Who we are

The Magistrates Association (MA) is the independent membership body for the magistracy. We work to promote the sound administration of the law, including by supporting our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the magistracy, the courts and the broader justice system. With 15,000 members across England and Wales, we are a unique source of independent insight and information on the magistracy.

Introductory comments

The MA welcomes the opportunity to respond to the Ministry of Justice’s consultation *Strengthening probation, building confidence*. The MA has noted the full terms of reference for the consultation and limit our response to those questions which fall within the MA’s remit.

We agree that probation services are central to an effective criminal justice system. We note the commitment in the consultation document to make a shift away from custody towards managing and supporting offenders in the community, and the acknowledgment that in order to do so a probation system is needed that the public is reassured by, that sentencers have confidence in, and that delivers the right balance of proportionate punishment and rehabilitative support to offenders. If community sentences are to fulfil their potential it is vital they are properly delivered and enforced, that offenders are effectively supervised, and that the courts, victims and the public have confidence in the ability of probation to do this.

The MA would suggest that in order to minimise the use of short prison sentences it is critical that the following three things are in place:

1. Good quality provision needs to be available in every area that can meet the needs of offenders as alternatives to custody;
2. Sentencers need to be aware of the services available in every area and pre-sentence reports (PSRs) need to be comprehensive and of good quality;
3. Sentencers should be provided with the power to monitor offenders on community orders. This would primarily ensure that community sentences are more effective through judicial monitoring, whilst also improving sentencer confidence. The MA invites the Justice Secretary to bring into force Section 178 of the Criminal Justice Act 2003.

Question 1: What steps could we take to improve the continuity of supervision throughout an offender’s sentence?

The MA agrees that when a court imposes a community sentence it is asking for that offender to be properly supervised, to undertake activity as reparation for their crime, and to receive the help they need to desist from offending. We agree that reliable and consistent discharge of the probation function is essential to judicial and public confidence in the criminal justice system and shows individuals they will face consequences for breaking the law. We also agree that for positive relationships to develop between offenders and those who supervise them, wherever possible the same responsible officer should supervise an offender throughout their sentence. Offenders have identified the importance of a key worker in turning their lives around—a single individual who can assist with liaison between different agencies. Some charities can appoint mentors to assist. It is important that both supervising officers and offenders are clear as to who the responsible officer is at all times.

Successful resettlement of offenders as they leave prison is also vital to preventing re-offending, and this requires probation to work effectively with prisons to identify and address resettlement needs, and with wider partners who have responsibilities to help prisoners secure accommodation on release, find employment or access to benefits, a bank account, access training and/or education if thought appropriate and continued access to health treatment and social care services. Without core needs being met, it is often difficult for offenders to successfully re-integrate and desist from offending. It should be noted that provision of accommodation can often be the critical underlying factor which impacts on successful resettlement.

Continuity of support offered by probation is particularly important in relation to resettlement so specific attention should be paid when offenders leave custody, or move across boundaries. Offenders are often particularly vulnerable in the period immediately after release from custody, and so we agree that it is vital that plans are in place before release to meet offenders’ basic needs. A good resettlement plan should involve discussions with the offender and probation and prison staff to establish what needs to be put in place. The resettlement plan then needs to be clearly communicated so that everyone is clear what is to happen and when.

The MA recommends allowing sentencers to review community orders by enacting Section 178 of the Criminal Justice Act 2003. This would allow sentencers to attach a requirement for review by a judicial office holder to a community order. This would primarily ensure that community sentences are more effective through judicial monitoring, increasing the effectiveness of sentencing and thus the criminal justice system as a whole, whilst also improving sentencer confidence.

This is particularly important in cases where the custody threshold has been crossed but sentencers are deciding whether custody is unavoidable (and sentencers need to ensure that the seriousness of the offending behaviour is properly addressed), or in cases where the offender has multiple, complex needs which are linked to offending behaviour. The MA notes the real risk that a lack of sentencer confidence in the robustness of a proposed community sentence for an offender could affect decisions in relation to assessing whether alternatives to custody are appropriate. Judicial monitoring is one way to ensure the necessary confidence in a community order in cases where the custody threshold has been passed but sentencers are considering a community sentence as an alternative to custody. Procedural issues such as the processes to be followed and judicial continuity would need to be agreed, but Drug Rehabilitation Requirement (DRR) panels could be used as a successful template.
Judicial monitoring could also assist with the confidence of sentencers that offenders will be brought back to the courts with appropriate swiftness and certainty by the National Probation Service (NPS) in cases of breach. Intervening earlier with breaches would offer earlier opportunities to ensure compliance, which might avoid offenders being sent to custody following repeated breaches.

**Question 2: What frequency of contact between offenders and offender managers is most effective to promote purposeful engagement? How should this vary during a period of supervision, and in which circumstances are alternatives to face-to-face meetings appropriate? Do you have evidence to support your views?**

The MA would be supportive of encouraging an approach that was tailored to the needs of the offender, and this requires embedding flexibility of approach into probation services, to allow skilled and experienced probation staff to adapt their approach in order to react appropriately to changing need. Skilled and experienced probation staff can provide appropriate support to these cohorts by robust support offered via face-to-face supervision, contact by telephone, or a combination of the two. We also acknowledge that regular contact by text message can be very supportive for offenders. Offenders with more complex needs linked to offending behaviour, such as mental health problems or substance abuse, might need additional support.

It is important that it is understood that one approach may not be appropriate for all offenders. It is obviously useful for there to be overarching frameworks to guide probation officers but the structures must allow for different approaches. For example, when working with prolific offenders who have struggled to successfully engage with probation services previously, more regular contact may be necessary.

Higher intensity orders with more frequent contact may also be appropriate for higher level orders, especially where made as an alternative to a custodial sentence. Sentencers are not usually given any indication of how often an offender would be seen though we understand that usually contact is more frequent at the start of an order.

**Question 3: How can we promote unpaid work schemes which both make reparation to communities and equip offenders with employment-related skills and experience?**

As with all community sentences it is key that good quality provision is available in every area that can meet the needs of offenders. Sentencers having wider understanding of the different schemes is useful as it can inform sentencing decisions, and provide necessary background when considering assessments made in PSRs as to whether unpaid work is appropriate for a particular offender. For offenders to attend unpaid work regularly when they often live chaotic lifestyles, they need clear and straightforward instructions about what is expected of them to aid compliance. In addition, it is important not to set offenders up to fail, so it is worth attempting to provide consistency in terms of attendance: so offenders are expected to attend on the same day and time every week. A prompt start to placements is also important, because it is often the case that if probation does not respond quickly and consistently then the opportunity is lost. A number of our members have reported to us that some CRCs bring offenders back to court in order to ask to extend an order just before it ends to allow requirements (such as unpaid work) to be completed. As mentioned above, judicial supervision would help ensure sentencing plans are agreed early, and offenders are placed on programmes promptly, thus obviating the need for late applications for extensions.

Particular attention should be paid to the practical suitability of unpaid work schemes for offenders, in terms of timings and locations, especially for those with caring responsibilities. This is particularly pertinent for female offenders. Provision of gender-specific work schemes is important. In order to formulate a high level community order, unpaid work can be one of the key components of an order as unpaid work is considered a sufficiently robust penalty to provide the punitive element of an
alternative to custody alongside appropriate rehabilitative elements, and respond to the seriousness of the offence committed. Sentencers need to be confident that unpaid work is started quickly and rigorously supervised. Clear enforcement is essential – an early decision on acceptable and unacceptable absence and early follow up and breach for consistent unacceptable absences is essential. Confidence in those supervising unpaid work is key not only for sentencers and the public, but offenders should also have assurance that enforcement will be transparently and fairly dealt with.

Unpaid work schemes should provide meaningful work as well as aiming towards providing genuine training and the opportunity for offenders to develop employability and life skills (potentially with accreditation). In designing unpaid work schemes, knowledge of the local labour market is useful, as work schemes should aim to provide skills and training for the types of work that offenders are suitable for, and for which there is a skills gap or employment opportunities in the local area. Involvement from local employers would enable the creation of varied schemes to accommodate different cohorts of offenders, and would help offenders to create links with potential future employers. There would need to be engagement with employers to challenge views about employing ex-offenders, as many are cautious about offering work to someone with a criminal record. There are often other restrictions in practice relating to unpaid work: for example in some cases unpaid work cannot cover any job that would normally be carried out by someone of paid employment (thus depriving them of a job).

It is important that probation services undertake risk assessments of offenders in order to ensure that they carry out the most appropriate unpaid work, and that any necessary safeguards are put in place. If employers understood that risk assessments were done for each individual, identifying the appropriateness of unpaid work, this would increase employer and sentencer confidence. Government support and encouragement for employers to offer work schemes for offenders would be important, and we would propose that an accreditation or awards scheme would add value for employers.

Question 4: What changes should we make to post-sentence supervision arrangements to make them more proportionate and improve rehabilitative outcomes? (You may wish to refer to your answer to question 2.)

Under the Offender Rehabilitation Act 2014 (ORA) any person sentenced to a custodial term of more than one day must receive at least 12 months’ supervision in the community. During the period of post-sentence supervision (PSS), if an offender fails to comply with supervision requirements they can be committed to custody for up to 14 days, given a fine, or have a curfew or unpaid work requirement imposed as part of a supervision default order. Between January and March 2018, there were 2,172 recalls of offenders released from a sentence of under 12 months, a 4% increase compared with the same period in 2017, however there has been a 6% decrease compared with the previous quarter, October and December 2017. Over the same period, the total number of licence recalls was 5,616, an increase of 7% compared with the same period in 2016. The total number of recalls in the period October-December 2014 (the last counting period before ORA recalls were introduced) was 4,548. Recalls therefore increased by 24% in a three-year period. The Howard League note that the majority of people sent back to prison are recalled for technical reasons, such as failing to attend appointments with probation officers. The most common reason for offenders being recalled between January and March 2018 was for non-compliance, with 69% of recalls having this recorded as one of the reasons for recall. Further charge was recorded as a reason in 43% of licence recalls. It is possible that cases of non-compliance could be dealt with in the community; and oversight or engagement with a court might help resolve issues around a lack of engagement.

However, it is important to make distinction between those released on license and those under PSS, and it is not always possible to make that distinction from the figures available. Obviously the increase is likely to be mainly due to the introduction of PSS, although other factors may be relevant.

We note that the Ministry of Justice (MoJ) want to consider how post-PSS can better fulfil its statutory aim of rehabilitating offenders, and is keen to explore alternatives to a blanket 12-month supervision period that would make the length of PSS more proportionate to an offender’s sentence or to their rehabilitative need, together with consideration of the types of incentives and punishments that should apply.

The consultation states that providing supervision and support to this group of offenders is the right thing to do if reoffending is to be reduced. The purpose of a PSS period is rehabilitation. In order to facilitate this we would suggest that specific rehabilitative targets must be set for the offender whilst he or she is in custody, as ensuring that there is a comprehensive plan in place before release from prison is fundamental to supporting offenders as they transition into the community. Important aspects such as providing secure and safe accommodation, as well as maintaining continuity for health treatments, are all vital in rehabilitating offenders.

It should be noted that a return to custody is often counter-productive to the stated aim of rehabilitation during PSS. It is arguable that if the intention of the MoJ is to ensure that PSS is truly rehabilitative in purpose then they should look at the options for punishing breach of the supervision. Removing any punitive aspect to the supervision through imposing immediate custody would be one option.

It should also be noted that probation officers should have a range of options available to them to encourage compliance, and similarly sentencers must have a range of sanctions at their disposal to enforce orders in response to the degree of non-compliance. Courts will of course look at several factors before deciding on a particular sanction. The level of compliance; what elements have been completed or partially completed and the proximity of the breach to the imposition of the order. One issue is that in relation to PSS, the current system does not allow any flexibility in terms of involving a court in setting the order: if a court had ordered a specific length of PSS and particular rehabilitative targets to be completed, a court responding to a breach would have a clear framework against which to assess compliance. The MA agrees that compliance with PSS should be considered in relation to the stated aim of the supervision as rehabilitation.

A comparison could be made to responding to breach of non-compliance with treatment requirement elements of a community sentence. Offenders can be breached for non-attendance but not non-engagement in treatment (for example in relation to a Mental Health Treatment Requirement (MHTR)). The MA is aware that the success of most therapeutic interventions are linked to an individual voluntarily agreeing to engage, and a similar argument might be made in relation to measures that are purely rehabilitative in purpose.

In terms of the length of the supervision period, it may be appropriate if the court sets the appropriate length of supervision at the time of sentencing, or the length of the supervision period could be fixed at the point that the resettlement plan is produced, with provision for oversight by magistrates. Having a probation officer available for appointments on court premises would also be helpful so that if an offender is in court for non-compliance sentencers could try to get any issues resolved and get offenders re-engaged straight away.
Question 5: What further steps could we take to improve the effectiveness of pre-sentence advice and ensure it contains information on probation providers' services?

The information used by sentencers in sentencing is provided to the court through the prosecution, defence, the offender themselves and the NPS. It is essential that magistrates have access to sufficient information about an offender through PSRs, such that they are able to dispose of the case in a way which meets the relevant principles of sentencing.

It is particularly important for magistrates to have access to this information where no requirement has been included in a proposed sentence which can clearly be identified as a punitive element. The court is legally obliged to include a punitive element in the sentence it hands down, and without access to full information about the offender and the proposed sentence, magistrates may have to add an extra requirement or choose another approach to sentencing in order to comply with the law.

Best practice in such a situation would be for the NPS to ensure magistrates are fully aware of the nature of the work envisaged for a given offender and which offending needs that work would address. Following the split between the NPS and CRCs, it is now the NPS which provides all advice to the court. As such, in many cases, the court hears about the content of a sentence at one stage removed from those who actually oversee the sentence.

MA member surveys found that, overall, members tended to feel the timeliness and quality of PSRs they received was about the same as it was before Transforming Rehabilitation (TR)—in fact, there seemed to be a mild improvement between 2015 and 2016. Whilst MA research shows that magistrates are broadly satisfied with PSRs, it is noted that they provide a valuable opportunity to provide more information about what exactly offenders will do on a community sentence and, indirectly, what services are available.

Recent research conducted by the Centre for Justice Innovation (CJI) found that between 2012-13 and 2016-17 there has been a 22% fall in the number of new PSRs produced. Falling numbers of PSRs are possibly linked to the decline in community sentences, but further research is needed to establish the reasons for the decline, whether a link exists between declining numbers of PSRs and declining number of community orders and, if so, whether the decline in use is driving the reduced use of community sentences or being driven by it. This research would need to consider whether lack of availability of services or resources was having an impact.

Over the same period, there has been a significant change in how PSRs are delivered to court, with an increasing proportion of PSRs delivered orally rather than in writing. MA research shows that 42% of magistrates had seen slightly more stand down (oral) reports by summer 2016, following the TR changes.

Stand down reports are generally less detailed than their written counterparts. Furthermore, if required to give stand down reports on the day, the NPS may have less of an opportunity to speak to the offender and gather additional information about their needs (for example, through Liaison and Diversion reports). As such, they may offer sentencers a reduced level of insight into the individual offender.

It is the experience of our members that even where stand down reports are ordered, which are normally dealt with on the day, lack of resources can sometimes result in delays of weeks. Stand down

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4 Magistrates Association, 2018: Confidence in the community: Magistrate attitudes to Transforming Rehabilitation and community sentences over time. To be published in autumn 2018. Data available on request.
6 Magistrates Association, 2018: Confidence in the community: Magistrate attitudes to Transforming Rehabilitation and community sentences over time. To be published in autumn 2018. Data available on request.
reports, if provided without the court having to adjourn, can increase the efficiency of the courtroom. As such, they can be the most appropriate process in some cases. The MA welcomes reforms which create efficiency in criminal justice processes, as providing swift outcomes is important for offenders, victims and wider society. It is, however, important that efficiency and speed of process does not inhibit effective, accountable and fair justice outcomes. It must therefore be acknowledged that sometimes an adjournment is necessary to allow NPS staff to collect all necessary information about an offender, as well as contact CRCs or other service providers to check availability of a particular order. The Effective Sentencing Framework (previously the SMART tool) programme that has been brought in should allow checks as to what requirements are available in whatever area the offender will be located.

An example would be a Mental Health Treatment Requirement, which requires an agreement by the mental health professional who will be providing the appointments before it is ordered by a court. In such cases, an adjournment is necessary to ensure all possible parts of a sentence have been considered. In the MHTR demonstrator site at Milton Keynes most assessments are carried out on the day, but more complex mental health issues may require more time and so an adjournment would be necessary. It is not clear whether sufficient resources are available in other areas to allow assessments on the day by a psychologist but ongoing pilots may provide more detail on this. Increased efficiency is beneficial for all parties, as well as ensuring best use of resources; but it must not come at the expense of a fair and effective process. Taking additional time to ensure all appropriate sentencing options are given to a bench, especially for offenders with complex needs linked to offending behaviour (for example mental health or substance abuse), is necessary to reduce re-offending.

The courts may also receive information about the offender from a Liaison and Diversion (L&D) report which may be provided through the case file (if an L&D assessment was carried out in the police station), via the defence, a PSR or provided directly to the bench by L&D staff working at the court. An L&D report should identify relevant vulnerabilities, mental health or substance abuse issues that may affect sentencing decisions. The MA welcomes the commitment set out in the Female Offender Strategy7 to provide full coverage of L&D schemes by March 2020, and would note that L&D schemes need to be provided with sufficient resources, and fully staffed with people with the appropriate expertise. We would, however, note that presently sentencers often only get access to the information contained in L&D reports from the NPS. It is important that sentencers are encouraged to ask for a report if they feel it is necessary to sentence appropriately because they have insufficient information before them from the case file, defence or PSR. This may be because not all suspects will be arrested so a court hearing may be the first opportunity for interaction with L&D, or because where L&D assessments were carried out at the police station, an individual’s circumstances may have changed and vulnerability which may not have been previously present may now be an issue. It is therefore vital that sentencers are able to ask for an assessment if they have any concerns about an individual before them.

Sentencers need to know what the individual’s circumstances and vulnerabilities are, who else will be affected by any sentence given, and what sentence is likely to be effective in supporting rehabilitation. To achieve this, it is important for NPS staff delivering reports to have detailed information about offenders, and a thorough knowledge of what community options are able to provide. Current Sentencing Council guidelines state it can be helpful for a court to indicate any ‘preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil’. It is important that in doing so, the court makes it clear that all sentencing options remain open to the sentencing court. We would propose that sentencers should be encouraged to highlight any particular needs linked to offending that should be addressed within PSRs, where appropriate. Sentencers should be encouraged to ask

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7 Ministry of Justice Female Offender Strategy June 2018
questions of NPS staff in court where issues or queries arise, and it is imperative for the officer in court to have sufficient knowledge of the offender to be able to answer questions posed.

Where a court orders the provision of an all options report, then it is important that all options are considered, including custody. It is important that a PSR includes information about the impact of custody. Probation provide sentencers with the information and assessments which inform sentencing decisions, and if the offence is so serious that custody is unavoidable then a PSR which has not addressed the option of custody will not assist sentencers.

Following the TR split between the NPS and CRCs, it is now the NPS which provides all advice to the court. As such, in many cases, the court hears about the content of a sentence at one stage removed from those who actually oversee the sentence, and the NPS are not always able to provide sentencers with detail of what community services or options are available through CRCs. The MA would suggest that improved communication and liaison between NPS/CRCs and sentencers would assist in the appropriate sentencing and supervision of offenders.

Greater liaison between NPS and CRCs is important, but we have also welcomed recent changes which encourage CRCs to communicate directly with sentencers through local probation sentencer liaison networks. It will be very beneficial if those networks enable sentencers to feedback any queries directly to CRCs.

**Question 6: What steps could we take to improve engagement between courts and CRCs?**

The MA welcomes the re-establishment of the National Sentencer and Probation Forum (NSPF), but also recognises the need to support local probation forums to provide information to sentencers on available services in the area. A new Local Liaison Probation Instruction (LI)\(^8\) has been issued, which took effect on 23 July 2018 with the aim to ensure that CRCs play a part in local discussions with courts about probation services, and to work to improve the relevance and reach of the NPS Sentencer Survey and Sentencer Bulletin. The MA welcomes this local liaison, and notes that the Head of Legal Operations (HOLO) and the regional/local NPS representative are responsible for arranging the liaison meetings for Judicial Delivery Groups (JDGs) between relevant judicial office holders and probation providers. It is important that there should be good communication with the magistrates groups such as Bench or MA Branch meetings and the JDGs. The MA welcomes local liaison and the opportunity for JDGs to raise any issues regarding the provision of probation services which cannot be resolved and that are of regional concern. The LI provides a mechanism to raise issues with the senior judicial liaison structure, Magistrates’ Liaison Group or the Judicial Oversight Group. As an example of good practice, we note that in North London quarterly probation liaison meetings are held, which the CRC attends.

Legislation prevents CRC staff from having direct contact with the courts in relation to sentencing specific cases, and it is the NPS which provides all advice to the court. As such, in many cases, the court hears about the content of a sentence recommendation at one stage removed from those who actually provide the supervision and so issues can arise with the quality of the information provided about the options available and what will actually be done as part of a sentence (especially in relation to Rehabilitation Activity Requirements (RARs)). This makes it harder to foster the confidence of the courts in the services that probation provides. A further concern in relation to the division of responsibilities is that CRC offender managers may not have any experience or understanding of the court process and sentencing practice in particular. Without a clear understanding about how the court came to decide on a particular sentence, CRC staff may not fully appreciate the different aims relating to the specific aspects that were ordered, which may impact on enforcement measures taken.

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\(^8\) PI05/2018 Liaison Arrangements between Sentencers and Providers of Probation Services
https://www.justice.gov.uk/offenders/probation-instructions
Similarly, as mentioned previously, the division of responsibilities has made it more difficult for court staff (including NPS officers and sentencers) to be fully aware of all community services or options available through CRCs. It is therefore essential that there are good channels of communication between NPS and CRCs following the making of an order.

We note with interest that one CRC, Achieving Real Change in Communities, in Durham Tees Valley, has co-located a dedicated worker with the NPS court team so that PSRs can be informed by current and bespoke information on the interventions and services available from the CRC. It would be of interest to see what the impact has been in terms of the quality of the information provided to sentencers, the impact on sentencers, and the impact (if any) on the success of community sentences.

With the exception of DRRs, sentencers receive no information about the progress of an offender under the terms of their sentence unless they are returned to court for breach of an order. Only seeing those who fail may create a distorted picture and reduce confidence in the effectiveness of orders. Sentencers should therefore be provided with the power to monitor offenders on community orders. This would primarily ensure that community sentences are more effective through judicial monitoring, whilst also improving sentencer confidence. The MA invites the Justice Secretary to bring into force Section 178 of the Criminal Justice Act 2003. DRR reviews lead to a good understanding by sentencers of how orders work and how effective they are. Reviews of other types of community sentence may assist in the same way, and also help offenders to feel that courts continue to take an interest. It is, of course, the case that sentencers would not have the capacity to review all community orders made but it would be possible to review those that met certain criteria, for example those cases involving a repeat offender or somebody with complex needs, especially where a community order has been given as an alternative to custody.

**Question 7: How else might we strengthen confidence in community sentences?**

One of the most significant effects of the TR reforms on sentencers has been a lack of information around CRCs. The MA has raised concerns that sentencers have too little information about the services offered by CRCs. Most members who responded to our surveys in 2015 and 2016 said they had received very little information or none at all about the work CRCs were doing. HM Inspectorate of Probation found in 2017 that ‘arrangements between the National Probation Service (NPS), CRCs and courts are more settled, and probation providers must now improve the confidence of judges and magistrates in how the community sentences they order are actually then delivered’.  

Research carried out by the MA on behalf of Crest Advisory showed that 48% of magistrates felt that they had insufficient information available on the requirements available in their local area: 7% said that they had “nowhere near enough”. Only 34% were very confident or quite confident that CRCs provide adequate support to offenders in their area (46% were neither confident nor unconfident, whilst 15% were not very confident and 4% were not at all confident).

A lack of information about community sentences is a significant problem. For sentencers to have confidence in Community Orders, they need to know that they will address the purposes of sentencing. Understanding what kind of programmes and work CRCs carry out is an important part of that knowledge, and a lack of liaison between CRCs and sentencers thus risks damaging sentencer

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9 Magistrates Association. 2018. Confidence in the community: Magistrate attitudes to Transforming Rehabilitation and community sentences over time. To be published in autumn 2018. Data available on request
11 The survey, which was commissioned by Crest Advisory and carried out by the Magistrates Association, surveyed 582 magistrates in England and Wales. Data available on request
confidence. When the MA surveyed members, a substantial minority said that their confidence in community sentences had reduced when compared with the previous arrangements (35% in 2015 and 38% in 2016).\textsuperscript{12} We also found a clear correlation between levels of perceived information about available community requirements and confidence in CRCs’ provision for offenders.\textsuperscript{13}

The MA would also note anecdotal concerns about the robustness of CRC management of community orders in many cases and a lack of engagement with resettlement of short-term prisoners. The split between NPS and CRCs means that, while NPS continue to sit in court, staff at CRCs who have an offender manager role do not necessarily understand the court process or sentencing procedure. Confidence about breaches therefore remains an issue for magistrates.

HM Inspectorate of Probation also found that judges and magistrates fear CRCs are lax in returning cases to court, undermining their confidence in community sentences.\textsuperscript{14}

An MA survey asked how confident members were that offenders given a community sentence would get help for any needs relating to mental health or learning disabilities which are relevant to their offending behaviour. 35% were not very confident and 12% were not at all confident.\textsuperscript{15} The provision of high quality information about local options may go some way to addressing this lack of confidence.

The consultation notes that community sentences are often more effective than prison in reducing reoffending, and states that the MoJ wants them to be used more often, particularly instead of short custodial sentences. The position of the MA is that we recognise the limitations of short prison sentences, and we wish to emphasise that under current sentencing guidelines, a custodial sentence must only be imposed if the offence(s) is so serious that neither a fine or a community sentence can be justified, and that it is unavoidable that a sentence of imprisonment be imposed; and then sentencers must consider whether it is possible to suspend the sentence (and give a suspended sentence order).

The Sentencing Council Guidelines on the Imposition of Community and Custodial Sentences state: “Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.”\textsuperscript{16} It must be remembered that a suspended sentence is a custodial sentence, and the expectation is that any breach will result in the custodial sentence being activated.

Where the custody threshold has been passed, sentencers are likely to consider that any community order used as an alternative should be of high level. The explanatory materials of the sentencing guidelines suggest that for high level orders, more intensive sentences which combine two or more requirements may be appropriate.

As an alternative to a custodial sentence, therefore, sentencers will need to know that a community sentence of this level is available and appropriate for the circumstances of the offender. The risk of setting up someone up to fail should be acknowledged and avoided. Sentencers also need to consider the number of requirements on an order and be mindful that the order must be workable. Provision of certain sentencing options can be patchy, and the lack of community options can restrict flexible sentencing.

\textsuperscript{12} Magistrates Association. 2018 Confidence in the community: Magistrate attitudes to Transforming Rehabilitation and community sentences over time. To be published in autumn 2018 Data available on request
\textsuperscript{13} Ibid
\textsuperscript{15} Magistrates Association. 2016. Mental Health in the Courtroom. Data available on request
Rehabilitation and reform is, of course, only one of the five purposes of sentencing. In accordance with S142(1) Criminal Justice Act 2003 in determining the appropriate sentence, the court must also have regard to the punishment of offenders, the reduction of crime (including its reduction by deterrence, the protection of the public, and, the making of reparation by offenders to persons affected by their offence. All sentences must contain a punitive element.

It is therefore the case that short sentences are only given by sentencers when they are unavoidable and the MA position remains that a new legislative presumption against their use is unnecessary and would be ineffective. We instead argue that to minimise the use of short prison sentences:

1. There needs to be good-quality provision available in every area that can meet the needs of offenders who would otherwise be sentenced to custody.
2. Sentencers need to be aware of the services available in their local area and PSRs need to be comprehensive and of good quality.
3. Sentencers should be provided with the power to monitor offenders on community orders. This would primarily ensure that community sentences are more effective through judicial monitoring, whilst also improving sentencer confidence. This would also help to provide sentencers with confidence that breaches will be brought back before the court promptly and appropriately.

If the Government and, potentially, Parliament want to reduce the use of short sentences, the MA is well-placed to make recommendations about how this can be done, given that the majority of these short sentences are likely to be given by magistrates.

It would also be useful to collect detailed data on those cases where short prison sentences were imposed, to identify the circumstances. Data collection and analysis could provide a dataset to reveal why such short sentences are given and try to assess whether there is any commonality in terms of offences, offenders, or availability of community options.

Data analysis could also identify those cases where a short prison sentence is given along with a longer sentence for a more serious offence. If, for example, the main reason that a short sentence is given is to comply with the requirement for a sentence to include a punitive element, then Parliament could consider legislative change to remove this requirement. If, however, it transpires that short sentences are given because of failures in probation provision, then the restructuring of probation proposed in this consultation is a good opportunity to address them. Or, if it is an issue of sentencer confidence, measures can be recommended to address that.

As stated above, there is a need for an evidence base to have certainty that a proposed solution is likely to have the desired impact. Possible suggestions could include:

- Probation to provide and fund bespoke services for specific cohorts including young adults, women and those with multiple mental health &/or substance abuse problems;
  - Senior Attendance Centres (SACs) provide one option for the provision of bespoke services, although they are not necessarily the solution for more vulnerable offenders as they do not address the reasons why more common community order requirements are not suitable or successful. For example, if someone has a mental health problem and a drug problem, it is complicated to deal with both issues either at the same time or sequentially. We understand that SACs are not operating at full capacity in some areas, and that they are rarely recommended as a sentencing option in PSRs.
- Introduce judicial monitoring for community sentences for cases where a community option was given as an alternative to custody;
- Require a sentencing bench to provide a report on every occasion that an immediate short prison sentence (less than 3 months) is ordered. The report should provide reasons why custody was considered necessary, and include reference to the recommendations contained in the PSR. This will (at the very least) facilitate detailed research on the offences/offenders receiving these sentences. If this was introduced quickly, it could feed into the MoJ work on renewing contracts for CRCs. It may be worth considering some aspect of scrutiny of reports as well.
• Focus on those who are most likely to get very short sentences:
  
a) Repeat offenders/those who have breached:
  • require probation to provide innovative options for those who have not been successfully rehabilitated rather than just providing the same options which have been shown to previously fail;
  • Consider an order akin to an Intensive Supervision and Surveillance Programme (ISSP) to offer greater support for those most challenging to rehabilitate.
  
b) Offenders who are refusing to engage with community options:
  • Allow a deferred sentence scheme for those at risk of immediate custody due to a refusal to engage with community options offered by probation. This would involve a short adjournment, offering the offender a last chance to discuss engagement with community options with probation, thus either making custody avoidable or allowing requirements to be attached to a suspended sentence. It should be noted that speaking to an unfamiliar probation officer in a busy court for a short time is unlikely to allow offenders the space for self-realisation that some help might be needed. But if sufficient time was given for a specialist probation officer or support worker to engage with the offender to identify particular needs, this could lead to alternatives being available to sentencers following the adjournment. Obviously, any such scheme would be distinct from the use of SSOs, which often offer a last chance for offenders to avoid immediate custody.
  • At the very least, if a record was made that a short prison sentence was given because the offender refused to engage in any community options, this is important evidence to collect.
  • There may be different reasons why an offender is refusing to engage with community options: substance abuse or mental health problems may be linked to offending behaviour but offenders may not have received a diagnosis or fully understand their problem. Our members report difficulties in such situations, as they are left with no options in terms of sentencing. Any research should look at such cases and see if there are alternative approaches that could be followed to give sentencers more discretion and options.
  
  NB It is likely that there will be overlap between those in groups a) and b)
  
c) Prison for non-payment of fines: look at re-working S151/Schedule 616 options to offer alternatives to custody in those situations where there is non-payment of fines as long as the offender is able to pay but non-payment is through wilful refusal or culpable neglect. A custodial sentence can only be imposed after the court has carried out a means enquiry and is satisfied that the defendant has not paid due to wilful refusal or culpable neglect.

Her Majesty’s Courts and Tribunals Service would be well placed to be able to compile a dataset for use if written reasons for custody have to be given every time a short prison sentence is given. Written reasons could be cross-referenced to PSRs.

Custodial sentences are the most severe sanction available to sentencers: short custodial sentences will only be ordered where there are no other available options in response to the seriousness of the offence and the particular circumstances of the offender. Prisons should be in a position to properly deliver the full range of custodial sentences needed, including short sentences.

We would also suggest that it is important for the voice of the offender to be heard, and so we would recommend research to be carried out in order to take into account the views of those people with direct experience of serving community orders.

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16 See Further Comments
Question 8: How can we ensure that the particular needs and vulnerabilities of different cohorts of offenders are better met by probation? Do you have evidence to support your proposals?

As stated in our answer to question 7, we would propose that there be a specific focus on those who are most likely to get very short sentences, which would involve a focus on the following cohorts:

a. Repeat offenders/those who have breached:
   - require probation to provide innovative options for those who have not been successfully rehabilitated rather than just providing the same options which have been shown to previously fail;
   - Consider an order akin to an Intensive Supervision and Surveillance Programme (ISSP) to offer greater support for those most challenging to rehabilitate.

b. Offenders who are refusing to engage with community options:
   - Allow a deferred sentence scheme for those at risk of immediate custody due to a refusal to engage with community options offered by probation: a last chance!
   - At the very least, if a record was made that a short prison sentence was given because the offender refused to engage in any community options, this is important evidence to collect.

It is likely that there will be an overlap between those in groups a) and b)

Probation should provide and fund bespoke services for specific cohorts including young adults, people from black, Asian and minority ethnic (BAME) backgrounds, women and those with multiple mental health and/or substance abuse problems. There is, of course, a balance between magistrates having a wider understanding to inform decisions whilst also staying focused on the individual in front of them. There is a need for flexibility. The MA would recommend that the Government works to facilitate a better flow of information and co-commissioning between departments, along with establishing a mechanism to ensure that services are provided for the most vulnerable and complex cohorts (such as women offenders and repeat offenders), on which the current binary approach to funding does not encourage focus. There are a number of repeat offenders regularly coming before the magistrates’ courts for whom a reduction in offending, or in the seriousness of offending, is significant progress which cannot be accurately measured by an ‘offending/not-offending’ indicator. The MA notes concerns raised that adopting a binary model does not allow for adequate focus on the most complex cohort of repeat, low-level offenders.

The MA points to the numerous ways in which we can measure success in rehabilitation outside of the frequency or seriousness of offending itself—including supporting offenders in accessing education, employment and housing, as well as mental health and drug/alcohol dependency support. The MA would therefore suggest that the focus on a binary approach merits re-examination.

With regard to BAME offenders, lessons may be learnt from the youth justice system. The MA is aware of positive work being done by some Youth Offending Services in response to the Lammy Review, both in terms of collecting disaggregated data on outcomes but also encouraging report writers to consider previous unfair outcomes in relation to criminal justice outcomes due to unconscious bias and taking such disproportionately into account when making sentence recommendations. We would encourage similar approaches to be taken in relation to producing PSRs for adult offenders. There is also a need for particular focus on unseen groups such as refugees and asylum seekers. This is a relatively small cohort of extremely marginalised and vulnerable individuals, who have particularly complex needs which differ significantly from the general offender population, and so need to be specifically taken into account and addressed.

Concerns have been raised about the availability of appropriate community options for women offenders in particular. Gender-specific community orders are not always available (for example, there can be challenges for women with child care responsibilities to take on the majority of unpaid
work, which may well be unsuitable as a predominantly male environment anyway), leaving a RAR as the only option, but there are issues around sentencer confidence in this being an appropriately robust alternative to custody. The MA notes the existence of a number of highly effective women’s centres, but they must receive support to be able to provide their vital services. And, as mentioned above, the CRCs must work closely with support staff, who may not be able to take on supervision or offender management responsibilities.

Research has shown that women can find probation offices intimidating especially where they might run the risk of encountering a violent ex-partner. Probation offices are also not good places to take children. The MA has supported suggestions that the minimum requirement on CRC contracts should be for a day or half day to be specified as women-only so that there is no risk of encountering potentially violent male offenders when attending appointments. Where there are women’s centres, CRCs can use these to host supervision appointments. However they are not available in all locations, and it is important that there are alternative women only locations where appointments can be held.

It may be worth exploring the possibility of conducting the initial appointment at court immediately after sentencing, which would at least mean that the offender would know what would be included in the sentence and have a plan to work to. This would require close liaison between NPS and CRC staff, and a likelihood that a community sentence will be ordered by the court.

NPS provided information to sentencers on what is available for sentencing women in each of the seven regions, which the MA welcomes. However, the amount of detail provided varies considerably and it is clear that the consistency of provision called for by the Justice Select Committee is lacking. This is problematic as sentencers are therefore faced with different options depending on where the offender lives. When the MA surveyed members on community sentences, nearly a quarter of respondents said that a lack of available requirements affected the ability to tailor sentences to an individual, which is a serious concern.

The MA believes there a number of key issues that relate to sentencing women:

- Ensuring the provision of gender-specific community sentencing options. It was worrying that in the recent HMIP report on Enforcement and Recall,\(^{17}\) they generally found no clear pathways for women offenders
- Sentencers rely on the NPS to provide details about whether specific requirements are appropriate in a particular case. Programme or Treatment Requirements should only be ordered where appropriate to the individual
- Sentencer confidence in the enforcement of community sentences is difficult to maintain when official inspectorate reports are assessing the performance of CRCs as poor.\(^{18}\) The MA suggests that while the failings identified should be addressed as a matter of urgency, magistrates should also be given the power to review the progress made by an offender serving a community sentence, to increase the legitimacy’s confidence in their effectiveness
- Providing magistrates with relevant information about caring responsibilities, so that the impact of a sentence on dependants can be considered. The MA acknowledges that women may be reluctant to give details to probation officers, but hopes that work such as the videos produced by Dr Shona Minson will raise awareness about the issue. Input from social services or other agencies may be necessary to enable the NPS to present a full report to sentencers. There should be greater availability of sentencing options for offenders with multiple vulnerabilities as well as trauma-informed work

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\(^{18}\) Ibid.
Question 9: How could future resettlement services better meet the needs of offenders serving short custodial sentences?

Good communication and liaison between prisons and probation is critical, as is adequate resourcing both in terms of suitably qualified staff and funding. There needs to be a focus on the needs of offenders that are most strongly linked to re-offending. For example, suitable accommodation is key to the initial success of a return to the community, and presents a significant challenge for many offenders leaving custody. There is also a need for continuity in respect of healthcare provision and access to services such as training and education. We would reiterate that arranging accommodation is a core aspect of a resettlement plan that must be provided, we would propose that a robust system is in place for checking this for all offenders before release.

Adequate and appropriate social care should be provided for all offenders whilst in prison and throughout the process of resettlement. However, it is often complicated as it is the local authority within whose area a prison is that is responsible for social care of prisoners but prisoners are often imprisoned in a different area from where they were living prior to being sentenced to imprisonment, and/or resettled in a different area upon release. Continuity therefore has to be ensured through planning, liaison and communication, with one person having clear overall responsibility.

Question 10: Which skills, training or competencies do you think are essential for responsible officers authorised to deliver probation services, and how do you think these differ depending on the types of offenders staff are working with?

No comment.

Question 11: How would you see a national professional register operating across all providers – both public and private sector, and including agency staff – and what information should it capture?

The MA welcomes a national professional register, to include both public and private providers if it assures the quality of providers. It should capture professional qualifications and associations.

Question 12: Do you agree that changes to the structure and leadership of probation areas are sufficient to achieve integration across all providers of probation services?

The MA welcomes the alignment of CRCs with NPS regions, as we believe that this is an important step to ensure that the NPS and CRCs work together more closely as part of a single, integrated system. We agree that this can improve the efficiency and effectiveness of local services, while creating the conditions for stronger partnership working.

We welcome the re-integration of CRC and NPS within Wales. We seek a commitment from the MoJ to undertake an assessment of the impact of this on probation provision in Wales in due course, with the learning from this being used to inform both practice in Wales, and thinking about the future of the CRC and NPS structure in England.

Our concern would be that it is ensured that services to courts and offenders are consistent and there is no material difference to sentences available to courts across the country because of differences in local provision.

Question 13: How can probation providers effectively secure access to the range of rehabilitation services they require for offenders, and how can key local partners contribute to achieving this?
The MA would recommend that the Government works to facilitate a better flow of information and co-commissioning between departments. It is clearly important that there are good working relationships between probation and health service providers, social services, and local authorities, for example. Clear lines of responsibility and co-operation are key. It is vital that there is clarity about where responsibility lies in relation to the provision and funding of health and support for offenders. Offenders need to be able to access bespoke services, tailored to their specific needs, rather than just being able to access existing ‘one size fits all’ services.

Increasing flexibility across probation area and local authority boundaries through liaison and cooperation would mean that service providers could work with others outside their area, providing more options for sentencers and at the same time improving efficiency. It could offer more flexibility in terms of making up groups for work programmes and reducing waiting times until programme groups can be run. There could also be benefits in being able to access resources such as women’s centres or attendance centres which are not available everywhere.

**Question 14: How can we better engage voluntary sector providers in the design and delivery of rehabilitation and resettlement services for offenders in the community?**

Identifying where CRCs are unable to provide the needed services, and commissioning the voluntary sector to fill the gaps is a good way to begin to improve the engagement of the voluntary sector. It should be acknowledged that lack of engagement and funding of voluntary organisations subsequent to the TR reforms will have resulted in the closure of some voluntary organisations, and so they may no longer be available to offer services to probation. Additional investment to encourage re-engagement may be required.

**Question 15: How can we support greater engagement between PCCs and probation providers, including increased co-commissioning of services?**

No comment.

**Question 16: How can we ensure that arrangements for commissioning rehabilitation and resettlement services in Wales involve key partners, complement existing arrangements and reflect providers’ skills and capabilities?**

Clearly devolved responsibilities mean different ways of doing things will evolve, but we should encourage consistency of sentencing options across all of England and Wales.

**Question 17: What should our key measures of success be for probation providers, and how can we effectively encourage the right focus on those outcomes and on the quality of services?**

While re-offending rates provide important information, this information can often disguise a more complex picture. Desistance from offending can be a lengthy process, where episodes of re-offending may occur, and so as a measure of success, a reduction in offending (both in terms of frequency of offending and seriousness of offences) is as important as the binary calculation of offending –v- no offending.

Other measures that could be included are: employment or education status; substance abuse reduction; engaging with treatment requirements; willingness to engage with social services; a reduction in the need for support from social services. New accreditation programmes to assess improvements in, for example, literacy and numeracy skills could be introduced. Various ‘soft measures’ can also be measured such as confidence and anxiety levels, the development of community or family ties.
Further comments

We are aware that the MoJ is interested in looking at the use of sentencing options in addition to unpaid work (Question 3): especially rehabilitation options including the Rehabilitation Activity Requirements (RARs). The RAR is designed to allow flexibility in terms of which services or interventions are delivered to participants. The court cannot specify how many days an offender must serve on a RAR, only a maximum number of days. Similarly, the court cannot specify what the offender must do as part of the RAR, although they can recommend that particular identified needs linked to offending behaviour should be addressed. This makes it particularly important that sentences have information about local probation services. The court needs to have a reasonable idea of what a sentence is intended to achieve, and how, in order to determine whether a disposal meets the purposes of sentencing.

A lack of input into RARs impacts on sentencer confidence. The MA’s surveys showed that, while a large majority of members did not believe that the shift to RARs was affecting outcomes, the largest single group in both 2015 and 2016 expected it to do so in future.\(^{19}\) A lack of information was most frequently cited by those who believed there had been or would be a change in sentencing decisions.\(^{20}\)

This requirement was introduced with a view to allowing CRCs to introduce innovative interventions to address offending, and decisions on the activities to be undertaken by the offender are not finalised until after the sentence has been imposed. The court specifies the maximum number of days for activities, but the CRC selects what rehabilitative requirements will be included as part of the RAR. The bench is not required to be given any detail of what would be included under a RAR. Although this allows greater flexibility for CRCs in deciding the precise elements of the requirement after more in-depth assessment of the offender, it can greatly reduce the information available to the court when deciding whether it is an appropriate sentence.

Some CRCs run specific RARs for women offenders, some based in women’s centres, some on an outreach basis, but available options appear to be widely different depending on the CRC. Not all options will necessarily be available throughout the area covered by the CRC as some services, including women’s centres, may only be available to those resident in particular local authority areas.

We would like to bring to the attention of the consultation team that rehabilitative early interventions could be possible (particularly with repeat, low level offenders) through the enactment of Section 151 of the Criminal Justice Act 2003 and Schedule 6 of the Courts Act 2003. Section 151 allows for magistrates to hand down a community sentence in cases where an offender has been fined three times previously and where the sentence would otherwise be a further financial penalty.

Section 151 would allow rehabilitative measures to be taken at an earlier stage, rather than continuing to allow offending behaviour to escalate. A financial penalty will do nothing to address the underlying causes of repeat offenders’ behaviour, whereas measures such as a mental health treatment requirement or an alcohol treatment requirement may be effective.

The MA are happy to examine and discuss amendments or judicial guidance to ensure that the use of Section 151 does not result in any apparent up-tariffing effectively in place on criminal record checks, i.e. that the sentence continues to be recorded as a fine; that the sanctions available for breach are no greater than those available for fine default, including clear judicial guidance as to the steps to be taken in sentencing, particularly disregard of the community order; and that the sanctions available for further offending during the existence of the community order under Section 151 disregard the

\(^{19}\) Magistrates Association. 2018. Confidence in the community: Magistrate attitudes to Transforming Rehabilitation and community sentences over time. Data available on request

\(^{20}\) Ibid.
fact that the offender was serving a community order when determining the level of sanction for the new offence(s).

The MA also supports the enactment of Schedule 6 of the Courts Act 2003: discharge of fines by unpaid work. This would empower the court to order unpaid work if fines payment is deemed impractical or inappropriate. Members of the MA understand that, for some repeat offenders, accumulating financial sanctions - when they have no ability to pay - can put a financial burden on them that is completely impossible for them to pay off. Again, this does not allow people to turn their lives around, but can exacerbate offending behaviour.

As in relation to Section 151, the MA would be happy to discuss how to ensure sanctions are not escalated and that the measure is used to rehabilitate, rather than further penalise, offenders.