*. May 2019

44 Ministry of Justice, Lord Farmer, *The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime*, August 2017. Page 6

45 Gov.uk, Ministry of Justice, *Jobs strategy aims to cut reoffending*. May 2018

46 Her Majesty's Inspectorate of Probation, *Accommodation and support for adult offenders in the community and on release from prison in England*, July 2020. Page 8

47 Ministry of Justice, *A Smarter Approach to Sentencing*, 2020. Page 70

48 Ministry of Justice, *A Smarter Approach to Sentencing*, 2020. Page 38

## The community is the best place for reform and rehabilitation

Research from multiple jurisdictions consistently tells us that those sentenced to community sentences or suspended sentences have lower reoffending rates than those sentenced to custody in the prison estate.<sup>49</sup> This is borne out in Ministry of Justice data on reoffending rates in the UK:

Close to half (47.6 per cent) of all adults who have served a custodial sentence go on to reoffend within 12 months of release.<sup>50</sup> When we consider those who are sentenced to custody for less than 12 months, this figure increases to 63.1 per cent.<sup>51</sup> In contrast, 32.5 per cent of individuals who have served a Community Order go on to reoffend, while 29.5 per cent of individuals who have served a Suspended Sentence Order with requirements later reoffend.<sup>52</sup>

Comparisons of this kind are often disputed on the basis that there is limited merit in comparing the reoffending rates of those sentenced to custodial sentences with those sentenced to community-based sentences. This is because individuals sentenced to custody are more likely to be repeat offenders or have committed more serious offences than those sentenced to community sentences or suspended sentences.

However, a study carried out by the Ministry of Justice compared the reoffending rates of individuals sentenced to custody with a control group of individuals sentenced to community-based sentences. The study controlled for background variables, including offending histories, and still found higher rates of offending amongst those sentenced to custody than those sentenced to a Community Order or Suspended Sentence Order. The one-year reoffending rate was around four percentage points higher and the one-year average number of reoffences was around 65 reoffences higher per 100 sentencing occasions.<sup>53</sup>

For the purposes of this report, we will consider five areas that play a significant role in an individual's journey towards desistance. This non-exhaustive list is intended to demonstrate the potential for the ICRO, in its community-based approach, to tackle risk factors that would ordinarily drive an individual towards crime, and strengthen protective factors that make the chances of further offending less likely.

## Family: the golden thread that runs through rehabilitation

I have three girls and before I went to prison, I was living with my children.

My youngest was eight months old at the time and when she came to visit, she didn't recognise me and didn't want to sit with me. That was really hard.

Close to half (47.6 per cent) of all adults who have served a custodial sentence go on to reoffend within 12 months of release.<sup>50</sup> When we consider those who are sentenced to custody for less than 12 months, this figure increases to 63.1 per cent.<sup>51</sup>

49 David Cole & Julian Roberts *Sentencing in Canada: Law, Policy and Practice* (Irwin Law: 2020). Page 81

50 Ministry of Justice, Proven reoffending statistics: January to March 2018. 30 January 2020. Table C2a: Adult proven reoffending data, by custodial sentence length (annual average)

51 Ministry of Justice, Proven reoffending statistics: January to March 2018. 30 January 2020. Table C2a: Adult proven reoffending data, by disposal (annual average)

52 Ministry of Justice, Proven reoffending statistics: January to March 2018. 30th January 2020. Table C1a: Adult proven reoffending data, by disposal (annual average)

53 Ministry of Justice, Georgina Eaton and Aidan Mews, *The impact of short custodial sentences, community orders and suspended sentence orders on reoffending*, 2019. Page 10

I did keep in touch with my children while I was in prison, I used to see them every month. But then [my partner] met someone else and it was two months, then three months, then six months between visits.

They might send me to prison, which I understand, but the kids suffer.

Graham

### The impact of prison on the family unit

There is a strong correlation between positive family relationships and the likelihood of an individual reoffending later down the line. Yet when an individual is sentenced to immediate custody, they are often placed in prisons far from their homes and communities, making it very difficult for family and friends to visit their loved ones. The average female prisoner is 64 miles away from her family, sometimes much further.<sup>54</sup> When surveyed, only one in five prisoners (19 per cent for men, 20 per cent for women) said they get visits from family or friends once a week or more, and only two in five (38 per cent of men, and 42 per cent of women) felt it is very or quite easy for family and friends to visit them in prison.<sup>55</sup>

As highlighted by Dr Shona Minson in 'Maternal Sentencing and the rights of the Child', the impact of imprisonment is not only felt by those in custody, but also by the families left behind. An estimated 312,000 children are separated from their parents by imprisonment each year,<sup>57</sup> and unlike the family courts, where the interests of the child are paramount, there is an absence of provision in the criminal courts when a child is separated from their parents.<sup>58</sup> Each child is at risk of suffering psychological, economic and social harms when their parent is sent to prison.<sup>59</sup> The consequences can be particularly severe for children of imprisoned mothers who are often the primary caregivers. There are an estimated 17,000 children affected by maternal imprisonment each year,<sup>60</sup> and the vast majority of these children will have to move out of their family home – only nine per cent will be cared for by their fathers while their mother is in prison.<sup>61</sup>

One would assume with a population this size there would be processes and pathways for these children, but in fact they are a population so overlooked that the question of whether a woman has dependent children is not even included in routine data collection at sentencing or imprisonment.<sup>62</sup>

Dr Shona Minson, *Maternal Sentencing and the Rights of the Child*

The impact of parental imprisonment will be felt long after the mother or father is released from prison. The imprisonment of a household member is one of the ten Adverse Childhood Experiences (ACE) known to cause significant trauma and harm to the long-term health, wellbeing, and life chances of an individual. It is also associated with a fivefold increase in exposure to other ACEs, even after adjusting for demographic and

54 Prison reform trust, *Bromley Briefings*, Winter 2019. Page 54

55 HM Inspectorate of Prisons, *Annual Report 2018/19*. Page 118

56 Ministry of Justice, *Lord Farmer, The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime*, August 2017. Page 6

57 Crest Advisory, *Children of Prisoners: Fixing a broken system*. February 2019. Page 7

58 S Minson, *Maternal Sentencing and the Rights of the Child*, 2020

59 *Young Adult Outcomes and the Life-Course Penalties of Parental Incarceration*; Daniel P Mears, Sonja E Siennick. July 2015. Page 1

60 Crest Advisory, *Children of Prisoners: Fixing a broken system*. February 2019. Page 20

61 Home Office, *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system*. 2007. Page 20

62 S Minson, *Maternal Sentencing and the Rights of the Child*, 2020

The odds of reoffending are 39 per cent lower for a prisoner who receives visits from a partner or family member during the course of their sentence than for a prisoner who does not receive such visits.

– Lord Farmer, the Farmer Review<sup>56</sup>

socioeconomic characteristics.<sup>63</sup> Children of imprisoned parents are at significantly greater risk of suffering mental illness and other health-related problems than children who do not have a parent in prison, and are more likely not be in education, employment or training later in life.<sup>64</sup> There also exists a high correlation between having a father in prison and the chances of a child going on to offend later in life, with studies showing that 63 per cent of prisoners' sons go on to offend themselves.<sup>65</sup>

While the evidence paints a stark picture of the impact of separation on family units, there is a complexity to every story that cannot be grasped in the data. Parental imprisonment does not need to be, and indeed is not always, determinative of the impact described above. There is always hope that the consequences of parental separation will be mitigated and that through effective intervention the negative effects will not bear out. What is clear, however, is that, wherever possible, every effort should be made to keep family units together.

An estimated 312,000 children are separated from their parents by imprisonment each year.<sup>66</sup>

### The need for family-focused interventions

There will be some instances, however, where the maintenance of family ties is not in the best interests of the individual. Indeed, not every family is a positive force in the lives of those passing through the criminal justice system. Broken and disruptive family units, where violence and substance misuse are commonplace, can serve to accelerate individuals towards a life of crime rather than help them on the path to desistance. Where this is the case, effective community-based and family-focused interventions are crucial.

### M-PACT

Action on Addiction's M-PACT programme was introduced in 2006 in response to the Advisory Council on the Misuse of Drugs' 'Hidden Harms' report, which shone a light on the impact of parental drug misuse on children. Almost 15 years on, M-PACT is one of the longest standing interventions focused on parental substance misuse in the UK.<sup>67</sup>

It is a psychosocial and educational whole-family intervention, seeking to improve the wellbeing of children and families affected by parental substance misuse by targeting the intersection between family and substance misuse.<sup>68</sup> Each programme brings together a small number of families and consists of ten sessions over a six-month period. Each programme is delivered under licence from Action on Addiction by at least two trained facilitators, supported by other volunteers.<sup>69</sup>

To date, over 700 families and almost 1000 children have participated in M-PACT. An evaluation of M-PACT has found that, across five M-PACT sites, for every £1 spent, M-PACT can save up to £6.53 in the first year after a family has completed the programme. Currently, the programme has an 80 per cent completion rate amongst families.<sup>70</sup>

63 Kristin Turney, Adverse childhood experiences among children of incarcerated parents. *Children and Youth Services Review*, Volume 89, June 2018

64 Minson, S. Safeguarding children when sentencing parents: Information for sentencing courts. March 2020

65 Ministry of Justice, Lord Farmer, The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime, August 2017. Page 7

66 Crest Advisory, Children of Prisoners: Fixing a broken system. February 2019. Page 7

67 Action on Addiction, M-PACT: Moving Parents and Children Together, Evaluation report, 2006 – 2018. Page 3

68 Prison Service Journal, September 2019, Issue 245. Page 15

69 Action on Addiction, M-PACT: Moving Parents and Children Together, Evaluation report, 2006 – 2018. Page 4

70 Action on Addiction, M-PACT: Moving Parents and Children Together, Evaluation report, 2006 – 2018. Page 6

M-PACT now exists in approximately 50 locations around the UK,<sup>71</sup> in the community, in prisons and in schools, and could be a vital resource for struggling families.

### Maintenance and restoration of family ties in the community

The ICRO presents an opportunity for individuals to serve their sentence without ever being separated from their family. Not only will this likely reduce reoffending rates, but it could also have a significant impact on the future life chances of individuals who would otherwise suffer the trauma of parental imprisonment. And for those for whom the family environment is not a helpful or positive one, the ICRO presents an opportunity for the court to refer individuals and their families to effective family-focused interventions in the community. Strengthening the family unit this way will reduce the likelihood of further offending and presents an opportunity to intervene early to prevent the breakdown of the family unit.

### Recovery from addiction

I have virtually served every last day of my sentence because of my drug addiction, and every sentence I have had, I have kept my addiction through the entirety of the jail term.

Trevor

### The drugs epidemic within the prison estate

In almost every prison, there exists a lucrative black market of illicit substances. The supply and distribution of drugs has brought instability and disruption and has made attempts at prisoner rehabilitation very difficult to achieve. Successive governments have committed to tackling the supply of drugs across the prison estate:

The motivation and ability of prisoners and organised crime groups to use and traffic illegal drugs has outstripped our ability to prevent this trade. We need to redouble our efforts to tackle this challenge with the aim of eradicating illicit drug use in prisons.

By 2020... We want prisoners who arrive dependent on drugs to get the treatment they need so when they leave, they don't need to commit crimes to feed their addiction.<sup>72</sup>

Ministry of Justice, Drugs Safety and Reform White Paper [2016]

Yet the drugs trade in prison continues to grow. In the 12 months to March 2019, the number of incidents where drugs were found in prisons increased from 13,118 to 18,435, a rise of 41 per cent.<sup>73</sup>

For some, drugs will act as an antidote to the daily realities of prison life. The lack of purpose and hope that comes with imprisonment, combined with the proximity of suppliers to potential customers, is a toxic combination that drives usage. Escaping the attention of dealers within the confines of the prison estate is difficult, even for those who wish to.

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71 Action on Addiction Website (Accessed via: <https://www.actiononaddiction.org.uk/addiction-treatment/families-and-children/m-pact>)

72 Ministry of Justice, Prison Safety and Reform, November 2016. Pages 46 and 53

73 Ministry of Justice, HMPPS Annual Digest 2018/19. Official Statistics Bulletin. March 2020

There were people in there who were abusing drugs to get their time over and done with. There are people who are coming out ready to smoke crack because they have done so many other drugs in prison to blast their time – and then they come out completely different. I don't recognise them anymore – people I grew up with who are only my age, in their mid-twenties.

Imran

It is perhaps no surprise, therefore, that many people become addicted to illicit substances while in prison. A survey of the prison estate found that 15 per cent of male prisoners reported that they had developed a problem with illicit drugs since being in prison, while 13 per cent of women said the same.<sup>74</sup> The picture varies from prison to prison, and in some, the statistics are much worse. An inspection of HMP Durham last year found that a third (30 per cent) of prisoners reported that they had acquired a drug habit since entering prison – while nearly two thirds of prisoners said it was easy to get drugs while in prison.<sup>75</sup>

You have someone like me who comes into jail with a drug dependency. I can walk straight onto a wing and know everyone, and I can go and get a drug as easily as I can on the street. There is a lot of bullying, a lot of intimidation [in prison].

Trevor

Addiction to drugs can trigger a spiral of chaos and dysfunction that can have lifelong consequences. Debt is often a consequence of drug misuse and can drive poor mental health and self-harm, as well as intimidation and violence across the estate. Where drug use is prevalent, violence, bullying, and vulnerability often follow quickly behind. The prisons with the highest rates of drug finds are also the prisons that have the highest rates of violence and instability.<sup>76</sup> The most recent report of Her Majesty's Inspectorate of Prisons describes the toxic cycle of drugs and violence within HMP Onley:

Onley was a clear example where the failure to deal with drugs and violence undermined many other aspects of prison life. There was a vicious circle where fear, frustration and boredom increased the demand for drugs, which in turn fuelled the violence, and thus completed the circle.<sup>77</sup>

Progress has been made against the availability and harm done by 'traditional drugs', with positive test results steadily falling since the mid-1990s. But there has been a growth in the use of stronger and more harmful psychoactive substances in recent years.<sup>78</sup> Excluding psychoactive substances, 10.4 per cent of random mandatory drug tests were positive in the 12 months to March 2019. This rate increased to 17.7 per cent when psychoactive substances were included.<sup>79</sup> The evolution of New Psychoactive Substances, along with their tendency to make already dangerous prisoners more volatile, presents new and unprecedented challenges for the prison estate.

A survey of the prison estate found that 15 per cent of male prisoners reported that they had developed a problem with illicit drugs since being in prison, while 13 per cent of women said the same.<sup>74</sup>

74 HM Chief Inspector of Prisons for England & Wales, Annual Report 2018–19. Page 119

75 HM Chief Inspector of Prisons, Report on unannounced inspection of HMP Durham, 2019. Page 5

76 HM Prison & Probation Service, Prison Drugs Strategy, 2019, page 3

77 HM Chief Inspector of Prisons for England and Wales, Annual Report 2018–19. Page 22

78 MoJ, Prison Safety and Reform, 2016. Page 45

79 Ministry of Justice, HMPPS Annual Digest 2018/19, Official Statistics Bulletin. Updated March 2020

## Treatment in the community

Drug misuse is evidently not a problem confined to the prison estate. Patterns of drug dealing and use within the prison walls often replicates those within the community, and a growing number of individuals entering prison do so as a result of the possession and supply of drugs.

But where the community is distinct from prison is in its capacity to deliver effective interventions away from violence and intimidation, offering individuals a meaningful chance of recovery. A poll commissioned by Revolving Doors found that 74 per cent of the public think people with drug or alcohol addictions belong in treatment programmes instead of prison.<sup>80</sup> And despite recent cuts, there exist within communities a number of organisations that offer holistic and targeted support to help individuals embark on their road to recovery. One such example is Changing Lives.

## Changing lives

Changing Lives' Recovery and Addiction services work to support people, their families and communities in their journey from addiction to connection. Delivering treatment and recovery services in York, Newcastle, Sunderland, Northumberland, North Tyneside, and North Yorkshire, Changing Lives are experienced in offering integrative drug and alcohol services, supporting people at all stages of their recovery journey from positive engagement through to exit and relapse prevention. At the heart of Changing Lives' service is a belief that personally defined recovery is achievable for every person and that healthy connection is a vital and central component to sustaining long-term recovery.

### Sarah's story

"Growing up, Sarah experienced multiple traumas, including childhood sexual abuse. By the age of sixteen she had become estranged from her parents and at 17 she had been victim to rape by multiple perpetrators. As a result, she later suffered from severe anxiety and depression, developing a dependency on a range of substances including cannabis, gabapentin, pregabalin, cocaine and ecstasy. As a single parent of two dependent children, her addictions had a significant impact on her family relationships.

In 2018, Sarah started full-time treatment through Changing Lives' 12 week abstinence-based recovery programme, Oaktrees. Here she accessed a range of interventions including counselling, group therapy, and peer support networks. She successfully graduated from treatment support and started attending aftercare provision. Having completed Changing Lives' Helping Women Recover programme, Sarah has been abstinent for over a year and is continuing to work with a sponsor and attend mutual aid meetings. Her relationships with her children have improved and she has started volunteering with a local organisation that supports the family and friends of people struggling with substance misuse."

The treatment and recovery sector in the UK has been subject to a decade of underinvestment, which has led to a material loss of capacity and expertise. Despite this, the community still remains the most effective environment to treat existing addictions.

<sup>80</sup> Revolving Doors Agency, Short Sighted: Reducing the use of short prison sentences in favour of a smarter approach, 2018. Page 1



The Government has committed to taking a new approach to addiction by, for instance, creating an addiction strategy in 2020 and reviewing elements of the commissioning process. There is therefore real cause for optimism that the capacity and the efficacy of the treatment and recovery sector is being addressed.

Further encouragement can be taken from the Government's commitment to learn more about the failings of our current system through the commissioning of Dame Carol Black's independent review on drug use in the UK, and the announcement of pilot projects to tackle drug use within our communities.

The White Paper, 'A Smarter Approach to Sentencing', acknowledges the clear benefit of effective interventions that seek to divert offenders with substance misuse into treatment and away from further involvement in the criminal justice system. Crucially, the White Paper makes clear that recidivism can be challenged by empowering probation to take on a greater role through investment in both trust and resource.

Cumulatively, there is a strong case for asserting that a sentence such as the ICRO, that will seek to tackle entrenched addictions, is likely to operate in a wider system that is building the capacity of the recovery sector. The community has a great deal of skill and knowledge that can build lasting recovery from addiction, and a sentencing option that further exploits this resource will serve to make us safer.

### Connectedness with wider society is crucial for lasting recovery

The Centre for Social Justice's report Road to Recovery made the case that connectedness with society – be it through family, friendships, employment, or wider participation in a community – is crucial to lasting recovery. This is something that can only be meaningfully achieved outside of the prison estate. Zoe experienced trauma and abuse from an early age. She spent years battling substance misuse and spent time in prison. The community she found herself in on release played a significant role in her journey to recovery:

So, I got in touch with Cais. There were a lot of people who wanted to become clean. We built a little recovery community together. And before I know it, I was working in the detox centre and the recovery hub. I started to build up my self-esteem. I realised I was not alone.

Zoe

The ICRO seeks to foster an environment where an individual can serve the punitive element of their sentence, while maintaining crucial family ties, positive relationships within the community and employment. Social structures, such as the family and sustained work, act as protective factors against future addictions and provide a far more stable environment for recovery to take place.

"You take away all their connections when you put someone in jail. What have they got? They are going to connect with their substances. And they come out to nothing."

– Zoe

## Education and work: hope for the future

I was a garage door technician – I was fitting garage doors for a living. I loved it, every day was a different job, I got to speak to different clients and different customers. I was earning good money.

Then the offence happened. I had to tell them that I was on trial, and they suspended me from the job. Obviously, once I was sentenced, I couldn't go back.

When I left [prison], I was put in touch with Tempus Novo – I went for an interview on Monday and they offered me a job within an hour as a landscape gardener.

Graham

### The challenge prison poses for long-term employment

Not only is work a powerful and crucial means of alleviating poverty, but it also brings with it many other benefits, from improved health through to greater inclusion in wider society. Indeed, there is a wide body of evidence which suggests that those who find employment on release from custody are much less likely to reoffend.<sup>81</sup> And yet, it remains uniquely difficult for prisoners leaving custody to find meaningful and lasting work. MoJ data shows that 83 per cent of prisoners are not in P45 employment a year after their release.<sup>82</sup>

Many individuals leaving prison are motivated to change the trajectory of their lives and engage in purposeful work, with the dignity and independence it brings. Yet the stigma that comes from a custodial sentence is hard to shake – a YouGov poll found that 50 per cent of employers would not consider hiring an ex-offender.<sup>83</sup> The longer an individual is in prison and therefore out of work, the harder it will be to find employment on release. Studies have shown that once an individual has been unemployed for longer than six months, their chances of finding employment significantly decreases.<sup>84</sup> More than half (52 per cent) of individuals sentenced to immediate custody are sentenced to more than six months.<sup>85</sup>

The challenge prisoners often face obtaining work on release is compounded by the fact that the prison population is disproportionately made up of those who did not gain qualifications from school or who have special educational needs. Of all adult prisoners, 42 per cent reported having been permanently excluded from school, and nearly one third of prisoners self-identified on initial assessment as having a learning difficulty and/or disability.<sup>86</sup> Indeed, half of prisoners in custody have the literacy and numeracy skills expected of an 11-year-old child.<sup>87</sup>

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81 Ministry of Justice, Analysis of the impact of employment on re-offending following release from custody, using Propensity Score Matching, March 2013. Page ii

82 Ministry of Justice, Jobs strategy aims to cut reoffending, 24 May 2018

83 YouGov Polling, 2016 (Accessed via: <https://d25d2506sfb94s.cloudfront.net/cumulus/uploads/document/42yrwixdo/YG-Archive-160126-DWPwaves.pdf>)

84 Rand Ghayad and William Dickens, What can we learn by disaggregating the unemployment-vacancy relationship? October 2012

85 Ministry of Justice (2019) Offender management statistics. Prison receptions October to December 2019. Table 2.5a

86 Dame Sally Coates, Unlocking Potential: A review of education in prison, 2016. Page iii

87 The Centre for Social Justice, The Long Game: How to reboot skills training for disadvantaged adults, June 2020. Page 17

The sentencing of an individual to a custodial or community-based sentence presents a unique opportunity to intervene to close the skills gap between those in prison and the rest of society. Proactive and effective intervention in education and work-related programmes during a sentence will ultimately serve to mitigate the inevitable battle that a prisoner will face trying to find employment on release.

Some provision is made for rehabilitative activities within the prison estate. However, the pockets of excellence are isolated and the prevailing narrative is one of complacency and lethargy. Inspectors found that that *'poor attendance and punctuality of prisoners in activities often went unchallenged by prison staff, which failed to promote a good work ethic'*. In one prison, only half of prisoners attended their lessons regularly and a third failed to attend scheduled prison work activities.<sup>88</sup>

Overcrowding, staff shortages and violence compound the challenges prisoners already face accessing education and training.<sup>89</sup> The consequence is that three fifths of prisoners leave prison without identified employment or an education or training outcome.<sup>90</sup>

I can categorically state that an overcrowded prison doesn't lend itself to the vital rehabilitation and educational requirements of its residents. We were just fighting fires and getting people to where they should be and we were glad to just get everyone locked up safely.

Val Wawrosz, Managing Director and Founder of Tempus Novo

Her Majesty's Inspector of Prisons sheds light on the scale of the failures across almost the entire prison estate, rating 25 out of the 35 prisons (71 per cent) inspected in 2018–19 as "requires improvement" or "inadequate" for the overall effectiveness of their education, skills and work provision. None were rated as "outstanding."<sup>91</sup>

A lack of meaningful engagement in educational, rehabilitative, or work-related programmes over the course of months or even years can significantly increase the barriers to employment on release.

### Upskilling and maintaining employment in the community

While there is a relative sparsity of skills development and training in prison, the community offers unique opportunities for sustaining employment and upskilling. Individuals on an ICRO, who are in employment prior to their conviction, will not be required to leave their job unless the court considers it to be a barrier to rehabilitation or where it conflicts directly with the conditions of their order – such as in instances where an individual is required to attend residential rehabilitation. For those who are not in employment, unpaid work and education programmes are requirements that could be imposed by the court.

25 out of the 35 prisons (71 per cent) inspected in 2018–19 as "requires improvement" or "inadequate" for the overall effectiveness of their education, skills and work provision. None were rated as "outstanding."<sup>91</sup>

88 HM Chief Inspector of Prisons for England and Wales, Annual Report 2018–19. Page 36

89 HM Chief Inspector of Prisons for England and Wales, Annual Report 2018–19, Page 12

90 Centre for Social Justice, the Long Game, 2020, Page 32

91 HM Inspectorate of Prisons for England & Wales, Annual Report 2018–19. Page 35

## Community learning

Community learning has been shown to help disadvantaged individuals who are traditionally hard to engage with, to access education and improve social outcomes – such as those who are far removed from formal education, or who face language barriers, or need help to develop basic skills to navigate daily life.<sup>92</sup> Indeed, community learning is best placed to help a demographic of people resonant of those who pass through our prison estate.

Community learning is made up of a wide range of basic courses, such as: parenting classes, English language classes, employability skills, maths, and information and community technology. There are a variety of courses available, each of which is intended to increase skills, confidence and resilience. Ultimately, community learning has an impressive record in supporting hard-to-reach adults into further learning or employment.<sup>93</sup>

In stark contrast to the quality of education provision in prison, according to Ofsted's latest annual report in 2018/19, 92 per cent of community learning and skills providers were rated as "good" or "outstanding", while just one per cent of providers were rated as "inadequate".<sup>94</sup>

A DfE study showed that 65.4 per cent of respondents reported that they had developed more skills or knowledge as a result of their participation in community learning.<sup>95</sup> A further randomised control involving community-based English language provision pilots showed that participants doubled their English language proficiency and showed a marked improvement in their ability to interact socially.<sup>96</sup> Evaluations have also pointed to significant improvements in mental health – with 52 per cent of learners with clinically significant symptoms of anxiety and/or depression showing improved symptoms at the end of the course. Individuals from disadvantaged backgrounds were shown to be most likely to report signs of recovery.<sup>97</sup> Improvements in wellbeing and social interaction are also common themes amongst those who participate in community learning.<sup>98</sup>

## Secure and stable housing

I was clean for six months before I came out of jail. But when I left, I didn't have anywhere to live so the council threw me into temporary accommodation with the street homeless, people who were using.

I was in temporary accommodation for three months. The people aren't getting help there – people walk out of there like the living dead. I was so desperate.

Eventually Cais put me forward for supported accommodation and they gave me a two bedroom house.

Zoe

92 Centre for Social Justice, the Long Game, 2020, Page 32

93 Centre for Social Justice, the Long Game, 2020, Page 32

94 Ofsted, Annual report from Her Majesty's Chief Inspector, 2018–19. Page 96.

95 Skills Funding Agency, FE Choices Learner Satisfaction Community Learning Survey 2015 to 2016, June 2016. Page 17

96 Ministry of Housing, Communities and Local Government, Measuring the impact of Community-Based English Language Provision, Findings from a Randomised Control Trial, March 2018. Page 9

97 Department for Education, Community learning mental health research project, Phase two evaluation report, October 2018. Page 11

98 Centre for Social Justice, the Long Game, 2020, Page 32

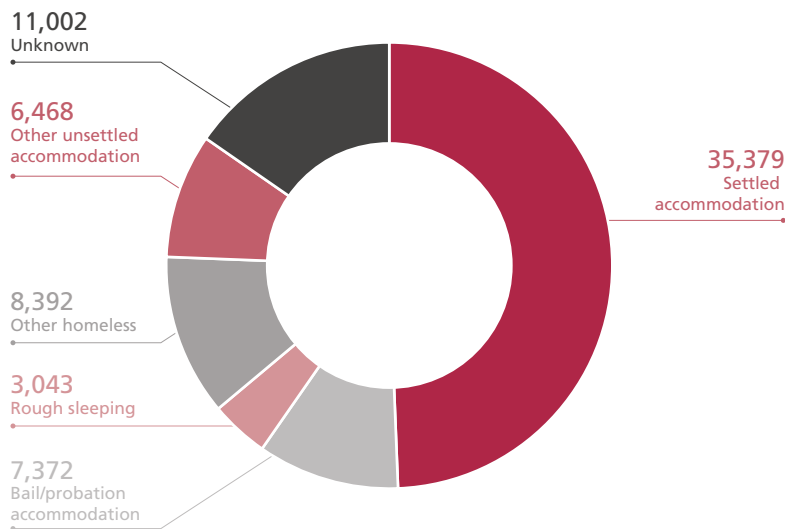
92 per cent of community learning and skills providers were rated as "good" or "outstanding", while just one per cent of providers were rated as "inadequate".<sup>94</sup>

Having settled accommodation on release from custody can significantly reduce the chances of further offending, and yet all too frequently individuals are released from prison into the community without a place to live.

Ministry of Justice data shows that in 2018–19, of the 71,656 individuals released from custody, fewer than half (35,379) found settled accommodation on release, ten per cent (7,372) were released into bail accommodation, while 25 per cent (17,903) were recorded as living in temporary accommodation or homeless.<sup>99</sup>

Ministry of Justice data shows that in 2018–19, of the 71,656 individuals released from custody, fewer than half (35,379) found settled accommodation on release.<sup>99</sup>

Figure 4: Accommodation status on release from custody, 2018–19



Source: Ministry of Justice, Community Performance Quarterly Statistics release, Accommodation Circumstance tables, Table 8. (April 2017 to March 2019)

Of the 25 per cent who were not released into settled or bail accommodation, some 3,000 individuals were recorded as sleeping rough, a further 8,400 were recorded as ‘other homeless’ – whereby they identified as homeless but were not actively identified as sleeping rough, and 6,000 individuals ended up in temporary accommodation.<sup>100</sup>

However, some studies paint an even starker picture. Using the Fulfilling Lives Newcastle Gateshead client group, Changing Lives considered the transition between community and prison for clients with complex needs. The analysis found that 44 per cent of individuals were released from custody with no fixed abode, while 71 per cent of clients experienced a transition in accommodation pre and post release, with the majority of these resulting in a worsening housing situation.<sup>101</sup>

Perhaps more concerningly, studies show that homelessness persists beyond the first night of release from prison and, where it does, can greatly increase the likelihood of further offending. Research carried out by Her Majesty’s Inspectorate of Probation found that, of

99 Ministry of Justice, Community Performance Quarterly Statistics release, Accommodation Circumstance tables (April 2017 to March 2019)

100 Ministry of Justice, Community Performance Quarterly Statistics release, Accommodation Circumstance tables (April 2017 to March 2019) Table 8: Accommodation on release from Custody: National Accommodation Circumstances, England and Wales

101 Changing Lives, Fulfilling Lives Newcastle Gateshead, Understanding the transition between the community and prison for individuals with multiple and complex needs. Page 5

The proportion of service users recalled or resented to custody within 12 months after release is almost double for those without settled accommodation.<sup>102</sup>

a sample of 116 prison releases, 18 per cent remained homeless, and a further 15 per cent remained in unsettled accommodation 12 months after release. The proportion of service users recalled or resented to custody within 12 months after release is almost double for those without settled accommodation.<sup>102</sup>

Table 1: A thematic inspection of 116 prison releases, 12 months following release<sup>103</sup>

	Accommodation status on release	Recalled or Resentenced to custody	Charged with further offences
Without settled accommodation	47 per cent	63 per cent	65 per cent
With settled accommodation	41 per cent	35 per cent	44 per cent

Source: Her Majesty's Inspectorate of Probation, 2020

### There are substantial barriers to securing settled accommodation on release from prison

Previous studies have demonstrated that some 15 per cent of individuals enter prison homeless.<sup>104</sup> The same is true for those sentenced to community-based orders – in 2018–19, at least 12 per cent of those starting community sentences were homeless or in temporary accommodation.<sup>105</sup>

While a number of individuals will be homeless at the point of sentence, many more will leave prison with nowhere to live.<sup>106</sup> Many individuals rely on their Housing Benefit or Universal Credit payments to cover their rent each month – thereby retaining their secure tenancy. Once these benefits are stopped – an inevitable consequence of a large proportion of prison sentences, the end of the tenancy is likely to follow quickly behind.

As highlighted by HM Inspectorate of Probation, once an individual leaves custody without settled accommodation, securing a tenancy becomes far more complicated. Most individuals leaving prison will not have priority on the housing register for several possible reasons. It might be because of previous behaviour, or because of a history of rent arrears – possibly as a result of being in prison. It could be because they are classed as 'intentionally homeless', or because they have no connections to the local area. Some social housing providers and private landlords will not take on residents supervised by probation. A number of obstacles that transcend the challenges faced by those in the

102 Her Majesty's Inspectorate of Probation, Accommodation and support for adult offenders in the community and on release from prison in England, July 2020. Page 4

103 Data taken from Her Majesty's Inspector of Probation. An inspection of 116 cases released in February 2019 and tracked for 12 months to see whether they reoffended, were recalled, or resented to custody during that period. This excludes those who on release were housed initially in approved premises, BASS accommodation, or immigration detention.

104 Ministry of Justice, Accommodation, homelessness and reoffending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) survey, 2012. Page 3

105 Ministry of Justice, Community Performance Quarterly Statistics release, Accommodation Circumstance tables (April 2017 to March 2019) Table 1: Accommodation status at start of Community Sentence: National Accommodation Circumstances, England and Wales

106 Her Majesty's Inspectorate of Probation, Accommodation and support for adult offenders in the community and on release from prison in England, July 2020. Page 4

criminal justice system also apply – such as the lack of affordable social housing and the cost of private renting, including considerable upfront fees which may not be covered by local rent deposit schemes.<sup>107</sup>

### Housing provision in the community

Those sentenced to an ICRO who already live in settled accommodation will not be required to give up their tenancy but will carry out their custodial sentence in the confines of their home. They will be able to continue receiving their benefits as before, and where possible, will pay their rent through earned income.

For the 12 to 15 per cent of individuals who are homeless or hidden homeless at the point of sentence, it will be essential to ensure that safe, stable housing and appropriate support is made available to enable individuals to comply with the ICRO. To support the effective implementation of the ICRO, it will be necessary for the courts to engage with local authorities, housing providers, local community safety partnerships, and homelessness partnerships. These relationships are critical to identifying what resources are available locally, to ensure that housing and support is in place for individuals in the community.

Through appropriate support, individuals might be helped to access private rented sector tenancies via social letting agencies or help to rent schemes. There is also the possibility of floating support for those with low to medium support-needs who need help to access social or private rented tenancies.

It has, however, been shown that for many of those leaving custody, the provision of a tenancy is not enough – wrap-around support is also crucial:

Jail is comfortable, it is familiar. But here you are, released from jail. They stick you in a flat where you feel isolated, alone, inadequate. It's scary in a flat on your own – you ask yourself, can I commit to this tenancy, can I pay the bills, can I be reliable, can I commit to this job?

Trevor

The court might, therefore, consider it necessary to commission targeted support alongside the rehousing process through, for example, the Critical Time Intervention. For individuals with multiple support-needs, Housing First is an effective model of support for those accessing settled accommodation.

### Housing First

The Housing First model makes the compelling case that we cannot wait for reform or rehabilitation to be achieved before securing stable housing. Rather, the security and stability that comes with settled accommodation should be seen as a backdrop from which the road to long-term desistance can be embarked upon.

<sup>107</sup> Her Majesty's Inspectorate of Probation, Accommodation and support for adult offenders in the community and on release from prison in England, July 2020. Page 8

Housing First helps people who are chronically homeless, and often with multiple other complex needs, to move into and sustain permanent accommodation. Typically, individuals will be helped to secure settled accommodation – reflective of the availability within the local housing market. A Housing First key worker will then work with service users and coordinate access to a range of services – such as drug and alcohol treatment, mental health support, and criminal justice agencies. This Intensive Case Management (ICM) approach is most commonly used across Housing First sites in England.<sup>108</sup>

Recent evidence from Scotland's five Housing First pathfinder areas shows that 88 per cent of the 270 people housed by June 2020 had sustained their tenancies.<sup>109</sup>

Recent evidence from Scotland's five Housing First pathfinder areas shows that 88 per cent of the 270 people housed by June 2020 had sustained their tenancies.<sup>109</sup> And an independent evaluation of the Threshold Housing First project in Greater Manchester, which supported 33 women with a history of offending between 2015 and 2017, found that over the first two years, 80 per cent of tenancies were sustained with a marked reduction in reoffending.<sup>110</sup> The impact of Housing First as an intervention transcends the provision of stable accommodation. A study from the University of York found improvements in substance misuse and physical and mental health amongst a cohort of 60 Housing First service users.<sup>111</sup>

Currently, there are £28 million worth of Housing First pilots underway in three parts of the country, something the Centre for Social Justice welcomes. As Housing First embeds in communities across the UK, the ICRO presents an opportunity for the courts of England and Wales to partner with Housing First initiatives up and down the country. Evidence suggests that in doing so, we might be able to navigate people away from the destructive cycle of custody, homelessness and reoffending and towards secure and stable accommodation, and the opportunity for rehabilitation that it brings.

108 The Centre for Social Justice, Housing First, Reducing rough sleeping and chronic homelessness. Page 47

109 Housing First Scotland: the Housing First tracker, Progress to June 2020. (Accessed via: <https://homelessnetwork.scot/wp-content/uploads/2020/07/HF-Scotland-Monthly-Tracker-JUNE-2020.pdf>)

110 Quilgars, D. and Pleace, N. York: University of York, The Threshold Housing First Pilot for Women with an Offending History: The First Two Years Report of the University of York Evaluation, 2017. Page 24

111 The Centre for Social Justice, Housing First, Reducing rough sleeping and chronic homelessness. Page 42



## chapter three

# Rethinking custody

### It is time to radically rethink our use of custody

We often look to custody because it carries penal weight that, for certain crimes, cannot be matched in existing community-based sentences. It also offers an immediate and decisive means of removing an individual from our streets, achieving what can be much needed respite for victims of crime and their communities. For many, sentencing an individual to time in prison is a proportionate and necessary response to the crime committed.

However, we consider that a large proportion of those who pass through our prison estate could face a far greater prospect of rehabilitation within the community. These individuals are not dangerous, nor do they present a material threat to society. They may have pro-social characteristics which, through effective intervention in the community, can be encouraged and developed. And their crimes are such that the punitive element of their sentence can be satisfied in the community through specific requirements imposed by the court.

There is a compelling case to make for the introduction of a new sentence that would command the confidence of sentencers, offer a robust response to crime, and keep the public safe. Only then can we go on to reap the benefit of the superior opportunities for reform and rehabilitation that present themselves in the community.

The ICRO promises to deliver on this, while going much further than any existing community-based order in its scope. The Suspended Sentence Order is available for those sentenced to a term of imprisonment of between 14 days and two years. Under the ICRO, individuals sentenced to custodial terms of up to three years and, in exceptional circumstances, up to four years, could serve their sentence in the community. The availability of a sentence of this kind has been greatly needed for some time.

Jurisdictions all over the world have introduced alternatives to custody, including, but by no means limited to, Canada, Australia, Sweden and Northern Ireland. There is also precedent in England & Wales for alternative sanctions to custody in the form of the Community Order and Suspended Sentence Order. There is scope, however, for a sentence that goes much further than our existing community-based orders – one that promises to be wider in application, while commanding the confidence of sentencers and the public.

## Determining the scope of the ICRO

The ICRO would be used in circumstances where the court identifies an offence that demands an immediate restriction of liberty, but an individual capable of rehabilitation. As laid out at the start of this document, an eligibility test has been adopted to give some indication of where the parameters of the ICRO should lie.

The ICRO would be used in circumstances where the court identifies an offence that demands an immediate restriction of liberty, but an individual capable of rehabilitation.

The ICRO will be a separate and distinct sentencing option to the Suspended Sentence Order. However, s189 of the Criminal Justice Act 2003 remains a helpful premise for some of the procedural elements of the new sentence.

### Procedure

It should be said at the outset that there will be some offences that are deemed to be of such gravity that the relevant individual must be excluded from the possibility of receiving an ICRO. We consider that the eligibility test will serve to rule out those who have committed more serious offences from receiving the ICRO.

In addition to the eligibility test, there are a range of factors that the court would take into consideration. The presence of the following elements in a case may prohibit the court from imposing an ICRO:

- The court considers that the individual presents a risk or danger to the public;
- It is considered that the appropriate punishment can only be achieved by a sentence of immediate custody in the prison estate.

The presence of the following elements in the case, meanwhile, would indicate that it might be appropriate to impose an ICRO.

- Strong personal mitigation;
- A sentence of immediate custody would have a significant harmful impact on others.

Each decision will be fact specific, and, therefore, a degree of judicial discretion should be secured in the test.

### Eligibility Test:

Those sentenced to an ICRO will be subject to a strict eligibility test set out below:

- I. There will be a presumption against the ICRO being handed out in cases involving a custodial sentence of three years or more unless the court finds exceptional reasons to do so. It is a matter for the court to decide what it recognises as being an exceptional reason. The court will not, under any circumstances, be able to impose an ICRO in cases exceeding four years;
- II. A Suspended Sentence Order is of insufficient punitive or rehabilitative effect or is unavailable in law;
- III. The court is satisfied that there are no substantial grounds to believe that the defendant, if granted the order with conditions, would commit a further offence;  
**and**
- IV. The court is satisfied that the defendant has demonstrated sufficient will to comply with the conditions of the sentence.

The first part of the test requires a consideration of the term of sentence that the individual would serve were they to receive a sentence of immediate custody. The parameters of eligibility under the ICRO go beyond the two-year cut-off that exists in the Suspended Sentence Order regime. There is, however, a statutory presumption against this sentence being handed down in cases involving three years or more, unless exceptional reasons for doing so are found.

The threshold of three years has been identified as it meaningfully extends the court's ability to both punish individuals who must serve a sentence exceeding the two years that could be suspended while also allowing for the continuance of pro-social factors, such as employment or family commitments. Beyond three years, after credit, the sentence is likely to reflect conduct one might reasonably expect to result in a sentence served within the prison estate. The preservation of judicial discretion and the possibility of the use of the sentence in exceptional cases – where the term of custody exceeds three years – is secured by the flexibility inherent in the use of a presumption. The court will not in any circumstances be able to impose an ICRO on any sentence exceeding four years.

The court is next required to consider whether a Suspended Sentence Order is of insufficient punitive or rehabilitative effect or is unavailable in law. Crucially, the ICRO is not intended to replace any non-custodial disposal or Suspended Sentence Order. If the court deems that the custodial threshold has not been passed, or a Suspended Sentence Order would be suitable, then the court should sentence accordingly. The ICRO only exists as a sentence for those who would otherwise find themselves facing immediate custody in the prison estate. We will address the possible challenge posed by net-widening in the following chapter.

The court is next asked to consider whether it is satisfied that there are no substantial grounds to believe that the defendant, if granted the order with conditions, would commit a further offence. This is necessary in order to safeguard the public and victims of crime.

Finally, the court must consider whether the individual has demonstrated sufficient will to comply with the conditions of the sentence. The ICRO is a sentence designed to bring about the meaningful rehabilitation of those passing through our criminal justice system. To achieve this, the court and statutory agencies must work with the individual to design a reasonable and proportionate package of support based on their criminogenic needs. This will serve both to increase the likelihood of compliance and increase the prospect of meaningful rehabilitation.

With regards to the length of the custodial period, the parameters of eligibility for the ICRO go beyond any existing Community Order or Suspended Sentence. As such, the package of enforcement and rehabilitative conditions at the heart of the ICRO is also more comprehensive than anything that currently exists in the adult criminal courts of England and Wales outside of immediate custody.

### Operational period

The operational period is the time for which the ICRO will run and the requirements may apply. The custodial period is the period of time the defendant would serve in the conventional prison estate if the order is breached.

The ICRO is not intended to replace any existing non-custodial disposal or Suspended Sentence Order... The ICRO only exists as a sentence for those who would otherwise find themselves facing immediate custody in the prison estate.

A court sentencing someone to an ICRO would not be expected to adhere to the guidelines that apply when determining the operational period of a Suspended Sentence Order, whereby the operational period runs for twice the period of custody that is suspended.

Instead, where an ICRO is imposed, the court is given a significant degree of discretion. It may stipulate any operational period, of no less than six months and not normally exceeding three years. The only departure from this rule might apply in those cases where the custodial sentence itself is of more than three years.

The court will impose an operational period which it deems necessary and proportionate to meet the demands of the relevant case, in line with the sentencing principles. The court will, in all cases where an ICRO is passed, be guided by the probation service and the Sentencing Council in determining the proportionate and necessary operational period.

While the duration of the operational period is a matter for public consultation, we would not expect requirements, such as the curfew, to continue beyond two years in any event.

### A custodial sentence served in the community

On sentencing a defendant to an ICRO, the court will have a package of enforcement requirements at its disposal. These requirements are designed to safeguard the public, while enabling the court to impose a proportionate and robust response commensurate with the seriousness of the offending behaviour.

Every individual serving an ICRO will have a mandated curfew requirement placed on their order, enforced through Electronic Monitoring technology. The court will have the discretion to impose a curfew according to the severity of the offence and the needs of the individual. It is for Parliament, following consultation, to determine the maximum number of hours a curfew can be applied in a single day under the ICRO. On the one hand, there is a need to impose a meaningful restriction of liberty, bearing in mind the court could, in exceptional circumstances, sentence an individual to an ICRO who would otherwise serve a term of up to four years immediate custody. On the other hand, Human Rights concerns should be considered in instances where lengthy curfew requirements are imposed. Regard should also be given to the possible elevated risks associated with confining an individual to their home for prolonged periods of time.<sup>112</sup>

In line with the recent Government announcement in the White Paper, 'A Smarter Approach to Sentencing', a curfew of up to, but not exceeding, 24 months will be available to the court when issuing an ICRO. Until now, curfew duration has been capped at 12 months under the Suspended Sentence Order regime. Additional requirements will be available to the court, including drug testing, financial restraint orders, excluded activities and associations, and prohibitions from leaving or entering certain areas. There may be times where the court does not consider a curfew sufficient to safeguard the public or to carry the necessary penal weight for the seriousness of the crime. In such instances, the court has the discretion to impose any other available requirement on the order to achieve the necessary restraint of liberty deemed commensurate with the crime.

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<sup>112</sup> The Government announced in the recent sentencing White Paper 'A Smarter Approach to Sentencing' its intention to allow courts to impose curfews of up to 20 hours a day, with the flexibility to alter the curfew duration throughout the week, with fewer hours spent under curfew on 'working days'. (Ministry of Justice, A Smarter Approach to Sentencing, September 2020. Page 45.)

It is through this integral restriction of movement, which ensures the safety of the public and achieves the necessary deprivation of liberty, that pro-social behaviours and influences can be developed and maintained in the defendant's life.

### Periodic reviews before the court

Built into every sentence will also be a series of periodic reviews before the court. Section 191(1) of the CJA 2003 confers a discretion on the court to provide that a suspended sentence is made subject to a periodic review. This will be extended to the ICRO, where the court will have the discretion to amend the conditions of the order after considering the individual's progress.

Each review will take the form of a problem-solving court. These hearings combine the authority of the court with the services necessary to reduce reoffending and improve outcomes in a unique forum that places the judge at the centre of the rehabilitation process.<sup>113</sup> The international evidence for problem-solving courts suggests that they are successful in overcoming complex challenges, reducing reoffending rates and achieving value for money.<sup>114</sup>

### The problem-solving court model

Problem-solving courts exist in jurisdictions all over the world. One such example is in Canada. While there is no statutory authority for the involvement of the sentencing judge in the administration of a sentence in practice, Canadian judges do sometimes request that individuals return to court to report on their progress through the course of the community custody sentence. In his book, *The Virtual Prison*, Professor Julian Roberts reflects on the value of periodic reviews before the courts in Canada:

This requirement focuses the offender's attention on the sanction, is probably of assistance to probation officers attempting to ensure compliance with conditions, and also permits the court to vary (or delete) conditions that have become problematic for reasons beyond the offender's control.<sup>115</sup>

There is also national precedent for periodic reviews before the judiciary in the form of problem-solving courts here in the UK. One such example is the Family Drug and Alcohol Court (FDAC), which works with parents to combat addictions and, where possible, to keep family units together. Throughout the course of proceedings, the family will appear before the same judge who both adjudicates the case and plays a proactive role in helping and encouraging individuals to turn their lives around. This judicial monitoring runs parallel to intensive support from a multi-disciplinary team which includes regular testing for drugs and alcohol.

A DfE commissioned study found that FDAC produced successful outcomes in terms of both cessation and helping to keep family units together. There is also evidence of their long-term cost effectiveness. A cost-benefit analysis by the Centre for Justice and Innovation found that in 2014/15, the Family Drugs and Alcohol Court in London cost

<sup>113</sup> Centre for Justice Innovation, *Problem-solving courts: An evidence review*, 2016. Page 3

<sup>114</sup> Centre for Justice Innovation, *Problem-solving courts: An evidence review*, 2016. Page 7

<sup>115</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, 2004. Page 88

£560,000 and produced a net saving of £1.25 million to public sector bodies over five years. Not only was there a reduction in the processing of cases, but there was also, crucially, a reduction in the number of children entering the case system, and reductions in drug misuse. Not only is the financial saving from FDAC substantial, but there is also an incalculable saving in human terms. The Centre for Justice and Innovation estimated that savings generated by FDAC exceeded the upfront cost within two years of a case entering the system.<sup>116</sup>

### Breach mechanism

As is the case with a Suspended Sentence Order, when an ICRO is imposed, the custodial period will be suspended above the individual. This custodial period will be activated, and therefore served in the prison estate, if the individual breaches the order. However, while the individual is compliant with the ICRO and under curfew, that same custodial period will be being served within the community.

The powers of the court and the procedure for breach should largely be drawn from the statutory approach taken to Suspended Sentence Order breaches, as set out in the Criminal Justice Act 2003.<sup>117</sup> However, we would propose a more nuanced approach to the existing presumption to activate on breach than is employed by the Suspended Sentence Order procedure. This is an attempt to simultaneously take a decisive and clear approach to any recognised fundamental disregard for the rules of custody and, at the same time, accommodate the need to allow people with often established patterns of behaviour to falter within acceptable parameters on their way to rehabilitation. This approach invests greater confidence in the exercise of judicial discretion.

### Deliberate breach of a primary condition

We would advocate discretion even here. In cases where the court has identified a deliberate breach of a primary condition, activation of the custodial period must follow. Only in very exceptional cases, such as in an emergency or where there is a clearly acceptable reason for disobeying the order, should leeway be given. However, if a court is persuaded that a 'one off' breach of a primary condition has occurred in circumstances where the individual's culpability is reduced, such as in instances of carelessness, perhaps in an otherwise well performed order, the court might allow the order to continue.

### Breach of one of the secondary conditions

Where there has been a breach of one of the secondary conditions of the sentence, the court should follow the same procedure as it would for a Suspended Sentence Order. When a deliberate breach reaches court, the sentencer will have a range of options at their disposal including the activation of custody. But it could also choose to place additional requirements on the order, lengthen the operational period, or impose a fine. We would recommend that the court take a modulated response to breach of a secondary condition, recognising the onerous nature of the order, and allowing for individuals, who would otherwise show willingness to comply, to falter on their journey towards desistance.

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<sup>116</sup> Centre for Justice Innovation, *Problem-solving courts: An evidence review*, 2016. Page 13

<sup>117</sup> Criminal Justice Act 2003, Schedule 12, para 8(1)(a) and (b)

### Available tech in the market

The feasibility of a sentence of this kind is dependent on the availability of monitoring and surveillance technology to ensure compliance with the order. This will largely take the form of Electronic Monitoring, otherwise known as ‘tagging’, which is already commonly used in the UK to monitor curfews and surveil individuals on court orders.

Radio Frequency (RF) tagging is the most frequently used form of Electronic Monitoring – a device which monitors whether a person is at home, or at the location they are supposed to be, during their curfew hours.<sup>118</sup> Around 60,000 individuals on licence, community sentences and on court bail are subject to a Radio Frequency (FR) tag each year.<sup>119</sup>

In the early 2000s, Global Positioning Satellite (GPS) Electronic Monitoring came onto the market – with the capability to monitor an individual’s whereabouts 24 hours a day, seven days a week. More recently, transdermal technology – a tag which detects substance misuse through the sweat on an individual’s skin – has also become available.<sup>120</sup> Were this to be used as part of the ICRO, it would arguably allow more supervision than is currently available in prison. Data from the Crime Survey for England and Wales shows that in 39 per cent of incidents of violent crime, the victim believed the offender to be under the influence of alcohol.<sup>121</sup> Two previous pilots of sobriety tags showed that offenders wearing the tags were alcohol free on 97 per cent of the days that they were monitored and reported a positive impact on their lives, wellbeing, and behaviour.<sup>122</sup>

In 2019, the Ministry of Justice announced the roll out of 24-hour GPS location monitoring tags across England and Wales. GPS Electronic Monitoring allows enforcement agencies to monitor an individual’s location at all hours of the day in near real-time, transmitting the data to a specialist monitoring unit, rather than simply confirming the presence of an individual at a particular address and time. The tag works by receiving location signals from satellites, which it then communicates, via a mobile phone network, to a case management system. This means that if an individual wearing a tag enters an area they have been excluded from as part of their court order, an alert will be automatically issued, and the location made known.

The capability and flexibility of Electronic Monitoring will enable the court issuing the ICRO to tailor an achievable and proportionate enforcement package that is commensurate with the severity of the crime committed. It also creates a secure environment in which rehabilitative interventions can take place.

### Rehabilitation in the community

The ICRO will take a whole person, multi-agency approach to desistance. Central to the order will be an intensive programme of wrap-around support to rehabilitate offenders, delivered by a multi-disciplinary team, overseen by probation. Through joint working between probation and specialist voluntary sector organisations, a detailed pre-sentence

118 GOV.UK, MoJ, Press release: Justice Secretary unveils GPS tag rollout to better protect victims, 16 February 2019

119 GOV.UK, MoJ, Press release: Justice Secretary unveils GPS tag rollout to better protect victims, 16 February 2019

120 Centre for Justice Innovation, Just technology: emergent technology and the justice system. July 2018. Page 57

121 ONS, the nature of violent crime in England and Wales: year ending March 2018. February 2019

122 GOV.UK, MoJ Press Release, ‘Sobriety tags’ come into force. May 2020

report will be submitted, advising the court on the most practical, appropriate, and proportionate means of addressing the defendant's criminogenic needs in the community. A package of requirements tailored to the individual will then be agreed upon at the point of sentence.

The court will be able to call on an alliance of players, including enforcement agencies, local community safety partnerships, voluntary sector organisations, treatment providers, homelessness partnerships, employers, and probation to devise the best and most appropriate package of conditions for the individual, tailored to their criminogenic needs. This body of experts will be able to advise the court on proportionality, to prevent the risk of benign over-dosing of requirements and interventions which could, ultimately, worsen the individual's outcomes. It will also help the court to assess the individual's suitability for the order.

The body of experts, led by probation, will advise the court on immediate practical arrangements that must be agreed before the individual is released into the community. In the first instance, the court will need to confirm the availability of accommodation. Where necessary, consultation will be made with relevant family members to ensure the order does not impinge on their safety, rights, and freedoms. In cases where an individual is homeless at the point of sentence, or in instances where there is no suitable property available for the defendant to live in, the court will make enquiries to hold the individual in approved premises until settled accommodation is found.

The court will have the discretion to tailor the programme according to the criminogenic needs of the individual – recognising that there is no one-size-fits-all solution to rehabilitation. It might be the case that the court considers it necessary to sequence relevant interventions. For example, in instances where an individual is required in the first instance to attend residential rehabilitation, or if an individual is living in transient accommodation looking for settled housing, the court might consider it appropriate to delay other requirements until initial housing and addiction related needs are met.

As under the Suspended Sentence Order regime, whenever two or more requirements are issued by the court, of either rehabilitative or enforcement in nature, the court must consider whether, in the circumstances of the case, the requirements are compatible with each other. The court must also ensure, so far as possible, that the requirements avoid any conflict with the individual's religious beliefs or with the requirements of any other relevant order, and avoid interference with the times, if any, at which he or she normally works, has childcare responsibilities, attends school or partakes in any other educational establishment. The court must also be satisfied that local facilities exist, and that local arrangements are in place, for the carrying out of relevant requirements.

While responsibility for individual case management and supervision will lie with probation, there exists a wealth of organisations in the local community that could be utilised in the wider administration of the ICRO. We consider that a community-led, multi-agency partnership, as seen in the existing local criminal justice board model, could be commissioned within each locality to oversee the wider strategic coordination of the order.

Often, effective rehabilitation requires the participation of the family and the wider community – an approach that goes beyond the traditional remit of criminal justice agencies.

– Changing Lives, theory of change



## The future of probation

In 2019, the then Justice Secretary, the Rt Hon David Gauke, set out his blueprint for the future of probation services. The blueprint outlined plans to restructure probation services across the country. Responsibility for all offender management would be returned to the National Probation Service, and all Community Rehabilitation (CRC) contracts, who until now have dealt with lower level offenders in the community, would be brought to an end.

Building on the plans outlined in 2019, the Government released its 'Draft Target Operating Model for the Future of Probation Services in England and Wales' in March 2020. Alongside a move to a unified model in the delivery of sentence management, including in the delivery of Unpaid Work, Accredited Programmes, and Structured Interventions,<sup>123</sup> the Government has also outlined its intention to create a system that is agile enough to respond to demands at a local level. To see this achieved, it has created 12 new probation regions across England and Wales, each led by a Professional Probation Director.<sup>124</sup> It has also committed to modernising the non-residential estate and investing in the probation workforce<sup>125</sup> – something that was reiterated in the recent White Paper, 'A Smarter Approach to Sentencing'.<sup>126</sup> It is intended that the reforms to probation will serve to better the use of community sentences as an alternative to custody, and increase judicial confidence through the provision of a higher quality service.<sup>127</sup>

The Government remains committed to seeing the voluntary sector play an enhanced role in the delivery of probation, running key rehabilitative services such as education, employment and accommodation. Procurement will take place via a 'Dynamic Framework' to enable a wider range of rehabilitative and resettlement services to be delivered locally.<sup>128</sup>

In making these changes, we cannot forget the role of specialist and voluntary organisations, which are vital in providing rehabilitation and resettlement support to more vulnerable individuals, such as women being released from prison or serving community sentences.<sup>129</sup>

Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

The CSJ has long made the case that the answer to the challenges the government is seeking to overcome are already being addressed by small, specialist providers up and down the country. Be it Tempus Novo, helping individuals find dignity and meaning through sustained employment after release from prison, or Cheshire Without Abuse, working with perpetrators of domestic abuse and women serving their sentences in the community, or Key4Life, whose prison and preventative programme manages to achieve reoffending rates as low as 14 per cent.<sup>130</sup> There are examples of excellence in every town of the UK, achieving tangible outcomes for the hardest to help.

123 HM Prison & Probation Service, Update to the Draft Target Operating Model for Probation Services in England and Wales, Probation Reform Programme. Page 12

124 HM Prison & Probation Service, A Draft Target Operating Model for the Future of Probation Services in England and Wales, Probation Reform Programme, March 2020. Page 22

125 HM Prison & Probation Service, A Draft Target Operating Model for the Future of Probation Services in England and Wales, Probation Reform Programme, March 2020. Page 13

126 Ministry of Justice, A Smarter Approach to Sentencing, September 2020. Page 63

127 HM Prison & Probation Service, A Draft Target Operating Model for the Future of Probation Services in England and Wales, Probation Reform Programme, March 2020. Page 17

128 Ministry of Justice, Update to the Draft Target Operating Model for Probation, 2020, Page 8

129 Robert Buckland, Statement on the Probation Services, 2020

130 Key4Life website (Found at: [www.key4life.org.uk](http://www.key4life.org.uk))

Under the Transforming Rehabilitation reforms, there were limited opportunities for the voluntary sector to deliver probation services, despite commitments from government to open the market up to a wide variety of players. An enquiry from the House of Commons Public Accounts Committee found that:

... Just 11 per cent of voluntary sector organisations (VSOs) working in the sector provide services to Community Rehabilitation Companies, and probation trusts spent less than three per cent of their budgets on voluntary and third sector provision... The voluntary sector has also become less involved in providing [through-the-gate] services, resulting in the loss of better-quality specialist services, that had been provided at no cost to the taxpayer.<sup>131</sup>

The exclusion of specialist voluntary sector providers was felt across probation delivery. As reported by the Public Accounts Committee, provision of specialist mental health, substance abuse and employment specialist services are poor and not tailored to the individual's needs.<sup>132</sup>

There is a fresh opportunity, as the Ministry of Justice enters a new procurement phase, for it to tap into the pool of specialist providers across England and Wales offering targeted support to individuals caught in the revolving door of crime. A multi-agency, tailored approach to rehabilitation is central to the delivery of the ICRO. Through a dynamic package of primary enforcement conditions and rehabilitative requirements, delivered by expert and specialist providers, we will start to see the lives of those caught up in our criminal justice system turned around and our communities made safer.

## Investment in probation

Our probation service currently serves around a quarter of a million individuals each year. Many of these individuals will have multiple and complex needs that require targeted support. Yet for too long there has been a dearth of adequate provision in the community, fueled by a lack of funding. The Departmental Expenditure Limit<sup>133</sup> in 2019-20 for prisons is £2,975m, close to three times the Departmental Expenditure Limit for probation, which sits at £1,022m.<sup>134</sup> This is despite the fact that our prisons house around a third of those managed by probation.

If the Government is serious about achieving sustained and meaningful rehabilitation, adequate funding must follow into probation services and front-line delivery within the community. For the ICRO, and indeed other existing community-based sentences, to have the desired rehabilitative effect, increased funding for probation is critical. It would not only help to overcome judicial unease about community-based provision for those serving both non-custodial and custodial sentences in the community, but it would also increase the prospect of rehabilitation for the quarter of a million people currently under the supervision of probation services in England and Wales.

**If the Government is serious about achieving sustained and meaningful rehabilitation, adequate funding must follow into probation services and front-line delivery within the community.**

131 House of Commons Committee of Public Accounts, Transforming Rehabilitation: progress review. Ninety-fourth report of session 2017–19. April 2019. Page 6

132 Ibid

133 The Departmental Expenditure Limit (DEL) is the government budget that is allocated to and spent by government departments.

134 Ministry of Justice, HMPPS Annual Report and Accounts 2019-20, September 2020. Page 16

## Community custody

The motivation for the ICRO is to enable the effective rehabilitation of individuals passing through the criminal justice system, and to prevent reoffending. It is also possible that the ICRO will have an impact on prison numbers and see an overall reduction in the prison population.

As we shall come to discuss, multiple jurisdictions have introduced alternatives to custody, in one form or another all over the world. In some instances, the introduction of community sentences has resulted in a decarceration effect, while in others, there has been no reduction in prison admissions. There has not been a comprehensive international review into the impact of community custody on prison numbers, and in a number of cases the sentences have not been around for long enough, or been implemented widely enough, to have had an effect.<sup>135</sup>

A jurisdiction that is worthy of consideration, however, is Canada.

### The impact of community custody on prison numbers in Canada

In his journal 'Reducing the use of imprisonment: Lessons from 20 years' experience in Canada', Andrew A Reid concludes that, overall, the Conditional Sentence of Imprisonment (CSI) has had a moderate impact on institutional custody over a 21-year period. He finds that aboriginal offenders, who are disproportionately represented in the Canadian Criminal Justice system, experienced the most pronounced reduction in the rate of institutional imprisonment admissions, with a -10.91 per cent decrease. Non-aboriginal offenders experienced a -7.85 per cent decline in admissions to custody. There has been variation across the different provinces in Canada. Six out of seven provinces experienced a net decarceration effect amongst non-aboriginal offenders over the 21-year period. Some jurisdictions, such as Newfoundland and Labrador, saw a decarceration effect of -13 per cent.<sup>136</sup> We will consider the case of Canada in greater detail in the next chapter.

As sentence lengths in England and Wales continue to increase for the most serious crimes, we are unlikely to see a meaningful change in our prison population. There is, however, evidence from Canada that the ICRO has the potential to impact on our rate of imprisonment. If the ICRO is going to achieve a reduction in prison numbers, this will be contingent on it successfully mitigating the challenge of net-widening in its procedure and practice.

### Net-widening

Net-widening occurs when 'a new alternative sanction is imposed on an offender who previously would have received a less severe sanction.'<sup>137</sup> We have already outlined that the ICRO is designed very specifically for a cohort of individuals who would otherwise end up in immediate custody in the prison estate. It is not intended to replace or extend the function of any existing Community Order or Suspended Sentence Order.

<sup>135</sup> Julian Roberts, *The Virtual Prison*, 2004. Page 116

<sup>136</sup> Andrew A Reid, *Reducing the use of imprisonment: Lessons from 20 years' experience in Canada*, 2020. Page 12

<sup>137</sup> Julian Roberts, *The Virtual Prison*, 2004. Page 117

There have been multiple attempts to divert individuals away from custodial sentences through the introduction of community-based sentences in jurisdictions all over the world, including here in the UK. In application, it has been found that such attempts have resulted in net-widening, whereby low-risk offenders, who would otherwise have been given a fine or lesser sentence, get swept up in a more punitive non-custodial sentence. This widening of the net of social control can result in new orders achieving the very opposite of what was intended. Rather than keeping individuals out of prison, new sentences capture individuals for whom prison was never an option.

### **Direct net-widening: at the point of sentence**

'Direct net-widening' occurs at the point of sentence, where the sentencer issues a harsher penalty on an individual than is required, due to the availability of a more punitive order. This happened in England and Wales following the reforms to the existing Suspended Sentence Order (SSO) contained within the Criminal Justice Act 2003.

As highlighted by Keir Irwin-Rogers and Julian V Roberts in 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales 2000–2017', prior to 2004, the SSO accounted for only a few thousand cases and less than one per cent of all sanctions. Following the 2003 reforms, the use of the SSO dramatically increased. By 2017, 53,148 SSOs were imposed, the equivalent of 4.4 per cent of all sentenced cases.<sup>138</sup> At the crown court, the rise is even more pronounced. The number of SSOs rose from 1,539 cases in 2004, which is equivalent to two per cent of all cases, to 20,772 cases in 2017, which is equivalent to 27 per cent of all cases sentenced at the crown court.<sup>139</sup> While the SSO was introduced to replace sentences of immediate custody, there is evidence in the data that instead, the SSO had a net-widening effect. Irwin-Rogers and Roberts note that, over the same period, 2004 to 2017, the rate of sentences of immediate imprisonment remained relatively stable, rising from 6.9 per cent to 7.2 per cent of all cases. Crucially, however, there was a decline of 52 per cent in the use of community orders across all courts between 2004 and 2017, suggesting individuals, who would have previously received a Community Order, were now being placed on a SSO.<sup>140</sup> Furthermore, it would be reasonable to expect the offending histories of candidates receiving a SSO to be closer to those receiving sentences of immediate custody than those receiving a Community Order. The data in fact shows that individuals subject to SSOs had, on average, fewer previous convictions than those receiving Community Orders.<sup>141</sup>

The ICRO is both more comprehensive in its rehabilitative package, and more robust than the existing Community Order and SSO. It is therefore more likely to command the confidence of sentencers, which, under the existing Community Order and SSO regime, has been lacking – resulting in a net-widening effect.

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138 Irwin Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017* (2019). Page 141

139 Irwin Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017*. (2019), Page 143

140 Irwin Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017*, (2019). Page 143

141 Ministry of Justice, *Offender Management Statistics Quarterly: October to December 2016, Offending History Data Tool: Sanction Statistics* (2017), as cited in Irwin Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017*, (2019). Page 144

In recognition of net-widening under the SSO, the Sentencing Council released guidance, first in 2004, and then again in 2016, on the imposition of principle sanctions. In 2004, the council outlined that, prior to imposing a SSO, the court must already have decided that a prison sentence is justified – thereby establishing the SSO as a direct replacement for a term of immediate custody, not as a replacement for the Community Order.<sup>142</sup> Again in 2016, the council reiterated that *'sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.'*<sup>143</sup> There is early indication that the interventions may be having an effect, as the rate of SSOs and sentences of immediate imprisonment have fallen, alongside an easing in the decline of Community Orders.<sup>144</sup> This imposition guidance should be further extended to the ICRO regime.

### Indirect net-widening: at the point of breach

The second, indirect means by which net-widening can take place is where an overly punitive breach mechanism results in the individual being sent straight back to custody due to non-compliance. Due to the stringent nature of the ICRO, there is an increased risk that individuals will breach the conditions of their order and be recalled to custody.

The success of an order lies, in large part, on the nature of the conditions imposed and the breach mechanism. If the conditions are too punitive, and the breach mechanism too stringent, the individual will end up straight back in prison.<sup>145</sup> It should be said, however, that simple breaches of a proportionate package of conditions, supervised appropriately, is not net-widening as we know it. Net-widening is far more concerned with the disproportionate imposition of excessively punitive conditions, monitored by an overly stringent breach mechanism.<sup>146</sup>

The court is advised to take a proportionate approach to the imposition of conditions to avoid benign over-dosing which could result in the immediate and unnecessary breach of the ICRO. Judges will also have the opportunity to adjust the conditions of the order as the sentence progresses at periodic reviews before the court.

### Net-widening and the ICRO

The threat of net-widening, therefore, is that new orders not only fail to reduce the prison population, but could result in more individuals entering the prison system. To mitigate the likelihood of this happening under the ICRO, it is necessary for Parliament, following consultation, to devise a model which seeks to prevent net-widening both at the point of sentence, and at breach.

Recognising the adverse impact of net-widening on prison numbers and on those who are given unduly punitive sentences for their crimes, it is incumbent on the Ministry of Justice to implement appropriate training for the judiciary and magistracy, and for the Sentencing

142 Irwin-Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017*, (2019). Page 145

143 Sentencing Council: *Imposition of Community and Custodial Sentences: Definitive Guideline*, 2016. Page 9

144 Irwin-Rogers, Keir, & Roberts, Julian V. *Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017*, (2019). Page 146

145 Julian Roberts, *the Virtual Prison*, 2004. Page 118

146 Julian Roberts, *the Virtual Prison*, 2004. Page 118

Council to issue clear guidelines to guard against net-widening. It might be necessary for an independent body, such as the Law Commission, to monitor sentencing practices, paying regard to net-widening.

### Prison numbers

It is difficult to establish a clear figure for the number of individuals that might be sentenced to an ICRO, and the consequent impact this would have on the prison population. We can, however, make progress towards an estimate figure based on the number of individuals currently serving a sentence of immediate custody in the adult prison estate, who have been sentenced to less than three years, and who were not found to be dangerous offenders by the court. As of 31 December 2019, there were 10,942 individuals in the prison estate for whom this was the case.<sup>147</sup> This figure does not and cannot, however, take into account the number of individuals the court might reject because there are substantial grounds to believe that they would commit a further offence; or have not demonstrated sufficient will to comply with the conditions of the sentence.

### The potential cost of the ICRO

The average overall cost of a prison place in England and Wales now sits at £43,213,<sup>148</sup> while the average cost of a Suspended Sentence Order or Community Order is £4,305 – roughly one tenth of the cost.<sup>149</sup> There may be an expected increase on this figure as Electronic Monitoring becomes mandatory as part of the ICRO. In 2019–20, the cost of GPS Electronic Monitoring was between £4,745 to £5,110 per offender, per year.<sup>150</sup> The ICRO is also more intensive than existing community-based orders in the rehabilitative package of conditions that individuals might be placed on. While it is expected that there will be a meaningful difference in the cost of the ICRO compared to a sentence of immediate custody, the ICRO will only be effective if it is met with adequate funding for front-line probation services.

Perhaps more significant, however, is the societal cost of reoffending which currently sits at £18.1 billion per year.<sup>151</sup> This translates to approximately £270 for every man, woman, and child in the UK and £600 for every taxpayer. Research has shown that the likelihood of reoffending is significantly reduced following a Suspended Sentence Order or a Community Order, even when controlling for other factors.<sup>152</sup> According to a 2019 government study, a reduction of just ten per cent in recidivism would lead to an economic benefit of £490 million.<sup>153</sup> We therefore anticipate that much of the savings made under the ICRO will be to the cost of reoffending, while there may be some impact on expenditure within prisons as prison numbers reduce.

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147 Ministry of Justice, FOI response: 200704005. July 2020

148 Ministry of Justice, Costs per place and costs per prisoner by individual prison, HM Prison & Probation Service Annual Report and Accounts 2018–2019

149 National Audit Office, Probation: Landscape Review, 2014. Page 14

150 Ministry of Justice, FOI response: 200615013. June 2020

151 Ministry of Justice, Economic and Social Costs of Reoffending: Analytical report. 2019. Page 2

152 Ministry of Justice, Georgina Eaton and Aidan Mews, The impact of short custodial sentences, community orders and suspended sentence orders on reoffending, 2019. Page 10

153 Ministry of Justice, Economic and Social Costs of Reoffending: Analytical report. 2019. Page 3

An inevitable consequence of the ICRO will be that a cohort of individuals will move from custody into the community, supervised by probation and relevant supporting specialist services. It is vitally important that if the Government is serious about achieving sustained and meaningful rehabilitation for those who would otherwise face a custodial sentence, adequate funding must follow and be channelled into the probation service, which currently serves around a quarter of a million individuals each year. At present, there is a lack of judicial confidence in existing community-based sentences. This is, to some degree, a result of a lack of available, quality interventions in the community. For the ICRO, and indeed other existing community-based sentences, to have the desired rehabilitative effect, increased funding of requirements within the community is critical.

■  
The economic and social cost of reoffending is £18.1bn per year.<sup>151</sup>





## chapter four

# Precedent

### The emergence of alternatives to imprisonment

Despite the dominance of the traditional form of imprisonment across the penal landscape, the emergence of different forms of imprisonment has increased in recent years. Even in the jurisdiction of England and Wales, there have been numerous attempts to diversify the tools available to the judiciary when sentencing an individual.

It is not unusual now for terms of custody to be served continuously or intermittently, wholly in the community or partly or fully suspended.<sup>154</sup> It is argued that the manifold variation in the types of crime and the types of offender can no longer be addressed by a single mode of custody.<sup>155</sup>

Indeed, the courts of England and Wales already have two alternative sentences to custody at their disposal in the form of Community Orders and Suspended Sentence Orders. We recognise the value of these existing orders and consider that each would sit well alongside the ICRO.

There are also a handful of orders that have been introduced in recent years in England and Wales that are resonant of the motivations and characteristics of the ICRO. We will consider both the Intermittent Sentence of Imprisonment pilot and the Intensive Alternative to Custody pilot.

#### The Intermittent Sentence

The Intermittent Sentence of Imprisonment was introduced via the Criminal Justice Act 2003. It was designed to provide the court with a sentencing option in cases where there was a need to punish individuals appearing for serious offences, but who did not pose a risk to the public. Individuals would be sentenced to either weekend or weekday custody, with one weekend counting as three custodial days, and a weekday period counting as four custodial days.<sup>156</sup>

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<sup>154</sup> David Cole & Julian Roberts *Sentencing in Canada: Law, Policy and Practice* (Irwin Law: 2020). Page 72

<sup>155</sup> Ibid

<sup>156</sup> Home Office, *The intermittent custody pilot: a descriptive study*, 2006. Page 5

It was considered that the Intermittent Sentence would enable individuals on the sentence to avoid the negative outcomes of a short custodial sentence, such as the breakdown of the family unit and the loss of a job, while still functioning as a punitive sentence.<sup>157</sup> In this way, there are clear similarities between the Intermittent Sentence of Imprisonment and the ICRO.

In 2004, two prisons were selected as sites for a pilot. During the first 18 months, 284 intermittent custody orders were passed – accounting for three per cent of all custodial disposals granted at the pilot courts.<sup>158</sup> In 2006, a Home Office descriptive study of the Intermittent Custody pilot observed that:

Judges were enthusiastic and viewed it 'as a sentencing option that allowed them to impose a proportionate punishment for serious offences that had passed the custody threshold, whilst avoiding the disproportionately damaging effects of full-time custody for offenders in employment or with childcare responsibilities.'<sup>159</sup>

In addition to some support from the judiciary, the Intermittent Sentence attracted a high level of compliance – fewer than 10 per cent breached the conditions, all those living with dependent children continued to do so during their sentence, and 87 per cent of those already employed were able to keep their jobs.<sup>160</sup>

The Intermittent Sentence was ultimately subject to some well-founded criticism, such as the under-use of cells and the consequent cost effectiveness of the order. The sentence was also seen by some, largely the magistracy, as being too narrow in scope to be worthwhile.<sup>161</sup> It was therefore brought to an end in 2006.

The ICRO is distinct from the Intermittent Sentence in all the areas that the intermittent sentence attracted criticism. The ICRO is broader in scope than the Intermittent Sentence – in particular, it does not exclude those with histories of substance misuse. It also does not demand cell space as the entirety of the ICRO sentence would be served in the community, enforced through Electronic Monitoring. Arguably, the ICRO is made more stringent than the Intermittent Sentence through the use of GPS tagging. When an individual on the Intermittent Sentence was released from custody, there were limited safeguards in place.

There are, however, clear similarities between the two sentences. Both are custodial sentences that avoid the negative consequences of custody and are focused on the rehabilitation of individuals through the development of pro-social behaviours. They each place high value on work and family as two crucial pathways to desistance – areas that saw particularly successful outcomes under the Intermittent Sentence.

### Intensive Alternative to Custody Pilot

The Intensive Alternative to Custody (IAC) pilot ran from April 2008 to March 2011 to test the effectiveness of Intensive Community Orders in diverting individuals away from custody. Courts were given powers, as part of the IAC pilots, to use existing sentencing

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157 Home Office, The intermittent custody pilot: a descriptive study, 2006. Page 5

158 Home Office, The intermittent custody pilot: a descriptive study, 2006. Page 4

159 Home Office, The intermittent custody pilot: a descriptive study, 2006. Page 6

160 Home Office, The intermittent custody pilot: a descriptive study, 2006. Page 5

161 Home Office, The intermittent custody pilot: a descriptive study, 2006. Page 8

options in new ways. Crucially, the orders combined a mix of demanding requirements with intensive supervision. However, each pilot area – of which there were seven – had a degree of flexibility in the approach they took, resulting in considerable variation in outcomes.

Early analysis showed evidence of positive outcomes under the IAC pilot compared to short term custody at the 10 per cent significance level. There was, however, no evidence of a difference between the IAC and other court orders with regards to reoffending.<sup>162</sup> However, a later study found that, unlike previously, there was no statistically significant difference in the one-year proven reoffending rate between an IAC order and short term custody. There was, however, a statistically significant positive impact of the IAC on the one-year frequency of reoffending relative to both short term custody (an 18.5 per cent reduction) and court orders (a 12.4 per cent reduction).<sup>163</sup>

A meaningful comparison of the IAC and the ICRO is hard to achieve due to the significant variation across each IAC pilot site. But as a sentence intended as an alternative to custody, there are some meaningful lessons to be drawn.

The Manchester IAC pilot was specifically targeted at 18–25-year-old men at risk of a short custodial sentence – who, for example, may have breached past community sentences.<sup>164</sup> There is a significant body of evidence to show that brain development continues until the age of 25 and, therefore, young adults have much to gain from diversion schemes that limit their exposure to the challenges of the prison environment. This cohort reported improvements in independence, confidence, and motivation.<sup>165</sup> The evaluation found that close to a third (27 per cent) of those who were unemployed prior to commencing the order had secured employment while on the IAC, while a significant proportion had made progress in relation to gaining education and training qualifications.<sup>166</sup> Following the IAC pilot, the Intensive Community Order was introduced in Greater Manchester in 2009.

Those who passed through the Derbyshire IAC had the highest rates of time spent in custody, and therefore constituted a more serious offending group. The Derbyshire pilot had similarities to the ICRO in its use of electronic curfews and periodic reviews before the court – which continued for the first three months of the order.<sup>167</sup> It was said of the IAC pilot that *'sentencers welcomed the combined punitive and rehabilitative aspects of IAC as an alternative to imposing short term custodial sentences.'*<sup>168</sup>

Sentencers in Derbyshire took up the option of imposing an IAC in 53 per cent of the cases where one was proposed and court reviews were perceived by participants as an important factor in ensuring compliance.<sup>169</sup> Those on the programme reported that, although intense, the IAC *'kept them busy and provided structure to their lives that many had not previously experienced.'*<sup>170</sup>

162 Ministry of Justice, Initial analysis of the impact of the Intensive Alternatives to Custody pilots on reoffending rates, 2012. Page 1

163 Ministry of Justice, Updated analysis of the impact of the Intensive Alternatives to Custody pilots on reoffending rates, 2014. Page 1

164 Ministry of Justice, Process Evaluation of Manchester and Salford Intensive Alternatives to Custody Pilot, 2012. Page 1

165 Ministry of Justice, Process Evaluation of Manchester and Salford Intensive Alternatives to Custody Pilot, 2012. Page 5

166 Ministry of Justice, Process Evaluation of Manchester and Salford Intensive Alternatives to Custody Pilot, 2012. Page 5

167 Ministry of Justice, Process Evaluation of Derbyshire Intensive Alternatives to Custody Pilot, 2012. Page 2

168 Ministry of Justice, Process Evaluation of Derbyshire Intensive Alternatives to Custody Pilot, 2012. Page 3

169 Ministry of Justice, Process Evaluation of Derbyshire Intensive Alternatives to Custody Pilot, 2012. Page 3

170 Ministry of Justice, Process Evaluation of Derbyshire Intensive Alternatives to Custody Pilot, 2012. Page 4

The Derbyshire pilot identified a more serious offending group. It was distinct in its use of electronic curfews, along with reviews before the court, which were considered to be helpful in ensuring compliance with the order. Overall, there was a positive response from offenders to the pilot.<sup>171</sup>

## International models

Multiple jurisdictions around the world have introduced new alternative sanctions to imprisonment. The Government of Australia, for example, introduced the Community Correctional Order (CCO) in 2012 as a new non-custodial disposition.<sup>172</sup> The Netherlands introduced community service in 1989 as the third principle penalty under the Dutch Penal Code in an effort to reduce the use of short-term imprisonment.<sup>173</sup> Long before Sweden introduced Radio Frequency Electronic Monitoring in 1994, conditional custodial sentences and community service were used to keep the prison population down. It then introduced intensive supervision with Electronic Monitoring as a further alternative sanction to imprisonment,<sup>174</sup> alongside France who introduced Electronic Monitoring in 1997 as a substitution for shorter prison sentences.<sup>175</sup> Israel introduced Community Service as an alternative to custody in 1987,<sup>176</sup> and closer to home, following a successful pilot, Northern Ireland is in the process of rolling out the Enhanced Combination Order (ECO) as an alternative to short custodial sentences.<sup>177</sup>

### The case of Canada

The Canadian Conditional Sentence of Imprisonment was introduced to reduce reliance on incarceration as a sanction and to increase the use of the principles of restorative justice in sentencing.<sup>178</sup> Unlike probation, which in Canada, is primarily a rehabilitative tool, the conditional sentence was intended to include both rehabilitative and punitive elements.<sup>179</sup> Those serving a CSI are subject to a range of conditions and requirements that are designed to address the needs of the offender.<sup>180</sup>

The Supreme Court of Canada dealt with the CSI in its decision in *R v Proulx* 30 C.R.(5th)1(SCC)(2000). Proulx went on to form the basis of using conditional sentences for every criminal court in Canada:

Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim and the community.<sup>181</sup>

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171 Ministry of Justice, Process Evaluation of Derbyshire Intensive Alternative to Custody Pilot, 2012. Page 1

172 Maxwell, Chris, Non-custodial dispositions and the politics of sentencing, 2017. Page 541

173 E C Spaans, Community Service in the Netherlands: Its Effects on Recidivism and Net-widening, 1998

174 Centre for Justice and Innovation, Old and new uses of electronic monitoring in Sweden. [Accessed via: [www.crimeandjustice.org.uk/publications/cjm/article/old-and-new-uses-electronic-monitoring-sweden](http://www.crimeandjustice.org.uk/publications/cjm/article/old-and-new-uses-electronic-monitoring-sweden)]

175 Annais Henneguelle, Benjamin Monnery, Annie Kensey, Better at Home than in Prison? The Effects of Electronic Monitoring on Recidivism in France. 2016. Page 8

176 Elena Kantorowicz, The 'Net-widening Problem and its Solutions: The Road to a cheaper Sanctioning System. Page 26

177 Probation board for Northern Ireland, Corporate Planning 2020-23. Page 9

178 *R v Proulx* 30 C.R.(5th)1(SCC)(2000)

179 *R v Proulx* 30 C.R.(5th)1(SCC)(2000)

180 David Cole & Julian Roberts *Sentencing in Canada: Law, Policy and Practice* (Irwin Law: 2020). Page 76

181 *R v Proulx* 30 C.R.(5th)1(SCC)(2000)

The CSI has been praised in some quarters as '*one of the most enlightened sentencing revisions ever enacted*.'<sup>182</sup>

Despite amendments in 2007 and 2012 which served to restrict the use of the CSI,<sup>183</sup> there were 11,349 Conditional Sentences of Imprisonment imposed in Canada in 2016,<sup>184</sup> and after 20 years of the sanction's existence, 314,044 individuals have served a CSI.<sup>185</sup> A large number of these individuals would have found themselves in prison, with the cost and multiple challenges that prison brings, had the sanction not been in existence.

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182 David Cole & Julian Roberts *Sentencing in Canada: Law, Policy and Practice* (Irwin Law: 2020). Page 78

183 In 2007 and 2012, the conditional sentence was restricted by two Acts: *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, and the *Safe Streets and Communities Act*

184 David Cole & Julian Roberts *Sentencing in Canada: Law, Policy and Practice* (Irwin Law: 2020). Page 86

185 Ibid

# Conclusion

Every day, prison separates family units and places individuals in an environment that is not conducive to maintaining meaningful relationships with those on the outside. It removes individuals from their homes, disrupts current work opportunities, and greatly decreases chances of future employment, while failing to upskill and ready individuals for life after release. It places vulnerable individuals in an environment awash with drugs and violence and offers little, if any, meaningful opportunity for rehabilitation.

If our criminal justice system is ever going to offer the hope of rehabilitation for perpetrators of crime, then it needs to prioritise family relationships, it needs to foster opportunities for education and work, and offer access to meaningful rehabilitation and services that will address the multiple complex needs that individuals in the criminal justice system present with.

Our prison estate can do much better at providing opportunities for contact and engagement with family on the outside, and there is much more to be done for the children of prisoners who are sentenced to immediate custody in our criminal courts. There are also excellent examples of innovation and good practice in the form of voluntary sector organisations up and down the country who are working against the odds to help individuals into education and employment, both during their sentence and on release. There are examples of good practice throughout the prison estate and we applaud these endeavours and those who work tirelessly to make them happen – including prison governors, prison officers, probation services and the voluntary sector. We call on the government to do more for those for whom imprisonment in the prison estate is an inevitable and necessary response to their crimes.

However, for a large cohort of the individuals who currently pass through our prison system, a more radical response is needed. The ICRO is a custodial sentence that operates in the community so that reform can be meaningfully achieved in a way that would never be possible in the prison estate. At the same time, it allows for the punitive element of the sentence to be satisfied while ensuring the safety of the public.

If the Government is serious about achieving sustained and meaningful rehabilitation, even for those in the community, then adequate funding must follow and be channelled into the probation service, which currently serves around a quarter of a million individuals each year. This would help overcome judicial unease about sentencing individuals to community-based sentences. For the ICRO, and indeed other existing community-based sentences, to have the desired rehabilitative effect, increased funding of requirements within the community is critical.

In the recent White Paper 'A Smarter Approach to Sentencing', the Government outlined its commitment to achieving sustained rehabilitation for those caught in the revolving door of crime. We welcome its commitment to invest in capital and trust in the probation service and its staff, its embrace of new technologies, and clear determination to see community disposals win back the confidence of the courts and the public. But we consider the Government can and must go further to see the lives of those caught up in our criminal justice system turned around, and to tackle reoffending in our communities.

The ICRO meets the need. It is bolder, braver and more comprehensive than anything that currently exists in the criminal courts of England & Wales. While being wider in scope, it is also more stringent and more rehabilitative than any existing community-based sentence. It will command the confidence of sentencers and offer a robust and compassionate alternative to custody in the prison estate.

# Annex

## Short term prison sentences

The debate regarding the appropriateness of passing custodial sentences of six months or less might be addressed with the introduction of the ICRO. Almost half (46 per cent) of those sent to prison to serve a sentence in the year to June 2019 were sentenced to serve six months or less.<sup>186</sup> The reoffending rate for individuals on short term prison sentences is high – two thirds (66 per cent) of those sentenced to a custodial sentence of six months or less go on to reoffend.<sup>187</sup> This can be explained by the fact that short term prison sentences cause significant disruption by separating individuals from their families, communities and work places, while not allowing enough time for any meaningful rehabilitation to take place. A body of research demonstrates that short term prison sentences are less effective at reducing reoffending than community-based sentences,<sup>188</sup> and yet short term custodial sentences continue to constitute a significant proportion of sentences handed out each year, while the use of community-based sentences has seen a dramatic decline. It should be considered, however, that short term prison sentences are often imposed by the court when all other community-based orders have been exhausted.

The ICRO might work well alongside a presumption against short term prison sentences. The ICRO would offer a more robust sentence than any existing community-based sentence, while avoiding the adverse consequences of confining someone to the prison estate, even for the short term. Crucially, family ties and other protective factors that mitigate the risk of further offending will be maintained under the ICRO.

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186 Ministry of Justice, Offenders Management Statistics, 2019. Table 2.5a: Sentenced admissions into prison by sentence length, age group and sex. Cited in Prison Reform Trust, Winter Bromley Briefings 2019

187 Ministry of Justice, Proven reoffending statistics: January to March 2018. 30 January 2020. Table C2a: Adult proven reoffending data, by custodial sentence length (annual average)

188 Ministry of Justice, Georgina Eaton and Aidan Mews, The impact of short custodial sentences, community orders and suspended sentence orders on reoffending, 2019. Page 10





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