

# Wither the rehabilitation revolution?

## Nicola Padfield assesses the sentencing reforms

There was a brief moment when it seemed possible that the Coalition government, committed to extraordinary cuts in public expenditure, would use the law to reduce the use of imprisonment and to target resources on what actually works, or at least helps, to reduce re-offending. Thus the Green Paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* promised a 'rehabilitation revolution' (Ministry of Justice, 2010). It included 59 questions for consultation (for an analysis see Padfield, 2011a) that were so broadly drafted that it was difficult to do justice to them in the brief format that was likely to be read by policy makers. Nonetheless the government received over 1,200 submissions.

The government's so-called *Response*, published in June (Ministry of Justice, 2011), is not a serious analysis of those submissions, but simply a brief account of the government's current plans. Published on the same day was the lengthy *Legal Aid, Sentencing and Punishment of Offenders Bill*. What we have is something very far from a rehabilitation revolution, but yet more complex and bitty legislation, and a system so squeezed of resources that sentencers and the public are unlikely to gain any greater confidence in the effectiveness of sentences.

### Dealing with reoffending

The Secretary of State for Justice says in his foreword that 'the big failure that we have inherited' is 'the national scandal of reoffending': 'tidal waves of legislation created an unworkable sentencing framework and a statute book littered with over-prescriptive law that undermined

the expertise of professionals in the system'. Yet how does he now plan to deal with the problem? Let us look at some examples from the *Response*:

*a clear national framework for out-of-court disposals*

This is long overdue, but we have yet to see it. In a system where only 55 per cent of detected notifiable and indictable offences result in a prosecution or other sanction (22 per cent of these are simply cautions and 9 per cent are dealt with by a Penalty Notice for Disorder: Ministry of Justice, 2009), there is a huge need for such decision making to be more transparent and accountable.

*transforming prisons into industrious places of hard work*

This does not require legislation, but to be successful not only must the government ensure that work inside leads to work outside, but they must also remove many of the barriers to employment that offenders face on release, not least of which is the burdensome reporting restrictions faced by many on licence.

*community sentences will better punish, control and reform offenders*

How? All we are told here is that courts will be able to prohibit foreign

travel and impose longer, tougher curfew orders! A curfew order (enforced idleness at home?) does not necessarily encourage the hard work ethic the government seeks to encourage. There is also mention of mysterious 'compliance panels' to ensure that young people comply with their sentences. What is wrong with a magistrates' court? At least the Bill recognises the need for judicial oversight of the supervision of young adult prisoners released from Young Offender Institutions (see below). Might this be a small step towards much more judicial oversight of the implementation of all sentences?

*offenders on licence will have their earnings deducted by 40%*

This makes sense only if the earnings themselves are realistic: a shortage of money lies at the heart of the difficulties faced by offenders in their ambitions not to re-offend. Does the Minister of Justice understand how it feels to come out of prison with a determination to go straight, but with no more than £46 in your pocket?

*greater use of financial penalties*

Nothing new in this government ambition, but the evidence suggests that many such penalties hit the poor disproportionately, and do nothing to help people avoid re-offending.

*replace Imprisonment for Public Protection sentences (IPPs) with more life sentences (including mandatory ones for the most serious repeat offenders) and determinate sentences of which offenders will have to serve at least two-thirds*

The Bill that has been published does not refer to IPPs: we have been told that these important changes will be introduced at a later stage.



Photo courtesy of Lorenzo Del Castillo

Presumably the Bill Committee will have completed its evidence gathering by the time the clauses are published – not a good way to make important new laws.

### **Sentencing and punishment**

This is a difficult area, of course: more mandatory life sentences may simply reproduce the current problems with IPPs, where prisoners remain in prison long after they have served their 'tariff': the rate of release for post-tariff IPP prisoners rose to 6 per cent in 2010–2011 (see The Parole Board, 2011). The vast majority are not released, nor even recommended for a move to open prison conditions, even when they have served their tariff. Because of the high recall rate, extended sentence prisoners may serve most of the period designed as a period of extended 'supervision in the community' in prison. When

we get to those parts of the Bill dealing directly with sentencing and the punishment of offenders, we discover that there are (so far) only small changes proposed. For example, it will in future be possible to suspend sentences of imprisonment of up to two years (clause 57, to be read

together with yet another nightmare Schedule of consequential amendments). How this will work in practice is uncertain. A suspended sentence is still, at least in theory, a custodial sentence. Without a serious re-writing of the current hierarchy of penalties and the abolition of the so-called 'custody threshold', the emphasis should be on encouraging

greater use of community penalties, not of suspended sentences (Padfield, 2011b).

*The sentencing system itself is unlikely to reduce crime very effectively*

### **Bizarre double track**

The more significant changes in the Bill are to the rules on release, which at least

the government seems to have understood have as much impact on the prison population as the initial 'front door' sentencing decision. In 2009–2010, a total of 13,900 determinate sentenced offenders were recalled to custody, up 18 per cent from 2008–2009. It is of course vital that these decisions to recall are effectively reviewed.

However, what is proposed here is a bizarre double track re-release scheme: the Parole Board continues to have a role, but the 'Secretary of State may, at any time after P is returned to prison, release P again on licence under this Chapter' (in clause 96, which introduces a new substitute section 255A to the *Criminal Justice Act 2003*, possibly another recipe for confusion). This

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provision is designed to save money: there is no need for the Parole Board to get involved where the executive is happy to re-release. Clearly the government wants to 'remove the bulk of operational complexity from release and recall decisions' (Ministry of Justice, 2011). Yet there is no mention at all on the face of the Bill of the 'due process' safeguards that need to be built into this invisible process. Speedy re-release, perhaps, for some, but what of the others? And was there adequate scrutiny of the initial decision to recall?

Greater attention needs to be paid to the reality of the second half of a sentence of imprisonment. Many offenders will serve this in the community, but often under very strict conditions (now to be more so, with up to 16 hours a day curfew for up to a year), which may feel more punitive than life in custody. Despite the creation and evolution of the National Offender Management Service, we have little 'beginning to end' sentence management, and the hard-pressed probation officer/offender manager is often more focused on public protection than rehabilitation.

### The Bill's shortcomings

The government is right to want to 'simplify other elements of sentencing law, making it easier for courts and practitioners to sentence and manage offenders'. However, there is no evidence that this Bill will lead to that. What have they got wrong? First and foremost, the Bill makes the law more complex. We urgently need a new code of sentencing law rather than endless amendments to earlier provisions, and much clearer thinking about what goes into primary legislation, into delegated legislation, Prison or Probation instructions, CPS Guidelines or Frameworks.

Secondly, the Bill does nothing to

enable the courts to 'manage' offenders, which the government rightly suggested it wanted to do (see above).

Sentencing is not a one-off event: more judicial oversight of sentence implementation would be not only fairer, but also more efficient, economic and effective (see Padfield, 2011c, for a comparison with French law and practice). One small step in the right direction is the proposal that breaches of the terms of supervision of young adult prisoners released from a Young

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the administration of punishments are of course valuable goals, but it is well known that the sentencing system itself is unlikely to reduce crime very effectively. Only a minority of offenders are caught and sentenced. Of those who are sentenced, it is often not the punishment that helps them go straight. This government, like its predecessor, seems reluctant to shout this very loudly, and it now seems that

they are not prepared to grasp the nettle. ■

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Offender Institution will be dealt with by courts, with powers to summons the offender and to impose a penalty for the breach (clause 97). Would that the courts (or a truly independent and strengthened Parole Board) were similarly empowered when other adults

breach the terms of their licence.

Thirdly, the Bill itself does nothing to focus attention on the reduction of re-offending. The rehabilitation revolution appears a chimera - preoccupations with risk assessment and risk management have encouraged both policy makers and practitioners to lose sight of the individual (see, for example, McNeill, 2010).

Perhaps this piece should not end without some recognition of the work of the new Sentencing Council, but it is not obvious why the Sentencing Guidelines Council needed replacing. Consistency and transparency in sentencing and in

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