

## **Post-release reforms for short prison sentences: Re-legitimising and widening the net of punishment**

### **Abstract**

*Transforming Rehabilitation (TR) promised a 'revolution' in the way offenders are managed, providing a renewed focus on short sentence prisoners. The TR reforms extends mandatory post-release supervision and tailored through-the-gate resettlement provisions to a group that has predominately faced a 'history of neglect' yet often present with the most acute needs within the criminal justice system. However, existing literature underlines that serving short sentences lack 'utility' and can be counter-productive to facilitating effective rehabilitation.*

*This article explores the purposes of providing post release supervision for short sentences, firstly exploring a previous attempt to reform short sentences; (the now defunct) 'Custody Plus' within the 2003 Criminal Justice Act and then the Offender Rehabilitation Act 2014 within the TR reforms. This article contends that both post release reforms have sought to re-affirm and re-legitimise prison as the dominant form of punishment in society- or what Carlen refers to as 'carceral clawback'. This article will also use Cohen's analysis on social control to establish that post release supervision will serve to 'widen the net' extend the period of punishment and oversight and will only reinforce a form of enforced 'state obligated rehabilitation' that will undermine efforts made to resettle short sentence prisoners.*

### **Introduction**

Killias et al (2010) and Johnston and Godfrey (2013) outline that there have been concerns with the use of short prison sentences since the 19<sup>th</sup> century, with Courts feeling that short periods of detention offer insufficient time to work with offenders and only serve to 'school' the individual into further offending behaviour. More contemporary criticisms of the use of short sentences outlines the 'cumulative' cycle of repeat short sentences that lack a rehabilitative element while simultaneously take away or disrupt valuable community

resources (Armstrong and Weaver, 2013). This can lead to issues of ‘penal legitimacy’ resulting in an undermining of the punishment and the individuals sense of wrongdoing, which can reduce the ability of the prisoner to take responsibility for their actions and lead to a belief that a return to prison is inevitable (Trebilcock, 2011).

Despite these criticisms, historically short sentence prisoners have predominately faced widespread neglect (Clancy et al, 2006) as the criminal justice system has increasingly shifted resources towards risk reduction and public protection (Robinson, 2008). This is despite clear evidence that the short sentence population has the highest rates of re-offending and often the most acute needs within the criminal justice system (National Audit Office 2010, Stewart 2008, Social Exclusion Unit 2002).

Since the decimation of voluntary aftercare services for short sentence prisoners (Goodman, 2012) there has been a lack of meaningful reform for this group, until the New Labour Government attempted to implement ‘Custody Plus’ into the 2003 Criminal Justice Act. This Act sought to offer short sentenced prisoners a period of post release support and supervision in the community. However due to budget and staff constraints ‘Custody Plus’ was never implemented (Roberts and Smith, 2003). The more recent ‘Transforming rehabilitation’ (TR) reforms have sought to correct this wrong and the extension of support to the short sentence cohort has been broadly welcomed (Burke, 2016).

However, although there is growing evidence that a short prison sentence is frequently counter-productive to enhancing rehabilitation and that a community order in many cases would be a far more beneficial and cost-effective option<sup>1</sup> (Mills 2010, Make Justice Work 2009), particularly in light of concerns regarding prison overcrowding (Sukhram, 2015) and a growing presumption against the short prison sentence in other criminal justice jurisdictions such as Scotland (Tata, 2016) the ORA reforms don’t seek to abolish this sentence. This

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<sup>1</sup> The ‘Make Justice work’ campaign (2009) noted that community sentences often provide better value for money and increased effectiveness than short prison sentences, particularly in regards to offenders with substance misuse issues. The report estimates potential savings annually of over one billion pounds if individuals were given residential drug treatment instead of a short prison sentence. Pease (2010, p.7) however provides an alternative viewpoint, claiming that there is no evidence that re-sentencing individuals to a community sentence instead of a short custodial sentence would improve re-offending rates, but instead would merely “free the group most likely to reoffend to do so sooner” and endanger the protection of the public.

article will look at both recent reforms in turn, and seek to answer what purpose it serves to not abolish the short prison sentence, but to provide additional post release supervision instead. After providing an analysis of the Custody plus and ORA reforms, three theoretical constructs will be introduced to offer an explanation for the purpose of post-release supervision for short sentences; the carceral clawback theory of legitimisation by Carlen (2002); the net widening, boundary blurring and mesh thinning social control theories applied by Cohen (1985) and a form of enforced 'state obligated rehabilitation' theorised by Cullen and Gilbert (1982) and Rotman (1990). This article will conclude with some brief thoughts on how the newly introduced post-release measures might not produce the desired outcomes of effective rehabilitation, could potentially undermine rehabilitation and instead act as a rhetoric, or a chimera (Padfield, 2011) used to justify more restrictive measures. Firstly however, a brief analysis will be provided of short custodial sentences within the context of the contemporary justifications given for administering punishment.

#### [The short prison sentence: A sentence without utility](#)

According to Cavadino and Dignan (2002) there are four primary justifications for the use of punishment; incapacitation, retribution, rehabilitation and deterrence. It is important to look at each of these justifications of punishment in turn to further understand the reasoning behind the continued widespread use of short prison sentences.

In regards to incapacitation Roberts and Smith (2003) note that the custodial period of a short prison sentence is so brief that any period of incapacitation is too limited to offer any meaningful claims towards public protection. O'Donnell (2016, p.40) also argues that "to punish offenders for periods so brief that ascribing to them a purpose other than incapacitation seems somewhat grandiose, little can be completed in such short terms".

A study of the 'stubbornly high' reoffending figures for short prison sentences (Ministry of Justice, 2013) also suggest that this sentence holds little deterrent factor. For example recently released re-offending figures from the Ministry of Justice (2017) calculate the reconviction rate of short sentence offenders as 59%, which is the highest reconviction rate by sentence type within the adult criminal justice system (this stands in comparison to an average reconviction rate of 44% for those given custodial sentences longer than a year).

Bottoms (2001) asserts that deterrence holds more value for an individual if they feel they have more to lose, particularly if the individual has attained capital in society. Yet the literature on short sentence offenders show that this cohort are nominally the most socially excluded and isolated in society (Anderson and Cairns, 2011) and that short custodial sentences often disrupts or inhibits access to any positive aspects that might give deterrence more force (Trebilcock, 2011).

The current state of prisons as reported by; inspectors, penal commentators and the media (Criminal Justice Joint Inspection 2016, Garside and Ford 2015, Allison 2017) suggest the chances of effective rehabilitation taking place during a short custodial sentence are increasingly improbable. Roberts and Smith (2003) report that a secure base is needed for effective rehabilitation to take place, but that the early weeks of imprisonment are chaotic, and the transition back to the community often disruptive, making the space for meaningful rehabilitation to take place during a short prison sentence “vanishingly small” (Roberts and Smith, 2003, p.189).

If the four main justifications of punishment are not achieved by the short prison sentence, what purpose does the extension of post release supervision serve? To better understand this question, it is important to look first at the contemporary political context to the English and Welsh criminal justice system, which is beset by significant constraints on policies that can be pursued due to a “punitive agenda” (Cavadino and Dignan, 2002, p.339) that does not allow politicians to be ‘soft on crime’ (Bottoms, 1995) primarily due to a ‘penal arms race’ that necessitates a tough on crime political stance (Annison, 2017). In this political context criminal justice policies need to be sufficiently punitive in order to promote and preserve prison as the dominant provider of punishment in society (Garland, 2001).

Despite the primacy of the use of imprisonment in society, Roberts and Smith (2003) argue that there is an absence of evidence that short prison sentences serve any legitimate purpose or function. The Halliday report (2001) one of several influential reports commissioned by the New Labour Government on the criminal justice system (see also: Home Office 2001, Social Exclusion Unit 2002) sought to put ‘the sense back into sentencing’ (Boothe, 2008, p.4) and served as a prelude to the flagship New Labour criminal justice

policy; The 2003 Criminal Justice Act. Halliday's report described short prison sentences as lacking any sense of utility and with no post-release support "literally mean half of what they say" (Halliday, 2001, P.1). The report aimed to address the deficiencies and lack of a clear message that short sentences sent out and subsequently laid the foundations for the 'Custody Plus' reform.

### Custody Plus: An extension of Punishment

Custody plus was introduced as the proposed solution to problematic short sentences (Boothe, 2008). The Custody plus sentence involved a short term of imprisonment followed by a period spent on license where the offender would carry out a community order tailored to their needs and aimed at reducing reoffending (Ashworth, 2005). However, there have been several notable critiques of the purposes of this sentence.

Roberts and Smith (2003) reported that custody plus was proposed for parsimonious reasons, to make the community-based element of the sentence more palatable to the public. The short custodial element would maintain public confidence by "providing a punitive ingredient" (Boothe, 2008, p.35), while the post-release element of the sentence allows rehabilitation to take place within a community sentence that might otherwise appear as insufficiently punitive to the public. The aim of custody plus therefore was to legitimise a community sentence which began with a short period of retribution in custody, followed by a rehabilitative community order tailored to the needs of the offender (Roberts and Smith, 2003 p.185). The custody plus 'package' offered the status quo of imprisonment, but in a new and attractive wrapping (Roberts and Smith, 2003 p. 182). This supports the belief that "the case for a purely rehabilitative sanction is extinct" (Robinson, 2008 p.437). The punishment value of imprisonment therefore becomes the prelude to rehabilitation and resettlement.

Liebling (2002) contended that the short sentence has the potential to entail a vital introduction to much needed support, such as basic skills or drug detoxification, before magnifying this support upon release in the community. However, Roberts and Smith (2003) argued that the custodial element of the order would diminish or negate any positive effect

gained in the community, as well as undermine the prospect of achieving gains in reducing reoffending, claiming an absence of evidence that interventions are improved if they are started in custody. Boothe asserted that the 'plus' element of the sentence was implemented to "effectively rescue the sentence" (Boothe, 2008, p.34), or to neutralise and contain the pains experienced in prison, compensating for custodial injuries (Roberts and Smith, 2003 p.196). The community element post release would in effect be used to compensate for the damage caused by the short period of imprisonment, so "custody through an undisguised punishment valued for its penal burden is conceived as a necessary component of the resettlement work that imprisonment makes necessary" (Roberts and Smith, 2003 p.188). Duff (2008) asserted that prison creates a need for rehabilitation rather than provides it, so released prisoners may need rehabilitation precisely because of what they have suffered in prison. Viewed within this lens the post-release portion of the sentence compensates for the punishment experienced during the custodial period.

Custody plus was never implemented into practice, but was quietly dropped during the 2006 summer parliamentary recess with the rationale that resources had to be prioritised for 'higher risk' public protection cases (Home Office, 2006). The shelving of custody plus occurred during a period of several notable public protection failures of the probation service which had received widespread criticism in the British press (Fitzgibbon, 2011). The dropping of the custody plus sentence follows the longstanding mantra in criminal justice that 'resources follow risk' (Robinson, 2002) yet also meant that a historically neglected cohort continued to receive inadequate post-custodial support. No further policies were implemented for short sentences until a change of Government and the subsequent implementation of the 'transforming rehabilitation' reforms, which once again brought the short sentence cohort centre stage into the contemporary policymaking field.

### ['Rehabilitation' Revolution?](#)

In England and Wales the resettlement of prisoners has once again been revitalised and viewed in increasing prominence in criminal justice policy (Ministry of Justice 2010, 2013). This resurgence has seen an increased focus on prisoners serving short prison sentences. The reforms have sought to transform resettlement provisions by introducing new 'through the gate' arrangements for the management and supervision of all prisoners (including- for

the first time- those serving short sentences of less than twelve months). The prison estate has been restructured in order to establish a network of 'resettlement prisons' where all prisoners serving twelve months or less should serve the entirety of their sentence. Within this model all prisoners should be screened so resettlement needs are identified at the beginning of their sentence, resettlement work should continue throughout the sentence, and upon release each offender should receive a tailored package of 'through the gate' support and supervision from the relevant probation service- alongside a dedicated through the gate mentor (Taylor et al, 2017).

Responsibility for these measures have been given nationwide to twenty-one Community Rehabilitation Companies (more commonly known as CRCs) who have been tasked with the supervision and rehabilitation of an estimated 200,000 low and medium risk offenders throughout England and Wales (Ministry of Justice, 2014). CRCs are also now responsible for providing support for an estimated further 45,000 offenders released from custody with sentences of less than 12 months (Ministry of Justice, 2014). Newly formed CRCs have been tasked with the statutory supervision of this caseload, and under the Rehabilitation of Offenders Act 2014 (ORA, 2014) provide prisoners released from custody having served more than one day's custody a mandatory 12 month period of supervision in the community. The ideal is that these companies will have the freedom to innovate in order to bring down re-offending rates, including the implementation of through the gate support services (Ministry of Justice, 2014).

The use of through-the-gate mentoring services should involve providers working with offenders before they leave prison and supporting them on release, offering practical help, as well as advice and guidance (Ministry of Justice, 2014). All work undertaken by CRCs is undertaken within the financial constraints of a payment-by-results (PBR) model, which will only pay CRCs on the ability to meet pre-prescribed targets of lowering re-offending (Ministry of Justice, 2014).

However, there is a growing number of contemporary academic research and inspectorate reports that indicate a large degree of trepidation towards the ability for TR to deliver the promised results (see for example: Criminal Justice Joint Inspection 2016, Moore and Hamilton 2016, Maguire and Raynor 2017, Taylor et al 2017). Leading to the TR

resettlement provision to be described as; 'more aspirational than deliverable' (Maguire and Raynor, 2017); a flawed process that has a narrow grasp of the problems and strives to provide an answer without a full understanding of the issues (Moore and Hamilton, 2016); and a system that is increasing resentment, with TR accentuating concerns with the prison system (Taylor et al, 2017, p.115). If the evidence suggests that the TR reforms are not producing their outwardly designed outcomes, it is important to try to understand what they are achieving instead.

The remaining sections of this article seek to provide an analysis of what these post-release reforms of short sentences are achieving in reality. Three theoretical frameworks will be used in order to further understand the policy implementation of custody plus and the ORA; the need to continually legitimise imprisonment; the widening of the net of punishment; and the re-imagining of rehabilitation into a more coercive form of control.

#### Post release supervision as 'carceral clawback'

The introduction of mandatory post-release supervision via custody plus or The ORA 2014 is to re-affirm and re-legitimise the use of imprisonment. Carlen (2002) argues that the primary function for prison is punishment and that prison remains the most compelling symbol of state power to punish, but the power to do this is not static and needs constant re-legitimation. This is often achieved through re-imagining the prison as something other than punishment, for example; a place for education, drugs rehabilitation or psychological assistance, this re-imagining renews the rationale for its continued use. This is referred to as 'Carceral Clawback' by Carlen (2002). However short prison sentences cannot be re-imagined as a place for rehabilitation, as the sentence holds no penal value according to the four main justifications for punishment set out above. But rather than advocate for a cultural transformation away from the use of imprisonment, the post-release reforms added to short sentences are in effect a way to give meaning to a meaningless sentence.

#### Post release supervision as 'net widening'



Harding (2003) argues that custody plus perpetuates the values that support imprisonment, where custody becomes the first, not the last resort, making community sentences harder to 'market' to sentencers, conversely the 'added value' to short periods in custody will be more attractive to sentencers, and encourage towards the use of custodial as opposed to community sentences. Johnson and Godfrey (2013) highlighted similar concerns regarding the TR reforms where custodial sentences become the norm as opposed to community-based sanctions. Liebling (2002) however argued that post release support for short periods in custody could actually encourage sentencers to be more lenient to those at risk of a 'medium' term of imprisonment, who might now receive a shorter period in custody than they otherwise would before these reforms were brought in. The re-branding of a short sentence could potentially lead to increases in the short sentence prison population, causing what Mills refers to as 'up-tariffing' (2011) where the sentence can be "used less to move offenders away from custody and into the community, but in the opposite direction" (Cavidino and Dignan, 2002, p.155).

Cohen in his work on 'visions of social control' refers to this as 'widening the net' (Cohen, 1985). This is a process whereby a sanction 'captures' individuals who would otherwise have been dealt with by a less severe punishment, increasing rather than decreasing the numbers into the criminal justice system.

A further result of 'widening the net' can lead to a 'blurring' of institutional and non-institutional forms of control according to Cohen (1985). The post-release reforms for short sentence prisoners can blur the boundaries between prisons and community, and as Goodman (2012, p.36) notes, can cause a "dichotomy and tension between punishment and rehabilitation, a blurring of control and benevolence- where measures might seem benevolent, but increase levels of control". Worrall (2008, p.117) contends that these 'seamless' sentences have an absence of boundaries between freedom and confinement and act as a 'continuum' extending imprisonment into the community, what Cohen (1985) terms the 'dispersal of punitiveness'.

The expansion of the license period and supervision requirement that the ORA 2014 mandates, potentially exposes more offenders to recall to custody via non-compliance with

license conditions (Padfield, 2016). This is a particular concern for the short sentence population who typically encompass a complex set of multi-systemic socio-economic and health-related needs that could potentially hinder compliance with onerous license conditions (Anderson and Cairns 2011, Brooker et al 2009). This could result in increases to the revolving door prison population via the 'backdoor' (Padfield and Maruna, 2006) of non-compliance. Cohen (1985) describes the process of drawing more people into a more interventionalist and restrictive system as 'thinning the mesh'. Initial indications of reconviction figures suggest that an increasing number of offenders are being drawn back into custody while on license, with national figures measuring 21,721 recalls in 2016 with 12,056 (56%) recalls taking place for technical breaches of license conditions, as opposed to committing further offences (Webster, 2017).

In order to avoid repeated recalls back into custody, post release supervision should provide assistance with practical needs, as well as seek to carefully balance elements of support and control (Maguire and Raynor, 2017) as supervision that provides one element without the other can increase the chance of the supervision 'failing' (Crow, 2006). Cavadino and Dignan (2002, p.46) make a similar argument in regards to how punishment should be enacted, they assert that there are two stages of punishment; disqualification, where the offender is publicly and symbolically shamed by punishment, and a requalification stage where the punishment comes to an end and the offender is reintegrated back into society as a full citizen. The authors however argue that the criminal justice system overdoes disqualification and pays insufficient attention to requalification.

Roberts and Smith (2003) believe that for the post-release contact to minimise the disqualification and enhance the requalification of the community portion of the sentence, interventions have to be carefully targeted and skilfully supported, as attaching demanding and intrusive requirements to the license period will only add to additional punishment and could potentially restrict an individual's autonomy and liberty, leading to disproportionate 'pains of probation' (Durnescu, 2011) or what Rotman (1990) terms 'authoritarian rehabilitation' an onerous form of post-release control, which seeks compliance via intimidation and coercion and allows no choice, individuality or self-responsibility.

Undertaking further analysis of Rotman's (1990) theoretical understanding of rehabilitation, the mandatory nature of the ORA Act (2014) presents further issues. This is in light of the avowed purposes of the two separate post release 'periods' that offenders subject to ORA face. Under the Act, an offender is released from custody at the halfway point of their sentence and spends the second half of their sentence on license and subject to potential recall if these conditions are not adhered to. After this period offenders are subject to an additional 'post sentence supervision' (PSS) period which 'tops up' the license period to make a total of 12 months supervision post-release (NOMS, 2014). The PSS period is ostensibly focused towards rehabilitative measures and so probation officers only able to apply requirements more 'limited in type' (NOMS, 2014, P.4). This potentially signifies that the initial license period is an extended period of control and 'net widening' why the PSS period is geared towards rehabilitation and resettlement. However, it remains to be seen how these two separate post-release periods are distinguished from each other, how the offender perceives each period and if the individual is able to transcend from the more onerous 'authoritarian' license period and comply meaningfully with the PSS period<sup>2</sup>.

#### Post release supervision as 'state obligated rehabilitation'

Duff (2008) contends that rehabilitation must be offered rather than imposed, this view supports the central argument of Cullen and Gilbert's (1982) and Rotman's (1990) 'state obligated rehabilitation' thesis, which argues that the state has a moral duty to offer (but not impose) rehabilitative measures. Within this ideal each individual has a right to be helped to become a better citizen, the state also holds a duty to provide rehabilitation to mitigate damage done by imprisonment and seek to eliminate any hindrances to reinstatement into the community (Cullen and Gilbert 1982, Rotman 1990).

Lewis (2005) encapsulating the state obligated rehabilitation argument, developed five principles of rehabilitation; i) Offenders should not be given a longer sentence in order to get rehabilitated, rehabilitation cannot be used as a pretext to extend punishment; ii) The

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<sup>2</sup> The initiation of an onerous and enforceable license period before entering into less restrictive rehabilitative focused work is also arguably counter-productive to best practice resettlement, which advocates for immediate practical needs to be addressed upon release, to help the offender achieve a secure base in order to secure long term change (Crow, 2006)

theory of 'cardinal proportionality' should apply, giving the right of the offender to receive the least restrictive sentence available; iii) Rehabilitation is voluntary and has to include the voice of the offender. If rehabilitation becomes mandatory then the individual may resent this and go 'through the motions' without benefitting from it; iv) Prison should be a sanction of last resort and should be humane and constructive, particularly as rehabilitation must take place in an adequate environment; v) Rehabilitative measures should be freely open to all, in or out of the criminal justice system.

The post-release provisions implemented within the ORA (2014) arguably fails to meet the threshold of Lewis's (2005) principles of rehabilitation. The ORA extends the term of the punishment and control into the community under the surveillance of the probation system and threat of recall for non-compliance. The ORA could potentially become a more attractive sentence than a lesser community order by providing a 'punitive envelope' to sentencers (Halliday, 2001, p.20). The ORA does not give allowances to the form of rehabilitation offered post release as it is mandatory for all individuals sentenced to a short custodial sentence, regardless of need and could potentially foster a one-size-fits all approach not consistent with the need for individualised levels of support (Hough, Farrall and McNeil, 2013). The ORA helps to re-affirm prison as the primary form of criminal justice sanction in society<sup>3</sup>, despite evidence of the poor state the system is in. Finally, the shift away from the welfare state and towards neoliberalism noted by Garland (2001) combined with the funding cuts of 'safety net' services under Government forced austerity measures (O'Hara, 2014) underlines the sparsity of practical help, assistance and rehabilitative measures available in society to those in or out of the criminal justice system.

Within this context, rehabilitation has become re-imagined and re-marketed as a means to exert further control and coercion and supplants offenders interests in favour of a more managerial and technical approach, which appeals to the call for securitisation and public protection of the 'late modern' penal narrative (Robinson, 2008, p.437).

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<sup>3</sup> A recent report by the Centre for Justice Innovation (Bowen, 2017) outline how in England and Wales there has been a 24% decrease in the use of community sentences in the past 10 years, while in Scotland there has been an 18% increase. The report notes that there is a presumption against the use of short custodial sentences in the Scottish justice system.

### Concluding thoughts: The Penal Imaginary

If the primary aim of post release supervision for short sentences is to provide utility to the short sentence, rather than offer any positive change to the short sentence cohort, then 'rehabilitation is a rhetoric' (Robinson, 2008). Rehabilitation becomes what Carlen (2013, p.32) terms a 'penal imaginary' an 'as if' concept used to justify responses to law breaking and appropriated by the 'rehabilitation industry'. Rehabilitation becomes a means of crime reduction, as Garland (2001) argues; rehabilitation is a means of managing risk, and not an end in itself. Rehabilitation is only used to the extent that it is able to offer sufficient public protection, reduce risk, and be cost-effective. Rehabilitation becomes a tool, a concept used to justify increased sanctions on the population of persistent offenders, or as Lewis (2005) describes rehabilitation is 'window dressing' for a punitive system used to widen the net and expand social control.

In this sense the 'rehabilitation revolution' advanced by the ORA 2014 is a means of reducing the cost of the high reoffending rates caused by short sentence prisoners and a means of de-responsibilisation from the state, by diverting responsibility of rehabilitating the short sentence cohort away from the state and towards the 'penal industrial complex' (Fitzgibbon and Lea, 2014) and 'the big society' (Morgan, 2012) the transnational security corporations, voluntary organisations and third sector agencies that the CRC's consist of. However, recent research suggests that a combination of under resourced and over stretched staff means the aims of the ORA reforms remain an ideal rather than the current reality (Criminal Justice Joint Inspection 2016, Moore and Hamilton 2016, Maguire and Raynor 2017, Taylor et al 2017) and the acute needs of the short sentence population continue to be neglected.

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