

Swift and Certain



A new paradigm for criminal justice

Kevin Lockyer

Edited by Glyn Gaskarth and Charlotte McLeod



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Contents

	Acknowledgements	4
	Foreword	5
	Executive Summary	7
1	Introduction	14
2	The Criminal Justice System – Slow and Unresponsive	16
3	Community Sentences – Breach and Sanctions	18
4	The Psychology of Sanctions	23
5	Swift and Certain in Practice	26
6	Swift and Certain in England and Wales: Overcoming the Obstacles	33
7	Swift and Certain in England and Wales: Opportunities for Change	39
8	Potential Impact on the Prison Population	49
9	Implementation	53

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Foreword

Glyn Gaskarth

Swift and Certain is the first report in a new Policy Exchange series looking at the impact of time considerations on the effectiveness of the criminal justice system. Justice delayed is justice denied. Swift justice can prevent the need for harsher punishments later on. The timeliness with which the justice system intervenes may be more important than the particular form of punishment. If the system were faster, it may not need to be as punitive.

This is particularly the case with Prolific and Priority Offenders (PPOs) who are the focus of this report. Around 10% of all offenders commit around half of all serious crime. Intensive behaviour change programmes designed to tackle key factors such as alcoholism or drug addiction can reduce the crime rate because these factors influence PPOs' propensity to commit crime. The justice system can be adapted to deal with these problems. Evidence from the HOPE Probation Programme in Hawaii suggests that offenders will change their behaviour in reaction to a new more rigorous justice system based around these principles. This means that many of the more serious offences they could have gone on to commit, had their behaviour been unchecked, will simply not occur.

Self evidently, time is a valuable resource. In the past, it has not been given sufficient consideration. This report looks at how delays in the justice system significantly affect offenders' compliance with the law and how a swifter justice system would be more effective. Swift and Certain shows that, if an offender is punished many months after the original crime, they rarely link that punishment with the offence, which may be one of many they have committed. Action and consequence must be more directly linked. This is best achieved by responding quickly to infractions. Unfortunately, the existing justice system is not set up to respond in a speedy manner.

Central to this report, as well as to previous Policy Exchange reports by the Crime and Justice Unit, is the idea that individuals can control their destiny and are responsible for their actions. Our research shows the need to reduce the number of offenders who, through drug problems and chaotic lifestyles, develop a perception of time which is short-termist. This perception prioritises immediate gratification without consideration of the long term consequences of different actions. These individuals are capable of making positive changes in their behaviour but they need the state to provide the right structure of incentives to encourage this behaviour change.

Swift and Certain provides the structure that has been missing in many of these individuals' lives by creating a new Conditional Behaviour Order that requires offenders to change their behaviour in specified ways, for example, to desist from drug or alcohol misuse. This order does not excuse bad behaviour. Rather it provides a constructive programme to help people make the transition to become law abiding citizens. If they fail to fulfil the terms of their order, they can be certain

of the punishment they will receive, which will include short stays in prison. This would be clearly outlined to the offender and enforced effectively. Key to this approach will be a reduction in the discretion probation officers have in applying sanctions for failure to comply with the conditions agreed. The response will be automatic and consistent with what has previously been specified.

Policy Exchange is aware that an intensive behaviour change programme and the provision of additional prison places will require a different type of prison system and for the courts to work in a fundamentally different way. It is right to have this debate about the structure of our justice system. Questions of expenditure should be viewed in terms of output. The main purpose of the justice system – and therefore the output to measure success – is the prevention of crime. All other aims should be ancillary. That is very different to the current political debate about this area where the focus is almost exclusively about inputs: how much would each party spend on policing or prisons? Who will create more new offences? What numbers of police officers are needed?

Swift and Certain attempts something different. This report identifies specific groups – such as prolific offenders – and then proposes the introduction of a programme rigorous enough to change the behaviour that leads them to commit crime. What are the incentives needed to ensure this behaviour change happens? Rather than beginning with the existing structure, this report starts with an analysis of the problems that need to be solved. It then questions why the existing system has not solved these issues and what needs to be put in place so that the courts in particular can deal with offenders in a constructive way that stops them from committing crimes in future.

Executive Summary

Our criminal justice system is inefficient and slow. Victims and witnesses are being let down through the constant delays in cases coming to court. The public lacks confidence in how justice is being dispensed. Defendants are waiting months for their cases to be brought to trial, causing uncertainty and ambiguity. Punishment for criminals is delayed by months and sometimes years.

Research consistently shows that the longer the delay between the time of an offence and the time a punishment is handed down and implemented, the less effective it will be. If punishment is uncertain, if there is a chance that the offender will 'get away with it' or if it is perceived to be so far in the future that its consequences are far outweighed by the immediate rewards of offending behaviour, then it is likely to have little impact on individual actions.

Offenders, particularly those who commit prolific relatively minor crimes, tend to be impulsive, reckless and short-term oriented. The potential consequences of punishment at some unspecified future time, and with unpredictable severity, may not weigh heavily on an offender's mind. It is these offenders that therefore particularly suffer from a slow and uncertain system, which continues to fail in changing their behaviour and prevent further reoffending.

Current breach process

Public confidence in community sentences is undermined by relatively high breach and reoffending rates. Currently, one third of all offenders serving a Community or Suspended Sentence fail to complete their Order. The number of offenders who fail to complete a Community Order stands at 46,000 a year, and around half of this number fail to complete the order for reasons of non-compliance with the requirements. Around 23,000 offenders therefore fail to complete Community Orders for reasons of non-compliance each year.

“Public confidence in community sentences is undermined by relatively high breach and reoffending rates”

When an offender breaches the requirements of their community sentence, the public should rightly expect there to be a swift consequence for their actions. Yet, figures show that punishment for breaching probation is not handed out on average until five weeks after the breach has taken place.

The role of the Offender Manager is to determine whether a breach is 'unacceptable' and therefore appropriate to be brought before court. What this means is that enforcement relies to a very significant degree on the judgment of Offender Managers as to whether the behaviour warrants enforcement action or not. In addition, there are often long delays in seeking breach action and in the completion of the required court proceedings. It can take up to 10 working days for a violation of the terms of a Community or Suspended Sentence Order to

be translated into breach action and for an application to be made to the Court. However, the delays do not stop there. The Court needs to list and hear the breach application, a process that can add at least a further week (five working days) to the breach process. In aggregate, and with a fair wind, it will take around 25 working days – five weeks – between a decision to initiate breach action and the completion of proceedings in court. A Joint Inspectorate found that this process can even take up to 53 working days.¹

The combination of a varied response to non-compliance, significant delay between non-compliance and a sanction and considerable variation in the eventual outcome is no recipe for improving public confidence in community sentences as an effective response to crime, nor is it an effective way to ensure that offenders are faced swiftly and robustly with the consequences of their actions.

The evidence on the impact of sanctions on behaviour suggests that what is needed is a criminal justice system with sanctions for offending behaviour that are:

- Swift – that is, they follow speedily from apprehension to sanction within hours or days of the commission of a criminal offence, not weeks or months.
- Certain – so that there is a predictable and transparent consequence for offending behaviour, rather than the inevitable uncertainty and unpredictability of much of the current system.
- Proportionate – sanctions should be severe enough to prompt behavioural change. They should be perceived as a fair and reasonable response to the sanctioned behaviour.
- Where possible, sanctions should require behavioural change, rather than hope that such change flows from the process of punishment itself.

Swift and Certain

Swift and Certain programmes are designed to manage offenders more effectively on probation and community supervision by combining the three elements of swiftness, certainty and fairness. The original programme introducing this was founded by Judge Steven Alm, who started the ‘HOPE’ probation programme in Hawaii in 2004 that has transformed how offenders are dealt with.

HOPE uses a fundamentally different approach to traditional probation supervision by identifying high risk probationers who are most likely to violate their conditions of supervision and placing them under highly intense supervision. Proportionate jail time is imposed swiftly and with certainty, as a sanction for a positive drug test or other probation infractions. ‘Swift and Certain’ punishment for violating terms of probation sends a consistent message to offenders about personal responsibility and accountability. Research has shown that this swift response to an infraction improves the perception that the sanction is fair and that the immediacy is a vital tool in shaping behaviour. HOPE-style probation programmes are now operating in 17 other states across the US.

HOPE has seen a huge reduction in the volume of reoffending and breaches of participants, but also success in transforming the lives of prolific and often drug-abusing offenders. The results showed that:

- Positive drug tests were reduced by 83%.
- Missed appointments with the probation service were reduced by 71%.

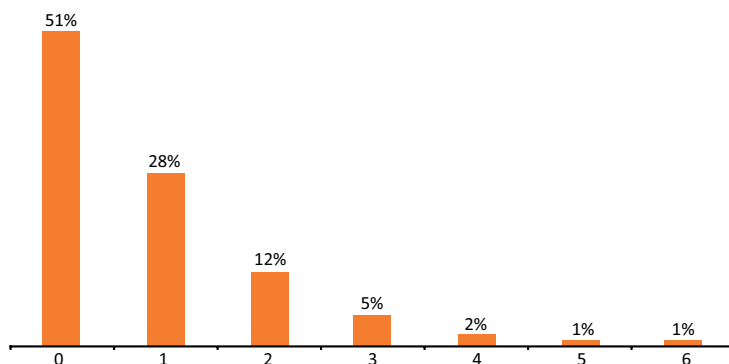
¹ A Summary of Findings on the Enforcement of Community Penalties from three Joint Area Inspections, HM Inspectorate of Probation, Courts Administration and Constabulary, 2007

- Non-HOPE participants were three times more likely to have their probation revoked.
- HOPE participants were 55% less likely to be arrested for a new crime.²

There are six key lessons that we must take from such Swift and Certain programmes in the US:

1. **Swift and Certain approaches deliver measurably better outcomes.** Evidence shows that such approaches deliver better rates of compliance with the requirements of community supervision and measurably improve downstream outcomes (such as reduced rates of conviction and reduced drug or alcohol use).
2. **Procedural fairness is critical.** Less than 10% of the HOPE participants expressed a negative view of the programme. Initial court hearings are clear about behavioural expectations and there is a clear link between non-compliance and sanction with a consistency of response. This reduces the opportunity for offenders to ascribe bias to the procedure.
3. **Evidence of non-compliance should be conclusive.** In Swift and Certain programmes, there is no requirement for a Probation Officer to exercise judgement as to whether a failure to comply is acceptable or not. The use of technology, such as drug tests or sobriety monitoring, provides reliable results to determine whether or not a breach occurred.
4. **A behavioural contract.** The HOPE project is based on an explicit behavioural contract between the court and the offender, with a particular approach from the judge to actively seek a positive outcome from the disposal and ensuring the offender completes the order.
5. **The use of custody does not necessarily increase.** Evidence shows that reductions in rates of non-compliance at least offset the use of custodial sanctions and the net use of custody remains static.
6. **There is an important shift of responsibility to the offender, referred to as 'behavioural triage'.** During the HOPE programme, the majority of participants test negative for drug use throughout, or have a small number of positive drug tests. However, there are a small number who test positive multiple times: this group of offenders are, in effect, triaging themselves into who does and does not require drug treatment.

Figure 1: Distribution of positive drug tests: HOPE programme



² www.nij.gov/journals/269/pages/hope.aspx

Barriers to implementation in the UK

Introducing Swift and Certain principles requires significant changes to the way in which our criminal justice system thinks and operates. In particular, it will require:

- Changes to the way in which magistrates and others involved in sentencing operate to create a new model with greater degrees of specialisation and increased flexibility.
- Changes in approach by offender managers responsible for ensuring compliance with community sentences.
- The encouragement of local ownership of innovation and the development of pilot approaches, rather than the a traditional approach of top-down change.
- Engagement of the new Community Rehabilitation Companies (CRCs) to develop new approaches for managing compliance with community sentences and the use of technology in support of it.

Making it happen

A new 'Conditional Behaviour Order'

This report proposes a new Conditional Behaviour Order ('CBO') as a new requirement for Community Orders, which would carry the promise of a Swift and Certain punitive response in the event of non-compliance. The CBO would specify certain behavioural requirements, such as drug testing, alcohol monitoring or GPS tagging to address the offender's pattern of offending behaviour. The CBO would also carry certain sanctions that would be specified at the point the order was made; these could be graduated and reflect the seriousness of the original offence. Such sanctions for non-compliance would be linked with the behavioural requirements of the order, such as abstinence from drugs or alcohol. Sanctions would be delivered immediately and consistently. Such an order would offer real opportunity to derive the benefits of Swift and Certain justice.

Breaches of probation

Community Orders: currently, breach of Community Orders (COs) cannot have an immediate custodial sanction but offenders can be re-sentenced on the facts of the original offence. Adopting a certain approach to such breaches would require graduated sanctions, such as a short custodial sentence where the nature of the original offence and circumstances of the breach warrant it, or the imposition of a new CO requirement such as a curfew order.

For Community Orders, the approach this report envisages would:

- Focus on prolific and priority offenders.
- Use drug and alcohol monitoring to underpin evidence of compliance.
- Require breach proceedings to be brought within 24 hours of detection to specialist courts dedicated to dealing with breaches of Community Sentences (and where possible with the same magistrate or judge).
- Use dedicated magistrates or judges for sentencing and breach.
- Use curfew orders where the circumstances of the original offence do not justify custody.

This report envisages a shift in the balance between the use of professional judgment in individual cases and the use of clearly defined criteria for non-compliance as reflected in ‘Swift and Certain’ programmes such as HOPE. This would need to be reflected in the guidance provided to the National Probation Service and Community Rehabilitation Companies for the enforcement of community sentences. This must specify that:

- Any failure to comply is unacceptable and will automatically lead to enforcement action.
- Breach cases would need to be prepared and submitted to the court within 24 hours of detection of non-compliance, which would be facilitated by clear evidence from monitoring and regular testing.

To successfully incorporate ‘Swift and Certain’ principles into a new vision for dealing with breaches of Community Sentences, the Ministry of Justice should:

- Work with one or more CRCs and Police and Crime Commissioners to scope and develop pilots to apply Swift and Certain principles to the enforcement of Community Orders using available technology to enforce compliance with drug or alcohol testing requirements.
- Develop new breach guidelines, reflecting the principles set out above.
- Work with HM Courts and Tribunals Service to establish dedicated breach courts and support processes in CRC areas undertaking the pilot.
- Recruit a small number of existing and new magistrates to sit in dedicated breach courts in the pilot areas and provide specialist training for them to undertake this new responsibility for Conditional Behaviour Orders.

Suspended Sentence Orders: the Ministry of Justice should also pilot a new approach to Suspended Sentence Orders in one or more Community Rehabilitation Company areas. Such an approach should:

- Be focused on prolific and priority offenders.
- Require the judge to take an offender-centred approach, taking a clear interest in the future behaviour of the offender and deal with all breaches from the relevant cohort of offenders.
- Use existing Suspended Sentence Order requirements, including drug and alcohol treatment, to provide a basis for monitoring the offender.
- Work with the National Probation Service to establish clear guidelines for breach action, to ensure that non-compliance is followed up quickly. Breach proceedings would be brought within 24 hours of the detection of non-compliance.
- Be based on short custodial elements of the SSO but offset by certainty of activation of the suspended element.

In the longer term, reform of the statutory framework for Community and Suspended Sentences will be necessary to derive the full benefit from the application of Swift and Certain principles for the enforcement of such sentences. The Ministry of Justice should:

- Pursue amendments to the Criminal Justice Act 2003 to introduce a standalone drug testing requirement to be attached to a Community or Suspended Sentence Order.
- Pursue amendments to the enforcement regime for community and suspended sentences such that the sanction for non-compliance is set by the court at the time of sentencing. Sanctions should include curfew requirements and short prison sentences of up to seven days.
- Seek amendment to the Alcohol Abstinence Monitoring Requirement to enable the same approach to enforcement.

The impact on the prison population

US experience suggests that the introduction of Swift and Certain principles will radically reduce the non-compliance rate for Community Orders and that a reduction in non-compliance rates of 50% is realistic and achievable. This might mean that the non-compliance rate for Community Orders might fall from the current figure of 23,000, to something like 12,000 offenders per year. If a graduated approach to sanctions is adopted, with around 50% receiving short curfew orders rather than use of custody, the total number of additional offenders receiving a short custodial sanction might be around 6,000 per year (or an increase of around 10% on the 2013 number of receptions for short sentences). If the reduction in non-compliance rates was less significant, say 25% rather than 50%, the total number of additional prison receptions per year would be around 8,500.

The introduction of Swift and Certain sanctions might therefore give rise to 6,000–8,500 additional very short custodial terms for offenders breaching Community Orders over the course of a year. If the average duration of a Community Order sanction was to be five days, the total number of offenders that would be required to be accommodated at any one time would be relatively small, between 90 and 110.

Long-term savings for the criminal justice system

Evaluations of the HOPE Programme have identified four clear indicators that implementing a successful 'Swift and Certain' model will result in savings across the criminal justice system in the long-term:

- HOPE probationers served or were sentenced to, on average, 48% fewer days in custody. This offers real opportunity for savings from the reduced incarceration of this group of probationers if such a programme is implemented in the UK.
- Swift and Certain programmes achieve better compliance rates with Community Orders, therefore offender managers will be required to spend less time engaging with offenders suspected of breaching their probation.
- HOPE probationers were 55% less likely to be arrested for a new crime after one year. This reduction in crime is likely to result in significant savings for all agencies across the criminal justice system.
- A flexible and targeted approach to drug treatment results in cost-efficiency, achieved through delivering intensive treatment to those who prove to need it, as opposed to an 'assess-and-treat' model.

A swifter criminal justice system

A new sentence will not be able to improve compliance and change offender behaviour alone. Our criminal justice system continues to process cases tremendously slowly. Currently, it takes an average of **158 days** for a criminal case to be processed,³ from an offence to completion. There has been little change in this figure over the last five years. It is time to find new ways to tackle the delays in the system.

Recommendations

Police Courts

As Policy Exchange has previously proposed, magistrates could administer much swifter justice after charge for offenders who plead guilty to low-level offences. To achieve this, the Home Office and Ministry of Justice should introduce new Police Courts, with magistrates sitting in, or nearby, police stations to deal with low level, guilty pleas where appropriate. This will considerably speed up the process of a significant amount of simple cases by hearing them on the spot rather than delaying dispensing justice simply for the case to be heard in a conventional courtroom. In the meantime, Police and Crime Commissioners should trial Police Court models in their local areas.

Fast track of Prolific and Priority Offenders

PPOs' consist of a small cohort of offenders who are known to commit a disproportionately large amount of crime. It is generally accepted that around 10% of the offenders in England and Wales are responsible for half of all serious crime.⁴ There is real scope to reduce the delay between apprehension and conviction and where 'Swift and Certain' principles could make a real difference, yet there continues to be a delay of more than two weeks to sentence these offenders. **To deal more quickly with PPOs, the Home Office and Ministry of Justice should introduce arrangements to fast track PPOs in magistrates' courts, utilising magistrates and/or District Judges to specialise in this cohort of offenders.** This report proposes that PPOs who plead guilty should be sentenced within 24 hours of the decision to charge.

³ Ministry of Justice, Court Statistics Quarterly, Main Tables April-June 2014 (Table 3.12)

⁴ Home Office, Criminal Justice: The Way Ahead, 2001

1

Introduction

This report examines whether it is possible to address the fundamental problems of delay in the criminal justice system and to deal very swiftly, in particular, with those individuals defined by the Justice system as Prolific and Priority Offenders, who cause significant damage to communities. It sets out an alternative paradigm which offers a fundamentally different approach for dealing with many offences.

The proposed new system would radically speed up the process between arrest and disposal for prolific offenders, ensuring that the response to such offences is direct and proportionate. This would go beyond achieving incremental improvements within the current summary justice system. In Part 7, this report sets out recommendations for improving the speed with which many offences are dealt with.

Justice delayed is justice denied has been a long standing if somewhat clichéd legal maxim that can be traced back to Clause 40 of the Magna Carta of 1215: “To no one will we sell, to no one will we refuse or delay, right or justice.” The principle being that, to offer effective redress, justice needs to be both sure and speedy. Redress that is delayed is, in effect, the same as no redress at all: it offends against instinctive values of justice. For this, and other reasons, the desire to speed up the criminal justice system has been a consistent theme for policymakers over the last 20 years. The problems were illustrated in a speech given by Damian Green MP, Minister of State for Policing and Criminal Justice, in February 2013:

“We know that the average time from offence to completion for indictable cases or those which can be tried in the magistrates or Crown Courts is 149 days, and this rises to 177 days for summary motoring cases. That means cases like burglary take almost 6 months from the time when the offence is committed to when they are completed.

“And even those criminal cases taking the shortest amount of time – theft and handling of stolen goods – took nearly three months to be resolved. In fact, some defendants will have spent more time waiting for a verdict or sentence than they will spend serving the sentence given.”⁵

In its 2012 White Paper, the Government identified the goals of the criminal justice system as being to deliver a swift and sure system of justice, which is more transparent, accountable and responsive to local needs.⁶ The White Paper argued that:

*“Justice needs to be **swift** if it is to be effective. Offenders need to be made to face the consequences of their actions quickly, using effective, locally-based solutions.”*

⁵ www.gov.uk/government/speeches/criminal-justice-reform-lecture

⁶ *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, Ministry of Justice, Cm 8388

The White Paper then set out a range of measures designed to ensure that the system was better at delivering such outcomes, including fast-tracking guilty pleas in the magistrates' courts, police-led prosecutions in some cases and more flexible court sitting arrangements.

The White Paper also argued that justice, as well as being swift, needs also to be sure:

*“Justice must also be **sure**, in the sense of commanding public confidence, if it is to provide an effective punishment and deterrent. Criminal justice services must do more to get a firm grip on offenders, making them face up to the consequences of their crime.”*

The question that this report addresses is whether, for much of the crime and anti-social behaviour which affects communities, the criminal justice system is capable of the speed of response that is necessary both to maintain community confidence in the system and, more importantly, to get the “firm grip” on offenders the Government wants to see. The policy imperative to develop speedier justice has been right, but has it gone far enough?

“The policy imperative to develop speedier justice has been right, but has it gone far enough?”

This report considers both whether the system is capable of providing a speedy response to offending in the first instance, that is whether there are ways of reducing the time taken between the commissioning of an offence and the criminal justice system's primary response, and how the system responds to further offending by those already subject to court-imposed sanctions.

There is an alternative sanction and punishment paradigm which is examined in this report. This paradigm is based on a much more immediate link between behaviour and consequence where criminal or anti-social behaviour is followed with genuinely Swift and Certain consequences. This new approach to punishment draws from the experience of programmes such as the HOPE probation programme in the USA and on the evidence from behavioural psychology of the effectiveness of responses to behaviour.

2

The Criminal Justice System – Slow and Unresponsive

The aims of the criminal justice system are, as defined by the Government:⁷

- **To prevent crime and protect victims:** providing an effective deterrent to crime.
- **To be responsive:** responding swiftly and effectively when crime does take place, so that offenders are quickly made to face the consequences of their actions.
- **To punish and reform:** ensuring that offenders are punished, and supported to reform.

Currently, the summary justice system, the magistrates' courts and out of court summary disposals, which are designed to respond to most criminal and anti-social behaviour, fail more often than not on the first two counts. On the third, the Government's welcome reforms to drive rehabilitation and action to reduce re-offending through the correctional services (for example, by the use of payment by results based approaches) have made real headway. But, on its own, this is insufficient.

As the Swift and Sure Justice White Paper acknowledged:

*"Too often we see offenders who, rather than having been on the receiving end of swift justice, have waited months to be brought before the courts during which time they have committed a string of other offences which need to be prosecuted."*⁸

The White Paper also acknowledges that the greatest deterrent to crime is not the severity of the possible punishment, but the likelihood of being caught.⁹ The issues of timeliness and deterrence are also inextricably linked. There is little point apprehending an offender quickly if the consequences of that apprehension, that is the punitive or other implications of a conviction, follow after so much time that they have no obvious link, in the mind of the offender, with the offending behaviour which they flow from. What is more, many prolific offenders will have committed such a volume of offences between the commission of the index offence and final conviction they may not even remember for which offence they are being punished.

One cannot expect the most serious offences, tried at the Crown Court, necessarily to be dealt with swiftly. Complex trials inevitably take time. But for summary offences, those dealt with by magistrates' courts and constituting the vast majority of offences (around 95% of criminal proceedings are started and concluded in the magistrates' courts) the process is often glacial.

⁷ Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System, Ministry of Justice, Cm 8388
Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System, Ministry of Justice, Cm 8388

⁸ Ibid

⁹ Green Paper Evidence Report, Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, Ministry of Justice, 2010

In all criminal cases, whether in magistrates' courts or the Crown Court, the stage in the process which takes the longest average (mean) time to process is that between charging an offender and summoning them to court. For all criminal cases the average time from offence to conviction (from the beginning of the process to the end) in the latest published data¹⁰ was 158 days. Of that time, on average (mean):

- 94 days elapsed between the date of the offence and the date the defendant was charged or the laying of information.
- 33 days elapsed between the date the defendant was charged or the laying of information and the first listing of the case in a magistrates' court.
- 30 days elapsed between the first listing of the case in a magistrates' court and the final completion of the case in either a magistrates' court or the Crown Court.

For criminal cases concluding in magistrates' courts between April and June 2014, the average (mean) offence to completion time for all criminal cases was 148 days.

Processes that take this long from the commission of a crime to conviction and punishment cannot, by any reasonable definition, be said to be responsive. It does not react swiftly and effectively to crime and offenders are not promptly brought to face the consequences of their actions.

Conclusions

It is a long-established principle that justice – particularly summary justice in the magistrates' courts – should be swift and effective. A slow response to individual offending is less likely to deter, influence future behaviour and give the public confidence that the criminal justice system works to tackle offending and reduce crime.

In Part 4, this report sets out the characteristics of an effective system of sanctions for behaviour, based on the principles of swiftness and certainty and Part 5 assesses how these have been applied in practice.

¹⁰ Court Statistics Quarterly April – June 2014, Ministry of Justice, 2014

3

Community Sentences – Breach and Sanctions

Most offenders are punished in the community, either by financial penalties or through the use of community sentences: Community Orders (COs) and Suspended Sentence Orders (SSOs). The CO and the SSO were introduced by the 2003 Criminal Justice Act (effective in 2005), replacing previous arrangements for sentencing offenders in the community.

The Community Order replaced the range of community sentences previously available with a single sentence. The Suspended Sentence Order brought in a custodial sentence to be served in the community unless breached. The Centre for Crime and Justice Studies states that the three aims of the changes were to reduce the use of short-term custody, to tackle up-tariffing (imposing harsher sentences) and to tailor community sentences to individual offender need, none of which, it believed, had been met in practice.¹¹

COs may be imposed in magistrates' courts or in the Crown Court and are served wholly in the community. They are supervised by the National Probation Service (for high risk offenders) and by Community Rehabilitation Companies (for low and medium risk offenders). COs require the offender to comply with the terms of the Order and the requirements set by the Court (see below). They may run for a maximum duration of two years.

SSOs are legally custodial sentences, in which activation of the suspended term of imprisonment is dependent on compliance in the community with the requirements imposed by the Court. The twelve requirements that may be imposed under an SSO are essentially the same as those for a CO, and include:

- **Rehabilitation Activity**, introduced by the Offender Rehabilitation Act 2014, introduces a requirement to engage in activities, as determined by the offender's supervising officer, designed to rehabilitate. The content of the Rehabilitation Activity requirement will largely be determined by Community Rehabilitation Companies following the Government's Transforming Rehabilitation programme.
- **Unpaid Work**, also known as Community Payback, for up to 300 hours.
- **Curfew**, a requirement to be at a designated address between specified hours, enforced by electronic monitoring.
- **Programme**, a requirement to undertake one of a number of accredited behavioural programmes, designed to reduce the risk of re-offending.
- **Mental health treatment**, provided by specialist mental health providers and requiring the offender's consent.

¹¹ Centre for Crime and Justice Studies, An unsurprising disappointment? Helen Mills www.crimeandjustice.org.uk/publications/cjm/article/unsurprising-disappointment

- **Drug rehabilitation**, the offender agrees to undertake a programme of drug rehabilitation, usually accompanied by regular drug testing.
- **Alcohol treatment**, the offender agrees to undertake a programme of alcohol treatment, delivered by a specialist provider.
- **Prohibited activity**, for example being banned from entering a licenced premises.
- **Exclusion**, being banned from entering a specific place.
- **Residence**, a requirement to live at a specific address, often probation Approved Premises.
- **Attendance centre**, for offenders aged under 25 a requirement to attend at specific times, usually at weekends, to undertake activities.
- **Restrictions on travel abroad.**

Community Orders and Suspended Sentence Orders, taken together, are the most common sentencing disposal for indictable offences (more serious offences, which are triable only in the Crown Court) and for summary offences (those triable in the magistrates' courts) they are by far the most common disposal other than a fine. In the year to March 2013:

- For indictable offences
 - 10% of offenders received a Suspended Sentence Order.
 - 26% of offenders received a Community Order.
 - In comparison, 27% received a custodial sentence.
- For summary non-motoring offences
 - 2% of offenders received a Suspended Sentence Order.
 - 11% of offenders received a Community Order.
 - In comparison, 3% received a custodial sentence.¹²

In total, slightly fewer than 182,000 offenders received either Community or Suspended Sentence Orders in the year to March 2013. Community and Suspended Sentence Orders are a critical component of the justice system's response to offending. They are used almost as frequently as custodial sentences for more serious (indictable) offences and, aside from fines, are the most common disposal for summary non-motoring offences.

Enforcement and breach

Effective enforcement of Community and Suspended Sentence Orders is essential to encourage offender compliance with those Orders and to maintain public and sentencer confidence in the use of community sentences. There are three problems: first that the orders may not relate to the factors that contribute to the offending, for example mental health problems or alcoholism; second that reaches of the orders are inconsistently enforced, partly due to the role of the discretion of offender managers in enforcement action and despite the increased emphasis on enforcement in recent years; and third that attempts to enforce the orders are met with bureaucratic delay that damages their effectiveness.

On the design of the existing Community Orders and Suspended Sentence Orders, the Centre for Crime and Justice Studies found that half of the requirements that could be made were rarely used. They suggest several reasons for this:

¹² Criminal Justice Statistics Quarterly Update to March 2013, Ministry of Justice, 2013

“...[S]ome theoretically available requirements are still not able to be imposed in some areas due to limited resources (the alcohol treatment requirement is a particular area of perceived unmet need in this regard), some are difficult to impose (the mental health treatment requirement), and there are reservations about what some requirements can meaningfully deliver (for example, how will prohibited activities or exclusion requirements be effectively monitored?).”¹³

On enforcement, the current regime has, in fact, become significantly more rigorous over the last 20 years. Enforcement action, in the form of breach proceedings, is taken relatively frequently:

- Around two thirds of offenders on Community or Suspended Sentence Orders completed their sentence successfully in 2013.¹⁴
- In 2013, 13% of Orders were terminated early by a court as a result of failure to comply with the requirements of the Order.
- In 2013, 12% of Orders were terminated early by a court as a result of conviction for a further criminal offence.¹⁵

The Government has acknowledged the importance of effective enforcement, both as a means of ensuring confidence in the delivery of community sentences, and to make sure that such sentences are sufficiently rigorous and punitive. For example:

*“Unless terminated early for good progress, Community Orders must run their full course if they are to achieve their purpose of rehabilitating and punishing offenders: at present about two thirds of Community Orders run their full course or are terminated early for good progress. In other cases, offenders will be returned to court for breach action. Offenders need to understand that failure to comply with their sentence will be properly dealt with.”*¹⁶

But, despite this progress, the enforcement process remains flawed because:

- As indicated above, it relies, to a very significant degree, on the judgement of offender managers (probation officers and other probation staff), in particular as to whether the behaviour of an offender warrants enforcement action or not.
- There are often long delays in seeking breach action and in the completion of the required court proceedings.

The procedures for taking enforcement action against an offender subject to a Community or Suspended Sentence Order are set out in the Ministry of Justice Probation Instruction PI06/2014.

The process required by the Probation Instruction – which applies to high risk cases managed by the National Probation Service and to low and medium risk cases now managed by Community Rehabilitation Companies – provides that:

*“On the first unacceptable failure to comply with a requirement of their Community Order or SSO issue, a warning or if in the judgement of the Offender Manager the breach is serious enough then breach proceedings should be commenced.”*¹⁷

The Instruction leaves the definition of “unacceptable” to the judgement of the Offender Manager. It similarly leaves the matter of seriousness to the judgement

13 The Centre for Crime and Justice Studies, *An Unsurprising Disappointment?*, Helen Mills

14 Offender management statistics (quarterly) – October–December 2013, Ministry of Justice

15 *Ibid*

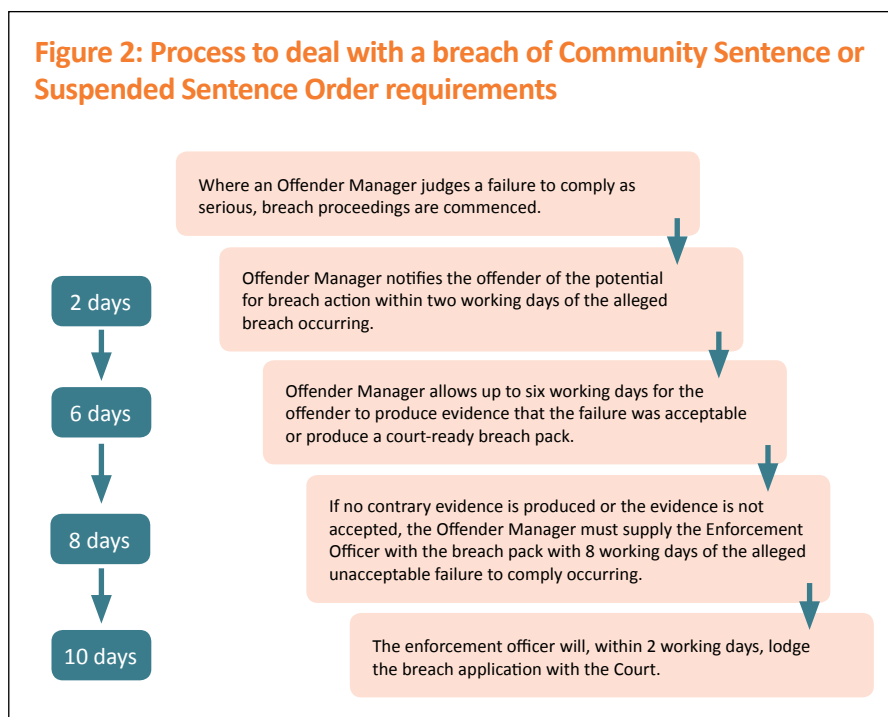
16 *Punishment and Reform: Effective Community Sentences*, Ministry of Justice, 2012, p20

17 PI06/2014 Enforcement of Community Orders and Suspended Sentence Orders, Ministry of Justice, paragraph 1.7

of the Offender Manager. Not surprisingly, the National Audit Office (NAO) in 2008 found significant variations in the number and types of absences which were judged by Offender Managers to be acceptable. The NAO report noted:

“We identified the sorts of reasons accepted by Offender Managers for absences during our case file review: nine per cent involved an offender forgetting their appointment or sleeping in and 11 per cent were due to self-certified sick note. Four per cent of reasons were accepted because the Area itself may have been at fault, for example Offender Managers were unavailable or an appointment letter had not been sent. Other reasons accepted included the order having less than a week to run and the offender having a positive attitude.”¹⁸

The Instruction then sets out the timescales within which breach action must be initiated and actioned by Offender Managers.



In total, it can take up to 10 working days for a violation of the terms of a Community or Suspended Sentence Order to be translated into breach action and for an application to be made to the Court. However, the delays do not stop there. The Court needs to list and hear the breach application, a process that can add at least a further week (five working days) to the breach process. In aggregate, and with a fair wind, it will take around 25 working days – five weeks – between a decision to initiate breach action and the completion of proceedings in court. But it can, and does, often take much longer. A joint inspection by the Inspectorates of Probation, Courts Administration and Constabulary in 2007¹⁹ found that:

- On average, it took 21 days from the Offender Manager initiating breach action to a first hearing in court.
- 43% of breach cases were dealt with at the first hearing.
- 49% of breach cases were dealt with within 25 days.

18 National Probation Service – The supervision of Community Orders in England and Wales, Report by the Comptroller and Auditor General, HC203, 2008, p21

19 A Summary of Findings on the Enforcement of Community Penalties from three Joint Area Inspections, HM Inspectorates of Probation, Courts Administration and Constabulary, 2007

- The average end-to-end time elapsed from initiation to the completion of breach action was 53 working days.

The response by the Courts to breach applications varies significantly. The Centre for Social Justice found,²⁰ for example, that breaches of Suspended Sentence Orders resulted in a custodial sanction in 18% of cases in Lancashire, but 80% in Nottinghamshire.

Conclusions

In terms of effectiveness, Community and Suspended Sentence Orders are something of a curate's egg:

- Re-offending rates for offenders on Community or Suspended Sentence Orders are lower than for short-term prison sentences (6.4 and 8.9 percentage points lower respectively²¹).
- But the one-year re-offending rate for Community and Suspended Sentence Orders combined was nearly 34% between July 2011 and June 2012.²²
- Around one in three offenders fail to complete a Community or Suspended Sentence Order.
- Public confidence in community sentences is undermined by relatively high breach and re-offending rates.²³

The flaws in the current arrangements remain significant. The response to non-compliance with Court and Suspended Sentence Orders remain heavily reliant on the judgement of Offender Managers; they are subject to significant delay between non-compliance and court ordered sanction and attract considerable variation in eventual outcome. This is not a recipe for cementing public confidence in community sentence as an effective response to crime nor is it the right way to ensure that offenders are faced swiftly and robustly with the consequences of their actions.

In Part 4, this report describes an alternative model for the enforcement of community sentences that replaces variability with certainty of outcome and delay with speed of response.

20 Sentences in the Community: Reforms to restore credibility, protect the public and cut crime, Centre for Social Justice, 2014

21 2013 Compendium of Re-offending Statistics and Analysis, Ministry of Justice, 2013

22 Proven Re-offending Statistics Quarterly Bulletin – July 2011 to June 2012, Ministry of Justice, 2014

23 Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, Ministry of Justice, 2010, p6

4

The Psychology of Sanctions

There is a compelling body of evidence to show that the behaviour of offenders is influenced most profoundly by the speed with which sanctions are delivered and the certainty with which they will follow offending behaviour. As the economist Mark Kleiman has noted:

“Way back in the eighteenth century, Cesare Beccaria – the Italian criminologist from whom Jeremy Bentham borrowed not only the term “utility” but many of his ideas for criminal-justice reform – identified three characteristics that determine the deterrent efficacy of a threatened punishment: its swiftness, its certainty, and its severity. Of the three, severity is least important. If punishment is Swift and Certain, it need not be severe to be efficacious. If punishment is uncertain and delayed, it will not be efficacious even if it is severe.”²⁴

Beccaria’s eighteenth century philosophical conclusions are supported by contemporary evidence from behavioural psychology and from economics. In particular:

- Young people, during adolescence, are more likely to engage in risky or reckless behaviour (including offending behaviour) in part because of a tendency to under-estimate the negative consequences of the behaviour (“it won’t happen to me”) and to value the short-term “sensation seeking” rewards over the longer term (and uncertain) negative consequences.²⁵ If punishment is uncertain, if there is a chance that the offender “will get away with it” or if it is perceived to be so far in the future that its consequences are far outweighed by the immediate rewards of offending behaviour, then it is likely to have little impact on individual actions.
- Offenders, particularly those who commit prolific relatively minor crimes, tend to be impulsive, reckless and short-term oriented. The potential consequences of punishment at some unspecified future time, and with unpredictable severity, may not weigh heavily on an offender’s mind. These tendencies are exacerbated in the case of offenders who habitually use drugs, where decision making is often wholly skewed towards the gratification of immediate needs.
- Economic models of crime and punishment show that, for rational economically-driven offenders, the longer the potential delay between the commission of an offence and any downstream punishment, the greater the “cost” of that punishment is likely to be as discounted against the value derived from the commission of the criminal offence.²⁶

²⁴ M Kleiman, Smart on Crime, Democracy, Issue 28, 2013

²⁵ J Arnett, Reckless Behaviour in Adolescence: A Developmental Perspective, Developmental Review 12, 1992

²⁶ M L Davis, Time and Punishment: An Intertemporal Model of Crime, Journal of Political Economy, Volume 96, No 2, 1988

- A degree of excessive present-orientation and excessive discounting of the risk of large losses, is normal in any person.²⁷ In other words, we all tend to think more about what will happen in the very near future and to underestimate the risk of very severe consequences for our behaviour. Slow and uncertain punishment simply exacerbates this apparently normal tendency.
- And, as James Q Wilson has noted, there are strong parallels with simple and effective parenting strategies. As every parent of a small child knows, behaviour needs to be tackled immediately and the link between action and consequence needs to be clear. No sensible parent would try to control a child's behaviour by imposing tiny risks of unpleasant punishments at some unspecified point in the future.²⁸

In summary, the evidence strongly suggests that:

- Reckless or offending behaviour is not deterred by something that might happen, even if the possible consequences are severe.
- Offenders, who may be highly impulsive and focused on short-term goals are less likely to be concerned about possible punishments that may lie several weeks or months down the line, if the short-term goals from their behaviour are gratifying.
- The discounting of future risks, and the uncertainties surrounding court processes, enable offenders, right up to the point of conviction and sentence to believe that "it might not happen to them."
- Delay between the commission of an offence and punishment makes it far less likely for an offender to link action and consequence and for future punishment to be discounted in favour of short-term gratification.

There is a need for a clear, fair and effective system to set boundaries and develop incentives for those who lead chaotic lives, as many offenders do. According to Kleiman:

"...[T]hat's consistent with his [the offenders'] entire life experience; the random nature of the system simply reproduces the sporadically severe discipline he likely received at home and the chaotic conditions in his social environment. His whole life has been spent having very little control over what happens to him, with only a weak correlation between his current behaviour and consequences."²⁹

In addition, much of the current system does little to engage with offenders and secure positive changes in behaviour. It remains relatively easy for those committing relatively minor crimes to treat the costs of conviction as an occupational hazard and for them to have little impact on the offender's future behaviour.

There are, however, ways in which sanctions in the criminal justice system might be used to change behaviour more directly. There are, broadly, two approaches (which are not mutually exclusive) to making the criminal justice system's impact on individual behaviour more direct:

- By building opportunities for rehabilitation into the structure of the sentence, such as the Rehabilitation Activity Requirement introduced into Community

27 M Kleiman, Smart on Crime, Democracy, Issue 28, 2013

28 A Hawken, HOPE for Reform, www.prospect.org/article/hope-reform

29 M Kleiman, A New Role for Parole, Washington Monthly, 2013

Orders by the Offender Rehabilitation Act 2014. That is, to punish with the hope of securing future behaviour change.

- By making the imposition of future sanctions conditional on the offender abstaining from certain specified behaviours (for example using drugs or alcohol). That is, to require behaviour change, with the possibility of future further sanction if the original offending behaviour is repeated.

Recent developments, such as the Government's Transforming Rehabilitation programme, have emphasised the first approach. There is evidence, as set out here, that firmly linking behaviour change with Swift and Certain sanctions can pay dividends in improved compliance and reduced re-offending. This should be the basis for further reform of our criminal justice system.

All of the evidence on the impact of sanctions on behaviour suggests that we need a criminal justice system with sanctions for offending behaviour which are:

- **Swift** – that is, they follow speedily from apprehension to sanction and within hours or days of the commission of a criminal offence, not weeks or months.
- **Certain** – there must be a predictable and transparent consequence for offending behaviour, rather than the inevitable uncertainty and unpredictability of much of the current system.
- **Proportionate** – sanctions should be severe enough to prompt behavioural change. They should be perceived as a fair and reasonable response to the sanctioned behaviour.
- Where possible, sanctions should **require behavioural change**, rather than hope that such change flows from the process of punishment itself.

Swift and Certain punishment, rather than increasingly severe responses, brings other potential benefits. Not least because severity has cost implications for the state: one of the recurring equations facing any Justice Secretary is the impact any new criminal offence, or any increase in available sentences, might have on the prison population. The more severe a response, the more direct the expense to the state and the less often it can be used.

The next chapter describes how systems based on Swift and Certain punishment currently work in practice.

5

Swift and Certain in Practice

Swift and Certain programmes have been introduced in 18 states in the USA. Designed to manage offenders more effectively on probation and other forms of community supervision, they seek to combine the three elements of swiftness, certainty and fairness.

Table 1: Features of a Swift and Certain justice system

Swift	Violations of the terms of probation or other community supervision are dealt with quickly. The offender is often brought before a judge on the day of the violation and an order made to vary or revoke the terms of the original order. The violation will commonly be dealt with by way of a short period (two or three days) in jail. ³⁰
Certain	<p>The potential sanctions for breach are made clear at the beginning of the period of supervision and behavioural expectations are clearly spelled out. Sanctions for non-compliance are <i>always</i> imposed. There is a clear link between simple to understand, clearly elucidated, rules and uniformly applied consequences for breaching them.</p> <p>Certainty of sanction requires similar hard evidence of violation of the conditions of supervision, so decisions often rest on evidence of GPS tracking, real time monitoring of sobriety or other objective evidence of non-compliant behaviour.</p>
Fair	<p>Fairness is central to the maintenance of confidence in the criminal justice system and sanctions which are considered to be fair by the offender are more likely to be complied with.</p> <p>Fairness has two dimensions:</p> <ul style="list-style-type: none"> • Fairness of process: offenders are more likely to comply with sanctions where they consider the outcome to have been the result of a process or procedure that is fair. This perception of fairness may be driven by the opportunity to put their side of a case, or equally by a clearly perceived and fair link between action and consequence. • Proportionality: the sense that the sanction is deserved and reflects the seriousness of the offence.

The HOPE programme

Hawaii's Opportunity Probation with Enforcement was developed in 2004 by Steven Alm, a state court judge in Honolulu, as an alternative to the existing probation system in the US.

Probation is a long-standing feature of the US criminal justice system and is found in every state but compliance with the regime is patchy, at best. Approximately one-third of offenders placed on probation ends up in prison or absconds.³¹

As in the UK, probationers in the traditional US system are subject to a number of restrictions on their behaviour and to the supervision of a probation officer and the sentencing court. Typically, a probationer must avoid any further crimes, remain

³⁰ Hawken, A & Kleiman, M, Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE, National Institute of Justice, 2009

³¹ Larkin, P, The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform, The Heritage Foundation, 2014

employed, pay any fine and, typically, is required to attend an appointment with his or her probation officer each month. The probation officer can deal with non-compliance with any of the conditions of probation by bringing the offender before the judge who placed the offender on probation, with the ultimate threat of revocation of probation and imprisonment.

“This system has neither the confidence of the public, nor the ability effectively to influence the behaviour of offenders subject to probation”

But this system has neither the confidence of the public, nor the ability effectively to influence the behaviour of offenders subject to probation. According to Paul Larkin:

“Underfunding of probation departments and overcrowding in prisons, however, have had unfortunate consequences. For example, probation officers have unduly large caseloads, and the work necessary to establish a case for revocation is considerable, which in turn forces officers to delay seeking revocation until a probationer has committed numerous offenses. Probationers who do not show up for monthly meetings can be arrested, but local police departments treat bench warrants as a very low priority. It also can take three or four weeks before a trial judge holds a hearing on a revocation request. Even then, the judge might decide that the offender should receive another chance to turn his life around or that prisons are too overcrowded to hold an offender for a mere probation violation.”³²

This model of probation inadvertently therefore creates a situation in which:

- Violations of probation conditions do not receive a consistent or timely response.
- A significant proportion of violations do not generate any kind of sanction from the authorities.
- There is little or no predictable link between action and consequences, but offenders know that they have a good chance of escaping any sanction for multiple violations of their parole conditions.
- The number of violations, and therefore the number of crimes committed by probationers, is driven by a vicious spiral. Unsanctioned violations increase the chances of further violations by the same offender.

Judge Alm’s response was simple:

“HOPE is based on the idea that the most effective way to reduce drug use and crime among drug-using offenders is to lay out clear expectations for drug-free behaviour and then to back up those expectations with tight monitoring linked to swift and certain but relatively mild punishments.”³³

HOPE replaces the unpredictability of traditional probation approaches with the certainty necessary for effective behaviour management. HOPE was designed initially to target offenders who were habitual users of methamphetamine – a significant and growing population across the United States. Around 25% of offenders on probation in Hawaii, and across the US, are serving sentences for drug-related offences.³⁴ Across the US, failure rates for probationers have consistently been high, consistently only around 35% of offenders successfully complete a probation programme.³⁵ According to Larkin:

³² Larkin, P.

³³ DuPont, R L, HOPE Probation: A Model that Can Be Implemented at Every Level of Government, Institute for Behaviour and Health, 2013

³⁴ US Department of Justice, Probation and Parole in the United States 2012, 2014

³⁵ Ibid

“Judge Alm decided to subject a small group of methamphetamine users on probation to weekly drug testing, using on-the-spot testing kits to avoid laboratory delay. Every probationer testing positive or failing to appear for drug testing would be taken into custody immediately. The probation officer would complete a standardised form containing the probationer’s name, details about the violation, and if there was a positive drug test, the drug involved. Shortly afterward, he would hold a probation modification hearing focused on the test results.

“Judge Alm would sentence every probationer found to have tested positive to a brief (e.g., 72 hours, seven days) term of confinement in the local jail, after which the probationer would be released and the process started again. Immediate imposition of a moderate penalty on every offender who violated a condition of his release, Judge Alm believed, would have a far greater deterrent effect than random probation revocation would.”³⁶

How it works

HOPE has expanded from an initial focus on a relatively small number of methamphetamine users to cover a caseload of around 2,200 offenders. For the whole caseload, the approach is the same. If an offender on HOPE fails a test for drugs or alcohol or misses an appointment with their probation officer, but then later hand themselves in, they are immediately sent to jail for two or three days. These short spells can be used several times before a lengthier term of imprisonment results for continued failure. If an offender fails to appear for a drug test or for a probation appointment and it is necessary to issue a bench warrant for their arrest, they receive a sentence of at least 30 days imprisonment.

Table 2: Typical sentences for probation violations

Circumstances of violation	Typical sentence
Violation admitted	3 days
Violation denied or delayed admission	15 days
Warrant for arrest issued	30 days

Drug testing

For drug-using offenders, once selected to participate in HOPE, they are assigned to a colour group that corresponds to a required frequency of drug testing. HOPE offenders are required to call an automated drug testing hotline every morning, and if their colour is selected for the day and announced on the hotline, they are required to report for drug testing before 2pm that day. Arrangements are made to test early in the morning for those participants in employment (6.30am). At the outset, offenders are usually tested at least six times per month but, over time, the frequency of drug testing may reduce. Offenders are rewarded for compliance, for example, by a reduction in the duration of their period of probation supervision, and negative drug tests can result in an assignment of a new colour associated with less-frequent testing.³⁷ In summary, HOPE is built on the following components:

³⁶ Larkin, P

³⁷ Program Profile: Hawaii Opportunity Probation with Enforcement (HOPE), National Institute of Justice 2013

1. Monitoring of compliance with probation terms, and in particular randomised drug testing, with the randomisation implemented through a call-in “hot line.”
2. A guaranteed sanction, usually a few days in prison for a first violation, escalating with subsequent violations.
3. A clear set of rules or behavioural contract.
4. An initial warning in open court at which the judge impresses on each offender the importance of compliance and the certainty of consequences for noncompliance.
5. Prompt hearings (most are held within 72 hours) after violations.
6. Compulsory drug treatment only for those who repeatedly fail, as opposed to universal assessment and treatment.
7. Capacity to find and arrest those who fail to appear voluntarily for testing or for hearings.³⁸
8. Accepting responsibility for your actions is rewarded; a participant will be given a less severe sanction if they admit to the violation rather than denying responsibility.

Success of HOPE

The evidence is that HOPE works. Extensive evaluation of the programme has shown:

- An 83% reduction in the rate of positive drug tests.
- A 71% reduction in the rate of missed appointments.
- That non-HOPE participants are three times more likely to have their probation revoked.
- That HOPE was neutral in terms of the use of custody. Although a short period of custody was certain for violations, increased compliance meant that overall custody days used remained unchanged.
- That HOPE participants were 55% less likely to be arrested for a new crime.³⁹

Replicating HOPE

The HOPE approach has been replicated in a number of other US states.

SWIFT

The **SWIFT programme (Supervision With Intensive Enforcement) in Texas** has adopted a broadly similar approach.

As with HOPE, offenders on the SWIFT Programme have clear behavioural expectations and a clear regime of sanctions (on entering SWIFT, offenders are given a document which details the sanctioning scheme, an offender who commits a violation knows exactly what the consequences will be). Unlike HOPE, the SWIFT programme uses hair samples to test every three months for illegal drug use. While HOPE relies exclusively on custodial sanctions, SWIFT uses progressive sanctions (including community service hours, increased reporting requirements, additional fines and custody). Importantly, SWIFT makes greater use of positive incentives than HOPE. The only positive incentive given under HOPE in response to demonstrated compliance is reduced Probation Officer contact and less frequent drug testing. SWIFT has more incentives for good behaviour, including reductions in supervision hours and in some cases, early termination from probation.⁴⁰

³⁸ Hawken, A & Kleiman, M., *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*, 2009

³⁹ McEvoy K, National Institute of Justice, *Journal No. 269*, March 2012, *HOPE: A Swift and Certain Process for Probationers*

⁴⁰ Hawken, A., Davenport, S. & Kleiman, M., *Managing Drug-Involved Offenders*, 2011

Washington State’s Swift and Certain approach started in 2011. The **Washington Intensive Supervision Program (WISP)** manages offenders with longer and more serious criminal histories than HOPE, partly since WISP targets offenders on parole rather than those on probation. But the programmes are essentially similar, with clear behavioural expectations and certainty about sanctions for violation. Like HOPE, the sanctions involve short, but certain, periods of imprisonment.

Success of the SWIFT Programme

Evaluation of SWIFT showed results similar to those found for HOPE. Compared to a matched comparison group, subjects in SWIFT were:

- Significantly less likely to violate the terms of their probation.
- Half as likely to be revoked.
- Half as likely to be convicted for new crimes.⁴¹

Evaluation results are equally positive with participants in WISP two-thirds less likely to test positive for drug tests.⁴² As with HOPE, implementation of a Swift and Certain approach has led to reduced use of prison, with WISP participants spending half as much time, per head, in custody compared to a control group.⁴³ The programme also achieved a statistically significant reduction in re-offending rates.⁴⁴

The success of WISP has led to a decision to apply Swift and Certain principles on a state-wide basis. The programme now covers around 17,000 offenders supervised from 113 field offices.

24/7 Sobriety

South Dakota initiated the Sobriety 24/7 programme in 2005 as a response to the highest drunk driving and road traffic death rates in the US (at the time, South Dakota had one of the highest DUI rates in the nation, with 21.6% of adults admitting to having driven while drunk). The programme requires total alcohol and drug abstinence from participants and has shown that a frequent testing regime and immediate punishments can produce periods of sobriety, even from chronic alcoholics.⁴⁵

Most offenders subject to Sobriety 24/7 are multiple drink-drive offenders and are referred to the programme either as part of a suspended sentence or as a condition of parole. Because of the speed at which alcohol clears the system, programme participants are either tested twice daily with urinalysis or breathalysers, or continuously through ankle bracelets using transdermal monitoring, which samples an individual’s skin for the presence of alcohol every thirty minutes.

The bracelet stores and records the test results that are collected throughout the day. At a pre-determined time, the transdermal test results are then uploaded via a base station which is connected to a telephone line or a mobile adaptor. If offenders do not have a telephone line, they can report to their supervising agency to have the data collected periodically.

Violations are dealt with extremely quickly. In cases monitored with breath or urine testing, programme participants are required to report every day at 7am and 7pm to be tested. Any participants testing positive are immediately taken

41 Ibid

42 Ibid

43 Hawken, A. and Kleiman, M., Washington Intensive Supervision Program: Evaluation Report, 2011

44 Ibid

45 Hawken, A., Davenport, S. & Kleiman, M., Managing Drug-Involved Offenders, 2011

into custody and brought to court; missed tests result in the immediate issue of a warrant. First violations typically result in one night in custody.

The impact of the programme has been extraordinary.

Success of 24/7 Sobriety

- Two-thirds of programme participants subject to breath tests do not violate the terms of the programme and only 7% violated twice.
- 78% of participants subject to transdermal monitoring remain wholly abstinent from alcohol during the programme.⁴⁶
- The three-year re-offending rate for repeat drink driving offenders (those with two or more previous convictions) fell by around 50% compared to a matched sample.
- Introduction of the programme across the state led to a 12% reduction in drink driving arrests and a 9% reduction in incidents of domestic violence.⁴⁷

Lessons from Swift and Certain programmes in the USA

1. **Swift and Certain approaches deliver measurably better outcomes.** The evidence from the US experience is that approaches based on Swift and Certain principles deliver better rates of compliance with the requirements of community supervision and measurably improved downstream outcomes (whether these are reduced rates of conviction, reduced drug use or other outcomes). And in the case of HOPE, although the sanctions regime relies on short periods in custody to respond to non-compliance, the evidence appears to show that the net use of custodial places is unchanged due to the improvements in compliance rates. In each of the US examples, expectations of programme participants is clear, there is a robust monitoring regime and sanctions are clear, transparent and effected quickly.
2. **Procedural fairness is critical.** The HOPE results are dramatic, with less than 10% of participants expressing a negative view of the programme. This is almost certainly because:
 - Initial court hearings are clear about behavioural expectations, but are pitched so that participants understand that the court wants them to succeed.
 - There is a clear link between non-compliance and sanction, with consistency of response, so that offenders cannot ascribe bias to the procedure.
3. **Evidence of non-compliance should be conclusive.** HOPE relies on the reliable results of drug testing to determine whether a breach has occurred. There is no requirement for a Probation Officer to exercise judgement as to whether a failure to comply with the requirements of an order are acceptable or not, or whether specific circumstances constitute non-compliance or otherwise. In short, the results of a drug test are either positive or negative. Similarly, the results of 24/7 sobriety monitoring also do not require the exercise of judgement to determine whether a breach has occurred. In both cases, the use of technology to derive concrete evidence of non-compliance underpins the perception of fairness and enables a speedier resolution of court enforcement action. There are other technologies that could provide similar levels of certainty, in particular, the potential use of GPS technology for offenders subject to exclusion or curfew requirements.

46 Robert L. DuPont MD & Keith Humphreys PhD (2011): A New Paradigm for Long-Term Recovery, Substance Abuse, 32:1, 1-6

47 Kilmer, B. et al, Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota 24/7 Sobriety Project, American Journal of Public Health, v. 103, no. 1, Jan. 2013

4. **A behavioural contract.** The HOPE project in particular is based on an explicit behavioural contract between the Court and the offender. Judge Alm’s approach is based on a clear “deal” with each offender, describing clearly what is required for successful completion of a probation order and being equally clear about the certain consequences for non-compliance.⁴⁸ This requires a particular approach from the Court, one in which the Judge actively seeks a positive outcome from the disposal and demonstrates a concern with ensuring that the offender completes the order.
5. **The use of custody does not necessarily increase** as a result of the use of short periods in custody as a sanction for non-compliance. The evidence is that reductions in rates of non-compliance at least offset the use of custodial sanctions and the net use of custody remains static.
6. **There is an important shift of responsibility to the offender**, in what Hawken and Kleiman⁴⁹ refer to as “behavioural triage”. The majority of participants test negative or have a small number of positive drug tests during the programme. However, there is a small number who test positive multiple times. Therefore, the participants are, in effect, triaging themselves into who does and does not require drug treatment. This “behavioural triage” function – identifying those in need of treatment by documenting their actual conduct rather than relying on assessment tools – is an independent benefit of HOPE processing.⁵⁰ In other words, rather than direct all chronic drug-using offenders through a treatment oriented pathway, which too often runs the risk of being done to the offender (rather than with them), the offender is encouraged to take primary responsibility for their own behaviour and to engage with treatment only where necessary.

Conclusions

The evidence of the effectiveness of Swift and Certain programmes in the United States is clear. Across all of the programmes based on Swift and Certain principles:

- Rates of compliance are significantly improved, with fewer breaches for missed appointments and failure to meet other requirements of the relevant order.
- Reconvictions are reduced, often by as much as 50% during the duration of the programme.
- Detected drug or alcohol use is lower.

48 Conversation with the author

49 Hawken, A & Kleiman, M., *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE*, 2009

50 Hawken, A & Kleiman, M., *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE*, 2009

The evidence is that the effectiveness of Swift and Certain programmes results from the speed and certainty of the sanctions for non-compliance, based on up-front clarity with the offender and enforcement procedures with predictable outcomes and consistency of judicial approach (often through the use of dedicated judges for the cases in question, as in HOPE). There is, therefore, *prima facie* a strong argument for seeking to replicate the key characteristics of the Swift and Certain approach in this country.

6

Swift and Certain in England and Wales: Overcoming the Obstacles

Parts 2 and 3 of this report have described how the justice system falls short of the aims set by Government. The primary response to offending – the period between the commission of an offence and conviction at the Crown Court or at a magistrates’ court – is slow and cannot by any reasonable definition be said to be a swift and effective response to criminal behaviour. Downstream, the response of the system to breaches of community sentences is slow, bureaucratic and subject to wide variation, with the response to similar behaviour being something of a postcode lottery, depending on the attitude of an offender’s Probation Officer and the court.

The case for applying Swift and Certain principles is, on the face of it, strong. So, what are the barriers?

Swift and Certain sentencing

There are essentially three types of barrier to the use of Swift and Certain principles at the primary sentencing stage of the criminal justice system.

The first is the need for due process and for defendants in criminal trials to be afforded the opportunity to advance a defence and to be properly and fairly tried against the criminal standard of proof. This, of course, makes the direct application of the principles of Swift and Certain programmes to criminal trials very difficult. Any approach, therefore, needs to balance the need to meet the requirements of justice and to protect the rights of defendants with the need for speed and certainty of outcome. The balance is between ensuring that our courts, on the one hand, are fair and just and, on the other, that they grip offenders early enough to influence their future behaviour and effectively deter them from future offending. The current system manifestly does not achieve this balance, in particular for prolific offenders, but there are real achievable options for rebalancing the system and introducing Swift and Certain principles. These are described further below.

“Any approach ... needs to balance the need to meet the requirements of justice and to protect the rights of defendants with the need for speed and certainty of outcome”

The second barrier is organisational. Judge Alm had the authority and flexibility to begin the HOPE programme as a small scale, single court project with a small cohort of offenders. Magistrates’ courts, although they deliver local justice and rely on local lay magistrates, are part of a centrally controlled national organisation. The centralised control of HM Courts and Tribunals Service reduces

scope for local flexibility and the development of approaches which reflect local circumstances and meet local priorities. According to Bowen and Whitehead:

“The England and Wales court system is characterised by being slow to develop change from within, often waiting for permission from central government. In a recent survey, only 30 per cent of court staff thought it was safe to challenge the way things are done in HMCTS.”⁵¹

In addition, in stark contrast to the US system, the scope for judges and magistrates to drive local innovation is limited as local imagination cannot often be translated into organisational change within the constraints of a heavily centralised national service.

The third barrier is cultural. There is compelling evidence that courts that focus on people rather than seeing “cases” in isolation are more effective in cutting crime and protecting the public.⁵² But virtually all magistrates’ courts, most of the time, do not work in this way. Nor do they work in ways that would support the development and implementation of Swift and Certain principles. In particular, the evidence from the US is that Swift and Certain approaches work most effectively where there is a degree of specialisation by individual judges in order to develop the right court culture and approach and also provide continuity of relationship with an offender and the wider criminal justice and other agencies. This is partly a reflection of the fact that courts in the US are presided over by professional, full-time judges, but it is also an important recognition of a fundamental barrier to magistrates’ full involvement in certain kinds of problem-solving courts.

This is partly an issue of continuity and ability to shape court culture. But it is also about developing expertise. As Policy Exchange noted in *Future Courts: A New Vision for Summary Justice*:

“Such expertise can most readily be developed by judges who are running specialist courts on a regular basis, rather than magistrates who may do it on just a few occasions a year. There are obviously also significant training implications to implementing specialist courts in this ‘leading-edge’ way.

“Forward-thinking magistrates often express a willingness to be more involved with this kind of work. It is not impossible for them to do so effectively, but we believe that the primary opportunity for magistrates in the problem-solving arena may not be in the more complex and specialised areas of addiction, mental health and domestic violence, but could instead be in making a reality of the community justice or neighbourhood justice model – where the idea is less about working intensively with offenders to solve deep and complex behavioural and addiction problems, and more about delivering swift justice in a way that solves specific local crime problems, generates solutions to community issues such as anti-social behaviour, and aims to transform community confidence in the justice system.”⁵³

In addition, one of the clear lessons from HOPE is that sentencers need to be proactive in engaging the co-operation of the police and offender managers to ensure that the new enforcement paradigm is effective. Judge Alm in Hawaii led this engagement personally and such a model may need to be replicated in our courts, requiring judges to engage with criminal justice agencies in order to establish a common understanding of how ‘Swift and Certain’ principles can work successfully with their co-operation.

⁵¹ Bowen, P & Whitehead, S, *Better Courts: Cutting Crime Through Court Innovation*, New Economics Foundation, 2013, p21

⁵² Bowen, P & Whitehead, S, *Better Courts: Cutting Crime Through Court Innovation*, New Economics Foundation, 2013

⁵³ Chambers, M. McLeod, C., & Davis, R., *Future Courts: A New Vision for Summary Justice*, Policy Exchange, 2014

Breaking out of the traditional paradigm for the way in which magistrates are used has proved difficult. We describe two attempts to do so below and draw out some lessons for future policy implementation.

Swift and Certain breach processes

Introducing Swift and Certain principles to the enforcement of Community and Suspended Sentence Orders is directly analogous to the most common US programmes. Despite this, there remain significant barriers to replicating the success seen in the US. In particular:

- The role of the professional judgement of Offender Managers in deciding whether to commence enforcement action and the historical culture of the probation service.
- The constraints of the Ministry of Justice bureaucracy and central control over processes and procedures.
- The role of the courts in the current breach process.

Professional judgement is, in many ways, central to effective probation practice. The ability of Offender Managers to take decisions that reflect the particular circumstances of individual offenders and to tailor their response to changes in circumstances and behaviour is key (it is argued) to reducing re-offending:

“The relationship between the offender and practitioner can be a powerful means of changing behaviour to reduce re-offending, through more effective and individualised one-to-one engagement. The Offender Engagement Programme aims to reduce re-offending, while ensuring compliance with court orders, by increasing the scope for practitioners to use their professional judgement.”⁵⁴

The scope for Offender Managers to respond to the particular needs of offenders is important in ensuring that the most effective rehabilitative options are made available. This is most likely to maximise the chances of reducing re-offending. It also contributes to effective use of resources by ensuring that programmes and other interventions are not wasted on offenders who are less likely to respond to them. But all of this needs to be balanced against the need for consistency and the benefits, demonstrated by the US experience of Swift and Certain programmes, of predictable outcomes as a result of non-compliance with the requirements of an order.

There are two objectives that Offender Managers must pursue: reducing the risk of re-offending and ensuring offender compliance. Although these two aims are by no means mutually exclusive, they may well require different approaches. It is critical therefore that Offender Managers balance these two imperatives but recognise that, to do so, will require a shift in the focus on professional judgement; this will require a culture-shift in the approach of Offender Managers. Offender Managers will, if the recommendations set out in section 7 of this report are accepted, be required to exercise significantly less personal judgement over whether breach action is necessary and the process such action should follow. This would require clear and enforceable guidance from the Ministry of Justice, but would enable Offender Managers to focus their professional skills on structuring and delivering the right packages of rehabilitative support for offenders.

54 Government Response to the Justice Committee's Report: The role of the Probation Service, Ministry of Justice, 2011, p6

The **role of the Ministry of Justice** and the National Offender Management Service (NOMS) is central to setting the parameters for breach processes and is instrumental in determining the culture of enforcement of community sentences. The shift in emphasis in probation towards more rigorous enforcement over the last 15 to 20 years has been almost entirely a product of central direction influenced by the political priority to improve and sustain sentence and public confidence in community sentences. The creation of Community Rehabilitation Companies (which will, in the next few months, have their ownership transferred to successful private and voluntary sector bidders) as part of the Transforming Rehabilitation process, makes the role of the Ministry and NOMS more complex but no less important.

Swift and Certain principles will need to be applied by Offender Managers and the service they operate in is subject to a significant reorganisation. Twenty one Community Rehabilitation Companies were created in June 2014. They replace the thirty five Probation Trusts that existed previously. The CRCs manage low to medium risk offenders who receive community sentences. They also provide resettlement services for all prisoners released in the CRC area as well as post-release supervision for all low and medium risk prisoners. The CRCs work in a geographically defined contract area. In April 2015 the services performed by the CRC will be contracted out and preferred bidders, including a number of voluntary sector organisations and consortia, have been identified by the Ministry of Justice.

CRCs will have significant freedom, with published national standards, in the way in which they manage low and medium risk offenders. The National Probation Service (NPS) will manage high risk offenders, within the same broad framework. The former will be subject to contractual controls imposed by the Ministry of Justice; the latter will be subject to more direct central control.

Any introduction of Swift and Certain principles will need to ensure that CRCs are able to meet the objectives of reducing re-offending, whilst at the same time providing consistency and certainty of approach across the CRC and NPS caseloads. Although care needs to be taken to get this balance right, the first priority for offender managers, whether employed by CRCs or by NPS, must be public protection. And our view is that it is in the interests of ensuring effective public protection that enforcement of community sentences should be as robust as possible.

The role of the courts is central to the enforcement of community sentences. The need for all enforcement action in respect of such sentences to be sanctioned by the courts adds both delay – as described in Part 3 above – and a significant degree of uncertainty as to the outcome.

The current guidance from the Sentencing Council⁵⁵ gives courts significant latitude in deciding how to respond to failures to comply with the requirements of a Community Order. The guidance steers courts to consider a range of issues, in particular:

- The Criminal Justice Act 2003 requires the court either to increase the severity of the existing sentence (i.e. impose more onerous conditions including requirements aimed at enforcement, such as a curfew or supervision requirement) or to revoke the existing sentence and proceed as though sentencing for the original offence. But the guidance makes it clear that it is acceptable to extend the duration of an existing requirement where the offender is towards the end of an Order.⁵⁶

⁵⁵ sentencingcouncil.judiciary.gov.uk/docs/web_new_sentences_guideline1.pdf

⁵⁶ *ibid*

- Courts are discouraged from using imprisonment solely as a punishment for breach. The firm emphasis in the guidance is on ensuring that the requirements of the sentence are finished, not necessarily on punishing the non-compliance. The guidance states:

“A court that imposes a custodial sentence for breach without giving adequate consideration to alternatives is in danger of imposing a sentence that is not commensurate with the seriousness of the original offence and is solely a punishment for breach. This risks undermining the purposes it has identified as being important.”⁵⁷

- The court is encouraged to “take account of the extent to which the offender has complied with the requirements of the Community Order, the reasons for breach and the point at which the breach has occurred.”⁵⁸
- Custody should be reserved as the last resort and used only in those cases of deliberate and repeated breach where all reasonable efforts to ensure that the offender complies have failed.

In practice, as noted in part 3 above, the response of courts varies considerably. This is not surprising, as the latitude given to courts by the sentencing guidelines is considerable. In addition, the stress in the guidelines on completion of the original order runs the risk of conflating two different aims of the enforcement process. On the one hand, it is right to stress the importance of seeking to ensure that the requirements of the original sentence are met, whether they are punitive (such as deprivation of liberty through a curfew order) or rehabilitative. But, on the other hand, a response to non-compliance which is both slow and has uncertain and unpredictable outcomes is less likely to secure compliance for the reasons discussed in part 4 above.

There are, therefore, significant obstacles to the introduction of Swift and Certain principles to the enforcement of Community and Suspended Sentence Orders. The obstacles presented by probation practice (in particular, the judgement of individual Offender Managers) and by the role of the Ministry of Justice (and NOMS) are administrative and with the right political direction can be overcome. The role of the courts in the process is more problematic. The next section sets out some options, both for working within the current legislative framework and for moving to an alternative system.

Transferring lessons from abroad

Our report *Future Courts: A New Vision for Summary Justice*⁵⁹ sought to draw some lessons from past attempts to introduce innovations to the summary justice system. *Future Courts* examined attempts to replicate US models of problem-solving justice in the UK. We concluded that:

- Local innovation, such as the desire by a number of Police and Crime Commissioners to push ahead with using remote alcohol monitoring to support 24/7 sobriety schemes, suffered due to Ministry of Justice risk-aversion which stifled developments rather than encouraging them.
- Attempts to introduce problem-solving justice models, such as the North Liverpool Community Justice Centre (NLCJC),⁶⁰ suffer from having been

⁵⁷ sentencingcouncil.judiciary.gov.uk/docs/web_new_sentences_guideline1.pdf

⁵⁸ *Ibid*

⁵⁹ Chambers, M., McLeod, C. & Davis, R., *Future Courts: A New Vision for Summary Justice*, Policy Exchange, 2014

⁶⁰ The NLCJC opened in 2005, was modelled on the Red Hook Community Court in New York and was designed to be a one-stop-shop for addressing local crime that would tackle the underlying behaviour of offenders, build public confidence in the justice system and offer a wide range of services to offenders, victims and local people.

centrally-driven, top-down reforms, which are often over-engineered (and, therefore, comparatively expensive compared to the status quo) and rely to a significant degree on individual senior champions at the centre. When those champions move on, local managers and stakeholders are left with a service that they may not have been on board with and that they might perceive to be unaffordable.

Future Courts concluded that, for innovations in the delivery of justice to be successful, there was a need to move away from top-down “all singing, all dancing” pilots:

“We believe that, rather than pushing down one particular model from the centre, the key to this is instead to create the right set of incentives for the innovation, to offer the information and toolkits that practitioners need to begin new projects, to help facilitate the partnerships required for it to succeed and to hold the key actors in the system much more accountable for the outcomes they deliver. These steps, if done properly, should help to drive the kind of new thinking that will allow us to develop our own successful court models.”⁶¹

In addition, care is necessary in importing models from other jurisdictions, where practice, culture and processes often do not translate well.

Conclusions

Introducing Swift and Certain principles require significant changes to the way in which our criminal justice system thinks and operates. In particular, it will require:

- Changes to the way in which magistrates and other sentencers operate, to create a new model, potentially with greater degrees of specialisation and with increased flexibility in the way in which magistrates, in particular, operate.
- Changes in approach by Offender Managers responsible for ensuring compliance with community sentences, with scope for the employment of professional judgement in respect of enforcement decisions potentially mitigated in return for the benefits of certainty of outcome.
- A different approach from the Ministry of Justice, which encourages local ownership of innovation and the development of pilot approaches, rather than a traditional model of top-down change.
- The engagement of the new CRCs, and their owners after the Transforming Rehabilitation competition runs its course, to develop new approaches to managing compliance with community sentences and the use of technology in support of it.

61 Chambers, M., McLeod, C. & Davis, R., Future Courts: A New Vision for Summary Justice, Policy Exchange, 2014

7

Swift and Certain in England and Wales: Opportunities for Change

This section sets out proposals for introducing Swift and Certain principles, both at the initial court stage (that is pre-conviction) and as a means of enforcing community sentences. Each case differentiates between steps that could be taken within the existing legislative framework and those that would require legislative change. A common thread through these proposals is to focus on those prolific offenders who commit a disproportionate volume of offences.

Initial court hearings

Part 2 describes the unacceptable delays between the commissioning of an offence and an outcome at court. In the magistrates' court, it takes an average of four and half months from the offence to sentencing, and 59 days from the time of charge to the completion of the case. There is on average 36 days until the first hearing, with a further 23 days until completion. This excessive delay means that the offender often finds him or herself convicted of an offence that they can barely recall and any link between action and consequence is dim, at best. Of course, it is true that complex cases take time to prepare and to process, but the vast majority of cases are minor or are uncontested in court. There is no good reason for the criminal justice system to operate according to such a leisurely timetable.

“There is on average 36 days until the first hearing, with a further 23 days until completion”

It is, rightly, a matter for sentencers – magistrates and judges – to determine the appropriate sentence in each case (within the relevant guidelines and consistent with the law). Although this report sets out some ideas for introducing more certain sanctions in some circumstances below, it will never be possible (or necessarily right) to have absolute certainty about the outcome of a criminal case. But it is possible to make the justice process significantly faster and, for the offender, to reinforce the connection between the offence, the charge and the punishment. There are options for speeding up the justice process that do not necessarily require changes to legislation.

Police courts

Future Courts sets out the case for magistrates to sit, as a bench of three or singly, inside or close to police stations to deal with summary cases. Such an approach would involve:

- Low level offences being dealt with immediately after charge, with legal advice given by the defendant's solicitor or by the duty solicitor, and a verdict and sentence administered on the spot. This would only take place when the offender had pleaded guilty. Magistrates would sit as a bench. To allow single magistrates to sit for this purpose would require an amendment to section 49 of the Crime and Disorder Act 1998.
- Procedural safeguards would be put in place to allow magistrates to refer the case to a conventional court where a not guilty plea is entered or if it were otherwise in the interests of justice to do so.
- Additional incentives could be offered to offenders to plead guilty and receive sentence on the day (for example an automatic reduction in the sentence). This would reflect the significant cost savings for the justice system – especially in terms of avoided CPS and police costs in building the case and court costs in terms of hearings.

Such an approach provides a clear foundation for faster and more certain summary justice.

It is therefore worth reiterating the report's two central recommendations:

- **As part of a new strategy for neighbourhood justice, the Home Office and Ministry of Justice should introduce new Police Courts, with swifter justice administered after charge for offenders who plead guilty.**
- **In the meantime, Police and Crime Commissioners should trial Police Court models in their local areas.**

Prolific and Priority Offenders

The Prolific and other Priority Offender programme was introduced in 2004 as a way of targeting the small number of offenders known to commit a disproportionately large amount of crime. It placed responsibility on local Crime and Disorder Reduction Partnerships and Community Safety Partnerships to establish local schemes, usually multi-agency partnerships primarily involving police and probation to work with Prolific and other Priority Offenders (PPO).

The strategy has three complementary strands, each designed to tackle prolific offending and its causes:

- **Prevent and Deter:** stopping young people from becoming prolific offenders.
- **Catch and Convict:** reducing offending by apprehension and conviction, and through enforcement, by ensuring a swift return to court for those who continue to offend.
- **Rehabilitate and Resettle:** working to increase the number of such offenders who stop offending by offering a range of supportive interventions.

This is a cohort of offenders where there remains real scope to reduce the delay between apprehension and conviction and where the introduction of Swift and Certain principles could make a significant difference. There is good evidence that local PPO schemes have been successful with demonstrated reductions in recorded convictions among the first offenders selected as PPOs in September and October 2004, over a 17-month period.⁶² But, at the same time, it is clear that

62 Prolific and Other Priority Offender Programme – Five Years On: Maximising the Impact, Home Office/Ministry of Justice, 2009, p6

despite the additional resource and attention devoted to PPOs, they do not necessarily progress through the criminal justice system more quickly, consequently, the impacts of swift justice are lost. A study by the criminal justice Inspectorates in 2009 showed that, even for PPOs, the delay between first appearance in court and conviction in the magistrates' court could still be relatively leisurely.⁶³

Table 3: Timeliness of case progression

Type of court procedure	Average number of days from first court appearance to sentence
Guilty pleas in the magistrates' court	15 days
Trials in the magistrates' court	68 days

Our view is that delays of more than two weeks to sentence a prolific offender pleading guilty in a magistrates' court are unacceptable. And we think that there should be scope for speeding up trials.

To deal more quickly with PPOs and secure the benefits of swifter justice, we envisage:

- Specialised PPO courts, with lay magistrates who deal regularly and predictably with such cases and who are able, therefore, to develop a degree of expertise. Alternatively, and where the volume of cases justifies it, District Judges could be used to expedite such cases.
- Prolific offenders, who will be identified as such by criminal justice agencies, should be fast-tracked into such specialised courts.
- Where possible, and reflecting our recommendation on police courts, hearings for prolific offenders who plead guilty should be conducted within 24 hours of the decision to charge, either by magistrates sitting in the police station or through video link.

Recommendations

- **The Home Office and Ministry of Justice should introduce arrangements to genuinely fast track PPOs in magistrates' courts, utilising magistrates and/or District Judges who specialise in this cohort of offenders. These arrangements should aim for PPOs who plead guilty to be sentenced within 24 hours of the decision to charge.**
- **Police and Crime Commissioners should work with HM Courts and Tribunals Service locally to develop deliverable models in their areas.**

A new Community Order requirement – the Conditional Behaviour Order

In addition to the changes proposed to the existing arrangements for sentencing and out of court disposals, there are also benefits in making a new disposal available to the courts that would be based firmly on Swift and Certain principles, the Conditional Behaviour Order. This could be an order that might be aimed

63 Prolific and Other Priority Offenders: A Joint Inspection of the PPO Programme, Criminal Justice Joint Inspection, 2009, p40

specifically at prolific offenders and could be a new requirement for Community Orders, which would specify certain behavioural requirements and would carry certain sanctions which would be specified at the point the order was made. Such an order – carrying the promise of a Swift and Certain punitive response in the event of non-compliance – might be used for offenders otherwise on the cusp of a custodial sentence and could be a suitably robust alternative to short prison sentences, whilst offering the genuine possibility of positive impacts on behaviour.

It might work as follows:

- On conviction, sentencers would determine whether the defendant was a prolific offender, whose offending had a pattern which could be addressed by (for example):
 - Regular drug testing, supporting abstinence from controlled drugs.
 - Continuous alcohol monitoring, supporting a requirement for 24/7 sobriety.
 - GPS location tracking, supporting an exclusion or a curfew requirement. The use of GPS tracking enables the movements of an offender to be tracked with real accuracy and can enable the strict enforcement of exclusion requirements (that is, a requirement prohibiting an offender from a certain location). For curfews, the technology brings the benefits of knowing where an offender is, as compared to passive curfew monitoring which simply indicates where they are not (i.e. the curfew address). The added certainty GPS tracing provides can effectively support Swift and Certain sanctions.
- The resulting Community Order could, for example, require:
 - A period of Unpaid Work, thereby providing an appropriate punitive element.
 - Frequent drug testing, continuous alcohol monitoring or GPS tracking using established technology.
 - A sanction for non-compliance determined at the time of sentencing and announced in court (with the ability for the offender's legal representative to make representations) and linked to the behavioural requirements of the order, such as abstinence from drugs or alcohol.
 - Sanctions could be graduated to reflect the seriousness of the original offence and could consist of a curfew period for less serious offences or a short custodial sentence (of no more than a few days) for more serious offenders.
 - Evidence of non-compliance would be provided exclusively by drug or alcohol testing or GPS tracking and would therefore deliver a degree of certainty and remove, to a very significant degree, the need for the exercise of judgement by Offender Managers.
 - Decisions on breach could be taken very quickly after non-compliance was detected, given the nature of the evidence required to demonstrate that non-compliance.
- Ideally, decisions about breach would be made by the same sentencers responsible for the initial sentence, providing an important element of continuity and allowing for the development of a degree of specialism.

Such an order might be used relatively sparingly and be targeted particularly at prolific offenders and those where drug or alcohol use is a significant contributor

to their offending behaviour. It would offer real opportunities to derive the benefits of Swift and Certain justice with a cohort of offenders for whom the current system arguably works least well in demonstrating a clear link between offending behaviour and consequences.

According to the 2012/13 Crime Survey for England and Wales (CSEW), there were 917,000 violent incidents where the victim believed the offender or offenders to be under the influence of alcohol; this accounted for 47% of violent offences committed that year.

Home Office estimates, derived from the Crime Survey, also suggest that drug addicts commit between a third and a half of all acquisitive crime.

Recommendation

The Ministry of Justice should consider the introduction of a new Community Order requirement, based on specified behavioural requirements, including drug and/or alcohol abstinence; exclusion requirements; or curfew requirements and with sanctions for non-compliance made clear at the point of sentence.

Breach of Community and Suspended Sentence Orders

Part 3 described the unacceptable delays in dealing with failures to comply with Community and Suspended Sentence Orders; the degree of discretion available to offender managers, which means that offenders breached in one area might not be breached in another for the same behaviour; and the variable response of the courts when offenders are finally breached.

This section sets out our proposals for:

- Greater **certainty** over the circumstances in which breach action will be initiated.
- Making the process significantly **quicker**.
- Making the outcome much more **certain**.

Some of these improvements could be made without changes to the legislative framework, but others would require new legislation. The next section makes this distinction where appropriate.

In addition, this section sets out proposals for introducing Swift and Certain principles to the management of offenders on licence or subject to post-custody supervision.

Suspended Sentence Orders

It would be possible to introduce Swift and Certain principles to the use of Suspended Sentence Orders (SSO), in particular to provide for greater certainty of outcome. The kind of alternative envisaged is a sentencer-led approach within existing sentencing frameworks. This would be based on a single judge (or district judge) taking responsibility for prolific offenders in the pilot area and, where appropriate, using SSO to secure compliance, with certainty of sanction if the requirements of the Order are breached. These judges would deal both at

the front (sentencing) end of the process and downstream, with breach action relating to in-scope offenders. Such an approach would:

- Be focused on prolific and other priority offenders whose pattern of offending lends itself to remote monitoring by reliable technology, including sobriety monitoring and frequent drug testing.
- Require the sentencer to take the offender-centred approach evidenced in the HOPE project. In other words, an approach to sentencing in which the judge takes a clear interest in the future behaviour of the offender and demonstrably follows up on that interest. The sentencing judge would deal with all breaches from the relevant cohort of offenders.
- Use existing SSO requirements, including drug and alcohol treatment, to provide the basis for monitoring of offender behaviour.
- Work with the CRC operator to develop the technological infrastructure for monitoring and with the National Probation Service to establish clear guidelines for breach action, to ensure that non-compliance is followed up quickly. Breach proceedings would need to be brought in all cases within 24 hours of the detection of non-compliance.
- Be based on relatively short custodial elements of the SSO (say a month), but offset by certainty of activation of the suspended element.

Recommendation

The Ministry of Justice should pilot such an approach to Suspended Sentence Orders in one or more Community Rehabilitation Company areas.

Community Orders

Within the existing legislative framework, it would be possible to introduce similar reforms to existing Community Orders. As with SSOs, this would require designated judges (or district judges in the magistrates' courts) to deal with the relevant cohort of offenders (the approach would be targeted at PPOs, in particular those with a strong drug or alcohol element to their offending). As with SSOs, sentencers would use the existing alcohol or drug treatment requirements as the basis on which to require on-going testing.

Breach of COs cannot, however, have an immediate custodial sanction. Offenders who breach a CO can, however, be re-sentenced on the facts of the original offence. This suggests that a Swift and Certain approach to such breaches would need to have a graduated approach for potential sanctions, which could include:

- A short custodial sentence, where the nature of the original offence and the circumstances of the breach warrant it.
- Imposition of a new CO requirement. In this case, a curfew order may be the most appropriate response.

For Community Orders, therefore, the approach envisaged would:

- Focus on prolific and priority offenders and use drug or alcohol monitoring to underpin evidence of compliance.
- Require speedy (that is within 24 hours) prosecution of breaches.

- Use dedicated magistrates or judges for sentencing and breach.
- Use short prison sentences where justified by the nature of the original offence.
- Use curfew orders where the circumstances of the original offence do not justify custody.

Such an approach would need to be supported by significant changes to probation practice; to the centrally prescribed breach procedures; to court practice; and potentially to sentence guidelines for dealing with breaches:

- A shift in the balance between the use of professional judgement in individual cases and the use of clearly defined criteria for non-compliance as reflected in Swift and Certain programmes such as HOPE. For prolific and other targeted offenders, we think that the potential benefits from a Swift and Certain approach justify such a shift. In particular, reducing the scope for offender managers to exercise discretion over whether breach proceedings should be initiated would create a system with more certainty of outcome, therefore encouraging greater compliance, and which was more fair, by ensuring that non-compliance in Norfolk and non-compliance in Northumbria were dealt with in the same way.
- That this new approach would need to be reflected in the guidance provided to NPS and CRC offender managers on enforcement of community sentences. This would, in particular, need to specify that:
 - **Any** failure of a drug test, alcohol monitoring, GPS location tracking or other similarly monitored sentence requirement is an unacceptable failure to comply with the requirements of the order and will lead to enforcement action.
 - **Any** failure to attend for a drug test or similar procedure will be considered unacceptable and will lead to enforcement action.
 - Breach cases would need to be prepared and submitted to the court **within 24 hours** of the episode of non-compliance – a timescale which would be facilitated by the significant reliance which would be placed on the use of clear evidence from drug testing or similar monitoring systems.
- For courts, an approach (mirroring those in the US experience of Swift and Certain programmes) based on specialist courts, dedicated to dealing with breaches of community sentences (and, where possible, consisting of the same magistrates or judge responsible for passing the original sentence) would facilitate speedier breach proceedings, with more consistent outcomes.
- That the more consistent approach we advocate would require fresh sentencing guidelines, to reflect the certainty in outcomes on which the approach is based.

Recommendations

The Ministry of Justice should:

- **Work with one or more Community Rehabilitation Companies and Police and Crime Commissioners to scope and develop pilots to apply Swift and Certain principles to the enforcement of Community Orders, using**

available technology to enforce compliance with drug or alcohol testing requirements.

- **Develop new breach guidelines, reflecting the principles set out above.**
- **Work with HM Courts and Tribunals Service to establish dedicated breach court(s) and supporting processes in the CRC area(s) concerned to support the Swift and Certain pilot.** Previous Policy Exchange research found that utilisation rates of courts in England and Wales stand at just 55.7%, which therefore provides ample opportunity to introduce dedicated courtrooms that can be used for breach court sessions.⁶⁴
- **Recruit a small number of existing and new magistrates to sit in dedicated breach courts in the pilot areas, providing specialist training to undertake this new responsibility for Conditional Behaviour Orders.**

In the longer term, we consider that reform of the statutory framework for community sentences will be necessary to derive the full benefit from the application of Swift and Certain principles for the enforcement of such sentences. We envisage a statutory framework with the following elements:

- The range of requirements currently contained in the Criminal Justice Act 2003, as amended, with the following additions:
 - A standalone drug testing requirement, to be used instead of the current drug treatment requirement, where the court judges that a requirement for abstinence alone is sufficient to deal with the offender concerned.
 - An amendment to the Alcohol Abstinence Monitoring Requirement (AAMR) introduced by sections 76 and 77 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 to enable enforcement as described below.
- The use of existing exclusion and curfew requirements, supported by GPS location tracking.
- A duty on the sentencing court to specify, at the point of sentencing, the penalty for non-compliance with the requirement of the order, using a graduated scale of responses reflecting the circumstances and previous record of the offender. The range of available pre-determined sanctions could include the use of curfews and short periods of imprisonment, as in the examples of US Swift and Certain programmes. The potential impact of short prison sentences as a sanction is examined in part 8 below. Such an approach affords for transparency of consequence for non-compliance, reduces the scope for variation of sanctions between offenders in similar cases and leaves the offender in no doubt about the likely result of not complying with the requirements of the order.
- Breach proceedings, if found proved by the court, would activate the pre-determined court-ordered sanction.

This new statutory framework would need to be supported by the changes to breach procedures we describe above, to ensure that breach proceedings are brought to court and concluded promptly.

The use of short prison sentences as a sanction, as proposed earlier in this report, raises two important issues:

64 Chambers, M., McLeod, C. & Davis, R., *Future Courts: A New Vision for Summary Justice*, Policy Exchange, 2014

- Should they be treated as normal prison sentences, subject to the Legal Aid, Sentencing and Punishment of Offenders Act 2012? If so, the offender would be required to be released at the halfway point of the term (for example, an offender sentenced to four days for non-compliance with a Community Order would be released after two).
- Should they be subject to the supervision requirements introduced by the Offender Rehabilitation Act 2014, which would require offenders to be subject to post-release supervision for 12 months after release from custody?

In both cases, the answer should be no. The intention is to introduce a swift, certain and effective response to non-compliance with community sentences. It would therefore be missing the point to regard them as a short prison sentence: they are a discrete sanction designed to secure compliance with the original sentence of the court. There would be little to be gained from applying the 2012 Act provisions.

Although there are clear benefits to extend post-release supervision for short-sentenced prisoners, particularly in reducing re-offending rates for this type of offenders, there is not the same evidence that extending these requirements to short custodial sanctions for non-compliance with a community sentence is a proportionate response. It would, too, have resource implications for CRCs and the NPS that may not be the most effective use of limited funding.

Recommendations

The Ministry of Justice should:

- **Pursue amendments to the Criminal Justice Act 2003 to introduce a standalone drug testing requirement to be attached to a Community or Suspended Sentence Order.**
- **Pursue amendments to the enforcement regime for Community and Suspended Sentence Orders such that the sanction for non-compliance is set by the court, at the time of sentencing. Such sanctions should include curfew requirements and short prison sentences of up to 7 days.**
- **Seek amendment to the Alcohol Abstinence Monitoring Requirement to enable the same approach to enforcement.**

Intensive Alternatives to Custody

The Intensive Alternatives to Custody (IAC) pilot programme ran from 2008/09 to 2010/11 to test the use of intensive Community Orders in diverting offenders from short-term prison sentences. The pilots enabled courts to use existing community sentencing options in new ways by combining intensive probation supervision with a mix of demanding requirements and interventions delivered by the probation service and by other agencies. Pilots took place in Derbyshire, West Yorkshire, South Wales, Dyfed-Powys, Manchester and Salford, Merseyside, and Humberside.

Evaluation of the pilots showed mixed results:

- The overall proportion of IAC orders revoked (for non-compliance) up to January 2011 was 33%. This was higher than the national proportion of

Community Orders terminated in 2009 due to failure to comply with the requirements or conviction of an offence (26%).⁶⁵

- Of 612 IAC orders revoked at the start of March 2011, custody was used in around 70% of cases.⁶⁶
- The average annual cost of an IAC order to the state was around £5,000 per offender, compared to an annual cost per prisoner of around £40,000.⁶⁷
- There was no statistically significant difference in the one year proven re-offending rate between IAC orders and short term prison sentences, and between IAC orders and other court orders. However, there was a statistically significant reduction in the frequency of offending compared to short term prison sentences (an 18.5% reduction) and other Community Orders (a 12.4% reduction).⁶⁸

These evaluations suggest that the Intensive Alternative to Custody orders could offer a useful and cost-effective alternative to short prison sentences with potentially positive impacts on re-offending only if it were possible to tackle the unacceptably high non-compliance rates. Orders with non-compliance rates as high as one in three do not inspire confidence, either publicly or politically and this undermines any broader benefits the order may have.

We think that there is a case for thinking again about the implementation of Intensive Alternative to Custody orders. Notwithstanding the improvements to the management of short sentenced prisoners introduced through the Transforming Rehabilitation programme, it remains important to have effective, well-implemented alternatives to short prison sentences, which command the confidence of sentencers, the public and politicians.

The IAC order is a perfect candidate for the application of Swift and Certain principles. As this report has identified, evidence from the US experience is that the use of Swift and Certain sanctions significantly reduces non-compliance rates. There is every reason to believe that IAC orders backed up by Swift and Certain sanctions would have much lower non-compliance rates. This would offer a viable sentencing option, which could be robustly enforced and with potentially positive outcomes.

There is a strong case for piloting, in one or more CRC areas, a new model of Intensive Alternative to Custody orders, aimed at offenders who would otherwise receive a short prison sentence, consisting of:

- Intensive supervision, supported by demanding rehabilitative interventions, delivered by the CRC and/or its supply chain of local partner providers
- Clear sanctions for non-compliance, following the model we suggest above for Community Orders generally, with the use of short terms of imprisonment to tackle non-compliance.

Recommendation

The Ministry of Justice should pilot a new approach to Intensive Alternatives to Custody orders in one or more CRC areas, combining the best elements of the pilots conducted between 2008 and 2011 with a Swift and Certain approach to enforcement.

65 Research Summary 3/11 – Evaluation of the Intensive Alternatives to Custody pilots, Ministry of Justice, 2011

66 Ibid

67 Ibid

68 Analytical Summary 2014 – Updated analysis of the impact of the Intensive Alternatives to Custody pilots on re-offending rates, Ministry of Justice, 2014

8

Potential Impact on the Prison Population

Swift and Certain programmes in the United States rely predominantly on the use of custody as a sanction for non-compliance. Our proposals would also use a potential custodial sanction where it does not currently exist (for Community Orders, in particular).

The US experience is that the use of short custodial sanctions has had a neutral impact on the total use of prison time; non-compliance rates are reduced and prison terms are shorter, even if they are used more frequently. But there are two key differences between the US experience and what this report proposed for our criminal justice system:

- The use of jail time is traditionally a more routine sanction for non-compliance with probation requirements, so the netting off between potentially larger numbers of offenders serving shorter terms as a result of non-compliance is a real one and the overall impact more likely to be neutral.
- The network of local county jails (as opposed to state or federal prisons) is much more extensive and localised than the prison system in England and Wales, where there is no comparable local system of incarceration. In the US, a jail is defined as a correctional facility administered by a local law enforcement agency, such as a sheriff's office or local corrections department, which holds offenders who are awaiting trial or sentenced to one year (12 months) or less. In 2007, according to the American Jail Association, there were 3,096 counties in the United States, which were being served by 3,163 jail facilities.⁶⁹

There are, therefore, two issues to be addressed for our criminal justice system:

- What is the likely impact on the prison population of wider use of custodial sanctions to support a Swift and Certain approach?
- How would these prisoners be managed, in the prison system or some other way?

Impact on the prison population

The following table shows numbers of offenders sentenced in the year to March 2013:⁷⁰

⁶⁹ American Jail Association accessed here: www.americanjail.org/

⁷⁰ Criminal Justice Statistics Quarterly Update to March 2013: Sentencing Tables, Ministry of Justice, 2013

Table 4: Persons sentenced to custody or a community order in England and Wales in the year to March 2013

Sentence type	Persons sentenced
Immediate custody	94,350
Prison sentence up to 12 months	60,330
Prison sentence 12 months or over	34,020
Community Order	138,870

As set out above, around a third of Community Orders are not successfully completed either as a result of failure to comply with the requirements of the order or as a result of a conviction for further offences. This means that, if the number of Community Orders imposed stays relatively static, around 46,000 offenders a year fail to complete a Community Order. Around half of this number fail to complete the order for reasons of non-compliance – this is the proportion that would be affected by the introduction of Swift and Certain enforcement (assuming that the proportion of offenders who fail to complete orders as a result of reconvictions remains unchanged, which is probably a pessimistic view). In other words, around 23,000 offenders fail to complete Community Orders for reasons of non-compliance with the requirements of the order.

US experience suggests that the introduction of Swift and Certain principles will radically reduce the non-compliance rate for Community Orders and that a reduction in non-compliance rates of 50% is realistic and achievable. This might mean that, with the volumes set out above, the non-compliance rate for Community Orders might fall to something like 12,000 offenders per year. If a graduated approach to sanctions is adopted with around 50% receiving short curfew orders rather than use of custody, the total number of additional offenders receiving a short custodial sanction might be around 6,000 per year (or an increase of around 10% on the 2013 number of receptions for short sentences). If the reduction in non-compliance rates was less significant, say 25% rather than 50%, the total number of additional prison receptions per year would be around 8,500.

These scenarios are summarised below:

Table 5: How Swift and Certain principles could affect the breach rate for Community Orders and the use of custody

Scenario	Impact
Assuming the 2013 volume of Community Orders at the 2013 breach rates for failing to meet requirements of the order	23,000 offenders breached
Reduction in non-compliance rate as a result of introduction of Swift and Certain enforcement	25–50% reduction in number of offenders breached: 12,500–17,250
Graduated enforcement approach	50% of breached offenders receive curfew: 6,250–8,625 receive custodial sanction
Average custodial sanction is five days	Average daily population 86–118

Taken on its own, therefore, the introduction of Swift and Certain sanctions might give rise to 6,000–8,500 additional very short custodial terms for offenders breaching Community Order over the course of a year. If the average duration of a Community Order sanction was to be five days, the total number of offenders that would be required to be accommodated at any one time would be relatively small, between 90 and 110, but the throughput would be more significant.

Managing this new prisoner population

Although the total additions to numbers in custody would be relatively small at any one time, the impact is not insignificant, especially at a time when prison capacity is tight. There are also practical problems with only utilising the prison estate to accommodate offenders who receive a custodial sanction for breach of a Community Order. Most critically, unlike the US system of county jails, our local prisons (which hold short-sentence and remand prisoners) are not well distributed. As a result, offenders serving short custodial sanctions may find themselves moved a significant distance from their home.

The only other readily available option is the use of police custody facilities. These are sufficiently local, but are not necessarily geared up to detain offenders for as long as five days. The average length of detention in police custody is around 8 hours.⁷¹ Detaining offenders for a period of five days introduces additional requirements: the need to provide meals, exercise and other basic facilities consistent with treating detainees with an acceptable level of decency (including visits and the means to maintain contact with families). Under Operation Safeguard, (the agreement between the Prison Service and a number of police forces to accommodate prisoners when prisons are full) the presumption is that prisoners will not spend more than one night in police custody.⁷²

The use of police custody facilities also potentially raises legal issues. If the custodial sanction is equivalent to a prison sentence, it would need to be served in an institution designated as a prison under the Prison Act 1952. Therefore, the routine and systematic use of police custody facilities is not an acceptable option.

Similar problems would be faced with the use of court custody facilities for short term detention. In any event, most court custody facilities are designed to hold prisoners for a few hours before a court hearing and lack the facilities for longer-term detention. Where court estate modernisation takes place in the future, however, larger courthouses could house custody facilities with the ability to be used overnight and for shorter periods of time than prison custody, to manage this new group of offenders under 'Swift and Certain' sentences.⁷³

This leaves use of the prison estate as the only current realistic option to accommodate this population of short term prisoners. Although the numbers are likely to be relatively small, it is important not to underestimate the impact it could have on a prison system which is already stretched. Ensuring that the prison estate has sufficient headroom to accommodate the numbers is feasible with good management and the benefits in terms of improvements in compliance with Community Orders make the price worth paying.

One more radical option may, however, merit further examination. As noted above, in the US Swift and Certain penalties are facilitated by the extensive network of county jails, for which there is no UK equivalent. Creating a network of small, genuinely local, custodial facilities might be desirable, but it would also

71 www.lesscrime.info/comparing-custody-and-non-custody-deaths/

72 Operation Safeguard: A report on exploratory work by HM Inspectorate of Prisons and HM Inspectorate of Constabulary, www.hmcp.si.gov.uk/documents/reports/CJI_THM/CSTC/operation_safeguard-rps.pdf

73 In Policy Exchange's report, Future Courts (2014), we proposed the introduction of new 'Justice Hubs' – larger courthouses with the facilities and flexibility for specialist courts and shared custody facilities.

be prohibitively expensive. But the private sector is already involved in building and managing local custody suites for the police: in some cases, providing significant numbers of cells in a police force area (600, for example, in the Thames valley force area). In a number of police force areas, new custody suites have been built and operated under the Private Finance Initiative.

It would be relatively simple to use the private sector to expand this local custody network, for relatively little capital investment and potentially at the provider's own risk. Private sector providers could provide modest additional local capacity, built around existing police custody facilities, but purpose-built for short periods of detention (including meeting the needs of very short prison sentences imposed as part of a Swift and Certain approach).

Private providers would then be free to sell this capacity to a number of potential customers, including the National Offender Management Service (to provide flexibility to respond to spikes in the prison population or to provide local capacity as part of a Swift and Certain approach). Other potential users include the Home Office, for immigration detainees, and the police themselves.

9

Implementation

The range of recommendations in this report together represent a challenging agenda for Government that offer a blueprint for a reformed criminal justice system which genuinely deals quickly and effectively with offending behaviour. Policy Exchange does not underestimate the scale of the change being proposed. The introduction of the principles of Swift and Certain justice on the scale being suggested would be a hugely ambitious programme of change. But the gains to be made from pursuing the course proposed would be significant. They would reboot our criminal justice system and create a system that is better able to deal with volume crime quickly and effectively.

This report envisages a staged approach, building on initial pilots and developing a domestic evidence base to support the changes to the legislative framework suggested in this report. The government is recommended to take the following steps:

Pre-sentence

- **Encourage Police and Crime Commissioners to pilot our proposed police court model** to develop local buy-in to the proposals and to set the foundation for the development of a local justice strategy and wider roll-out of the model.
- At the same time, **encourage PCCs and HMCTS to work together to genuinely fast-track prolific offenders** and use the models developed locally on this way as blueprints for developing a service across England and Wales that ensures that prolific offenders who plead guilty are sentenced within 24 hours.

Sentence

- **In parallel with these pilots**, the government should
 - Consult on the introduction of a **new Community Order requirement**, a 'Conditional Behaviour Order.'
 - Pursue amendments to the Criminal Justice Act 2003 to facilitate the introduction of standalone drug and alcohol testing requirements to be delivered as part of a Community Order.

Enforcement

- **Review probation National Standards** to provide a foundation for the Swift and Certain enforcement of Community and Suspended Sentence Orders. Such a review should refocus the standards on more predictable criteria for breach action to be taken and significantly reduce the scope for individual professional judgement by Offender Managers.

- **Pilot a Swift and Certain approach to the enforcement of Suspended Sentence Orders** in one or more CRC areas, focusing on low and medium risk offenders supervised by the CRC.
- **Work with one or more CRC operators** to develop pilots for Swift and Certain enforcement of Community Orders.
- **Pilot a new approach to Intensive Alternatives to Custody** in one or more CRC areas, engaging CRC operators to develop programme content and to deliver through established CRC supply chains.

Long-term savings for the criminal justice system

The obvious objection to the proposals set out in this report is that they will be costly to implement and, in particular, that the costs of even a marginal increase in the prison population will be difficult to manage. But this is a short-sighted view and would be ignoring the significant whole-system benefits from implementing a successful 'Swift and Certain' approach.

The evidence from the HOPE evaluation is compelling in suggesting that a successful 'Swift and Certain' model will result in significant potential savings across the criminal justice system in the long-term. In particular:

- HOPE probationers served or were sentenced to, on average, 48% fewer days in custody. This offers real opportunity for savings from the reduced incarceration of this group of probationers if such a programme is implemented in the UK. This reduced incarceration is due to the fact that this group commits less crime or breach probation orders less often, rather than that the system is more lenient with crimes committed.
- Swift and Certain programmes achieve better compliance rates with Community Orders, therefore offender managers will be required to spend less time engaging with offenders suspected of breaching their probation.
- HOPE probationers were 55% less likely to be arrested for a new crime after one year. This reduction in crime is likely to result in significant savings for all agencies across the criminal justice system.
- A flexible and targeted approach to drug treatment results in cost-efficiency, achieved through delivering intensive treatment to those who prove to need it, as opposed to an 'assess-and-treat' model.