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THE CRIMINAL JUSTICE BILL 2002: THE FUTURE ROLE AND WORKLOAD OF THE NATIONAL PROBATION SERVICE

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Abstract

This article aims to do two things. First, to identify which elements of the Criminal Justice Bill (2002) seem likely significantly to affect the role and workload of the National Probation Service (NPS) in the short to medium term. Secondly, to identify what other policy initiatives might also exert an influence, and to what extent. The exercise will necessarily involve a good deal of speculation: predicting the future is partly a matter of modelling and projection, but mostly a question of political choice. We will indicate the options we think should ideally be chosen.

Setting the Scene: the Principal Factors Driving Change

The NPS has been in existence for less than three years. It has arguably coped well with large-scale structural, cultural and procedural change (HMIP, 2003, para 2). The Service yearns now for stability. In fact it faces a large range of initiatives which will significantly alter both the nature and size of its workload and may be accompanied by further structural change.

The principal factors to be considered are:

- A large raft of legislation currently before Parliament – the Courts, Anti-Social Behaviour, Sexual Offences, Mental Health and Criminal Justice Bills – of which the latter is of particular importance.
- The Correctional Services Review, begun in the Home Office in 2002 and, as we write (October 2003), about to be completed within the Cabinet Office under the leadership of Pat Carter, an advisor called in by the Prime Minister. It is as yet unclear precisely what the Carter recommendations will be and whether the Review report is to be published. However, sufficient has already been leaked to the media for us to see

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the direction in which its thinking is going and it is most unlikely that a review undertaken at the behest of No 10 will not be acted on to some degree.

We shall consider each of these factors in turn and conclude with an attempt to draw aggregate conclusions. Before we do so we should first establish the current trend regarding the uses to which the Probation Service is put.

The dominant change in sentencing policy during the last decade appears to have been the use by the criminal courts of increasing levels of punitive intervention. One consequence of this trend – the rising prison population and prisons overcrowding – is well publicised and known (see, for example, HMI Prisons, 2002: 3-4; Hough, Jacobsen and Millie, 2003). Another consequence - the increasing workload of the Probation Service and the silting up of its caseload with low-risk offenders - is less well appreciated but is attracting increasing attention (Morgan, 2003). This workload pressure led to some sporadic industrial action on the part of probation staff in the early part of 2003.

The basic facts are straightforward. Roughly the same number of defendants appeared before the courts in 2001 as in 1991. Yet the proportionate disposal of those defendants was very different.

Table 1 – Sentencing of offenders aged 21 and over for indictable offences, all courts, 1991 and 2001

Sentence	1991	2001
Discharges	17.5	15.5
Fines	37.4	25.9
CROs	9.5	13.6
CPOs	7.2	8.6
CPROs	-	2.2
Curfew Orders	-	0.4
DTTOs	-	1.6
All Community Orders	16.7	26.3
All Immediate Custody	17	28

Source: Home Office, 2003a: Table 7.10

As we can see from Table 1 the proportionate use of custody has increased dramatically and the reduction in the use of fines has been equally dramatic. Use of discharges has declined modestly and there has been a significant increase in the use of a broadening range of community penalties.

We suggested above that this trend represents more punitive intervention. But does it? Can it be explained by a changing mix of offences coming before the courts? Or offences

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being more serious of their type? Or changes in the criminal careers, lifestyles or circumstances of defendants? These questions, particularly the third, are complex and difficult to evaluate. The most exhaustive analysis of the issues so far conducted (Hough, Jacobson and Millie, 2003) shows conclusively that though there have been some changes in the mix of offences sentenced, the changes do not account for the trend and there is no evidence to support the contention that the offences coming before the courts are generally more serious of their type. But what of other offender characteristics? Sentencers typically explain their decisions on the basis that the offenders coming before them tend now to be more persistent (ibid: 30-31) and there is limited support for this contention: the proportion of offenders sentenced to imprisonment with no or few previous convictions has marginally fallen whereas those with 11 or more has slightly increased (Home Office, 2003b: Table 4.2). There is also abundant evidence that the number of dependent and heavy drug, including alcohol, users in Britain has greatly increased, large proportions of arrestees test positive for heroin or cocaine and the links between drug dependency and persistent offending are strong (Godfrey et al, 2002; DoH, 2003; Bennett et al, 2001; MHA Matrix and NACRO, 2003; Richardson et al, 2003). It is also clear that despite the fact that there is currently the lowest level of unemployment for 15 years, average household indebtedness has greatly increased (Bank of England figures, 13 September 2003). This may have a bearing on the view, in our experience often held by magistrates, that decline in the use of financial penalties reflects the fact that proportionately more defendants are multiple debtors who have not the means to pay them. Allied to this has been an increasing concern about the ability of the court system to administer the collection of fines (Public Accounts Committee, 2002; National Audit Office, 2002b).

What is clear is that the proportionate increased use of custody has been across all age groups and courts, applies to men and women, and is exhibited in practically all offence categories (Morgan, 2003; Hough, Jacobson and Millie, 2003). In certain offence groups – robbery, burglary, rape and other sexual offences – the custodial sentences have also been getting longer, with long-term sentences (4 years or more) increasingly replacing medium-term sentences. The aggregate consequence is that whereas the prison population was around 41,000 in 1991 it reached 74,000 in summer 2003, an increase of 75 per cent, albeit the figure has since fallen back a little from that high point.

Analysis of the *Probation Statistics* reflects the same trend – a ratcheting up of intervention, with more and more low risk offenders, who would formerly have been fined or discharged, coming on to probation caseloads.

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Table 2 – Characteristics of Offenders subject to Community Penalties

Characteristic	CRO		CPO		CPRO	
	1991	2001	1991	2001	1991	2001
Summary Offence	28	37	31	43	30	45
No Previous Convictions	11	27	14	51	10	28
No Previous Custody	63	64	67	82	55	67

Source: Home Office, 2002a: Tables 3.5 and 3.7

The data displayed in Table 2 indicate that the various indices of offender seriousness – the proportions convicted of summary as opposed to indictable offences, first offenders or offenders without experience of a prior custodial sentence – are in the same direction – namely, declining seriousness.

It may be objected that these are only prima facie indices. First offenders, for example, may nevertheless be serious offenders or may present a high risk of future harm. Though this may of course be true in individual cases, the evidence does not support the contention generally. For example, the proportions of court order-supervised offenders who have been convicted of offences involving violence or sex, robbery or burglary has significantly declined. Further, Tables 3 and 4 display the most recently available risk assessment data for offenders subject to community penalty court orders.

Table 3 – Offender OGRS Scores – % Distribution by Sentence

	0-29	30-76	77+
Imprisonment	9	48	42
Youth custody	16	54	30
CRO	15	59	25
CPO	66	29	5
CPRO	25	59	16
Fine	41	54	6
Conditional Discharge	50	49	0
Misc (usually minor)	31	42	26

Source: National Probation Directorate.

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Table 4 – OASys Assessments of Likelihood of Reconviction and Risk of Harm

	CPO	CRO	CPRO	DTTO
Risk of Reconviction				
Low	57	23	31	4
Medium	39	55	54	42
High	4	22	16	54
Risk of harm to children – low	97	90	96	97
Risk of harm to public – low	83	78	68	86
Risk of harm to staff – low	99	97	99	100
Risk of harm to unknown adult	91	84	68	86

Source: National Probation Directorate

The distribution of OGRS (the best validated predictor of future reconviction, based on current offence, age and previous convictions) and OASys scores (the tool jointly developed by the Probation and Prison Services to assess, separately, risk of reconviction and risk of harm) show that high proportions of offenders - 15-23 per cent of those subject to CROs, 57-66 per cent of those subject to CPOs and 25-31 per cent of those subject to CPROs - are at low risk of re-offending. That is, they have scores below the level at which it is considered that participation in an accredited offending behaviour programme might be beneficial. Or, to put the matter another way, offenders who either do not need such an intervention or it would likely be counter-productive – that is, would serve to increase rather than reduce the likelihood of re-offending. This is particularly important given that the NPS is shortly to roll out an accredited system termed 'enhanced community punishment', a system which the data suggest almost two thirds of offenders currently on CPOs do not need. Nor, as can be seen from the bottom rows of Table 4, is more than a very small proportion of court order-probation supervised offenders judged to present a significant risk of harm to anyone.

Conceptualising the Trend in Penal Policy and Practice

These data provide an opportunity to think afresh about the longstanding debate regarding the nature and function of community penalties, their place in the sentencing hierarchy and the manner in which the introduction of new penalties – of which the Criminal Justice Bill 2002 is the latest in a long line – impacts on sentencing practice generally.

The courts in England and Wales now have a larger range of non-custodial penalties available to them than any other jurisdiction with which we are acquainted. The last decade has witnessed the introduction of the Combination Order, the Curfew Order with Electronic Monitoring, the Drug Treatment and Testing Order (DTTO), the Exclusion

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Order and the Drug Abstinence Order. A separate set of new community orders has been introduced for juveniles. The language of community penalties has also been toughened. Probation Orders have become Community Rehabilitation Orders. Community Service Orders have become Community Punishment Orders. Combination Orders have become Community Punishment and Rehabilitation Orders. Alongside this, successive editions of national standards have been issued prescribing the content and nature of supervision. However, this process of toughening-up and ostensible intensification of intervention has not, as we have seen from the custodial statistics, served to displace custody. On the contrary, all the evidence supports the view that it has ratcheted up a more punitive approach across the board with more and more offenders being dragged deeper into what is increasingly referred to as the 'corrections' system.

Bottoms, Gelsthorpe and Rex (2001) have summarised the conceptual frameworks that have been employed to describe community penalties which they define as 'structurally located between custody on the one hand, and financial or nominal penalties…on the other' (ibid: 1). Three distinct stages of evolution from the 1980s to the present are suggested. First, the growth of the *alternatives to custody* approach of the 1970s and 1980s, following the collapse of the *rehabilitative ideal*. Whilst this approach had the merit of focusing attention on the damaging human and financial costs of imprisonment, it led, in many cases, to 'net-widening', with many offenders being made the subject of community-based supervision who were not at risk of custody. In some cases the problem was compounded because breach of the order led to the imposition of a custodial sentence.

Concern that the *alternatives to custody* approach was not having the desired impact on the prison population led, the authors suggest, to a second phase of policy development: the desert model, whereby restrictions of liberty should be consistent with the gravity of the current offence. The 1991 Criminal Justice Act marked a bold attempt to offer sentencers sanctions (including making the probation order a sentence of the court) each of which was supposed to be credible in its own right: this came to be known as *punishment in the community*. The climate surrounding passage of the 1991 Act was initially reasonably successful in reducing use of custody. However, against a backdrop of public and political disquiet the philosophy of proportionality with the current offence at the heart of the policy was effectively abandoned.

The third and most recent conceptualisation of probation practice identified is a synthesis: of *punishment*, a concern for *public protection*, *risk management* and a renewed focus on effective practice, or '*what works*', as evidenced by the proliferation of accredited programmes for offenders subject to supervision. This has 'contributed to a trend towards the '*creative mixing*' [italics added] of different kinds of interventions in offenders' lives (rather than imposing a single type of punishment or treatment)' (ibid: 6). It is this *creative mixing* that characterises much of the discussion of community penalties in the Halliday Report (Home Office, 2001) which has now found legislative expression in the Criminal Justice Bill (2002).

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The experience of earlier attempts to change the focus and purpose of community penalties, and/or reposition the place of custody in the tariff, provides ample evidence of the complex inter-play of forces at work. Nellis (2001) has extended the historical analysis of Bottoms, Gelsthorpe and Rex (2001). Community penalties, he emphasises, have not developed in isolation from other sentencing options. Further, the shifting sands of criminal justice policy have at times often allowed competing criminal justice policy aims to coexist. For example, the 1982 Criminal Justice Act 'short sharp shock' detention centres were the most publicly known aspect of the legislation, yet the Act also introduced the supervised activity requirement for young offenders and restricted the use of custody for them. Nellis (2001) also argues that the Probation Service has not in the past been as successful as juvenile justice workers, with their consistent focus on a 'whole system' approach, in steering a successful course through the vicissitudes of criminal justice policy change. He suggests that the retention of the name Probation in the Service's title may prove to be a hollow victory: giving the appearance of continuity might, 'ironically, given the retentionists' intentions', enable the Service to be portrayed as anachronistic, thereby more easily enabling the Government to merge it with the Prison Service (ibid: 34). It is not yet clear what Martin Narey's appointment in February 2003 as Commissioner for Correctional Services betokens, nor what structural recommendations the Carter Review team will make, but this part of Nellis' analysis may yet prove prescient.

It follows that though we can identify broadly coherent policy phases in the development of community penalties, there have generally been contradictions also. The central themes have been: a concern with the financial (and at times human) costs of imprisonment; the desirability of community penalties appearing credible (which has usually meant tough – see Dunbar and Langdon, 1998); and effectiveness in protecting the public and reducing re-offending. At different stages different ingredients have been more or less prominent. The manner in which criminal justice legislation is developed and implemented is subject to significant variation and adaptation over time as a result of competing pressures – periodic scandals or alarms, media campaigns and alleged expressions of public opinion, fiscal crisis and political expediency, sentencer practice and the attitudes and capabilities of probation staff. In the final analysis much depends on political leadership and rhetoric. This complex mix makes the task of predicting the shape of future policy and practice well nigh impossible. The Criminal Justice Bill (2002) is a *pot pourri* of a large number of complex provisions which cannot sensibly be interpreted as signalling a clear shift in one penal direction or another. There are many possibilities. The manner in which the Act is used will ultimately depend on how it is steered, funded and interpreted. That is, though Ministers are apt to maintain that penal practice depends on factors essentially beyond their control – the level of crime and the independent decisions of the judiciary - in fact the outcome depends on political choice.

What are the provisions in the Criminal Justice Bill that will likely impact on the Probation Service and what choices and decisions are likely to be emphasised in the Review of Correctional Services?

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The Criminal Justice Bill

The Criminal Justice Bill has a number of provisions that impact directly or indirectly on the work of the Probation Service. The provisions that are particularly pertinent can be summarised as follows:

- A cafeteria of sentencing aims. The Bill states that any court dealing with an adult offender 'must have regard to' punishment, the reduction of crime (including its reduction by deterrence), reform and rehabilitation, the protection of the public and reparation.
- The creation of a Sentencing Guidelines Council, chaired by the Lord Chief Justice. The Council to comprise seven judicial members and five non-judicial members. There will also be a duty to publish information about sentencing as a means of 'promoting public confidence and preventing re-offending'.
- The reversal in the presumption of bail for those who positively test for Class A drugs, whose offence is drug-related and who are unwilling to undergo assessment or who, having been assessed, are unwilling to participate in treatment.
- As far as sentencing is concerned any previous convictions, where they are relevant, to be regarded as an aggravating factor (this marks the final departure from the philosophy of the 1991 Criminal Justice Act). Magistrates to have increased powers generally to impose custodial sentences of greater length in certain circumstances. In the Crown Court an increase in the maximum penalties for selected drugs and driving offences and life or indeterminate sentences will be imposed for public protection for serious offenders where there is held to be a significant risk of further serious harm through the commission of further offences.
- All existing community orders to be replaced with a single portmanteau *community order* to which can be attached different requirements, or conditions, ranging from undertaking unpaid work, participation in an activity or programme, refraining from a prohibited activity or subjection to a curfew or exclusion, to going to an attendance centre. Court powers to review an extended range of community orders to be introduced.
- Alterations in the arrangements for custodial sentences. All custodial sentences of less than 12 months to be replaced with something known as *custody plus*: a maximum period in custody of between 2 and 13 weeks accompanied by a licence period of at least 26 weeks and the total length of which, in the case of consecutive sentences, not to exceed 15 months. During the licence period the offenders may be subject to requirements on the lines of a community order. Further, plans to introduce a new sentence of *intermittent custody* of between 28 and 51 weeks with respect to a single offence (65 weeks in the case of consecutive sentences) whereby the courts will be enabled to specify the periods in each week to be spent in custody and on licence (for example, weekends in custody). Finally a new form of suspended sentence of imprisonment – known colloquially as *custody minus* - to be introduced whereby a prison sentence of less than twelve months (now taking the form of a *custody plus* sentence) can be suspended for between six months and two years for as long as the

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offender does not commit a further offence and complies with requirements in the community along the lines required in a community order.

Correctional Services Review

At the time of writing all the signs are that the deliberations of the members of the Review team have been grounded on asking some fundamental questions seldom adequately addressed. To what extent does sentencing policy significantly impact on the incidence of crime? What might constitute a sensible, cost-effective use of the Probation and Prison Services? What other providers of services might be relied on? How might new technology come to the aid of the penal system? And so on.

The core of their thinking appears to be that the 'sentencing drift' which has characterised the last decade is unsustainable and ill-serves crime prevention. Building on previous reports (Home Office, 2001; HMI Probation/HMI Prisons, 2001; National Audit Office, 2002a; Social Exclusion Unit, 2002) it seems likely that they will endorse the view that short terms of imprisonment, unsupported by sentence planning and not followed by supervision, are counter-productive. This group of typically persistent 'revolving door' offenders have of all prisoners the highest rate of re-offending and reconviction (see Home Office, 2003: Table 9.5b). Few interventions are delivered that might ameliorate the social exclusionary factors – fractured relationships, lack of basic skills, unemployment, debt, etc – that characterise short-term prisoners and which typically are exacerbated by their self abuse of alcohol and other drugs. Current arrangements represent possibly the best way, as a White Paper once conceded, of expensively 'making bad people worse' (Home Office, 1990: para 2.7). Conversely, there is good research evidence that subjecting low risk offenders to community penalties – with or without the inclusion of accredited offending behaviour programmes – is both expensive and counter-productive in the sense that their likelihood of re-offending is likely to be increased through a process of contamination (Walker, Farrington and Tucker, 1981; Andrews et al, 1990; Bonta et al, 2000). We might call this the best way of severely tarnishing the reputation and character of imperfect but reasonable citizens.

What is required, the Review is likely to argue, is a radical shift of the centre of gravity of current penal policy. Low risk offenders need to be got off the Probation Service's books so that the Service can more effectively deal with medium and higher risk offenders, both those sentenced to community penalties and, in the future, those subject to *custody minus* and *custody plus*. How is this to be done? Use of fines, the Review will argue, needs radically to be resuscitated. Greater use could also be made of the increasingly efficient and cheap means of electronically monitoring and tracking offenders. The commercial sector, already engaged in this work, could take on more of it. There is also scope for expanding the use of restorative justice, both pre- and post sentence.

Running to Stand Still?

What then, in the light of the above thinking and the legislative provisions in the pipeline, can be said about the future workloads of the Prison and Probation Services? We

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should begin with the projections, which the Home Office routinely produces, based on existing trends.

The problem with projections is that in recent years none of the factors taken into account – the rate at which custody is used and the average length of sentences, etc - has remained constant. Thus during the last decade the projections have consistently underestimated the number of prisoners. Which is not to say, as we shall see, that this will continue to be the case.

In autumn 2002 court appearances and sentencing trends were such that the prison population was officially predicted to rise to between 91,400 and 109,600 by 2009 (Councell and Simes, 2002). The most recent, as yet unpublished, projections suggest, in the light of some reduction in the upward trend in sentence lengths and the custodial sentencing rate, that the rise will be more modest – to 92,500 by 2009. This slackening in the rising use of custody explains why, at the time of writing, both the number of juvenile and adult offenders in prisons and young offender establishments has fallen from the high points reached earlier in the year (see, for example, Youth Justice Board 2003: Figure 13). By definition any growth in the prison population will spell a concomitant, though more modest, increase (because, currently, short-term prisoners are not subject to supervision on release) in the number of offenders supervised on licence by the Probation Service. However, these projections, it should be stressed, take no account of 'what if' factors such as the commencement of new legislative provisions.

What then can we say about the implications of the Criminal Justice Bill? The principal piece of published evidence comprises the financial memorandum to the Bill. This indicates what the Government, most importantly the Treasury, has agreed to. The financial memorandum states that the sentencing provisions 'will be implemented as part of a strategy which will aim to ensure that custody is reserved for sexual and violent offenders and serious persistent repeat offenders, and that the benefits of community supervision are made available for more offenders' (Explanatory Notes, para 791). The implicit suggestion is that the provisions in the Bill will balance out and use of custody not rise, or rise only modestly, over and above that which it is predicted it will do anyway. The attached costings support this interpretation. They provide for only modest additional increases in prisons spending during the period 2006-2009 – between £36 and £47 million per annum – compared to an additional £176 to £194 per annum reserved for the Probation Service (ibid: para 792). The latter represents a significant proportionate increase in Probation Service spending which in 2003-4 is planned to be £637 million.

How plausible is the outcome which the Treasury has agreed to fund? Critics of Government policy will be able to find abundant scope for predicting that the legislation will exacerbate the more punitive trend of recent years and likely increase the prison population well beyond 100,000 by the end of the decade. Were that to happen it would mean that at a time of generally falling crime rates (both successive sweeps of the British Crime Survey and recorded crime statistics indicate a reduction in the incidence of

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volume crime since 1995 – see Simmons and colleagues, 2002: Chapter Three) the prison population would have increased by substantially more than one hundred per cent in less than twenty years. This would be an unprecedented rise, taking England and Wales way beyond all other incarceration rates in comparable (non-former Soviet) Western European states (Home Office, 2003b: Table 1.21). To which features of the legislation might the pessimists point?

They could point first to the fact that the core of the Government's crime strategy appears now to be closing what is termed 'the justice gap' (Home Office, 2002c: para 0.4; Aim 3, Home Office, 2003b). That is, reducing what criminologists used to call the attrition rate in crime recording and detection and success in bringing criminal justice proceedings. The Government has a target of increasing the number of offenders brought to justice (OBTJ) to 1.2 million by 2005-6 (a 17 per cent increase on the number in 2001-2). Secondly, the Government is focused on improving the desistance of detected criminals. This aim is represented by the target of reducing the rate of re-offending by 5 per cent by 2005-6. The contention will be that the Government is focused on existing offenders – that is, what is generally termed tertiary crime prevention – rather than reducing the likelihood that offences will be committed in the first places or focusing on groups at risk of offending within the population at large - *primary* and *secondary* crime prevention (Brantingham and Faust, 1976). Success in this aim, it will be argued, will increase the number of offenders brought before the courts and concomitantly exacerbate the already growing burden on the Probation and Prison Services.

This contention has substance, but it is only part of the story and may not prove to be the driver of a more punitive trend. Despite the emphasis on 'narrowing the justice gap' – an objective, reducing criminal impunity, which the Government clearly takes to be essential for raising public confidence in the criminal justice system generally (see Home Office, 2003c) - Home Office aims still include overall crime reduction targets for vehicle crime, domestic burglary and robbery (see Aim 1, Home Office, 2003c). Further, the justice gap could be narrowed without employing punitive interventions. The latest, lower projections for the prison population, for example, *assume* that the 'narrowing the justice gap' target will be met or exceeded, but the latest data show that because the number of OBTJs includes those who accept offences *taken into consideration* or who are *cautioned*, the impact on the prison population has so far not been as large as was previously anticipated.

Further, there is substantial scope for extending the proportion of offenders dealt with non-punitively. The Criminal Justice Bill provides for *conditional cautions*, which holds out the diversionary promise of a significant shift away from prosecutions towards reparation, restorative justice and so on. At the time of writing the Bill does not envisage *conditional cautioning* involving agencies other than the CPS and the police on the arguable grounds that the Probation Services has *vires* only in relation to convicted offenders (it is not clear how the Service's tradition of providing pre-trial services in relation to approved premises, bail information, etc, fits with this logic). However, given that restorative justice conferences are in many of the initiatives around the country convened by the police

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(Young and Hoyle, 2003), and the CPS is responsible for informing victims about what is happening in 'their' case, there is ample scope for getting many offenders to put right some of the wrongs represented by their admitted offences without court proceedings. Moreover, the Probation Service may yet be drawn into *conditional cautioning* schemes through late amendment of the Bill or subsequent provision. There is no reason why *cautioned offenders* could not be subject to a *condition* or *conditions* involving their participation in programmes, or accessing facilities, provided by either the Probation Service or one of its partners. There are, however, good reasons why the Probation Service might resist this suggestion. If the Service is already overburdened with low risk *convicted* offenders, it would make little sense for that burden to be further increased with responsibilities for *conditionally cautioned* minor offenders. However, at present this issue does not arise and no costs have been attached to the provision in the Bill. Even so, narrowing the justice gap need not, indeed should not, ratchet up the punitive trend.

Secondly, critics of the Bill may contend that insufficient has been done effectively to resuscitate use of the fine and other financial penalties. Indeed, they may plausibly argue quite the opposite. Clauses in the Criminal Justice and Courts Bills provide, in the event of default, for unpaid work or a curfew requirement or a disqualification from driving to be substituted for a fine. They may argue that it is doubtful that this will enhance the enforcement of financial penalties: on the contrary, it may encourage further prevarication by fined offenders in a poor position to pay or unwilling to pay. They may also emphasise that the Government has not been prepared to re-introduce the unit fine principle (by which a formula connection is forged between the seriousness of the offence and the disposable income, and thus capacity to pay, of the offender) incorporated in the Criminal Justice Act 1991 and so precipitately and unwisely abandoned in 1992. In which case, it will be argued, there is a very real danger that extended use of community penalties will continue.

We doubt this argument will prove sustainable. We anticipate that the Correctional Services Review will give a substantial boost to the argument that at a time when unemployment is at it lowest point for more than two decades it is not acceptable for the proportionate use of fines to be substantially lower today than 10-15 years ago. We anticipate that the legislative measures currently before Parliament (the Courts Bill places, *inter alia*, an obligation on defendants to complete means inquiry forms, enables courts to appoint Fines Officers with discretionary powers to take enforcement measures without offenders having to be brought back before the court, introduces discounts for prompt payment and excesses to be levied in the event of default and makes it easier for courts to order deductions from benefits), backed up by administrative initiatives (including the contracting out of fines collection), will serve to increase sentencers' confidence that fines imposed will be collected. We predict that the proportionate use of fines will return if not to former high levels then will significantly increase.

Thirdly, critics may argue that the new portmanteau *community orders* are likely to be increasingly loaded up with the many requirements which the courts will henceforth be

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able to attach to them. It is true that the courts will be required to consult an officer from the local YOT or Probation Area before inserting most conditions, but, as we have seen, the new expansive NPS has been willing to oversell its services and this tendency as yet shows no signs of abating. If *community orders* are loaded up with more and more requirements, in the same way that bail, for example, has in recent years increasingly had conditions attached to it, then it is almost inevitable, given the Government's general stress on enforcement, that a growing proportion of offenders will be returned to court for breach, some of them destined to have custodial penalties imposed as a substitute.

It appears, however, that the Correctional Services Review team has fully grasped these dangers and will stress the need to remove low risk offenders from the NPS workload. To the extent that this argument prevails how might it be done? We would stress two aspects: *process* and *disposal*.

There are signs that the Probation Service is re-thinking the form that pre-sentence court report advice takes. Chief Officers widely doubt that the increasing number of court reports the Service is being asked by sentencers to prepare are warranted and doubt that the shorter Specific Sentence Reports (SSRs), introduced partly to displace full-blown Pre-Sentence Reports (PSRs), are working to that end. Several Probation Areas have recently introduced short-format PSRs, produced on the same day as the court hearing, on the basis of a brief interview within the precincts of the court with the case being put down the magistrates' list. Why, quite apart from the fact that it offers potentially greatly reduced demands on probation officers, might this device be significant? If short-format PSRs are increasingly used in cases where a quick OGRS check reveals that the offender is low risk, and if the brief interview confirms that there are no significant risk factors for the Service to address, then we might see the Service recommending disposals falling short of community sentences for a significantly higher proportion of defendants than is currently the case (discharges or fines are currently recommended in only 6 per cent of courts reports – see Home Office, 2002a: Table 6.4). The pending widespread introduction of an effective electronic version of OASys also offers a way forward.

We also detect increasing interest, which again the Correctional Services Review is likely to emphasise, in the growing efficiency and reduced cost of electronic surveillance techniques to monitor and track offenders. If the courts deem that offenders who though at low risk of re-offending nevertheless merit on tariff grounds a sentence more punitive than that represented by a financial penalty, then stand-alone electronic tagging orders could increasingly be imposed on offenders who, as we have seen, are currently often made the subject of community punishment or community punishment and rehabilitation orders. By this means, very large numbers of low risk offenders could be removed from the Probation Service's caseload so as to provide the Service operational room for manoeuvre to do more intensive work with medium and higher risk offenders, many of whom are currently being sent to prison. It is in relation to the latter category of offenders that the critics have more substantial grounds for fearing that the Criminal Justice Bill may exacerbate the growth in the prison population.

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The *custody plus* provisions in the Criminal Justice Bill are on the lines of the recommendations of the Halliday Report reviewing the sentencing framework (Home Office, 2001). Halliday devoted a great deal of attention to modelling the likely cost-benefit consequences of his proposals and, almost inevitably, described a number of possibilities. Because *custody plus* involves more tightly circumscribing, and reducing, the degree to which any custodial sentence of less than 12 months involves time spent in initial custody, pessimists fear that sentencers might increasingly go for sentences of 12 months or more to avoid the constraints. Equally damagingly, sentencers contemplating intensive community interventions might, given the new opportunity represented by *custody plus*, be tempted to throw in a modest term in custody. In addition there arises the possibility that the savings in prison places achieved by reducing the *initial* terms spent in custody might be outweighed by the breaches, and recall to prison, resulting from the likely intensive, and periodically judicially reviewed, supervision in the community. Halliday, who considered all these possibilities, estimated that his proposals might, depending on the different assumptions applied, result in either a reduction of 1500 in the prison population, or an increase of almost 10,000 (ibid: Appendix 7, para 89). Either way, the consequences for the Probation Service were predicted to be much the same – an increase in their caseload of over 80,000 - it having been decided that the Service should supervise the resettlement, as currently it does not, of all prisoners, however short-term, on release on licence. Halliday's assumptions still apply.

Finally, the critics will point out, correctly, that various other provisions and recent announcements will certainly make some long sentences longer. For example, clauses in the Criminal Justice Bill increase the maximum penalties for certain drugs and driving-related offences causing death from five to fourteen years. In May 2003 the Home Secretary announced principles, to be enacted under the Criminal Justice Bill, to inform the tariff for the amount of time life sentence prisoners will in future spend in custody. There are to be three levels. Certain murderers – for example, those who abduct and murder a child and terrorists – are to serve a whole life tariff. Others – murderers of police or prison officers, killing done for gain, etc – are to attract a starting point of 30 years. All others are to have a starting point of 15 years 'on which judges can build as necessary to ensure the appropriate sentence' (Home Office Press Release, 7 May 2003). These changes will greatly increase the average duration in custody of life sentences – which is currently about 13 years – and they are in addition to other provisions, in the Criminal Justice Bill providing for life or indeterminate sentences of imprisonment for public protection where a serious offence has been committed and 'the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences'.

Conclusion: Immediate Challenges

To sum up, it is clear that the workload of the Probation Service will substantially increase as the various provisions in the Criminal Justice Bill commence over the next three or four years. Taking on responsibility for the supervision of short-term prisoners makes that certain. We can anticipate the number of offenders supervised by the Service

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rising from approximately 200,000 to somewhere between 250,000 and 300,000. The precise number will depend on the efforts, which we anticipate will grow in their intensity, put into removing from probation caseloads those low risk offenders who might otherwise be conditionally cautioned, engaged in restorative justice processes, discharged, fined or electronically monitored by one means or another. What also seems clear, however, is that the staffing and other resources required by the Probation Service and its partners will depend as much on the *nature* as the *size* of its caseload. The offenders with whom the NPS will in future typically deal will likely be higher risk (both in terms of re-offending and likely future harm), be more intractable and exhibit multiple socio-economic problems and needs. They will have to be worked with more intensively if the Service is to enjoy the confidence of sentencers and the public at large in terms of public protection. It follows that scaling up the number of probation staff, assuming that the delivery of services is not contracted out to others, so as to match the anticipated caseload, will not suffice. Caseloads, however one calculates them (see Morgan, 2003), have significantly increased in recent years. No matter how future work with offenders is spread among the increasingly diverse probation workforce, caseloads cannot be allowed to grow yet further. If they do then the capacity of the Service to do the job – and thus its credibility - will undoubtedly be prejudiced.

As far as the prison population is concerned, the future is genuinely in doubt. The probability is that no matter what the impact of the particular provisions in the Criminal Justice Bill, it will grow towards 90,000 by 2009. If we are wrong about some of the prospects we have explored above, it may well exceed 100,000. Further, the process of *bifurcation* – shortening the time that less serious offenders spend in custody while keeping more serious (or dangerous) offenders in for even longer (see Bottoms, 1977 and Morgan, 2002) - will continue.

It seems possible, however, that, given strong political leadership, the provisions in the Criminal Justice Bill, backed up by the Correctional Services Review recommendations, may mean that we are on the cusp of a significant change of policy direction. *Parsimony* in the use of *custody* and *bifurcation across the range* may in future characterise the manner in which we deal with offenders. In this period of *creative mixing* when, as the Criminal Justice Bill emphasises, the full cafeteria of philosophical justifications and purposes can be drawn on by sentencers, we are likely to find different sentencing objectives being resorted to in support of different policies for allegedly different groups of offenders. There could be significantly greater resort to non-punitive responses avoiding prosecution for minor and lightly convicted offenders, while at the same time a small minority of serious and persistently serious offenders are incarcerated for the better part, or even the whole, of their natural lives. Meanwhile a middle range of repeat offenders may conditionally be subject to custody *plus* or *minus*, depending on their compliance with a judicially reviewed mixture of intervention and surveillance administered by probation and prison staff belonging perhaps to more integrated *correctional services* within which overall resources are more flexibly used. This is probably the politically saleable medium term future to which we are moving.

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