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The Offender Management Bill

Bill 9 of 2006-07

This Bill was published on 22 November 2006, and is due for its second reading on 11 December 2006.

It would allow for probation boards to be replaced with trusts, with the Secretary of State commissioning services from a range of providers, including in the private and voluntary sector. There has been considerable controversy about this; organisations representing the Probation Service oppose the changes, although there has been support from some private and voluntary sector organisations.

The Bill would also make changes to the powers of officers in contracted out prisons, bringing them more into line with those in the public sector. It also introduces changes to tighten up prison security.

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Summary of main points

Part 1 of this Bill is designed to increase the involvement of the private and voluntary sectors in probation work by allowing the Secretary of State to commission services directly. Currently only probation boards can make provision for probation work, either providing services directly or contracting it out. Between 2% and 3% is contracted out, although the Government is requiring them to increase this proportion, with a 5% target for 2006/07.

The Bill forms part of a programme of change which has taken place since the then Home Secretary, David Blunkett, accepted the main recommendations of the Carter Report, published in 2003. This argued for:

- “end-to-end management” of offenders, to ensure continuity both in prison and under supervision in the community
- a purchaser/provider split, with regional managers contracting services
- greater “contestability” (allowing the private and voluntary sector to compete to provide services)

The overall aim was to drive up standards and reduce reoffending. Around 60% of adult offenders reoffend within two years.

The private sector has been involved in prisons since the early 1990s both through taking over the management of existing prisons, and building and running new ones.

The National Offender Management Service (NOMS) was formed in 2004, and has an aim of reducing reoffending by 5% by 2008 and 10% by 2010. Around 14,000 staff were moved to NOMS Headquarters, although both the Prison Service and the Probation Service retained their headquarters. Ten regional managers were appointed, and they began commissioning services in April 2006. An “Offender Management Model” is being implemented to provide an integrated approach with a single manager for each offender. The Probation Service is being required to contract out more of its services. However, the Government considered that legislation was necessary to gain more control over this process, and ensure greater contestability.

The “NOMS vision” for probation has evolved since the Government first responded to the Carter report. First a regional structure was proposed then, following concerns about the loss of local links, it was decided that the 42 probation boards would be retained, but would be directed to contract out more. A bill, which would have put NOMS on a statutory footing and allowed the Secretary of State to direct local probation boards on how to perform their contracting-out functions, was introduced in the Lords in January 2005. However, it made no progress before the May 2005 General Election. A further bill was announced in the Queen’s Speech for the following session, but did not materialise. Then a consultation paper published in October 2005 proposed the Secretary of State himself should be given the statutory responsibility to commission probation services. Probation boards would be replaced by trusts who, along with others, could be contracted to deliver probation services. The broad thrust of the Government’s proposals was confirmed in a “contestability prospectus” published in August 2006. The Bill reflects this, except that it allows the trusts to be phased in over

time. The first trusts are expected in 2008, and it will probably be the higher performing probation boards which will move to trust status first. At the same time, action is being taken to try to improve the worst performing probation boards. Thinking has also changed over NOMS HQ as part of the present Home Secretary's review of the Home Office, and it is due to reduce in size and concentrate on commissioning.

The National Probation Service was formed as recently as 2001 following a major restructuring, and the Government has acknowledged that it has improved its performance across a wide range of targets. However, despite this it wishes to improve performance still further through the involvement of the private and voluntary sector. Pressure for change has also increased as a result of a series of serious, high profile public protection failures, such as the murders of John Monckton and Naomi Bryant by offenders who were under supervision.

Generally speaking, whilst "end-to-end management" of offenders has been broadly welcomed, contestability has proved highly controversial. The National Association of Probation Officers is campaigning strongly against the relevant clauses in the Bill. The Probation Boards Association has criticised what it sees as the reliance on central direction, and has put forward an alternative model of local commissioning. By contrast the Confederation of British Industry welcomes the policy and expresses impatience over the slow speed of change. There is a range of views from voluntary sector organisations, with some pointing out that the origins of probation lie in this sector and welcoming the opportunity to increase their participation, and others raising questions about the ethical and practical implications.

The rest of the Bill mainly concerns prisons. Part 2 contains measures to increase some of the powers of officers in private prisons to bring them more into line with those of their public sector counterparts. Directors of private prisons would be given new adjudication and segregation powers. There is a range of other measures designed to improve prison security. Officers in private prisons would be given increased powers to search visitors and new powers to detain visitors they suspect of committing an offence for up to two hours pending the arrival of a police constable. Offences connected with assisting escapes and with smuggling drugs, alcohol and other forbidden items into prisons are overhauled. A new offence of smuggling cameras, recording equipment and (mobile phones) into prisons would be created, although there would be a public interest defence. This follows the case of an undercover reporter who managed to get a job as a prison guard and take pictures of the Soham murderer Ian Huntley. Part 3 of the Bill contains a variety of other "offender management" measures, including provisions which would allow young offenders to be transferred to adult prisons when they reach the age of 18, rather than staying in Young Offender Institutions until they reach 21.

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I Introduction

The Offender Management Bill was published on 22 November and is due to have its second reading on 11 December 2006. The Bill would:

- Move responsibility for commissioning probation services from Probation Boards to the Secretary of State
- Allow for Probation Boards to be abolished and for new Probation Trusts to be established over time.
- Remove some of the differences in the powers of officers in contracted-out and public sector prisons
- Create a new offence of taking photographic images inside a prison

The most contentious of these changes are the reforms to the probation service, which in turn are bound up with the development of the National Offender Management Service (NOMS). Part II of this research paper describes the background to and development of NOMS, including some of the terms such as contestability and commissioning which are so central to this debate. Part III focuses on the developing policy towards the probation service within the NOMS changes, and examines part 1 of the Bill, which covers the changes to probation. Part IV of the paper looks at the changes to prison law, and Part V deals briefly with some of the other measures to do with offender management.

The Bill extends only to England and Wales (except for two very minor provisions to do with regulation making and consequential provisions, when extend throughout the UK.)

The Government has made a statement that in its view the provisions of the Bill are compatible with rights under the European Convention on Human Rights. The Joint Committee on Human Rights is currently consulting on the Bill, which, it states, raises eight issues requiring further scrutiny.¹

II Background to the probation changes

A. History of probation

The origins of probation can be traced back to the 1820s when Warwickshire magistrates combined their various common law powers to take sureties to secure offenders' future good behaviour by releasing young offenders into the charge of an employer.² During the latter half of the 19th century, magistrates in police courts found themselves dealing

¹ Joint Committee on Human Rights, *Legislative Scrutiny Session 2006-07 Bills under scrutiny* http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchris06_07.cfm#OMB

² Dick Whitfield, *Introduction to the Probation Service*, 1998 p11

with a wider range of offences as summary justice was extended.³ A large number of these offences were associated with drunkenness. In 1876 a printer named Frederick Rainer donated five shillings for a missionary at Southwark Crown Court through the Church of England Temperance Society so that 'something might be done', and by 1880 there were eight full time missionaries working in the metropolitan courts.⁴ By the time of the enactment of the *Probation of Offenders Act 1907*, which put probation on a statutory footing, there were 143 missionaries at work.⁵ The system usually involved supervision being offered in place of a sentence. By the end of the 20th century, there were 54 "probation areas", which were relatively autonomous, with no national framework or national co-ordinating body with responsibility for the service. Every probation area had a probation committee made up of local magistrates.

In 1998, the Government published a green paper, *Joining forces to protect the public*, which argued that there were considerable problems with the fragmented nature of the service:

It is a fragmented organisation, with 54 autonomous units free to deploy the resources allocated by central Government as their committees see fit. There is only limited accountability to central Government. By modern standards, the lack of democratic accountability even at local level is a concern. The Committees have done and continue to do excellent work on a voluntary basis, but the new probation services they have helped to create now have outgrown their organisational origins.⁶

The consultation paper went on to make the case for a "unified approach".⁷ It stated that the probation service required both stronger national leadership and direct and unequivocal accountability to Ministers and Parliament.⁸ The result was the *Criminal Justice and Court Services Act 2000*, which established the National Probation Service as a unified service for England and Wales, based on 42 local Probation Boards, coterminous with police force areas and composed of representatives of the local communities and the courts. More detailed background can be found in Library Research Paper 00/36.⁹

B. The Carter report

The decision to reform the system for managing offenders resulted from the review of correctional services, led by Patrick Carter, now Lord Carter of Coles. Lord Carter is a healthcare entrepreneur and non-executive director on the Home Office's Group

³ Andy Selman "England and Wales" in *Probation and Probation Services A European Perspective*, ed. Kalmthout and Derks, 2003, chapter six

⁴ Joyce Moseley, "Throwing away the key? The historical and modern context of charities working in the criminal justice system", in the Social Market Foundation report, *Returning to its roots? A new role for the Third Sector in Probation*, ed Natalie Tarry, 2006, p 28,
<http://www.smf.co.uk/index.php?name=UpDownload&req=viewdownload&lid=186>

⁵ Koichi Hamai and others *Probation round the world: A comparative study* 1995

⁶ *Joining Forces to Protect the Public* Home Office August 1998

⁷ *ibid*

⁸ *ibid.* paragraphs 2.9-2.11

⁹ *The Criminal Justice and Court Services Bill: Probation, Community Sentences and Exclusion Orders*, 27 March 2000, <http://www.parliament.uk/commons/lib/research/rp2000/rp00-036.pdf>

Executive Board, who has chaired a number of Government reviews.¹⁰ These included a 2001 report on PFI and market testing in the Prison Service.¹¹ New Labour had previously investigated the possibility of merging prisons and probation soon after it was elected in 1997, but decided it was a “bridge too far” because of the separate responsibilities of the two services and the management costs and disruption of a merger.¹² Instead, the Government decided to create a new unified National Probation Service. Patrick Carter’s correctional Services Review began under the Home Office but subsequently was moved to the Prime Minister’s Strategy Unit.

The Carter report, *Managing Offenders Reducing Crime*, began by examining the significantly increased use of both prison and probation, concluding that this resulted from increased sentence severity rather than an increase in the number of offenders caught and sentenced or an increase in the overall seriousness of crimes brought to justice. It found “significant structural problems”, with the prisons and probation service forming two “silos” which were largely detached from one another. Access to services such as drug treatment and education depended “more on whether an offender is sent to prison or probation, rather than their individual needs,”¹³ and programmes and interventions undergone in prison were not necessarily followed up in the community. The report also commented that the performance of private sector prisons had been “generally very good” and had provided a strong incentive for improvement in the public sector.¹⁴

The Carter report concluded that a new approach was needed with:

- “end to end management of offenders” through a new National Offender Management Service replacing the Prison and Probation Services; and
- greater use of competition from private and voluntary providers
- a purchaser/provider split, with Regional Offender Managers contracting rather than managing services on an equal basis from the public, private and voluntary sectors.

An integral part of the proposed reforms was sentencing policy. Proposed changes included: changes designed to improve the credibility of community sentences; more demanding community sentences for medium risk offenders; and greater control and surveillance, including satellite tracking, of persistent offenders, combined with help to reduce re-offending. Custody would be reserved for “serious, dangerous and highly persistent offenders.”¹⁵

¹⁰ <http://www.homeoffice.gov.uk/about-us/organisation/senior-management/>

¹¹ Patrick Carter, *Review of PFI and market testing in the Prison Service*, January 2001. Deposited in Library by the Home Office, Dep 02/410, 27 February 2002.

¹² Home Office, *Joining Forces to Protect the Public, Prisons-Probation, A consultation document*, August 1998 paragraph 2.38

¹³ p 33

¹⁴ Patrick Carter, *Managing Offenders: Reducing Crime*, 11 December 2003, <http://www.probation.homeoffice.gov.uk/files/pdf/52pp.pdf> p 23

¹⁵ p 4

C. The National Offender Management Service

1. Announcement

The Government accepted most of the recommendations of the Carter report and set out its plans for the National Offender Management Service (NOMS) in *Reducing Crime – Changing Lives*.¹⁶ NOMS was to have an overall remit to reduce re-offending. It was also to be responsible for:¹⁷

- improving the enforcement and credibility of community punishments so that prison is not the first resort for less serious offenders;
- ensuring that both custodial and community punishments make offenders address their behaviour and offer a path away from crime; and
- raising educational standards among offenders in order to break the link between low educational attainment and criminality.

The document went on to make clear that greater use would be made of the private and voluntary sectors in the new service:

27. The new National Offender Management Service will also ensure greater value for money by encouraging the greater use of the private and 'not-for-profit' sectors in prisons and in the community wherever it can demonstrate its greater cost effectiveness. In the community in particular we want to make much more use of the 'not for profit' and voluntary sector by involving communities in the supervision of offenders and the reduction of crime

On 6 January 2004, the then Home Secretary, David Blunkett, gave further details in a statement to Parliament:¹⁸

The new National Offender Management Service will have direct responsibility for the punishment and rehabilitation of adult offenders both in custody and in the community. I am pleased to announce that Martin Narey, former director general of the Prison Service, will be the chief executive of the new service. We are also announcing today the establishment of the National Offender Management Board, chaired by the Under-Secretary of State for the Home Department, my hon. Friend the Member for Wythenshawe and Sale, East (Paul Goggins), who has responsibility for correctional services.

In due course, we shall make separate announcements on the inspection regime, which will remain independent. We intend to learn lessons from the use of contestability within the Prison Service. Contestability will extend to not-for-profit and voluntary organisations, which we invite to come forward to work in partnership with the service.

We believe that the task of integrating the management of offenders is best achieved at regional and local level, where effective links can be forged and

¹⁶ Home Office *Reducing Crime, Changing Lives*, January 2004, <http://www.probation.homeoffice.gov.uk/files/pdf/master%200pp%20BB.pdf>

¹⁷ <http://www.probation.homeoffice.gov.uk/output/Page214.asp>

¹⁸ HC Deb 6 January 2006 c 171-2

joined-up strategies developed. Those will include working with complementary services, including health, education, housing and employment.

We will create 10 regional offender managers, responsible for the end-to-end management of offenders, covering the nine English regions and Wales. We will, as part of the overall review of the location of Government posts, be looking to de-centralise more of the service.

The regional offender managers will be responsible for ensuring effective case management. They will contract for prison places, community placements, supervision and other critical interventions, as part of the new partnership approach. But I believe—perhaps that phrase is a bit hackneyed now—that the judiciary can be much better informed about the effectiveness of different forms of sentencing and be more aware of what is likely to be most effective for particular individuals. We introduced in the Criminal Justice Act 2003 the new Sentencing Guidelines Council to formulate a comprehensive set of guidelines.

I have agreed with the Lord Chief Justice and the Secretary of State for Constitutional Affairs that it is important that greater knowledge on the effectiveness of interventions, including the cost-effectiveness of different approaches, should inform the work of the Sentencing Guidelines Council. That will be crucial to the work of the judiciary and magistracy at regional and local level. In the first instance, we would seek their urgent intervention in eliminating the drift in sentence length and to seek a reduction in unjustified variation in sentencing across the country.

I expect those reforms to lead to a much more effective, consistent and transparent criminal justice system, but those who work in the service bear the brunt of both the challenges and the change for the future. I wish to pay tribute to the staff in the prison and probation services and the YJB, whose expertise has contributed so much to the achievements that I have already outlined in this statement. Those changes represent an assertion of our confidence in those who work with offenders and our belief that the new arrangements will help substantially to make their work in custody and in the community significantly more effective.

Since its inception, the NOMS change programme has covered three main programmes:

- organisational development
- offender management
- commissioning and contestability¹⁹

These are described in more detail below.

2. NOMS Headquarters

NOMS was established, with Martin Narey as its chief executive, from 1 June 2004.²⁰ The full roll-out of the new service was expected to take five years.²¹ The National

¹⁹ *NOMS Strategic Business Case*, October 2005, p2

²⁰ HC Deb 6 January 2004 c 171-2

Offender Management Service Headquarters was set up in June 2004. It was formed initially from existing Home Office units, although since then a number of staff and functions have transferred in from the Prison Service and the National Probation Service.²² By September 2006, there were around 14,000 employees.²³

Martin Narey resigned as Chief Executive with effect from October 2005 to become Chief Executive of Barnardos and has been replaced by Helen Edwards, previously Director General of the Home Office's Communities Group.²⁴ NOMS has also seen three Home Secretaries since its inception. David Blunkett resigned in December 2004. Then in May 2006, his successor, Charles Clarke, resigned in response to revelations that over a thousand foreign national prisoners had wrongly been released without having been considered for deportation. John Reid, who succeeded him, ordered a review of the Home Office having commented in evidence to the Home Affairs Committee that "in the wake of the problems of mass migration that we have been facing our system is not fit for purpose."²⁵ In July 2006, three reports were produced; one on reforming the Home Office itself;²⁶ one on "rebalancing" the criminal justice system;²⁷ and one on reforming the Immigration and Nationality Directorate.²⁸ The report on the Home Office stated that there would be a "reshaping" of the top team in NOMS. A "more integrated and joined up" strategic policy function would be established at the Home Office, which would be smaller than the previous one but "more influential". NOMS HQ would become smaller, concentrating on commissioning, with casework and operational decisions being devolved to the front line:²⁹

We will focus its headquarters on the job of commissioning high-quality services for managing offenders and driving up the performance of the probation and prison services. This will involve a more effective inspection and performance system, intervening decisively where performance is weak and opening more services up to competition from the voluntary and private sectors. We will devolve the NOMS headquarters casework and operational casework and operational decisions closer to the front line. As a result, **NOMS head quarters will get progressively smaller, reducing by half by 2010.**

The Guardian, reporting an interview with the NOMS Chief Executive Helen Edwards, described future plans for NOMS as follows:³⁰

²¹ HC Deb 19 April 2004 c104W

²² HC Deb 12 September 2005 c2753W

²³ 1,375.7 full time equivalents: HC Deb 4 September c1855W

²⁴ Updates on the NOMS Change Project are available on the Probation Service website at <http://www.probation.homeoffice.gov.uk/output/page224.asp> and NOMS now has its own website at <http://www.noms.homeoffice.gov.uk/>.

²⁵ Select Committee on Home Affairs Minutes of Evidence , 23 May 2006, question 866, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/6052302.htm>

²⁶ Home Office, *From improvement to transformation An Action Plan to reform the Home Office so it meets public expectations and delivers its core purpose of protecting the public*, July 2006, <http://www.homeoffice.gov.uk/documents/reform-action-plan.pdf/reform-action-plan-eng.pdf?view=Binary>

²⁷ Home Office, *Rebalancing the criminal justice system in favour of the law-abiding majority*, July 2006, <http://www.homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>

²⁸ Home Office, *Fair, effective, transparent and trusted Rebuilding confidence in our immigration system*, July 2006, <http://www.homeoffice.gov.uk/documents/ind-review-250706/ind-review-eng?view=Binary>

²⁹ Home Office, *From improvement to transformation An Action Plan to reform the Home Office so it meets public expectations and delivers its core purpose of protecting the public*, July 2006, p9

³⁰ "Competitive instinct", *Guardian*, 8 November 2006, <http://society.guardian.co.uk/crimeandpunishment/story/0,,1941532,00.html>

Under this blueprint, Noms, - whose strategic policy function is to return to the main Home Office, - will become a small, strategic commissioning organisation setting out clear national standards of what is expected for offenders both in and out of prison.

3. Objectives

The main overarching target for NOMS is to reduce re-offending by 5% by 2007-08, rising to 10% by the end of the decade.³¹ The Appendix to this Research Paper discusses reoffending rates.

A highly influential report published by the Government's Social Exclusion Unit in 2002 identified nine key factors that influence reoffending.³² Building on this work, NOMS published its *Reducing Re-offending National Action Plan* in July 2004, identifying seven "pathways" (or areas of work) to support the rehabilitation of offenders.³³ These are:

- accommodation
- education, training and employment
- mental and physical health
- drugs and alcohol
- finance, benefit and debt
- maintaining relationships with children and families
- attitudes, thinking and behaviour

A delivery plan was published in November 2005,³⁴ and regular updates are provided on the NOMS website.

In addition to the overarching goal of reducing reoffending, the Carter Report had originally stated that its proposed package of reforms could have the effect of containing the numbers of prisoners and those under supervision.

The Carter report had stated that these could be achieved by its suggested reforms:

On current forecasts, by 2009 there will be 93,000 offenders in custody and 300,000 under supervision

Implementing the proposed package in this report would ensure more effective targeting of resources and help keep numbers at lower levels – estimated at

³¹ NOMS Business Plan 2006-07, May 2006, page 18:
<http://noms.homeoffice.gov.uk/news-publications-events/publications/strategy/noms-business-plan-06-07?view=Binary>

³² Social Exclusion Unit, *Reducing re-offending by ex-prisoners*, 2002. Summary (and full report on request) available at <http://www.socialexclusion.gov.uk/publications.asp?did=190>

³³ <http://www.socialexclusionunit.gov.uk/downloaddoc.asp?id=249>

³⁴ NOMS, *Reducing Re-offending Delivery Plan*, November 2005,
<http://www.noms.homeoffice.gov.uk/news-publications-events/publications/strategy/reducing-reoffending-delivery-plan/reducing-reoffending-delivery?view=Binary>

under 80,000 offenders in custody and 240,000 under supervision, whilst increasing the effectiveness of offender management.

This would be achieved through preventing further sentencing drift, increasing the use of fines and intensive community sentences and marginal reductions in sentence length.

Initially, stabilising the prison population at 80,000 and numbers under supervision at 240,000 by 2009 were also adopted as targets for NOMS.³⁵

The Home Affairs Committee in its December 2004 report *Rehabilitation of Prisoners* was sceptical about the goal of stabilising prison numbers at 80,000:

There are considerable grounds for scepticism about the accuracy of the present projection—of 80,000 by 2009—not least because it rests on very large assumptions about the net effect of sentencing changes arising from the Criminal Justice Act 2003, and because it produces a result in which, conveniently, population exactly matches capacity. Any prison population above 80,000—and certainly a prison population reaching up from 91,000 to 109,000 as previously projected by the Home Office—would continue to impose intolerable strains upon the prison regime and prospects for rehabilitation. In the absence of a fuller statement of its methodology than the Home Office has been able to supply us with, there must be a suspicion that the actual calculation may have been the other way round to what is claimed: i.e. that the Government started from a basis of the maximum prison population that the Treasury was willing to pay for, and then adopted sentencing assumptions which delivered that required total.³⁶

An article in the *Guardian* in September 2005 indicated that that this aim would be dropped:

The home secretary, **Charles Clarke**, has told the *Guardian* he is to abandon his predecessor's aspiration of pegging the prison population in England and Wales at 80,000. He will also drop plans to put a legal obligation on the judges' Sentencing Guidelines Council to take the size of the prison population - currently 77,000 and rising - into account when laying down the "going rate" for major crimes.

"I am not convinced that an overall obligation to look at the overall size of the prison population is the right thing to do," Mr Clarke, who succeeded David Blunkett, said. Instead, Mr Clarke wants to cut Britain's reoffending rates by creating a network of community prisons to ensure that those serving short sentences remain close to their families and communities.

He recognises that an overcrowded prison system means that goal will be difficult to achieve, but believes a system of community prisons can be set up by restructuring the jail network and by greater use of community punishments for some of those serving short sentences.³⁷

³⁵ These were set out, for example, in NOMS Update Issue No 4/2005, June 2005, <http://www.probation.homeoffice.gov.uk/files/pdf/NOMS%20Update%20JUne%202005.pdf>

³⁶ Home Affairs Committee, *Rehabilitation of Prisoners*, HC 193-I 2004-05, December 2004, p 43

³⁷ "Clarke to scrap plan for peg on prison numbers", *Guardian*, 19 September 2005

The 2006-07 Business Plan makes no mention capping prison numbers (which stood at just over 80,000 by December 2006)³⁸ or checking the increase in the numbers on supervision.³⁹ It groups a large number of detailed targets and milestones under six broad goals:

- Protecting the public (covering targets on prison escapes and management of prisoners who pose a high risk of harm)
- Supporting the courts (concerning probation pre-sentence reports and timely delivery of prisoners to court)
- “Firm and fair punishment” (with targets concerning enforcement of court orders, prison suicides, serious assaults and overcrowding)
- Helping to cut crime (covering targets on rehabilitation programmes)
- Contributing to communities and society (with targets on unpaid work and victim contact)
- Organising and supporting delivery (on staff sickness absence and race equality)

4. Offender Management

As was discussed above, the concept of “end to end” management of offenders was a central one in the Carter report. The aim is for each offender to have a named offender manager who will be responsible for making sure that they are both punished and properly rehabilitated, and that the public are protected. A North West Offender Management was started in October 2004 involving prison and probation staff working together to establish how offender management could be delivered operationally. It comprises three different areas of work: community orders; young adult offenders serving custodial sentences; and adult offences. An evaluation of two of these is available on the NOMS website.⁴⁰

Implementation of offender management began with people on Community Orders from April 2006, and is due to be introduced for custody shortly.

³⁸ NOMS, *Prison population and accommodation briefing for 1 December 2006* http://www.hmprisonservice.gov.uk/assets/documents/1000249301122006_web_report.doc

³⁹ Home Office, NOMS Business Plan 2006-07, May 2006 <http://noms.homeoffice.gov.uk/news-publications-events/publications/strategy/noms-business-plan-06-07?view=Binary>

⁴⁰ NOMS, *Action Research Study of the implementation of the National Offender Management Model in the North West pathfinder – summary* (undated) <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr3205.pdf>

5. Commissioning

Commissioning is fundamental to the Carter vision, which emphasised the need for a “purchaser/provider split”. Similar principles have been applied elsewhere in public sector reforms, for example in health care and community care. The Carter report cited a successful model in the field of criminal justice, the youth justice reforms, whereby the Youth Justice Board established under the *Crime and Disorder Act 1998* purchases custodial places from the Prison Service, local authority and private sector providers.⁴¹ Multi-agency Youth Offending Teams (YOTs), made up of representatives from the police, Probation Service, social services, health, education, drugs and alcohol misuse and housing officers, were set up in each local authority to coordinate youth justice within their area and provide services and programmes to reduce youth offending.

A senior NOMS official, in a recent essay, explains what commissioning means in this context:⁴²

Commissioning describes a set of activities which are separate from actually running the services. These include identifying the services needed, specifying the service; negotiating funding and outcomes with the provider; monitoring performance; and accounting for what is being delivered. Service providers no longer determine the services to be delivered, but deliver those services which have been purchased by the commissioner. Their accountability, as set out in “Reducing Crime, Changing Lives” is for the efficient operation of the services provided.

In the same publication, the Chair of the Youth Justice Board, Rod Morgan, questions the extent to which the youth justice reforms should be cited as a model for the NOMS changes:⁴³

Though the Carter report and several Home Office documents have referred in highly positive terms to the youth justice delivery model, the proposed NOMS/Probation structure does not even remotely replicate it. Determining who is to provide services at national or regional level arguably provides neither the accountability nor sensitivity to local conditions and local state agencies which YOTs embody and which area Probation Boards promise in theory.

6. Contestability

Whilst the concept of end-to-end management of offenders has been one which has been broadly welcomed, there has been considerable controversy over “contestability” – a concept which was explained in *Reducing Crime, Changing Lives*⁴⁴:

⁴¹ p23

⁴² Nicola Lowitt, “The National Offender Management Service – the case for change”, in the Social Market Foundation’s report, *Returning to its roots? A new role for the Third Sector in Probation*, ed. Natalie Tarry, 2006, pp21-2

⁴³ Rod Morgan, “Working with volunteers and the voluntary sector – some lessons for probation from youth justice”, *Returning to its roots? A new role for the Third Sector in Probation*, ed Natalie Tarry, 2006, p 28

⁴⁴ Home Office *Reducing Crime, Changing Lives*, January 2004, <http://www.probation.homeoffice.gov.uk/files/pdf/master%2020pp%20BB.pdf>, p14

The Government are not interested in using the private sector for its own sake, whether in prisons or in the community. We want the most cost effective custodial and community sentences no matter who delivers them. The experience with the Prison Service's use of the private sector has been extremely positive. Four private companies successfully run nine prisons (shortly to grow to eleven). Many prisoners and visitors to these prisons speak positively about the way they are treated by staff.

More significantly, the threat of contestability in running prisons has led to dramatic improvements in regimes and reductions in cost at some of the most difficult public sector prisons. So effective has contestability been that the public sector have won two prison contracts back from private sector operators and in the last few weeks, responding to the threat of the private sector, Dartmoor and Liverpool Prisons have transformed their performance.

We intend therefore to encourage the private and 'not for profit' sectors to compete to manage more prisons and private and voluntary sector organisations to compete to manage offenders in the community. We want to encourage partnerships between public and private sector providers and the voluntary and community sectors which harness their respective strengths. As a market develops, offender managers will be able to buy custodial places or community interventions from providers, from whatever sector, based only on their cost effectiveness in reducing re-offending.

However, the term is subject to different interpretations. Academic commentator Mike Nellis characterises these as follows:⁴⁵

'Contestability' – the Carter report's chosen term for the mechanism for involving private and not-for-profit sector involvement – originated with the Treasury. Carter proposed that within five years, contestability should be 'introduced across the whole of prisons and community interventions, with outcome-based contracts' (Carter, 2003). The concept – and exactly what it might mean in practice – was and remains ill-defined. At its mildest, contestability seems merely to be a synonym for the process of market testing rather than for the specific outcome of privatisation or contracting out. This is how the Home Office now tends to project it. At its strongest, it seems to be about the engineering of a mixed economy of provision, which intentionally and systematically destroys the near-monopoly of the public sector, in order to institutionalise a permanently competitive – and in the government's terms more desirable – environment. This is what current stakeholders in corrections – the PBA (Probation Boards' Association) Napo, and the Prison Officers Association (POA) fear is the real agenda, regardless of what is being said officially, even by the HM Inspectorate of Probation, which ostensibly endorses the mild view.

After Charles Clarke took over as Home Secretary he made his first major speech on the issues to the Prison Reform Trust on 19th September 2005.⁴⁶ In this he confirmed that he was committed to "the creation of a vibrant mixed economy within NOMS":

⁴⁵ Mike Nellis, "NOMS, contestability and the process of technocorrectional innovation", in *Reshaping probation and prisons The new offender management framework*, ed. Mike Hough, Rob Allen and Una Padel, Centre for Crime and Justice Studies, January 2006

I believe that, particularly within the voluntary and community sector, there is a large untapped resource which is keen to help us achieve the reductions in reoffending that I have described. A strong structure of commissioning and contestability in prisons and probation will create a wider range of appropriate interventions and raise the quality of offender management services across the country.

This is of course not easy to achieve, particularly when the historic cultures of the nationally managed prison services and the locally-managed probation services are so very different. It is however essential and I believe we can drive improvement through seeking the best possible providers for interventions and offender management in each area. In many areas the public sector's skill and expertise will deliver the continuous improvement we need. In other areas, competition is needed to stimulate this improvement. For example voluntary organisations with significant experience and history of success often already provide drug treatment interventions.

In short I see no reason of principle or practicality why offender management should not be provided by the private or voluntary sector. And a very important part of the development of commissioning and contestability will be the ability to specify and contract for cross-cutting services, straddling the current silos of prison and probation, and making a reality of the end-to-end management of offenders.

There had been some criticism that the Government had failed to produce a business case. The National Association of Probation Officers, for example, hoped that it would explain how contestability would reduce reoffending:⁴⁷

Since early 2004 Napo has been asking for the Business Case for NOMS and the specific models of contestability as proposed. The Business Case that explains the causal link between contestability and a reduction in reoffending has still not been published.

The NOMS "Strategic Business Case" was published in October 2005. This indicated that the commissioning/providing split in the new system should "dramatically increase" contestability, which would "maximise use of scarce resources" and improve services:⁴⁸

The establishment of the National Offender Management Service, within which a single National Offender Manager (NOM) would be responsible for offenders, is designed to break down the silos of the prison and probation service. Ten Regional Offender Managers (ROMS) supporting the NOM, will be key agents working across the two services, commissioning rather than line-managing services to maximise use of scarce resources. The intention is that this will dramatically increase the level of contestability in the system, improving services by opening them up to new providers.

⁴⁶ Home Secretary, *Where next for penal policy*, Speech to Prison Reform Trust 19 September 2005

⁴⁷ NAPO, *Restructuring probation – What works*, 2005, para. 2.24
http://www.napo2.org.uk/Napo2docs/NapoResponseRestructuringProbation/i._Restructuring_Probation_-_What%20Works_-_Napo's_Response_to%20Home_Office_Consultation_Paper.pdf

⁴⁸ Home Office, *NOMS Change Programme Strategic Business Case*, 20 October 2005,
[http://www.probation.homeoffice.gov.uk/files/pdf/NOMS%20Strategic%20Outline%20Business%20Case%20\(Oct%202005\)%20.pdf](http://www.probation.homeoffice.gov.uk/files/pdf/NOMS%20Strategic%20Outline%20Business%20Case%20(Oct%202005)%20.pdf)

The document went on to describe the “anticipated benefits”:

The primary benefit from NOMS will be the value to society of a reduction in crime, estimated to be worth £1.7 billion annually for the targeted reduction in re-offending of 5%. The delivery of this benefit is dependant on both improving the impact of NOMS activities on the likelihood of each individual offender re-offending, and providing more front-line services to tackle criminogenic needs through the re-investment of efficiency gains.

It went on to state that the new offender management capability would result in more effective case management and better targeted interventions, with the new commissioning system improving the effectiveness of interventions.⁴⁹

However, the document stated that there is a separate business case which the Government do not intend to publish:⁵⁰

The NOMS Programme Directorate maintains the evolving Outline Business Case that includes work in progress in completing elements of the Final Business Case. This is a management tool and will not be published at the present time because detailed elements of the change programme represent policy making in progress. This also includes the risk register, which includes risks that fall into categories such as timing, capability, effectiveness and cost.

In July 2006, the new Home Secretary, John Reid, published his plans for “rebalancing” the criminal justice system.⁵¹ This stated that the Government would build an additional 8,000 prison places⁵² and also highlighted a number of ways in which the Government intends to improve probation performance:⁵³

First, we want to make sure that probation services are not being swamped with less serious offenders, and with huge burdens of report writing. We know that more and more minor offenders are getting community sentences (including people who might have been fined in the past). And courts are also demanding more and more reports from probation before they sentence. We need probation to be able to concentrate on the people who really need intensive supervision, either because they are dangerous, or because of their very high risk of reoffending. We will work with the Lord Chief Justice and with sentencers to find ways of ensuring that probation resources are targeted on those who most need them, that more minor offenders are fined rather than given low-level community sentences, and that courts do not make excessive demands for reports.

3.31 Second, we want to get a wider range of partners involved in managing offenders and cutting reoffending. At present, probation boards are monopoly providers of probation services. Only around 3 per cent of probation work is carried out by the voluntary and community sector, in partnership with probation

⁴⁹ p8

⁵⁰ p2

⁵¹ Home Office, *Rebalancing the criminal justice system in favour of the law-abiding majority Cutting crime, reducing reoffending and protecting the public*, July 2006

⁵² p 6

⁵³ p29

boards. We believe both that there are more providers out there who could help us improve the way we manage offenders in the community; and that allowing others to provide services would also help drive up standards across the board, as it has done in the Prison Service.

Therefore, we will legislate to open up probation to other providers, and will only award contracts to those who can prove they will deliver reductions in reoffending, and keep the public safe. To accelerate this process, we are introducing measures to improve performance immediately. They will focus first on Probation Boards which are performing well below the standards of the best. We have already required six Boards to produce immediate improvement plans. We will ensure that all these Boards have made demonstrable, measurable progress by March 2007.

A *Financial Times* article criticised the fact that the document “barely mentioned the role the private sector might play in building prisons or managing the probation service” despite the fact that private companies had been urging the Home Office to invite them to play a greater part “for months”.⁵⁴

Then in August 2006, the Government published what it refers to as a “contestability prospectus” aimed mainly at existing and potential providers of services to NOMS. This summarised the Government’s aims with regards to contestability as follows:⁵⁵

1.26 Contestability is not new to NOMS (...). Around 25%, by value, of adult offender services are delivered by private and voluntary sector providers. Whilst we have greater plurality of provision than many government departments, there is further to go before we have all providers playing to their strengths. There are over 1,100 organisations delivering correctional services in England and Wales, but the values of these contracts are often very low; on average probation boards sub-contract around 2%-3% (by value) of their budget allocated for providing adult offender services.

1.27 Key elements of our programme of contestability for prison and probation services will include:

- ***Challenging underperforming prisons and probation boards to demonstrate how they will improve, with contests held to commission alternative provision if existing providers fail to provide or deliver a satisfactory improvement plan;***
- ***Market testing (when legislation allows) a range of offender services (interventions) across community and custodial settings;***
- ***A major extension of partnership working and sub-contracting by probation boards to enable a wider range of providers to play to their strengths and deliver offender services;***

⁵⁴ “Companies must wait on prisons role”, *Financial Times*, 21 July 2006

⁵⁵ NOMS, *Improving Prison and Probation Services: Public Value Partnerships*, August 2006, p 6, http://www.noms.homeoffice.gov.uk/news-publications-events/publications/strategy/impr_prison_probab_partnerships?view=Binary

- ***Competitions to run new business including the building and operation of all new prisons and other accommodation for offenders;***
- ***Pathfinder projects that offer new solutions;***
- ***New competitions for previously competed services, including competitions with new specifications so that they cross custodial and community boundaries to make them more effective.***

1.28 Overall we envisage a five year programme of competitions, with a value of up to £9 billion, covering around a quarter of NOMS current annual expenditure on adult offender services. Additional to this is the value of competitions for any prison establishments or probation trusts which fail a performance test or fail to deliver agreed improvements.

III Changes to the structure of the Probation Service

A. The developing policy

The Government's proposals met with controversy, partly because the Probation Service had been reorganised as recently as 2001. In the January 2004 announcement, the then Home Secretary, David Blunkett, set out that out how the Government envisaged that the service would be delivered at regional level.⁵⁶

We believe that the task of integrating the management of offenders is best achieved at regional and local level, where effective links can be forged and joined-up strategies developed. Those will include working with complementary services, including health, education, housing and employment.

We will create 10 regional offender managers, responsible for the end-to-end management of offenders, covering the nine English regions and Wales. We will, as part of the overall review of the location of Government posts, be looking to de-centralise more of the service.

A consultation followed and the resulting controversy led the Government to back track. On 20 July 2004, Paul Goggins, then a junior Home Office minister, announced that the Government had decided not to move to this regional structure, but would continue to use the existing 42 local probation boards. The regional managers, who had by now been appointed,⁵⁷ would "lead performance and innovation at regional level."⁵⁸ The consultation which lead to this decision is described in some detail in a House of Lords Library Note.⁵⁹ The Bill introduced in January 2005 would have retained the 42 boards.

⁵⁶ HC Deb 6 January 2004 c171-2

⁵⁷ NOMS update Issue No 5, 20 October 2004

<http://www.probation.homeoffice.gov.uk/files/pdf/NOMS%20Update%20Issue%205.pdf>

⁵⁸ HC Deb 20 July 2004 cc17-18WS

⁵⁹ House of Lords Library Note 2005/002, *Management of Offenders and Sentencing Bill*, <http://lweb.parliament.uk/Library/content/NotesPapers/>, pages 4-7

On 20 October 2005, the Government published a further consultation document, *Restructuring probation to reduce reoffending*, which made it clear that the Government's thinking had changed since it published the Bill in January 2005. Rather than simply allowing the Secretary of State to direct local probation boards to contract out some of their functions, the Government now wished to take the provision of probation services away from the boards, and give them to the Secretary of State. In future the NOMS Regional Offender Managers (ROMs) would enter directly into arrangements with the public, private and voluntary sector to provide these services:⁶⁰

6. Following two previous written consultations on NOMS in January and May 2004, the Management of Offenders and Sentencing Bill included a provision to enable the Secretary of State to direct a local probation board to contract out certain of their functions. The Bill had its first reading in the House of Lords on 12 January 2005 but progressed no further due to lack of parliamentary time.

7. This additional power would have supported commissioning and contestability, in that it would have enabled a ROM, acting on behalf of the Secretary of State, to direct a local probation board to contract out specified functions to a specified provider where the ROM thought that that provider would deliver a better service. But the power had its drawbacks. It would not have supported commissioning across geographical and organisational boundaries. The ROM would still have been tied to working through the board, and the board would have found itself in the potentially awkward position of having to enter into and manage contracts with providers to whom it had lost out in a competition.

8. Since then consideration has been given to how the power might be made more effective. Between February and May this year, the Home Office held detailed discussions with key stakeholders on the way forward, and concluded that it was necessary to go significantly further than the provision in the previous Bill and change the statutory framework under which probation services are delivered. Various organisational models for delivering this were considered and details are given in the Regulatory Impact Assessment (...)

9. The Government proposes:

- to give to the Secretary of State the statutory duty to make arrangements with others to provide probation services; and
- to create new bodies, replacing local probation boards, with whom he may contract.

10. This does not mean that the Secretary of State will provide probation services directly (in the way that he does with public sector prisons). What it does mean is that the National Offender Manager and the 10 Regional Offender Managers will, on his behalf, enter into arrangements, through contracts or service level agreements, with other organisations in the public, private or voluntary and community sectors to provide them for him.

⁶⁰ NOMS *Restructuring probation to reduce reoffending*, October 2005 <http://www.probation.homeoffice.gov.uk/files/pdf/Restructuring%20Probation%20to%20Reduce%20Reoffending.pdf>

Under the proposals, Probation Boards would be abolished and be replaced by Probation Trusts whose members would be appointed by the Secretary of State, but with more flexibility of membership than the current boards. Trusts would, the document said, “operate with greater independence from the centre”. They would become one of a number of possible providers of probation services. As contestability developed, some work might be transferred to alternative providers. If a trust lost all its business, or if what remained was insufficient to support its overheads, it would cease to exist.⁶¹

A Partial Regulatory Impact Assessment was published on 1 November 2005.⁶² The closing date for responses to the consultation document was 20 December.

B. Reactions to the proposals

These proposals proved highly controversial. There were press reports that, out of some 748 responses, 740 were against the restructuring plans.⁶³ Labour MP Neil Gerrard, chairman of the cross-party Justice Unions Group of MPs (which has raised concerns about the changes) took this up with the then Home Secretary following his statement on the Government’s five year strategy on offender management on 9 February 2006. In reply, Charles Clarke confirmed that few respondents supported the original proposals:⁶⁴

Mr. Neil Gerrard (Walthamstow) (Lab): I am sure that the majority of people agree with my right hon. Friend’s comments about the need for stronger partnerships with a range of providers. However, some of us have serious concerns about contestability. Yesterday, I received a reply to a written parliamentary question in which I asked about responses to the consultation on restructuring probation. It appears that there were 748 responses but nobody could tell me how many were in favour of contestability. I suspect that the answer is a small number. I urge my right hon. Friend to reconsider the matter. It would be much easier to make a success of the positive agenda that he presented if we carried probation staff with us rather than having a fight with them over privatisation.

Mr. Clarke: My hon. Friend is right. I give away no secrets by saying that, when the full results of the consultation are published, they will show that, as he suggested, few people supported the original proposals. I also accept that it is critical to move forward in the way that the strategy sets out with the professionals in the service, not against them. However, almost everybody in the service believes that the end-to-end offender management strategy and the partnership approach is right. They are not convinced that our proposals fulfil those two requirements. I am committed to fulfilling them and to trying to tackle my hon. Friend’s point.

More recently, in April 2006, the Home Office minister Baroness Scotland stated that it was not possible to state what proportion of responses were against the proposals.⁶⁵

⁶¹ p7

⁶² http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/cons-restructure-probation-1105/RIA_restructuring_probation?view=Binary

⁶³ “Home Office retreats on probation reform”, *Guardian*, 3 April 2006, p11

⁶⁴ HC Deb 9 February 2006 c 1041-2

⁶⁵ HL Deb 26 April 2006 c32WA

Lord Ramsbotham asked Her Majesty's Government:

What was the proportion of responses to the consultation document Restructuring Probation to Reduce Re-offending that were opposed to the proposal. [HL5150]

The Minister of State, Home Office (Baroness Scotland of Asthal): Responses to the consultation engaged with the detail of the proposals rather than simply stating their opposition or support, so it is not possible to break down into accurate proportions the views submitted. The summary of responses, Working with Probation to Protect the Public and Reduce Re-offending, published on 30 March, clearly sets out the range of views expressed.

The National Association of Probation Officers was heavily critical of the proposals:⁶⁶

The proposals in the paper abolish the National Probation Service (NPS), as a unified national service for England and Wales based on local probation boards and instead replace it with a mixed economy of providers working on the basis of competition and contestability.

1.4 In 2005, four years after its establishment as a national service and at a time when the Home Office recognises that the Probation Service is performing better than ever against all targets, Napo disputes the rationale of the plans to abolish the successful NPS and the current structure of Probation Boards, involving and representing the local community.

1.5 This is a complete reversal of the Government's position in 1998 when in the consultation paper 'Joining Forces to Protect the Public' it recommended that the National Probation Service be established. At that time, the Probation Service was perceived as a *'fragmented organisation'* with *'only limited accountability centrally and locally'*.

1.6 No case has been made, or evidence put forward, to explain how the abolition of a unified Probation Service and its replacement by the fragmented model now proposed, will reduce reoffending. Rather, the model proposed runs counter to the evidence that does exist on what is necessary to reduce reoffending and to protect the public, namely:

- strategies based on the principles of cooperation and partnership;
- consistency in supervision by a skilled, professional workforce working to a clear value base, including the promotion of diversity;
- the involvement and confidence of members of the local community and sentencers in the work of the Service.

The issues were discussed in an evidence session held by the Commons Home Affairs Committee on 29 November 2005. In this, John Raine, Chairman of the Probation Boards Association (PBA) argued that the Government's proposals would make it more difficult to reduce reoffending.⁶⁷

⁶⁶ NAPO, *Restructuring probation – What works*, 2005, paras.1.2-1.6
http://www.napo2.org.uk/Napo2docs/NapoResponseRestructuringProbation/i._Restructuring_Probation_-_What%20Works_-_Napo's_Response_to%20Home_Office_Consultation_Paper.pdf

⁶⁷ Home Affairs Committee, *Restructuring Probation*, 29 November 2005,
<http://www.publications.parliament.uk/pa/cm/cmhaff.htm>

Q12 Chairman: Mr Raine, would you share the view that the main problem in getting better results on re-offending is whether the resources are available for the Probation Service; rather than the way the Probation Service delivers its services—which is clearly what lies behind the Government's proposals?

Mr Raine: Not wholly. Clearly there is a resource issue, but it is also about smarter ways of working. We have to accept that reducing levels of re-offending is the Holy Grail and that has to be the yardstick against which we judge the whole of these proposals from the Home Secretary. The overriding criterion is: are these proposals likely to reduce levels of re-offending? Our contention is that by promoting a multiplicity of providers in a confused marketplace (and Regional Offender Managers commissioning from a regional level and not the local level) that can only militate against the achievement of reduction in re-offending.

The PBA's submission to the Home Affairs Committee about the consultation document argued that "the development and implementation of offender management can be achieved without restructuring a successful service".⁶⁸

Fragmenting probation provision risks the loss of a universal level of service, particularly to courts and the Parole Board, and the potential loss of equal access to services by offenders.

Any change process should trigger a full risk assessment; if there is one for these proposals it is not in the public domain.

The Local Government Association had three main concerns:⁶⁹

- loss of meaningful local accountability for offender management services. These services impact daily on local communities, whose interests may not be identical with those of the service, or of the courts.
- the proposed commissioning model, which is heavily dependent on the role of individual Regional Offender Managers (ROMs) working to a national Chief Executive and the Secretary of State, runs counter to current moves to strengthen horizontal accountabilities and multi-agency partnership working, via Local Area Agreements (LAAs) and Local Strategic Partnerships (LSPs).
- that the contractualised model of service delivery may introduce inflexibilities, and hamper responsive partnership working, innovation, and sharing of sensitive data, at a time when councils, police, health services, employment services, and other local agencies are working more closely than ever before.

In Written Evidence to the Committee, the Howard League for Penal Reform also criticised the proposal:⁷⁰

⁶⁸ Probation Boards Association The Future of Probation, October 2005, <http://www.probationboards.co.uk/dox/PBA%20for%20Home%20Affairs.pdf>

⁶⁹ <http://www.lga.gov.uk/Briefing.asp?lsection=59&id= SX100E-A7836344&ccat=946>

⁷⁰ Home Affairs Committee, *Restructuring Probation*, HC 728-I 2005-06, 6 March 2006, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/728/728we11.htm>

The Howard League for Penal Reform does not believe that the government has made the case for a further seismic change in the way that probation services are delivered. Such a change would come only four years after the last major reorganisation established the National Probation Service (NPS). The Howard League for Penal Reform considers that the current proposals sound the death knell for a publicly accountable probation service.

The recommendations of the Carter report, on which these proposals are based, was unquestioningly accepted by the Home Office without any consultation, debate or testing. This is a very fragile base for a major restructuring. As a result, the whole process of establishing the new National Offender Management Service (NOMS) has been marred by confusion, waste of public money, lack of consultation and secrecy. Despite these problems, a business case for the establishment of NOMS has never been made. It is no surprise, therefore, that the latest proposals for the probation service are a reversal of the position initially adopted last year. This does not inspire confidence in NOMS to achieve what it was set up to do, namely a reduction in reoffending.

The consultation document wrongly draws on the experience of the NOMS pathfinders to justify the proposals for introducing "contestability" and expanding the role of private providers. These pathfinders, which have achieved some impressive results, are piloting integrated offender management between prison and the community. It is sadly ironic that much of what has already been achieved in respect of partnership and community links may be fractured or lost entirely if the new proposals are introduced.

The Minister has acknowledged in her foreword the achievements of probation areas, which have been increasingly successful at meeting Home Office targets. Why not build on this, rather than embark on further massive organisational change, a new and expensive layer of bureaucracy and threaten the gains that have already been made?

By contrast, the CBI welcomed the contestability proposals:⁷¹

5. The CBI welcomes the government's proposals to introduce contestability in the probation service, as set out in 'Restructuring Probation to Reduce Re-offending'. The use of competition and contestability to improve public services in the last decade has brought about significant improvements. The discipline of contracting and competitive pressure can bring quality and efficiency to services.

Contestability in the construction and management of prisons has seen construction times fall by more than 40% and costs fall by more than 20%. The CBI estimates competition saved the taxpayer between £200million and £260million from 1991 to 2002 – equivalent to 20 new secondary schools or three new general hospitals.² Comparative analysis indicates privately managed prisons perform better in terms of escapes, time out of cell and purposeful activity.

⁷¹ *Future of the probation service - government consultation: 'Restructuring probation to reduce reoffending' - CBI official response*, 30 December 2005
<http://www.cbi.org.uk/ndbs/PositionDoc.nsf/0/e8eef6894e7342898025710100566483?OpenDocument>

6. There is already a wide range of good resettlement practice in prisons that has been shown to reduce re-offending. Private sector providers are already playing a key role in this:

At HMP Parc, G4S have hosted resettlement fairs to supply prisoners with a range of support, advice and engagement with employers. By October 2005, six months into the year, Parc had already ensured accommodation on release for 816 prisoners, well ahead of the rate required to reach the Home Office target of 1072 by March 2006.

- At Ashfield Young Offenders Institution, Serco have arranged for young people to work with Avon Fire and Rescue and worked with Ford to provide equipment for automotive training courses.

7. There is an opportunity to extend this kind of innovation to probation, which will enable providers to supply a continuous service from custody into the community. This will deliver the end-to-end offender management that has been demonstrated to reduce re-offending.

Turning Point, a voluntary organisation providing services to people with problems such as drug and alcohol misuse, poor mental health, and learning difficulties, has also welcomed moves to increase contestability:⁷²

Turning Point welcomes the introduction of contestability into probation services and anticipates that this will help to bring effectiveness and value for money into the provision of probation services. However, clear working guidelines need to be put in place to ensure that the strategy is implemented effectively. It is key that protocols are developed between NOMS and service treatment providers from the outset, and that ownership for the management of offenders' care is shared across services. This could take the form of contracts of care that evidence inter-agency working and are based on good practice of what works, whilst ensuring the needs of the individual are met.

Funding needs to be transparent to make sure that allocated resources are spent appropriately. There needs to be realistic funding for resources that maintains the balance between sentences for offenders and alternative rehabilitative programmes.

An ongoing process of monitoring and reviewing outcomes needs to be put in place to allow those working under the new management structure and members of the community to have faith in the system and lend their support to it.

It is imperative that provision reflects the experience and good practice of those services which are most effective in providing treatment and reducing offending behaviour. Measures should be taken to ensure that service provision reflects local need.

⁷² Turning Point's Response to the Home Office Consultation on 'Restructuring Probation to Reduce Re-Offending', December 2005, <http://www.turning-point.co.uk/NR/rdonlyres/A99F485D-EE0B-4029-AB07-39AB5D374D6F/30289/ResponsetoNOMSconsultation2.doc>

Contestability should not just be a term but based on a recognition that evidence and value for money can be improved through plurality of provision, including a greater role for the voluntary sector. This will demand a shift in how services are commissioned and a cultural shift that ensures the sector to be a valued player in the criminal justice provision.

C. The Government's response

Press reports in January indicated that a revolt by 80 Labour back benchers had led to the legislation being shelved for the time being.⁷³

On 30 March 2006, the Government published a summary of the responses to the consultation document. In the foreword to the document, Home Office minister Baroness Scotland acknowledged that the proposals had been contentious, but stated that further change was necessary.⁷⁴

It is clear from responses to this consultation that the proposals we suggest for improvement and change in the system, through which we can assess risk, protect the public and rehabilitate offenders, are contentious.

Many within the Probation Service challenge the need for such fundamental change. They point to the creation of the National Probation Service, and the benefits derived from greater co-operation and the partnership working between the criminal justice system agencies achieved in the last 3 years.

These are indeed a good start. Some have said that this progress suffices and no further change of structure is needed, that they are meeting the needs of victims and offenders, embroiled in the day to day challenges which face the criminal justice system.

We do not agree. We accept that there has been significant improvement with the dedication and application of good practice, which in many areas has been commendable, and there is much to be applauded. However, whilst we have a re-offending rate which means that almost 60% of those who enter the criminal justice system re-offend within 2 years, we cannot deem the process a success nor can we accept that further change is not needed.

On the central proposal to give the Home Secretary a duty to commission probation services, the document noted opposition, particularly from the Probation Service. This was partly because opponents objected to the removal of Boards' exclusive duty to provide probation services, and partly because of a lack of confidence in the Regional Offender Manager being able to identify local needs accurately. However, in its response, the Government stated that it did not believe commissioning would be successful if undertaken through the existing Probation Boards because "alternative

⁷³ See for example "Revolt forces delay in plan to part-privatise probation", *Independent*, 19 January 2006

⁷⁴ Home Office, *Working with probation to protect the public and reduce re-offending: Summary of responses to Restructuring Probation too Reduce Re-offending*, March 2006, http://www.noms.homeoffice.gov.uk/downloads/probation_restructuring_300306.pdf

providers would be reluctant to enter into contracts managed by public sector competitors":⁷⁵

We will be able, through outcome-based contracts, to incentivise providers to deliver. We agree with many respondents about the importance of retaining the local links and responsiveness which currently exist. If the public are to have confidence in community penalties it is essential that we address local needs, risk and patterns of offending. The Regional Offender Managers will be tasked with ensuring that specific local requirements are identified and addressed. We will in addition consider whether there should be a specific statutory duty on the Secretary of State to consult on how he proposes to commission prison and probation services.

4.9. By April 2007, we will have a more developed commissioning system in place, with purchasing decisions starting to be made on the basis of need rather than historic provision. We will develop new ways of specifying services, crossing current prison and probation boundaries, in order to make a reality of end to end management of offenders. We will work on turning these service specifications into outcome focussed contracts and service level agreements which will be used to drive performance and service delivery.

On contestability, the document reported "a strong body of opinion amongst respondents from the Probation Service against the introduction of competition between Probation Boards and alternative providers" which they saw as privatisation.⁷⁶ The Government felt that some of the concern might be based on a "misunderstanding":⁷⁷

Contestability is not simply the process of bringing in alternative providers in place of existing ones. It has a number of forms beyond the better known market-testing and outsourcing, many of which are already being used across NOMS. These are tools to drive up standards, support purchasing choice and give commissioners scope to buy the most effective services available, and include sub-contracting and benchmarking performance. We see all of these tools as having an important role to play in driving up performance.

In the mean time, probation boards have been ordered to spend more through voluntary, community and private sectors. Probation circular 7/2006 advises that a target of 5% of the main resource grant for 2006/07 must be used to deliver services through these sectors.

D. The performance of the Probation Service

1. Spending on the Probation Service

In 2006/07 spending on probation services will be over £900m, a real terms increase of 40% since 2001/02.⁷⁸

⁷⁵ p 15

⁷⁶ p17

⁷⁷ p19

⁷⁸ Letter from Home Office Parliamentary Under Secretary of State Gerry Sutcliffe to Chiefs and Chairs of Probation Boards in England and Wales, 17 November 2006

2. Performance measurements

The issue of the Probation Service's performance has, unsurprisingly, been raised in debates on the need for reform. On the one hand the Probation Service has pointed to overall improvements in its success in meeting targets. On the other hand, there is still concern about the level of reoffending. Moreover, when people under supervision in the community commit violent offences then the effects upon victims will be devastating and public confidence will be damaged, even if these kinds of incidents represent a very small proportion of total caseloads.

The Probation Service business plan for 2006-06 states that "in the first four years of its existence the National Probation Service has improved its performance year on year."⁷⁹ The Service's 2005-06 annual report pointed to what it called "consistent improvement", with the service achieving or exceeding seven of its 11 service delivery targets and being within 10% of the other four.⁸⁰ The previous year's report spoke of "unprecedented achievement".⁸¹

The Probation Service's performance reached record levels with virtually all of our targets achieved. This is particularly pleasing when we consider that it has taken place against a backdrop of considerable change to create the National Offender Management Service (NOMS)

The Government acknowledges improvements in performance, but points to the need for further change.⁸² The August 2006 prospectus warns that performance testing will be followed by market testing for poor performers:⁸³

2.7 Probation boards have improved their performance in recent years but commissioning will help us do more to monitor and improve performance. The service level agreements negotiated between the commissioner and probation boards will set out the targets we expect them to deliver and will form the key focus for improvement.

2.8 To accelerate this, we are introducing a more rigorous performance improvement and testing system for the Probation Service. It will focus initially on those probation boards which are performing well below the standards of the best. The process will assess probation boards' current performance and their capacity and determination to change in order to deliver the outcomes required. They will be challenged to develop acceptable improvement plans and held to the delivery of them. If these poor performers fail to demonstrate improvements, we will look to contract out service delivery to those who can do a better job.

⁷⁹ *National Probation Service for England & Wales Business Plan 2005-06* p6
http://www.probation.homeoffice.gov.uk/files/pdf/NPD_BusinessPlan.pdf

⁸⁰ NPS Annual Report 2005-06, p3

⁸¹ NPS Annual Report 2004-05, p3

⁸² See for example Home Office, *Background Note Offender Management Bill* 15 November 2006 at
<http://www.pm.gov.uk/files/pdf/offender%20management%20bill.pdf>

⁸³ NOMS, *Improving Prison and Probation Services: Public Value Partnerships*, August 2006, p 15,
http://www.noms.homeoffice.gov.uk/news-publications-events/publications/strategy/impr_prison_probate_partnerships?view=Binary

Breakdowns of performance by the different probation areas are produced in quarterly “weighted scorecards”.⁸⁴ The results from the most recent one – published in November 2006 – were summarised by the NPS’s Director as follows:⁸⁵

This report presents the performance of the National Probation Service against the targets set at the start of the year. The report covers the first half of 2006-07. Performance nationally has built on the solid start made during the first quarter and, if maintained to the end of the year, will see another record achievement for the NPS.

The weighted scorecard shows the overall performance, grouped by the four functions that describe our work: public protection, offender management, interventions, and organisational efficiency and effectiveness. We have removed the family groups component so this report is solely about area performance against target. I am particularly pleased to see the assessment of those cases that present a high risk of harm, and the PPO cases exceeding the target. This is very important and, linked with our work on the enforcement of offenders who do not comply, is at the heart of our contribution to public protection.

The overall results are very encouraging:

- Cumulatively the national performance is above zero.
- 27 areas are individually above zero
- Only 6 areas are more than 50 points below zero.

Six areas were placed under special measures at the end of the last performance year. Although there is no room for complacency every one of them has improved on its score and ranking.

When an offender under Probation Service supervision is charged with committing a serious further offence (SFO) the supervising area informs NOMS and initiates the SFO notification and review process. According to the Home Office:

The SFO procedures are intended to ensure that there is an effective system for internal review of SFO cases in order to identify areas of continuous improvement to risk assessment and management practice throughout the Probation Service; and to allow PPU to advise on any significant developments when they arise and to trigger with those responsible, any action necessary to strengthen public protection.⁸⁶

These procedures were implemented nationally on 1 April 2004 replacing the Serious Incident Report (SIR) procedures which, according to an HMI Probation review⁸⁷, were flawed and significantly underreported. Because of this change in procedure direct comparisons between SFO and SIR statistics cannot be made.

⁸⁴ Available at <http://www.probation.homeoffice.gov.uk/output/page34.asp>

⁸⁵ *National Probation Service Performance Report 22 and Weighted Scorecard Q2 2006/07*, November 2006, <http://www.probation.homeoffice.gov.uk/files/pdf/NPS%20Performance%20Report%2022.pdf>

⁸⁶ 5.9 Offender Management Caseload Statistics, HOSB 18/06

⁸⁷ *Serious Incidents, an Occasional Paper*, HMIP Probation, 2000 (as sourced in 5.10 Offender Management Caseload Statistics, HOSB 18/06)

Serious Further Offence notifications received

	2004/05	2005/06
<i>Resulting in a conviction</i>		
Murder	60	38
Attempted murder	16	16
Manslaughter	22	15
Rape	53	53
Arson with intent to endanger life	25	18
Kidnapping/abduction	13	15
Attempted kidnapping/abduction	0	1
Other serious sexual or violent offences ¹	137	132
<i>SFO convictions</i>	326	288
<i>Offences which did not meet SFO criteria</i> ²	81	53
All convictions	407	341
<i>Not resulting in a conviction</i>		
Death or suicide	2	4
Awaiting trial	0	112
Not guilty or acquitted	54	50
Case dismissed etc.	62	68
Offender at large	1	1
Did not meet SFO criteria	4	2
Hospital Order	7	3
All non-convictions	130	240

Notes:

(1) Any other very serious violent or very serious sexual offence, armed robbery, assault with a deadly weapon or hostage-taking

(2) Offenders who had been charged with an offence which met the SFO criteria, but following a reduction in charges were convicted of a less serious offence.

Source: Tables 5.4 - 5.7, Offender Management Caseload Statistics, Home Office Statistical Bulletin 18/06

During 2004/05 there were 537 SFO notifications, 61% resulting in a conviction for an SFO, 15% for a less serious offence and 24% not resulting in a conviction.

During 2005/06 there were 581 SFO notifications, an 8% increase on the previous year. According to the Home Office 'this increase can be attributed to further improved identification and reporting of SFOs by Probation Areas and increased attention to the importance of continuous improvement across all agencies involved in this work'.⁸⁸

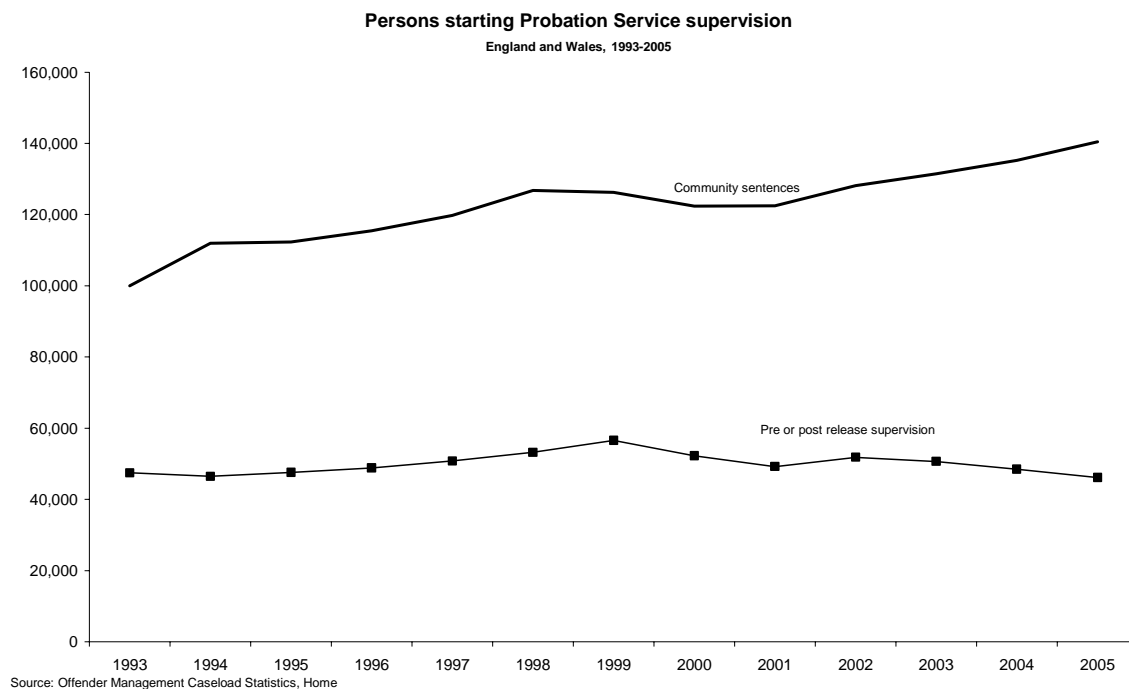
Excluding those cases where a trial is yet to begin, 62% of SFO notifications resulted in a conviction for an SFO, 11% for a less serious offence and 27% did not result in a conviction.

⁸⁸ 5.14 Offender Management Caseload Statistics, HOSB 18/06

3. Probation service workloads

In 2005, 181,210 persons started Probation Service supervision, either under a community sentence or under pre or post-release supervision from custody. This was a 2% increase on the number of starts in 2004 and a 27 per cent increase on 1993. The number of persons starting supervision has increased in each year since 1993, with the exception of 2000 and 2001.

The chart below shows the number of persons starting a community sentence or pre or post-release supervision from custody between 1993 and 2005.

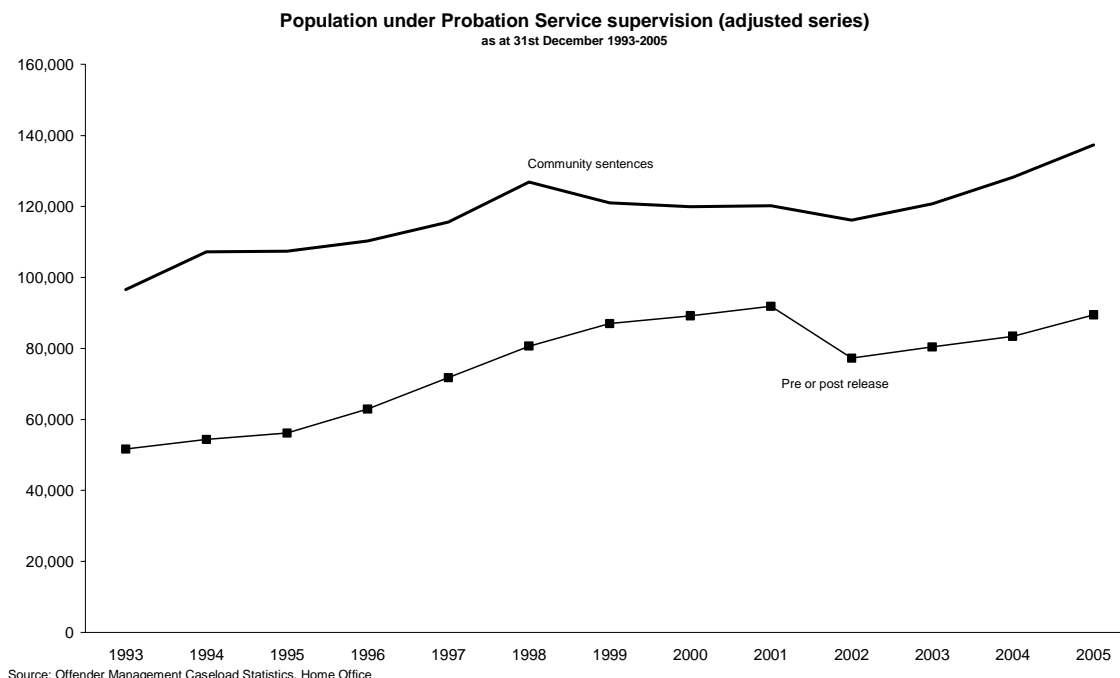


The number of people starting community sentences has increased by 40% since 1993, while the number of people starting pre or post-release supervision has fallen by 3% over the same period. Pre or post-release supervision increased from 46,466 in 1994 to reach 56,722 in 1999 and with the exception of 2002 has subsequently fallen in each year, to reach 46,103 in 2005.

Decreases in the number of people starting Probation Service supervision in 2000 and 2001 were due to the transfer of youth supervision work to local Youth Offending Teams, as well as reductions in the numbers sentenced by the courts during this time. The Probation Service supervises some juveniles on court orders, but information on the number of juveniles starting community sentences that are not supervised by the Probation Service is not included in the figures.

The number of offenders ending the calendar year under Probation Service supervision increased by 78% between 1993 and 2005, to reach 224,094 in December 2005. The number of offenders under community sentence supervision increased by 57% over the same period, while the number of people under pre or post-release supervision increased at a much higher rate (119%).

It should be noted that a change in the caseload data collection system was introduced in 2002 which revealed that the figures had been inflated in the years prior to that. In order to be able to make comparisons across this period an adjusted series was calculated and it is this series that has been used to compare 1993 with 2005.



The rise in the caseload of those supervised under a community sentence reflects increases in the numbers being sentenced to such disposals. The increase in the caseload under pre or post-release supervision has occurred due to the growth in the number of offenders receiving custodial sentences of 12 months or more, who therefore require supervision on release from custody, and the rise in the number of prisoners released on parole.

4. Public protection failures

While legislation has been expected for some time now, there have been a series of public protection failures which have brought the problems of reoffending into particularly sharp relief and added to the pressure for reform. Two recent cases were highlighted in the subject of reviews by HM Inspector of Probation.⁸⁹ A banker, John Monckton was murdered in November 2004 during a robbery at his home by Damien Hanson and accomplice Elliott White. At the time, both were under the supervision of the Probation Service – Hanson on licence from prison where he had served a sentence for attempted murder, and White under a Drug Treatment and Testing Order for which breach proceedings had been sought. The inspector found that in Hanson's case there had been "an overall collective failure within London Probation Area both to identify the nature of his risk to others and to keep that risk of harm to a minimum."⁹⁰ In August

⁸⁹ National Probation Service for England and Wales, Annual Report 2005-06, p 17

⁹⁰ HM Inspectorate of Probation, *An Independent Review of a Serious Further Offence case: Damien Hanson & Elliot White*, February 2006 p4,

2005, Naomi Bryant was murdered by Anthony Rice while he was being supervised by Hampshire Probation Area, having been released after serving 16 years of a life sentence for attempted rape. There had been a number of earlier cases, including Marian Bates, who was murdered by Peter Williams in September 2003, who was being supervised by a Youth Offending Team and had been electronically tagged.

The issue of the adequacy of supervision of offenders in approved premises by the Probation Service was raised in an undercover Panorama report on 8 November 2006, which found that a convicted child killer had befriended a group of young girls while staying in a bail hostel, and reported allegations that hostel staff had provided the Probation Service with enough evidence to recall a dangerous offender before he went on to murder a taxi driver.

The Chief Executive of the Probation Boards Association (PBA) was interviewed on Radio 4's Today programme the day before the programme, and argued that much of the media coverage of the programme had missed the point, and unfairly criticised the probation service.⁹¹

This is about the parole system releasing prisoners into the community. They're not being released into another prison, so they're being released into a hostel where there isn't 24 hour supervision. If you want them under 24 hour supervision then they should be in prison, it's as simple as that. (...)

(...) people are free to come and go in the hostel. That's why they've been released to the hostel, it's a halfway stage between being in prison and being released into the community. To pretend that they're going to get 24 hour supervision or to believe that is completely missing the point.

On the same day, 7 November 2006, the Home Secretary gave a speech at Wormwood Scrubs Prison in which he was reported as having said that the service was not working as well as it should and was failing properly to protect the public.⁹² The Guardian reported this as a "scathing attack upon the probation service".⁹³

He said the performance of the probation service was "poor or mediocre" in too many areas. More than 60% of adults released from prison offend again despite the government spending pounds 800m a year on the probation service.

"There is only so much that internal re form of the probation service can achieve," he said, making clear that he wants to see some routine and administrative work such as checking on curfew conditions or running random drug tests done by others.

http://inspectorates.homeoffice.gov.uk/hmiprobation/inspect_reports/serious-further-offences/HansonandWhiteReview.pdf?view=Binary

⁹¹ Transcript available on PBA website at

<http://www.probationboards.co.uk/dox/Today%20Programme%2007.11.06.pdf>

⁹² "Private firms asked to rescue probation service", *Telegraph*, 8 November 2006; Reid backs role for business in probation services, *Financial Times*, 8 November 2006

⁹³ "Reid wants bigger role for private sector in probation service", *Guardian*, 8 November 2006

This would leave tasks involving higher skills, such as putting together a package of surveillance and treatment for a serious offender coming out of prison, to the trained probation officer.

"There is no need for all of these jobs to be done by the same agency. Just as the policing team has been expanded over the years to enable uniformed officers to concentrate on what they do best, we need to free up professional probation officers to focus on the most serious criminals in the community."

The Chairman of the National Association of Probation Boards, John Raine, criticised Mr Reid's speech in a letter on 13 November 2006:⁹⁴

Your focus on underperformance without acknowledgement of the overall record high levels of performance by probation services across England and Wales presented a distorted and undermining picture to a wider public audience. To an audience of prisoners, many of whom will come under the supervision of probation staff upon their release, your message about probation failure would have ill-served the validity of work which requires a building of respect between probation officers and those they supervise.

(...)

Mistakes are acknowledged; managing offenders in the community is a high risk business and catastrophe may never be far away. That is inherent in the job. But just as the public can expect offenders to be managed against rigorous standards, and in ways that provide taxpayer value, so the service can expect a properly informed public that is understanding of risk and of the fact that they system does not provide for offenders to be supervised 24 hours a day.

The junior Home Office minister Gerry Sutcliffe replied as follows:⁹⁵

Nobody doubts the dedication of individual probation staff to the difficult work which they do on behalf of the wider community. We also recognise the improvements in performance which staff have delivered over recent years. Probation is a crucial service, vital to public protection, and we have invested record sums in it: over £900m this year, a real terms increase of 40% since 2001/02.

But the issue now is how best to improve the performance of the whole system from here? How do we take what has been achieved to date and build on it further and faster. I am determined to maximise the benefits from our investment and tackle unacceptably high rates of re-offending and better protect the public. More of the same is not sufficient. We are not doing well enough.

⁹⁴ <http://www.probationboards.co.uk/dox/PBA%20Chair%20to%20Home%20Sec%202013.11.06.pdf>

⁹⁵ <http://www.probationboards.co.uk/dox/2006-11-17%20Sutcliffe-Raine%20re%20probation.pdf>

E. The Bill

1. Provision of probation services

Clause 2 of the Bill gives the Secretary of State responsibility for providing probation services – a responsibility which currently rests with Probation Boards under the *Criminal Justice and Courts Services Act 2000*. **Clause 3** would allow the Secretary of State to “make contractual or other arrangements **with any other person**” (emphasis added) to make provision for the probation purposes set out in **clause 1**. The purposes set out under the bill are:

- Advising courts over sentencing
- Advising on conditional caution
- The supervision and rehabilitation of people charged with or convicted of offences (including enforcing community orders, rehabilitation work with prisoners, supervision of ex-prisoners on licence, and providing accommodation such as probation hostels)
- Assisting people remanded on bail
- The supervision and rehabilitation of people given conditional cautions
- Victim contact work

These broadly replicate those set out in the *Criminal Justice and Court Services Act 2000*.⁹⁶

The Government has suggested that contracting out from the public sector is likely be applied to interventions such as courses and treatment programmes and unpaid work programmes, rather than the more sensitive areas of offender management.⁹⁷

We envisage probation services continuing to play a central role, particularly in relation to offender management. However, other providers should have the opportunity to show what they can do, especially with regard to interventions.

However, nothing is “ring-fenced” for the public sector under the Bill. It will be up to the Secretary of State, through the Regional Offender Managers, to commission the services they require from whichever provider they choose. A possible future development which might be thought relevant to this debate is that the Government is currently consulting on proposals to allow probation officers and other “offender managers” such as electronic monitoring contractors to increase the penalties for breaches of community sentences without going back to court.⁹⁸

Some commentators have raised concerns about the propriety of transferring some of the “offender management” tasks such as preparing reports for courts to advise on

⁹⁶ Sections 1, 2 and 5, as amended

⁹⁷ NOMS, The Offender Management Bill: The Facts, 30 November 2006, <http://noms.homeoffice.gov.uk/documents/OMBill-Facts-Leaflet?view=Binary>

⁹⁸ Home Office, *Making Sentencing Clearer A consultation and report of a review by the Home Secretary, Lord Chancellor and Attorney General*, http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary

sentencing, or performing risk assessments. In the essay for the Social Market Foundation already cited, Rod Morgan chair of the Youth Justice Board, raised the issue of a potential conflict of interest:⁹⁹

NOMS has yet to state any principles which should govern the proposed market in probation services (this was accomplished for prisons in the Criminal Justice Act 1991 for the appointment of a Crown ‘controller’ in each privately managed prison, etc.). Are any aspects of probation work – the preparation of court reports, for example – to be exempted from the services for which non-public bodies might contract? And, if not, would non-public agencies, voluntary or commercial, preparing court reports be eligible also to deliver interventions, possibly proposed in those court reports? Within the youth justice field we would unequivocally take the view that such overlaps would embody conflicts of interest: the preparation of court reports is the sole responsibility of YOTs.

The junior Home Office minister, Gerry Sutcliffe, wrote to Chiefs and Chairs of Probation Boards in England and Wales on 17 November 2006 and offered them the following reassurance about the Government’s plans for the public sector in probation:¹⁰⁰

Finally, there are a lot of myths floating around to the effect that this amounts to privatisation and signals the end of probation. It does not. It is about making the best use of public money by getting the best services from the best providers and enabling them to work more flexibly together. We are fully committed to a strong public sector probation service, and to show that I mean what I say I can offer you the following six guarantees:

1. The guiding principle for all changes to the probation service will be to ensure that the highest quality services are delivered in order to best protect the public.
2. Probation will continue to be valued as a profession, reinforced by rigorous national standards and training.
3. We want to support probation boards to become part of a network of viable, public sector trusts, working alongside providers from the voluntary and private sectors to deliver high quality services
4. As long as it is meeting the demanding and transparent standards we set, the public sector trust for each area will be awarded the contract to run offender management services in the first instance.
5. Where a new provider is asked to run probation services in a particular area, staff who transfer to it will have their terms and conditions protected by law.
6. New providers, will have to take account of the two-tier workforce regulations which means they have to recruit new staff on terms and conditions

⁹⁹ Rod Morgan, “Working with volunteers and the voluntary sector – some lessons for probation from youth justice”, *Returning to its roots? A new role for the Third Sector in Probation*, ed Natalie Tarry, 2006, p 28

¹⁰⁰ Letter from Home Office Parliamentary Under Secretary of State Gerry Sutcliffe to Chiefs and Chairs of Probation Boards in England and Wales, 17 November 2006

which are, overall, no less favourable than those of employees transferred from the public sector.

The *Transfer of Undertakings (Protection of Employment) Regulations 2006 SI No.246* (TUPE) safeguard employees' rights in the event of transfers of undertakings, businesses or parts of businesses. The rules also apply when a "service provision change" takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor). The TUPE regulations protect the terms and conditions of workers transferred when public services are contracted out to the private sector. However, existing employees or new employees hired by the contractor are not covered, creating a "two-tier" workforce. This problem has been tackled, in part, by introducing a policy covering transfers between public sector employers and by imposing conditions on private sector bids for public sector contracts.¹⁰¹ The following documents contain this guidance:

- Cabinet Office, *Staff Transfers in the Public Sector Statement of Practice*, January 2000.¹⁰²
- The *Code of Practice on Workforce Matters in Local Authority Service Contracts* was originally issued in March 2003 and updated in March 2005.¹⁰³ On 18 March 2005 it was announced that this Code was extended with immediate effect to cover not only local government but also the wider public sector, including the Civil Service, NHS and maintained schools.¹⁰⁴ Thus the requirements concerning "new joiners" now apply more widely beyond local government contracting exercises.

2. Probation Trusts

Clause 4 gives the Secretary of State the power to establish probation trusts by order. Clause 7 would abolish local probation boards and allow their property and staff to be transferred to the trusts under provisions in Schedule 2. However, clause 33(2), which deals with commencement, allows for these and other provisions to be brought into force at different times and in different areas.

The October 2005 consultation document made no mention of trusts being phased in, but simply stated that probation boards would "cease to exist in their present form and be replaced by new bodies which will operate with greater independence from the centre".¹⁰⁵

¹⁰¹ Library Standard Note SN/BT/1064 *Transfer of Undertakings* covers this topic in detail

¹⁰² http://www.hm-treasury.gov.uk/media/7BB/E3/staff_transfers_145.pdf

¹⁰³ <http://www.lge.gov.uk/lge/core/page.do?pagelId=54914>

¹⁰⁴ Cabinet Office Press Release CAB 018/05 *Prime Minister announces roll-out of code to tackle two-tier workforce across the public sector*, 18 May 2005:

http://www.cabinetoffice.gov.uk/newsroom/news_releases/2005/050318_twotiercode.asp?ID=70

¹⁰⁵ NOMS *Restructuring probation to reduce reoffending*, October 2005
<http://www.probation.homeoffice.gov.uk/files/pdf/Restructuring%20Probation%20to%20Reduce%20Reoffending.pdf>, p6

However, the Government's thinking appears to have moved on since then. The Regulatory Impact Assessment states that:¹⁰⁶

We intend to move from boards to trusts in a measured and phased way, using clear and objective criteria (on which we will consult stakeholders) for determining which boards move when. Subject to parliamentary approval, we envisage that the first trusts will be established, and the first contracts awarded, in April 2008.

In the interview with the Guardian on 8 November 2006, cited above, the NOMS chief executive, Helen Edwards, was reported as saying that the better performing Probation Boards would be the first to turn into trusts:¹⁰⁷

"We won't do it with everybody on one date," Edwards says. "That's too much change in the system all at once. They will go in waves so the trusts that are performing well, and who we are confident can deliver offender management, will become trusts in the first wave, probably spring 2008 at the earliest. It will be the kind of earned autonomy model we have seen in the health service, so you get independent status when you are ready for it."

F. The Regulatory Impact Assessment

The Regulatory Impact Assessment (RIA) provides an assessment of the overall benefits of the Government's proposals to introduce full contestability to probation services set against a 'no legislation' option.

The RIA assumes efficiency savings in the order of 3.5% to 8.5% which are applied to both options. It is assumed that the process of sub-contracting and contesting are essentially the same and differ only in that the Probation Boards are conducting the contests in one scenario and NOMS in the other. The RIA therefore assumes that both options will yield similar efficiencies.

The estimates that efficiency savings will be between 3.5% and 8.5% are based on prison service experience.¹⁰⁸

The basis for modelling assumption within this range is the experience gained from contracting out within the Prison Service. The upper estimate of 8.5% annual efficiency was achieved in a number of large establishments, where there was greater scope for efficiencies. 3.0% was the minimum level of efficiency improvement delivered through contracting out Prison Service activity. A high proportion of Prison Service costs are fixed infrastructure costs with over £450m of resource cost being required for the maintenance and capital charges on the

¹⁰⁶ NOMS *Offender Management Bill Regulatory Impact Assessment*, p15
<http://noms.homeoffice.gov.uk/news-publications-events/publications/consultations/OM-Bill-RIA?view=Binary>

¹⁰⁷ "Competitive instinct", *Guardian*, 8 November 2006,
<http://society.guardian.co.uk/crimeandpunishment/story/0,,1941532,00.html>

¹⁰⁸ NOMS *Offender Management Bill Regulatory Impact Assessment*, p22
<http://noms.homeoffice.gov.uk/news-publications-events/publications/consultations/OM-Bill-RIA?view=Binary>

estate alone. The probation service has proportionately higher levels of staff related costs and the scope for medium term efficiencies is therefore at least comparable and probably far higher than in the Prison Service where the nature of the estate imposes severe constraints on restructuring. A lower estimate of 3.5% has therefore been used.

The average annual saving is calculated by subtracting from gross annual savings the anticipated annual costs for each of the 25 years and calculating the average saving over the period.

Gross annual savings are calculated by applying the efficiency savings to the value of the contracts. There are two anticipated costs, a one-off cost each time a contract is tendered, estimated at 4% of the contract value, and annual contract management costs estimated to be 1.2% of the contract value.

The RIA estimates that, if there is no change to legislation, the average annual savings through the increase in sub-contracting to partner organisations would, over a 25 year period, be approximately £280,000 at 3.5% and £2m at 8.5%. Discounted over a 25 year period to allow for inflation, this option would have real term net savings of £4m at 3.5% and £33m at 8.5%.

If the statutory responsibility for the provision of probation services is transferred from Probation Boards to the Secretary of State the RIA estimates, over a 25 year period, average annual savings of over £2m at 3.5% and around £13m at 8.5%. Applied over a 25 year period and discounted to allow for inflation, this option offers net savings of £35m at 3.5% and £212m at 8.5%.

G. Commentary on the probation changes in the Bill

NAPO remains firmly opposed to the Bill, and is actively campaigning against it. The press release quotes their Assistant General Secretary Harry Fletcher as follows:¹⁰⁹

This Bill will, if implemented, lead to the abolition of the National Probation Service and its replacement with a competitive market. Local accountability would be lost, information sharing between agencies will be diminished by competition, and public protection compromised. The Bill is not about improving standards, it is about privatisation, yet to date no business case has been produced by the Government to show how the replacement of Probation by a market will actually work and improve the delivery of service. Whole probation Areas could be sold off under the arrangements, including the supervision of high risk offenders.

The experience of privatisation in probation work so far has been a disaster. The management of property and hostel facilities such as cooking and cleaning were privatised three years ago and resulted in a 30% hike in prices and a dramatic fall in standards. Indeed, the contracts are currently being renegotiated.”

(...)

¹⁰⁹ NAPO Press Release, *Offender management bill published*, 23 November 2006, http://www.napo2.org.uk/noms/archives/2006/11/offender_manage.html

“ The sale of the Probation Service was first justified by Ministers on the grounds that it was failing. Yet, this experiment comes at a time when Probation is performing better than ever. Ministers then said that reconviction rates were too high. In reality the rates are significantly lower than those for prison. Adjusted figures show that during the two-year period after completion of probation between 41% and 46% are involved in a further offence compared to 67% from custody.

Statements by Ministers that the re-offending rates are the same are totally inaccurate. The Probation Service is an agent of justice and the courts and must not become an agent of commerce and profit.

The way forward is through partnership with the voluntary and private sector not competition. The Government should look to arrangements in Scotland for offender management where there is a statutory duty on agencies to cooperate with each other to reduce re-offending.”

(...)

“Napo will be urging MPs of all Parties to vote against the relevant clauses which remove the power from local Areas to commission and give them to the Secretary of State, and therefore pave the way for privatisation.

The Probation Boards Association argues that the proposals represent too much central direction. It proposes instead a system of probation trusts managing local commissioning which, it argues, would be more responsive and avoid the traps of the high cost failures of large scale contracts:¹¹⁰

The Home Office model for change is unpopular across a wide range of parties. It concentrates responsibility on central direction with civil service managed contracts and local community involvement is ignored.

(...)

There is an opportunity now to move from confusion to a genuinely radical reform which parallels government policy in other key areas of public policy. It would move a key criminal justice agency away from the sterile debate on whether public or private is better. It would substitute local accountability for national bureaucracy allowing the public to change from being passive and badly informed recipients into the planners of the service they use.

The study by the Social Market Foundation cited above, brings together a variety of views from commentators, including a number from Voluntary and Community Organisations (VCOs – often referred to as the “third sector”), whose perspectives, the editor argues, have not received sufficient attention in the debate so far:¹¹¹

The proposals have come under fierce criticism and have provoked an intense ideological debate...Those opposed have seen them as little more than the ‘first

¹¹⁰ Probation Boards Association, *The future governance of probation*, October 2006 pages 1 and 6

¹¹¹ Natalie Tarry *Returning to its Roots? A new role for the Third Sector in Probation*, Social Market Foundation 2006 p13

steps' along the road to privatisation. Almost entirely ignored in the debate is the positive and sustainable role the third sector might play in the reform process, unencumbered by the profit motives of the private sector.

Views in the report range from those who see genuine contestability as leading to better and more innovative approaches across the public, private and voluntary sector to those who fear that voluntary organisations may lose their unique perspectives and ability to challenge those who commission services because they fear the loss of contracts. The editor concludes:¹¹²

There is no consensus as to whether contestability in itself will be able to deliver the much-needed reduction in re-offending. Most contributors agree that allowing maximum flexibility for VCOs within the new framework is vital if innovations are to be fostered and successful relationships with offenders maintained.

Crime Concern, a crime prevention charity which provides consultancy services and does preventative work in communities, welcomes contestability:¹¹³

Graham Beech, Director of Offender Justice Services at the national crime prevention charity Crime Concern today (7/11/06) welcomed Home Secretary John Reid's determination to bring the voluntary and private sectors into probation work.

Mr Beech said: "Bringing other skills into probation work should not automatically be seen as a criticism of the probation services and probation staff, but as an acknowledgement that the status quo, a re-offending rate amongst ex-prisoners of 60 per cent, is not acceptable.

"The voluntary sector has very specific skills, particularly around community support that can help to give an ex-offender options in life other than crime. In particular we can work with communities to ensure that ex-offenders develop the range of social contacts that supports that a life away from crime.

"We shouldn't let the fact that the Home Secretary's proposals are published on a day when the media is absorbed with the supervision of violent and sexual offenders distort debate on this issue. We must not let the very specific behaviour of paedophiles lead the debate about how we can best turn relatively low level criminals away from a life of crime. "

NACRO, a crime reduction charity which works with ex-offenders, has also welcomed the increased role for the voluntary sector offered by the bill:¹¹⁴

Commenting on the publication of the Offender Management Bill, Paul Cavadino, Chief Executive of Nacro, the crime reduction charity, has welcomed an increased role for the voluntary sector, but warned against a competition 'free-for-all'.

¹¹² p19

¹¹³ Crime Concern, Response to Home Office plans to change probation, 7 November 2006 <http://www.crimeconcern.org.uk/>

¹¹⁴ NACRO Press Release *NOMS Bill partnerships will reduce reoffending* 23 November 2006 <http://www.nacro.org.uk/templates/news/newsItem.cfm/2006112300.htm>

Mr Cavadino said: "The Bill will improve the prospects for reducing crime by involving charities more extensively in the rehabilitation of offenders.

"Voluntary organisations have experience in providing help for offenders with accommodation, employment, mentoring, addictions, mental health and family support. This kind of help is crucially important in reducing reoffending.

"Offenders who get and keep a job have their likelihood of reoffending cut by between one-third and one-half. Getting offenders into stable accommodation reduces their reoffending rate by at least one-fifth. One recent study found that basic skills education cut reoffending rates by two-thirds.

"These effects are interrelated. If you are homeless it is harder to hold down a job or make a success of a drug rehabilitation programme. Commissioning voluntary organisations to provide more practical resettlement services will do far more to cut crime than tougher sentences.

"From the formation of NOMS we have argued that the new arrangements will work best if services are commissioned on a carefully planned basis of partnership rather than by an all out competitive free-for-all. In recent discussions the Government has responded positively to our arguments. Commissioning plans should place a strong emphasis on promoting collaborative partnerships between the prison and probation services, the private sector and large and small voluntary organisations.

"The Bill's vision of reducing reoffending more effectively by drawing on the combined strengths of all three sectors deserves strong support."

The YMCA has argued that public protection work must remain statutory, and pointed to certain risks for the voluntary sector:¹¹⁵

In response Pete Crossley, YMCA England Prisons unit, said: 'Any new arrangements should leave overall accountability with the Probation Service. 'The responsibility to protect the public and to manage the risks must remain statutory.

Partnership opportunities

'With the opportunities presented by the new Offender Management bill, the voluntary sector must weigh up the costs of delivering probation services.

'YMCA England calls on the government to provide opportunities for partnerships, not just the transfer of public services.

'YMCA England would not take compulsory supervision, where a young offender on probation is obliged to turn up.

¹¹⁵ YMCA response to the proposed offender management bill, 15 November 2006, http://www.ymca.org.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_225143

'Our experience with young people shows us that they need to choose to work with us for us to be truly effective.

Need for choice

'If charities are allowed to offer optional support services, the chances of rehabilitation are far greater.

'This is because the relationship between the charity and the young offender is one which both have chosen.

Charities need to go into potential Probation Service partnerships with their eyes wide open. 'Take away the voluntary element and you remove an important degree of trust which could be disastrous to the charity's effectiveness.

'Charities need to go into potential Probation Service partnerships with their eyes wide open, otherwise they could come to represent a poisoned chalice rather than a golden opportunity.'

The Leader of the Conservative Party, David Cameron, indicated in a speech to the Youth Justice Board on 2 November 2006 that he was in favour of involvement by the private and voluntary sector in offender management:¹¹⁶

The fact is, custody should represent an opportunity for changing lives for the better. But at the moment, too often, it's just a social dustbin.

I want to see far more innovation -...and yes, that means the opening up of offender management services to both public and private competition.

But just as important, I'd like to see all YOIs, and prisons for that matter, whether privately or publicly run, open themselves up to voluntary organisations.

The Liberal Democrat Home Affairs spokesman, Nick Clegg, commented as follows in a press release:¹¹⁷

In launching yet more reforms to the probation service, John Reid should be careful not to blame probation officers for failings in the criminal justice system that are not their fault. Undoubtedly there is a case for looking at the role of the voluntary and private sectors, especially in non-core areas, but John Reid should not pretend that the private sector can act as a panacea for the problems of dealing with dangerous individuals. Probation officers on the whole do a good job in helping to protect the public, and it would be self-defeating if the disruption caused by government reforms weakened rather than strengthened this essential service."

¹¹⁶ http://www.conservatives.com/tile.do?def=news.story.page&obj_id=133328&speeches=1

¹¹⁷ Liberal Democrat Press Release, 7 November 2006

H. Comparisons with changes in Scotland

The *Management of Offenders etc. (Scotland) Bill* was introduced in the Scottish Parliament on 4 March 2005 by Cathy Jamieson, the Minister for Justice. The Bill took forward a number of policy commitments from the Scottish Executive's Criminal Justice Plan *Supporting Safer, Stronger Communities* which was launched in December 2004. The Bill aimed to reduce levels of re-offending in Scotland by improving the management of offenders through greater integration of the work undertaken by the various criminal justice agencies in Scotland. In 2004, the Scottish Executive issued its consultation on re-offending, *Reduce, Rehabilitate, Reform*.¹¹⁸ From responses received, there appeared to the Executive to be weaknesses in the way that offenders were being managed which in themselves were contributing to the levels of re-offending in Scotland. In its Criminal Justice Plan the Executive set out its proposals for addressing those weaknesses.

The Act, which received Royal Assent on 8 December 2005, establishes new Community Justice Authorities which will co-ordinate and improve the delivery of services for offenders, and be responsible for monitoring and reporting on the effectiveness of joint working between local agencies to tackle re-offending. The new CJAs are expected to be fully operational by April 2007. Criminal justice agencies in local government have a duty to consult with partners, share information and draw up plans to reduce reoffending. NAPO sees this as a better way forward than the Government's proposals for England and Wales:¹¹⁹

In Napo's view, the changes underway in Scotland have been driven by a concern to increase the effectiveness of all services in reducing re-offending, but in England there is a real risk that structural changes based on the creation of a purchaser/provider split and competition will be counterproductive, overly bureaucratic and will not have the impact that the government desires. Indeed, this model is likely to be of greater benefit to the voluntary sector if it leads to fixed long-term contracts, means that bidding capacity will be kept to a minimum and results in partnership on a statutory basis.

IV Changes to prison law

A. Background

1. Private sector involvement in the Prison Service

There are 141 prison establishments in England and Wales, 11 of these are run by four private companies. On 24 November 2006 there were 8,396 prisoners in contracted establishment, 10.5% of the total prison population in England and Wales.

The *Criminal Justice Act 1991* gave the Home Secretary power to contract out the running of prisons, but this was confined to new remand prisons. In July 1992, the

¹¹⁸ <http://www.scotland.gov.uk/Topics/Justice/criminal/19556/CONSULTATION>

¹¹⁹ Harry Fletcher, "Supervision in the community – an alternative approach", *Returning to its roots? A new role for the Third Sector in Probation*, ed Natalie Tarry, 2006, p 76

power was extended to all new prisons,¹²⁰ and then in March 1993 to existing prisons.¹²¹ The 1991 Act was amended by the *Criminal Justice and Public Order Act 1994*, which provided for the second phase of the contracting out process, allowing contractors to design, build and then run the new prisons.

The first private prison to open since prisons had been nationalised in 1877 was HMP Wolds in 1992. Under the Conservatives, a further three prisons were opened that had been built with public funds but were privately managed. These were Blakenhurst and Doncaster, which both followed private sector competitions, and Buckley Hall, which opened after a “market testing” exercise in which the private and public sector competed. Market testing was also applied to Manchester, but in this case the public sector in-house team won the contract for five years.¹²² The Conservative Government also commissioned the private sector to build and run two more prisons – Altcourse and Parc.

Labour opposed prison privatisation in opposition. However, it decided to proceed with the ongoing competitions for Altcourse and Parc soon after coming to power, and set up two internal reviews. In May 1998 in a speech to the Prison Officers Association the then Home Secretary Jack Straw said that the transfer of existing private prisons back to the private sector would not be value for money, and that market-testing would continue, with the Prison Service being allowed to bid for the management of privately maintained prisons.¹²³ Under the market-testing process, two privately managed prisons were returned to the public sector – Buckley Hall and Blakenhurst. In 2000, the Labour Government extended market testing to cover those prisons identified as underperforming. Brixton was the first failing public prison to undergo a market test, but in the event no private companies submitted a tender.¹²⁴ The lack of private sector interest in competing led to market testing being replaced by performance testing as the way of achieving value for money. The following PQ explains the difference:¹²⁵

Mr. Bellingham: To ask the Secretary of State for the Home Department what plans he has to establish the independent monitoring of (a) performance and (b) market testing in the Prison Service; and if he will make a statement. [209399]

Paul Goggins: Performance testing is used by the Prison Service as a means of improving the performance of underperforming public sector prisons. Market testing is a delegated responsibility of the National Offender Management Service (NOMS) and can be applied to all prisons, whether publicly or privately managed. Under market testing the bids made in each competition are assessed by an evaluation panel which includes independent members. Performance testing and market testing processes are liable to be the subject of regular scrutiny by

¹²⁰ SI 1992/1656

¹²¹ SI 1993/368

¹²² National Audit Office, *The Operation of PFI Prisons*, HC 700 2002-03, 13 June 2003, http://www.nao.org.uk/publications/nao_reports/02-03/0203700.pdf

¹²³ Relevant extract of speech reproduced in the Prison Reform Trust's *Prison Privatisation Report International*, No 21, June 1998

¹²⁴ “Private firms refuse to run ‘Britain’s Worst Jail’”, *Guardian*, 2 August 2001

¹²⁵ HC Deb 21 February 2005 c461W

Parliament, the National Audit Office, and other independent bodies and there are no plans to establish any additional independent monitoring of these processes.

Following the establishment of NOMS, market testing restarted with the announcement on 22 March 2005 for the management of a cluster of three prisons on the Isle of Sheppey.¹²⁶ On 19 May however, the Home Secretary announced that the competition was being suspended.¹²⁷

I am prepared to defer until September further work on the market test of the Sheppey cluster. This will allow time for the performance improvement mechanisms set out in the agreement to be applied with a view to reshaping the services delivered by the three prisons concerned. Come September, I will look to Martin Narey to evaluate the outcome in much the same way as he would have under the former performance testing procedure. If the desired outcome has been achieved we would then not proceed with the market test: if it has not, I will take immediate steps to re-start the process. "

The decision was criticised by the CBI, which warned that the Government had to maintain its commitment to using the private sector for the delivery of public services if companies were to invest.¹²⁸ In the event, the Prison Service has been successful in its bid and the Home Secretary has agreed that they should be awarded a Service Level Agreement for three years commencing in April 2006.¹²⁹

In addition to privately run prisons, prisoner escort services are provided under contract by private companies. Until the early 1990s, the Prison Service and the Police Service jointly shared responsibility for escorting prisoners to and from courts and caring for them within the court complex. Then, between 1993 and 1997 the Prison Service contracted out prisoner escort and custody services. A "Better Quality Services Review" in 2002 recommended that court escort and custody services should remain contracted out but that there should be a re-competition of the existing contracts. In 2005 a joint thematic review by HM Inspectorate of Prisons and HM Inspectorate of Court Services found a "very mixed picture" with generally good attitudes towards prisoners and well managed security, but uneven standards of custody facility and "very disappointing" performance under the new contracts with late arrivals to court and returns to prison.¹³⁰

¹²⁶ " Raising standards through contestability: competition to operate three prisons announced", NOMS Press Release 22 March 2005

<http://www.hmprisonservice.gov.uk/resourcecentre/pressreleases/index.asp?print=1&id=3001,230,608,242,0,0>

¹²⁷ NOM Press Release *Announcement on the Isle of Sheppey Contestability Bid* 19 May 2005
<http://www.probation.homeoffice.gov.uk/output/Page289.asp>

¹²⁸ "CBI criticises jail tender 'about turn', *Financial Times*, 30 June 2005

¹²⁹ Home Office Press Release, Home Secretary announces result of Sheppey Prisons Performance Test, 21 December 2005, <http://press.homeoffice.gov.uk/press-releases/Sheppey-prison-results>

¹³⁰ HM MCSI and HMI Prisons *Thematic Review The joint inspection of prisoner escort and court custody in England and Wales* June 2005,
http://www.hmica.gov.uk/files/Custody_and_enforcement_draft_5.pdf#search=%22HM%20MCSI%20and%20HMI%20Prisons%20prisoner%20escort%20and%20court%20custody%20in%20England%20and%20Wales%22

2. The performance of private prisons

All prisons are rated on a 1 to 4 performance scale. Level 4 is awarded to excellent establishments that are delivering exceptionally high performance. Level 1 indicates a poor performer.

The ratings are reviewed quarterly and are professional judgements based upon:

- Cost performance and output data from the Weighted Scorecard, showing performance against key performance targets;
- Compliance with Prison Service Standards;
- Findings from external inspections by HM Chief Inspector of Prisons and Independent Monitoring Boards; and,
- The views of Prison Service Area Managers and the Prison Service Management Board, allowing for assessment of more subjective factors such as decency and the prison's commitment to delivering change.

The criteria for achieving each rating are given below, as is the proportion of public sector and contracted sector establishments achieving each rating in Q4 2005/06¹³¹:

- 4 Exceptionally high performing, consistently meeting or exceeding targets, no significant operating problems, achieving significantly more than similar establishments with similar resources

<i>Public Sector</i>	20%
<i>Contracted Sector</i>	9%

- 3 Meeting the majority of targets, experiencing no significant problems in doing so, delivering a reasonable and decent regime

<i>Public Sector</i>	68%
<i>Contracted Sector</i>	64%

- 2 Basically stable, secure and providing a limited but decent regime; experiencing significant problems in meeting targets and / or experiencing major operational problems

<i>Public Sector</i>	12%
<i>Contracted Sector</i>	27%

- 1 Failing to provide secure, ordered, or decent regimes and/or has significant shortfalls against the majority of key targets.

<i>Public Sector</i>	0%
<i>Contracted Sector</i>	0%

¹³¹ <http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=87>

The CBI, in a report published in July 2006, argues that the private sector has resulted in an improved service including a better environment for rehabilitation and better staff-offender relationships.¹³²

Out of 157 establishments across England, Scotland and Wales, there are now 12 contracted prisons, including two under 'operate only' Service Level Agreements with HM Prison Service. Since the 1999 report on GSL-run HMP Altcourse said it should be considered as a 'jewel in the crown' of the prison estate, providers from outside the public sector have begun to dispel the myth that they provide services on a purely efficiency-related basis. Altcourse, for example, is one of only six prisons rated as high performing on the HM Prison Service scorecard. The CBI's 2003 report, *Competition: a catalyst for change in the prison service* outlined the advantages delivered by competition over a decade. It is now clear that quality improvements are driven by the existence of a mixed market of providers and the existence of transforming criminal justice clear Key Performance Indicators (KPIs) – an essential part of the competitive market – has underpinned the process.

A 2005 report from the Prison Reform Trust assessed the performance of private prisons as being "mixed".¹³³

An argument often used in favour of prison privatisation is that private companies can be more innovative and reform minded, deliver a higher quality regime, or at least the equivalent of the best of the public sector, for lower costs.

A government commissioned report into how best to develop the contribution of the private sector and in particular PFI to achieve the objectives of the Prison Service which was published two years ago noted:

"...experience in this country and abroad is that the specification of requirements and responsibilities, essential to a contracting process, brings a focus to operations which results in higher quality and lower costs." (Carter, 2001)

However, this pursuit of a better quality service through innovation with efficiency savings has not necessarily lead to improved regimes. As the Chief Inspector of Prisons noted in her report on HMP Dovegate the private sector has been open to change which the public sector has in the past found hard to achieve, but this has come with significant drawbacks.

'There was some welcome innovation, and good staff-prisoner relationships. But there was also a worrying lack of experience and confidence amongst a young, locally recruited staff, few of whom had any previous prison experience, and who were operating with low staffing levels and high staff turnover. By contrast Dovegate's prisoners were not inexperienced' (HM Chief Inspector of Prisons, 2003).

Overall the performance of private prisons has been mixed.

¹³² CBI, *Protecting the public Partnership in offender management*, July 2006, p2 <http://www.cbi.org.uk/pdf/transcriminaljust0706.pdf>

¹³³ Prison Reform Trust, *Private punishment who profits?*, January 2005

B. The Bill

Part II of the Bill contains changes intended to remove some of the differences in the ways contracted-out prisons operate as compared to public sector prisons. There are also prison security measures, which apply both to private and public sector prisons, and a removal of the requirement to appoint a medical officer, in recognition of the fact that health care in prisons is now provided by the NHS.

1. Powers in private prisons

For the most part, the same primary legislation applies to private prisons as to public sector prisons – the *Prison Act 1952* (as amended). However there are some differences. Instead of a governor, private prisons have both a director employed by the private contractor, and a “controller”, who is appointed by the Secretary of State to oversee the running of the prison.¹³⁴ Certain disciplinary powers are vested in the controller rather than the director. Directors are not allowed to conduct adjudications, segregate prisoners, apply restraints or to order confinement in a special cell, except in emergencies.¹³⁵

Officers who run private prisons are known as “prisoner custody officers”¹³⁶, as opposed to simply “prison officers” in state prisons. While prison officers, including the governor, have all the powers of a constable while they are on duty,¹³⁷ prisoner custody officers have more circumscribed powers. Their duties are to prevent escapes, detect and prevent the commission of unlawful acts, ensure good discipline and attend to the well-being of prisoners.¹³⁸ In the performance of these duties, prisoner custody officers have the power to search inmates in accordance with prison rules, and to search visitors, although these are confined “rub-down searches” involving only the removal of an outer coat, jacket or gloves.

The bill will remove some of the differences between officers’ powers in private and state-run prisons. Clause 11 provides for prisoner custody officers to require visitors to remove items of clothing other than the outer layer, although intimate searches (i.e. physical –rather than visual - examination of bodily orifices) would not be permitted.¹³⁹ The clause would also extend similar powers to custody officers in secure training centres. Any such searches would have to be performed in accordance with the Prison Rules or Secure Training Centre Rules. The Joint Committee on Human Rights is consulting on whether there are sufficient safeguards.¹⁴⁰

¹³⁴ Sections 84 and 85 *Powers of Courts (Sentencing) Act 1991*, as amended

¹³⁵ section 85(3)

¹³⁶ section 85

¹³⁷ section 8 *Prison Act 1952*

¹³⁸ section 86 *Powers of Courts (Sentencing) Act 1991*, as amended

¹³⁹ clause 11(2)(b) and section 164(5) of the *Customs and Excise Management Act 1979*

¹⁴⁰ Joint Committee on Human Rights, *Legislative Scrutiny Session 2006-07 Bills under scrutiny* http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm#OMB

Controllers will still have statutory duties such as reviewing the running of the prison, reporting to the Secretary of State, and investigating allegations against prisoner custody officers. The Joint Committee on Human Rights is also calling for views on this provision.¹⁴¹

Clause 12 would give officers in contracted out prisons or secure training centres powers to detain visitors suspected of committing certain offences, such as assisting escape or smuggling prohibited items into or out of the prison. Detention could be for up to two hours pending the arrival of a police officer, using “reasonable force” if necessary. Police community support officers (CSOs) are given similar detention powers under police legislation, but in their case detention can only be for 30 minutes.¹⁴² This is also a provision on which the Joint Committee on Human Rights is consulting.¹⁴³

Clause 21 would allow a person who is not necessarily an employee of the prison, but who is working there, to be authorised to conduct a “rub down search”. Clause 13 would give “authorised persons” in private prisons the power to perform tasks normally restricted prison custody officers. This would cover a range of auxiliary officers who operate in private prisons.

2. Prison security

At present, the *Prison Act 1952* contains three main offences connected with prison security:

- Assisting a prisoner to escape, which has a maximum sentence of 10 years in prison
- “Unlawful conveyance of spirits or tobacco” into prison, which has a maximum sentence of six months or a maximum fine of level 3 on the standard scale (£1,000)
- Unlawful introduction of “other articles”, which has a maximum fine of £1,000.

The rules make no explicit provision either for illegal items such as drugs, or items such as mobile phones, which can be used for controlling criminal activities from within the prison, or cameras which can be used to breach prison security.

Clause 17 makes changes to the offences of bringing unauthorised items in or out of prison. Articles would now be classified as “List A”, “List B” or “List C”, and different rules and penalties would apply to each.

¹⁴¹ Joint Committee on Human Rights, *Legislative Scrutiny Session 2006-07 Bills under scrutiny* http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm#OMB

¹⁴² schedule 4, *Police Reform Act 2002*

¹⁴³ Joint Committee on Human Rights, *Legislative Scrutiny Session 2006-07 Bills under scrutiny* http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm#OMB

List A includes controlled drugs, firearms, explosives or weapons. The maximum penalty for bringing these in without authorisation would be ten years in prison and an unlimited fine. This represents a large increase in the penalty for these items.

List B covers mobile phones, alcohol, cameras and sound recording devices, which would attract a maximum sentence of two years in prison and/or an unlimited fine on indictment, or 12 months and/or an unlimited fine on summary conviction.

List C articles are not set out on the face of the bill, but would be prescribed by the prison rules. They would attract a maximum fine of £1,000.

There would be a public interest defence for list B or list C, and also a defence if the person reasonably believed he had authorisation.

Lists A and B could be amended by order, subject to negative procedure. List C could be amended by a change to prison rules.

Clause 16 makes changes to the wording of the statutory offence of assisting a prisoner to escape, using similar wording to clause 17 with regard to items brought, thrown or “otherwise conveyed” into the prison for that purpose. The maximum sentence – ten years in prison – is unchanged.

Clause 18 creates new offences of taking a photograph or making sound recordings within a prison or transmitting images or sounds from a prison without authorisation. This arose from the case of a journalist who was given a job as a prison guard and took photographs of the Soham murderer Ian Huntley. There was a police investigation but charges were dropped.¹⁴⁴ The new offence also carries a public interest defence, and a defence that the person thought they were authorised.

The Joint Committee on Human Rights is consulting on this proposed offence.¹⁴⁵

3. Prison medical officers

Under section 7 of the 1952 Act, prisons are required to have a governor, a chaplain, a medical officer and such other officers as “may be necessary”. The medical officer had a combination of managerial and medical functions. Since April 2003, prison health became the responsibility of the Secretary of State for Health and the NHS, through Primary Care Trusts, has assumed statutory responsibility for local prison health centres. As a result, the Explanatory Notes state that the “original medical officer role is no longer required”.¹⁴⁶ The Bill removes references to it.

The Joint Committee on Human Rights is also consulting on this provision.

¹⁴⁴ “Inquiry over Soham suspect's bogus guard”, *Scotsman*, 16 January 2003 <http://thescotsman.scotsman.com/index.cfm?id=663492003> “Journalist 'prison scoop' probed”, BBC, 26 February 2005, <http://news.bbc.co.uk/1/hi/uk/4301565.stm>

¹⁴⁵ http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm#OMB

¹⁴⁶ paragraph 95

V Other provisions on offender management

A. Young offenders

Part 3 of the bill contains a number of provisions concerning the management of young offenders.

1. Background

Sentences for young offenders were changed as part of youth justice reforms in the late 1990s.. The *Crime and Disorder Act 1998* introduced Detention and Training Orders to replace the “sentence of detention in a young offender institution”, which used to be available for 15-17 year olds, and the secure training order for 12-14 year olds. The maximum period of a DTO is 24 months, and generally half is served in custody and half in the community. Youth Offending Teams are responsible for sentence planning during both halves of the sentence. Children guilty of more serious offences can be sentenced to longer fixed terms¹⁴⁷ or detention at Her Majesty’s Pleasure.¹⁴⁸

Although the *sentence* of “detention in a young offender institution” no longer exists for this age group, the vast majority of children do actually serve the custodial part of their sentences in the Young Offender Institutions. These are mainly run by the Prison Service (although there are some privately run YOIs) and they cater for 15-21 year olds. However, those aged under 18 are usually kept in juvenile wings separated from the 18-21 year olds.

Other children can be held in Local Authority Secure Children’s Homes (LASCH), which cater for younger or more vulnerable children or Secure Training Centres, which are purpose-built centres, run by private operators according to contracts managed by the Youth Justice Board. The types of accommodation are set out in section 107 of the *Powers of Criminal Courts (Sentencing) Act 2000*.

The *sentence* of “detention in a young offender institution” does, however, still exist for 18, 19 and 20 year olds. This is now provided for by the section 96 of the *Powers of Criminal Courts (Sentencing) Act 2000*. As long ago as 1999, the Government issued a consultation document on YOI detention for this age group. In this, it proposed to abolish this sentence:¹⁴⁹

Following the reform of the sentencing arrangements for 12-17 year olds, the Government has reviewed the current arrangements for 18-20 year olds to assess whether alternative arrangements might meet the punishment, treatment and rehabilitation needs of this older age group more effectively. The Government has concluded that the sentence of detention in a young offender institution for 18-20 year olds is no longer justified on the grounds that it no longer

¹⁴⁷ section 91 of the *Powers of the Criminal Courts (Sentencing) Act 2000*

¹⁴⁸ section 90 of the *Powers of the Criminal Courts (Sentencing) Act 2000*

¹⁴⁹ Home Office, *Detention in a young offender institution for 18-20 year olds: a consultation paper*, 1999, <http://www.nationalarchives.gov.uk/ERO/records/ho415/1/cpd/sou/det1820.htm>

caters properly for the needs of that age group and has practical disadvantages in its enforcement.

1.3 The Government therefore proposes to abolish the sentence of detention in a young offender institution when Parliamentary time allows and to replace it with the same sentencing arrangements as currently apply to convicted defendants who are 21 and over. The Government invites views on this proposal.

Following the consultation, section 61 of the *Criminal Justice and Court Services Act 2000* was introduced to abolish the sentence. However, this has never been brought into force.¹⁵⁰

Clauses 25 and 26 of the Bill contain provisions which would allow a young person to be transferred to prison once he or she reaches the age of 18. Clause 25 would generally widen the category of accommodation in which a period of detention or training may be served. At present, a young person subject to a Detention and Training Order (a “trainee”) must be placed, during the custodial part of the sentence, in one of the types of “secure accommodation” set out section 107 such as LASCH or a Secure Training Centre. Under Clause 25, a trainee would, unless he or she had attained the age of 18, be put in “youth detention accommodation”. The explanatory notes set out what this means:¹⁵¹

This category is wider than the current “secure accommodation”. In future, it will be possible, for example, to place a young person in an “open” children’s home as well as in a secure children’s home. Trainees who are sent back to custody because they have breached the terms of their notice of supervision or committed a further offence during the community part of the order, must, unless they have reached 18, also be placed in “youth detention accommodation”.

However, the explanatory notes go on to that once the repeal of the sentence of detention to a Young Offender Institution is brought into force, clause 25(5) would allow a trainee who reached the age of 18 to be detained in an adult prison.¹⁵²

Once the repeal of the sentence of detention in a Young Offender Institution (under the Criminal Justice and Court Services Act 2000) is brought into force, it is possible that young offender institutions will cease to accommodate 18-20 year olds. It is therefore necessary to make alternative provision for trainees for whom youth detention accommodation is no longer appropriate. *Subsection (5)* inserts a new section 105A into the 2000 Act which provides that, where a trainee has reached the age of 18, it will be possible for him or her to be detained in a prison at the direction of the Secretary of State.

Clause 26 would allow the Secretary of State to direct that a sentence of detention be converted into a sentence of imprisonment where an offender has reached the age of 18. Once again, the explanatory notes make it clear that this is “to take account of the

¹⁵⁰ section 61

¹⁵¹ paragraph 104

¹⁵² paragraph 106

reduction in the minimum age of imprisonment to 18 (by section 61 of the Criminal Justice and Court Services Act 2000 – yet to be commenced)".¹⁵³

The Joint Committee on Human Rights is consulting on “whether there will be adequate safeguards accompanying the proposed power of the Secretary of State to send people who receive a detention and training order to prison when they reach the age of 18.”¹⁵⁴

Other changes in Part 3 of the Bill include:

- The power for the Secretary of State, rather than the current independent Correctional Services Accreditation Panel, to accredit offender management programmes (clause 22). The Explanatory Notes say there is no longer a need for an independent body, because of the separation of commissioning from operations under NOMS, but that a panel of experts will offer advice.
- New flexibility over early release from the custodial part of a Detention and Training Order (clause 24).

¹⁵³ paragraph 108

¹⁵⁴ http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchris06_07.cfm#OMB

Appendix – Reoffending rates

The Home Office's Spending Review 2002 Public Service Agreement (PSA) 5 target included a goal to reduce re-offending for young offenders and adults by 5% from the 2000 baseline by 2006.

The Home Office Spending Review 2000 had specified a target (PSA 10) to reduce reoffending by 5% between 1997 and 2004. The results for juvenile offenders indicate that the target was not met as the reduction in re-offending was 3.8%. Between 1997 and 2003 there has been a reduction of 3.4% in the adult reconviction rate.¹⁵⁵

The Home Office has recently changed the way it measures reoffending. Previously re-offending rates only measured those offences where the offenders were convicted within the follow up period; now it measures offences taking place within the follow up period even if the offender was not convicted until after that period.

At the same time the data source of offenders' criminal histories and their subsequent reoffending changed to the Home Office Police National Computer (PNC). The system became operational in the Home Office in 2005. The source of the criminal histories had been the Offenders Index. This index only dealt with 'standard list' offences unlike the PNC which covers all offences dealt with by the police.

Both of these changes are likely to have increased reoffending rates. Therefore it is not sensible to compare re-offending rates before 2000 with rates after this date.

In order to calculate the change in re-offending, to measure progress against the PSA target, two types of rates are published:

Actual – This is the percentage of offenders who re-offended during a two-year follow-up period (one year for juveniles), and were subsequently convicted in court.

Predicted – This is the estimated percentage of offenders who will re-offend, after changes in offender characteristics are accounted for.

The PSA target specifies a reduction in the re-offending rate, expressed as a percentage reduction against the predicted rate. The Home Office have said that:

'The predicted rate is necessary as the outputs from the Criminal Justice System (CJS) depend in part on the characteristics of those coming in to it, just as the examination pass rate in a school will be related to its intake. The predicted rate of re-offending offers a like-for-like comparison with the 2000 cohort'

It would not be sensible to base performance against this target on the change in actual re-offending rates over time as changes in the characteristics of offenders from one year to the next may impact on this measurement. Rates of re-offending are highest amongst

¹⁵⁵ As the follow up period for adults is two years compared to one year for juveniles, 2004 re-offending data for adults won't be published until November 2007.

younger offenders, those who have higher numbers of previous convictions and whose original offence related to theft and other burglary. If, compared with members of the baseline 2000 cohort, the 2006 cohort contained more of the characteristics that have a stronger association with re-offending and fewer with a weaker association, then a like-for-like comparison is not being made.

The latest available data showing progress against the PSA 5 target is provided in the table below. As the adult target is based on a two year follow up period the latest available data is for the 2003 cohort. The juvenile target is based on a one year follow up period, therefore figures for the 2004 cohort are provided.

Overall re-offending rates against SR 2002 PSA 5 target

	Adult			Juvenile		
	Actual	Predicted	Progress against target	Actual	Predicted	Progress against target
2000	57.6	n/a		43.3	n/a	
2003	57.6	58.9	2.2%			
2004				41.3	41.9	1.4%

Source:

Re-offending of adults: results from the 2003 cohort, Home Office Statistical Bulletin 20/06

Re-offending of juveniles: results from the 2004 cohort, Home Office Statistical Bulletin 10/06

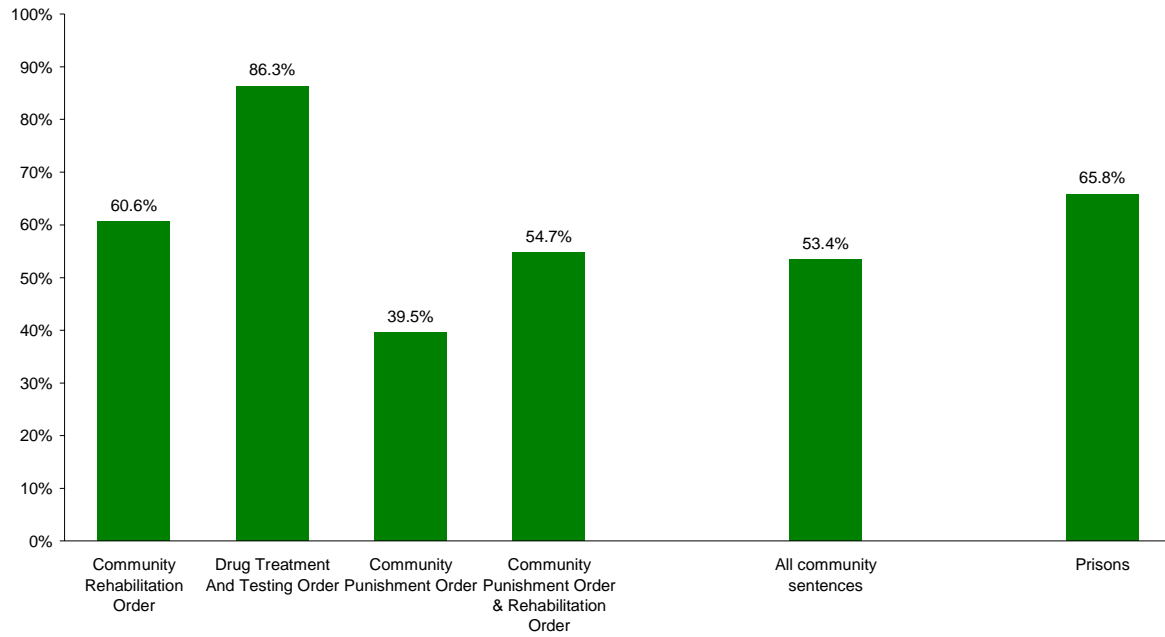
The progress against the target is derived by calculating the percentage point difference between the actual and predicted rates (1.3% for adults). This figure is then expressed as a percentage of the predicted rate ($1.3/58.9 = 2.2\%$)

For adults in the 2003 cohort the actual re-offending rate was the same as the 2000 baseline figure. As the 2003 cohort were deemed more likely to offend than the 2000 cohort the predicted rate was 58.9%. With the actual rate below the predicted there has been an improvement over the 2000 baseline so progress against the target (2.2%) has been made. A further 2.8% is required to meet the target to be measured on the 2006 cohort.

For juveniles in the 2004 cohort the actual re-offending rate of 41.3% was below the predicted rate of 41.9%. This improvement over the 2000 baseline shows that progress against the target has been made. However with progress of 1.4% made over the last four years a further 3.6% is required to meet the target to be measured on the 2006 cohort.

Re-offending rates vary considerably by type of disposal, but much of this will depend on the characteristics of the offenders given each type of disposal. For this reason actual rates should not be used to judge the effectiveness of the different disposals. The following chart shows the actual adult reoffending rates for the different types of disposal.

Actual adult re-offending rates by disposal, 2003 cohort



By comparing the actual re-offending rates for individual disposals with the predicted rates we could see how each disposal was performing in relation to the PSA target. The Home Office does not publish predicted rates for individual disposals.