House of Lords
House of Commons
Joint Committee on Human Rights

Legislative Scrutiny: Offender Rehabilitation Bill

Sixth Report of Session 2013–14
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Report, together with formal minutes

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Joint Committee on Human Rights

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The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee is: Mike Hennessy (Commons Clerk), Megan Conway (Lords Clerk), Murray Hunt (Legal Adviser), Natalie Wease (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Holly Knowles (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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Summary

The Offender Rehabilitation Bill was introduced into the House of Lords on 9 May 2013. By 9 July 2013 it had passed through all in stages in that House and had received its First Reading in the Commons. Second Reading of the Bill in the Commons took place on 11 November, and the Committee stage is due to conclude by Tuesday 3 December. In this Report we consider the significant human rights issues raised by the Bill.

The Bill forms part of the Government’s “rehabilitation revolution” programme of reform. The Government says that the aim of the programme is to reduce reoffending by ensuring that offenders are not only punished but receive the rehabilitation and the “broader life management” support they need to “get their lives back on track so they do not commit crime again”. The Offender Rehabilitation Bill brings into effect one of the five reforms contained within the Government programme—that is, the extension of rehabilitation to offenders released from short-term sentences.

Human rights law imposes positive obligations on the State to take all reasonable steps to protect the public from crime, including from re-offending by known offenders. We welcome the Bill’s potentially human rights enhancing objectives of taking measures to protect the public from crime, at the same time as focusing on rehabilitation and extending positive support to those vulnerable people who receive short-term prison sentences.

We repeat our general recommendation to Departments that it is best practice for them to publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond. We are not satisfied with the information and analysis provided by the Government in relation to the Bill’s compatibility with other relevant international standards. Departments should provide detailed information explaining why the Government is satisfied about the compatibility of a Bill with relevant international human rights obligations, not just the ECHR, in their human rights memoranda. Departments should also, as good practice, provide us with a supplementary human rights memorandum on Government amendments with significant human rights implications.

In formulating the Transforming Rehabilitation strategy and the Offender Rehabilitation Bill, the Government has a duty to assess the potential impact of the reforms on protected groups of people. We are concerned about the lack of evidence provided by the Government so far to support its assertion that the proposals have been considered fully in line with the requirements of the Equality Act 2010. We call on the Department to publish the information which demonstrates this without delay. We would particularly like to see the Government’s analysis of the Bill’s potential impact on women offenders, young offenders and Black and Minority Ethnic offenders.

We welcome the Government’s assurance that private providers of probation services are obliged to act compatibly with human rights law. However, we recommend that there should be statutory provision in the Bill setting out the providers’ duties (rather than reliance on contractual obligations to guarantee private probation providers’ compliance with human rights obligations). Such a provision in the Bill may better ensure that the
private provider fulfils the positive obligations of taking all reasonable steps to protect others from the risk of harm. We also recommend that the Government should develop clear guidance on the obligations of private probation providers to take all reasonable steps to assess and manage offenders’ risk of harm to others, and clear guidance on how the Ministry of Justice will monitor the performance of the contracted providers in this regard.

We welcome, in principle, the particular benefit that may result for the majority of women offenders from the Bill’s extension of supervision and rehabilitation support in the community to all offenders sentenced to under 12 months imprisonment, provided that the terms of the supervision and support take into account any particular need or vulnerability of the offender. The Bill now contains an express obligation that probation arrangements for the supervision and rehabilitation of women offenders must comply with the Public Sector Equality Duty, in so far as it relates to gender. We also welcome the Government’s assurance that guidance will be issued to the new providers of probation services on working with women offenders, and we would ask the Department to report to Parliament on the impact on women offenders of the Transforming Rehabilitation reforms after 2 years have elapsed.

We welcome the Government’s commitment to producing Easy Read versions of licence and supervision condition documents to help ensure that people with learning disabilities and learning difficulties are able to understand their supervision requirements and what is expected of them.

We remain concerned that the new supervision regime proposed by the Bill imposes a mandatory 12-month period in all cases where the offender is sentenced to a term of imprisonment of more than one day. The court does not have any discretion in this regard. In our view, there should be scope for some judicial discretion to provide the courts with the option that, in certain instances, the supervision period may either be reduced or not be imposed at all, where it is considered disproportionate or unnecessary to impose a 12-month period.

We note that the Bill’s provisions in relation to further custody for a breach of the new supervision requirements may lead to an increase in short-term prison sentences, and we are concerned by the risk that custody as a sanction for breach will not be used only as a last resort. We welcome the Minister’s assurance that recall to custody for breach of a supervision requirement does not trigger a new period of supervision, and recommend that the Government makes this explicit in relevant guidance to courts and probation services about the operation of sanctions for breach of supervision requirements.

Given the proposed changes to the availability of legal aid, and proposed changes to judicial review which will also restrict its availability, we welcome the assurance from the Government that there are no proposals that would restrict the right of offenders to challenge supervision requirements by way of judicial review. However, we are currently conducting inquiries into the implications for access to justice of the proposed changes to both legal aid and judicial review, in the light of which that assurance from the Government may need to be kept under review.
Finally, we welcome the assurance that guidance will be issued by the National Offender Management Service to providers of probation services in relation to the “good behaviour” supervision requirement—especially since there remains an issue as to whether this requirement is sufficiently clear on the face of the Bill for an individual to understand its meaning and how it might apply to him or her.
1 Introduction

Background

1. The Offender Rehabilitation Bill was introduced in the House of Lords on 9 May 2013.\(^1\) It received its Second Reading on 20 May 2013. Its Committee stages were on 5 and 11 June, and its Report stage was on 25 June 2013. Third Reading was on 9 July 2013, as was First Reading in the House of Commons.\(^2\) It received its Second Reading on 11 November 2013. The Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, has stated that, in his view, the provisions of the Bill are compatible with Convention rights.\(^3\)

2. We wrote to the Justice Secretary on 10 July 2013 to ask for further information about the human rights implications of the Bill. The Government’s response to our letter, dated 19 September, was received on 3 October.

3. We are grateful to the Prison Reform Trust and the Criminal Justice Alliance for providing us with written evidence and representations about the human rights implications of the Bill.\(^4\)

Purposes of the Bill

4. The Bill forms part of the Government’s “rehabilitation revolution” programme of reform.\(^5\) On 9 May 2013, the Ministry of Justice published *Transforming Rehabilitation: a strategy for reform*,\(^6\) which is scheduled to be implemented across England and Wales by 2015.\(^7\) The *Transforming Rehabilitation* strategy contains five main reforms to the rehabilitation system:

- Extending rehabilitation to offenders released from short-term sentences
- Establishing new “resettlement prisons”
- Inviting organisations from the voluntary and private sectors to bid for contracts to provide rehabilitation services
- Introducing “payment by results” for rehabilitation service providers

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\(^1\) HL Bill 2. See also Lords Library Note 2013/009, *Offender Rehabilitation Bill*, 16 May 2013

\(^2\) 9 July 2013, HC Bill 88. See also House of Commons Library, *Offender Rehabilitation Bill*, Research paper 13/61, 6 November 2013

\(^3\) As required by section 19 of the Human Rights Act 1998 c.42


\(^5\) The Coalition: our programme for government, May 2010, p.23. The Government first outlined its intention to open up the probation services market to new providers from the private, voluntary and community sectors and to apply the use of Payment by Results to all providers by 2015 in *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (December 2010), Cm 7972, see paras 36–38 and Chapter 3

\(^6\) The consultation, *Transforming Rehabilitation: a revolution in the way we manage offenders*, took place between 9 January and 22 February 2013.

\(^7\) Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform*, Cm 8619, May 2013, p33
• Creating a new public sector National Probation Service responsible for high risk offenders only. This will replace the current system of probation trusts.8

5. The Ministry of Justice has said that the aim of the reforms is to reduce reoffending by ensuring that offenders are not only punished but receive the rehabilitation and the “broader life management” support they need to “get their lives back on track so they do not commit crime again”. It has said that offenders, particularly short term prisoners, need consistent support from prison to the community; and it wants the best of the public, private and voluntary sectors to help achieve this.9 The Government is also committed to reducing probation costs.10

6. The Offender Rehabilitation Bill brings into effect one of the five reforms, that is, the extension of rehabilitation to offenders released from short-term sentences. The Bill introduces a mandatory rehabilitation period of 12 months for all offenders released from custodial sentences of two years or less. In his statement to the House of Commons on 9 May, the Justice Secretary explained the need for such a measure due to the high rates of reoffending by those who, currently, do not receive any rehabilitation support upon release from short-term custodial sentences.11 According to the Ministry of Justice, offenders released from a period of less than 12 months in custody,12 who are currently released without any further rehabilitation, are those most likely to reoffend.13 The Government has said that the changes would mean that “all offenders who enter prison, even for just a few days, will be subject to the new supervision and will be given vital support into housing, employment, training and substance abuse programmes”.14

7. The Bill also introduces changes to requirements that may be imposed as part of a Community Order or Suspended Sentence Order with the existing “activity” and “supervision” requirements replaced by a single “rehabilitation activity requirement”.15 The Ministry of Justice has said the changes would provide greater flexibility in the delivery of rehabilitation services.16

8. Human rights law imposes positive obligations on the State to take all reasonable steps to protect the public from crime, including from re-offending by known offenders. Many short-term prisoners are also amongst the most vulnerable people in society, often experiencing drug and alcohol dependency, mental illness, homelessness, unemployment and poverty. The provision of positive support to rehabilitate such vulnerable individuals following a period of imprisonment is also likely to enhance the

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8 Probation services are provided by 35 Probation Trusts across England and Wales. Trusts receive funding from the National Offender Management Service (NOMS) to which they are accountable for their performance and delivery. http://www.justice.gov.uk/about/probation

9 Ministry of Justice, Transforming Rehabilitation: A Strategy for Reform, Cm 8619, May 2013, p 3

10 Ibid, p44

11 HC Deb 9 May 2013 c149

12 An estimated 50,000 offenders (Ministry of Justice, Transforming Rehabilitation: A Strategy for Reform, Cm 8619, May 2013, p6)

13 According to Ministry of Justice data, 58% of offenders sentenced to less than a year in custody reoffend again within a year. This compares with 35% for offenders released from more than a year in custody (Transforming Rehabilitation: A Strategy for Reform, Cm 8619, May 2013, p41)

14 Ministry of Justice press release, 12 months supervision for all prisoners on release, 9 May 2013

15 Clauses 13–17 of the Bill

16 Ministry of Justice, Transforming Rehabilitation: A Strategy for Reform, Cm 8619, May 2013, p14
UK’s performance of its human rights obligations to the vulnerable. We welcome the Bill’s potentially human rights enhancing objectives of taking measures to protect the public from crime, at the same time as focusing on rehabilitation and extending positive support to those vulnerable people who receive short-term prison sentences.

Information provided by the Government

Human rights memoranda

9. The Explanatory Notes to the Bill as introduced set out a brief summary of the Government’s human rights analysis of the Bill. On 17 June, the Government provided a separate human rights memorandum, which provides a fuller analysis of the compatibility of the provisions of the Bill with the requirements of human rights law. The memorandum is detailed and helpful, but it was received after the Bill had completed its Lords’ Committee stage and just over a week before its Report stage. We repeat our general recommendation to Departments that, in our view, it is best practice for them to publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond. Such a memorandum can be based upon the ECHR memorandum prepared for the Cabinet’s Parliamentary Business and Legislation Committee. This would also enable our legislative scrutiny to be more focused. Additionally, we encourage Departments, as best practice, to publish a human rights memorandum in place of the relevant part of the Explanatory Notes to the Bill. This is done routinely by some Departments, such as the Home Office.

Compliance with relevant international human rights standards

10. The Government’s human rights memorandum states that it addresses issues arising not only in relation to the ECHR but also “other international human rights obligations of the UK.” This is welcome and in keeping with our recommendations as to best practice by Departments. However, apart from a brief reference to the International Covenant on Civil and Political Rights in relation to Clause 16 of the Bill as introduced, the memorandum is in fact confined to a consideration of the Bill’s compatibility with the ECHR. However, the subject-matter of the Bill does engage a number of other relevant

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17 HL Bill 2 EN 2013-14 paras. 133–150
21 Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 1
23 Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 109.Clause 16 of HL Bill 2 requires an offender subject to a Community Order or Suspended Sentence Order to seek prior permission from the responsible officer or the court to change their place of residence. This right engages the right to liberty of movement and freedom to choose residence guaranteed by the Article 12 of the International Covenant on Civil and Political Rights, with which the UK is obliged as a matter of international law to comply. This right is qualified in much the same way as Article 8 of the ECHR. The Government states that the provision is compatible with Article 12 ICCPR on substantively the same basis as its justifications for the provision’s compliance Article 8 ECHR, discussed at paras. 93 to 108 of the Government’s Human Rights Memorandum.
human rights standards, such as the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders 2010 (the “Bangkok rules”), and recent concluding observations to the UK by the UN Committee Against Torture and the Committee on the Elimination of Discrimination against Women. We, therefore, asked the Government to supplement its human rights memorandum with its analysis of the Bill’s compatibility with those other relevant international human rights standards.

11. The Government’s response states that “the provisions of the Bill are compatible with the UK’s obligations under all relevant human rights instruments to which the UK is a party.” However, it has not provided any analysis to support this assertion, except in relation to the Bangkok Rules. The Government’s response acknowledges that the Bangkok Rules highlight that due regard must be had to the specific needs of women offenders post-release or when subject to non-custodial sentences. The Government is confident that its proposals allow for this, stating that:

“Under the Bill, post-sentence supervision and changes to the community order regime incorporate a considerable degree of flexibility that will enable those regimes to be implemented in a way that accommodates the specific rehabilitative needs of female offenders.”

12. We are not satisfied with the information and analysis provided by the Government in relation to the Bill’s compatibility with other relevant international standards. We expect human rights memoranda to go beyond assertions that all relevant human rights obligations have been considered, and we repeat our general recommendation that Departments should provide detailed information explaining why the Government is satisfied about the compatibility of a Bill with relevant international human rights obligations, not just the ECHR, in their human rights memoranda.

13. The issue of provision of appropriate information also extends to Government amendments. The Government tabled an amendment to the Bill at Third Reading, which is designed to “place a statutory duty on the Secretary of State to identify and record in the contracts with new probation providers how he has discharged his duty to consider the particular needs of female offenders”. We did not receive any additional information about the Government’s amendment, which is significant as it relates to the duty to take into account the Public Sector Equality Duty (the “PSED”) in relation to women offenders. We are disappointed that we did not receive any additional information from the Department about the Government’s amendment on women offenders, and we repeat our general recommendation that Departments should, as good practice, provide us

24 UN Standard Minimum Rules for the Treatment of Prisoners 1955; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders 2010 (the “Bangkok rules”); UN Principles on Medical Ethics


26 Letter from the Chair to the Lord Chancellor and Secretary of State for Justice, 10 July 2013, Q.1

27 Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q.1

28 Ibid.

29 Ibid.
with a supplementary human rights memorandum on Government amendments with significant human rights implications, such as the Government amendment relating to women offenders in this Bill.  

**Information provided in the Government’s Impact Assessment**

**Alternative policy options to assist consideration of proportionality**

14. A revised Impact Assessment was published on 20 June 2013, following an undertaking to do so at Lords’ Committee stage by the Minister of State for Justice, the Rt Hon Lord McNally. Members of the House of Lords had been critical of the quality of the initial Impact Assessment, particularly in relation to the Government’s costings of the reforms. Peers were also critical about the lack of policy options contained in the Impact Assessment, which presented only two options: one to maintain the status quo and the other to implement the measures contained in the Bill. During the Lords’ debates, Lord Ramsbotham GCB CBE stated:

“far too many of the impact assessments that I have seen recently seem to have only two options—take it or leave it.”

15. When scrutinising a Bill’s compatibility with human rights law, information about alternative measures can assist in determining whether the proposed measure is proportionate and strikes a fair balance between competing rights—in this instance between the rights of those who will be subject to extended supervision requirements and the rights of others to be protected from crime. It would be helpful if the Government would provide in its Impact Assessments its analysis of relevant and alternative policy options, as this would assist Parliament in scrutinising the proportionality of the proposed legislative measures.

**Equality information**

16. Public bodies must have due regard to the need to avoid discrimination and promote equality of opportunity for all protected groups when making policy decisions. This is known as the Public Sector Equality Duty (the “PSED”). An Equality Impact Assessment

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31 HL deb., 5 June 2013, col 1179–1184

32 HL deb., 5 June 2013, col 1180

33 The protected grounds covered by the equality duty are: age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief, sexual orientation, marriage and civil partnership

34 Section 149 of the Equality Act 2010. In May 2012, the Government announced a review of the PSED. The Review of the Public Sector Equality Duty: Report of the Independent Steering Group was published on 6 September 2013 along with the Government’s response. The Review has not considered repeal of the PSED. However, the Government agrees with the Steering Group’s conclusion that a full evaluation should be undertaken in 2016 when the duty will have been in force for five years. The review identified a number of issues associated with the implementation of the PSED and makes recommendations for the Equality and Human Rights Commission, for public bodies and for Government. As part of the Government’s reform of Judicial Review, it is considering limiting the availability of JR in relation to the PSED disputes, and introducing an alternative, non-judicial mechanism instead. See: GEO, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013; HC Deb 6 September 2013 cc33–34; EHRC, Commission responds to Public Sector Equality Duty Review report, 17 October 2013
17. The case of *R (Brown) v Secretary of State for Work and Pensions* determined that a public authority has to be able to demonstrate that it had paid ‘due regard’ to its equality obligations. While there is no legal requirement to carry out specific equality impact assessments, documentary evidence of compliance with the PSED is important.\(^{36}\) The Court stated that it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their equality duties, stating that proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their equality duties conscientiously.\(^ {37}\) The Court emphasised that the duty must be exercised in substance, with rigour and with an open mind. It is not a question of “ticking boxes”.\(^ {38}\) Also, the Court advised that the duty to consider the impact of a policy on people with protected characteristics is a continuing one.\(^ {39}\) The Equality and Human Rights Commission has published various guidance documents for public authorities on how to assess and document compliance with the equality duty.\(^ {40}\)

18. On 19 November 2012, the Prime Minister announced that the Government is “calling time on equality impact assessments”.\(^ {41}\) However, the legal duty established in *Brown* remains for public authorities to demonstrate that they have had ‘due regard’ to their equality obligations. Indeed, some Departments continue to publish these assessments in order to facilitate and show evidence for compliance with their equality duties, a recent example being in July 2013 by the Department for Work and Pensions.\(^ {42}\)

19. During the *Transforming Rehabilitation* consultation, the Government asked two specific questions on the equalities implications of its proposals.\(^ {43}\) Following the consultation, the Government announced further engagement with stakeholders on issues relevant to minority groups of offenders with protected characteristics other than gender (as the Government stated it had engaged separately and extensively with relevant stakeholders on meeting the needs of women offenders).\(^ {44}\) However, the Government has not published the responses to this further consultation. Further, the Government has not set out its analysis of the potential impact of the Bill on protected groups of people. It has

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36 *R (Brown) v Secretary of State for Work and Pensions and another*, [2008] EWHC 3158 (Admin), para 96; *R (D) v Worcestershire County Council* [2013] EWHC 2490 (Admin)

37 *R (Brown) v Secretary of State for Work and Pensions and another*, [2008] EWHC 3158 (Admin), para 96

38 Ibid, para. 93

39 Ibid, para 96


42 *Equality impact assessment about the introduction of the online jobsearch service, Universal Jobmatch*, Department for Work and Pensions, 3 July 2013.


not published an EIA to accompany the Bill, and the Government’s revised Impact Assessment does not contain any such analysis.

The relevance of equality information in relation to age

20. The Government’s revised Impact Assesment does not contain any analysis of the potential impact of the proposals on young people. This is significant as the Bill contains a number of provisions relating to young offenders. In particular, the new adult supervision regime established by the Bill will apply to any young person who has reached the age of 18 at the point of release from juvenile detention. At present, the Youth Justice Board and Youth Offending Teams continue to supervise the offender upon release until the end of the relevant supervision period. Instead, a young person aged 18 or over will transfer to the probation service, or private probation provider, for supervision in accordance with the regime established under the Bill. The Youth Justice Board highlighted concerns about transition arrangements for young adults, stating that:

“Evidence suggests that failing to manage transitions appropriately can lead to young people committing further offences during this period”.

The relevance of equality information in relation to race

21. It is unclear what, if any, impact the Transforming Rehabilitation proposals, and in particular the Offender Rehabilitation Bill, may have on Black and Minority Ethnic (“BME”) offenders. The Government’s summary of responses to its consultation outlined that Trade Unions and professional associations raised concerns that the competition for probation services could lead to unequal treatment of certain groups within the current Probation workforce, especially for women and Black, Asian and Minority Ethnic staff.

No further analysis was provided. We note that a 2010 study by the Youth Justice Board for England and Wales found that young black offenders tended to be over-represented in the youth justice system in relation to their representation in the general population. The proposals in the Bill to transfer young people aged 18 or over at the point of release from juvenile detention to the adult supervision regime (i.e. to the new National Probation service or to a private probation provider) may, therefore, have a more significant impact on young BME offenders. We also note a report published by NACRO in 2009, which outlines the particular needs of BME offenders in transition from the criminal justice system, particularly in relation to accessing health and social care services. This may be relevant to the new period of mandatory supervision for offenders following release from a term of imprisonment of over 1 day. In providing for the new 12-month supervision period in the Bill, the Government should have had due regard to any such particular needs of BME offenders to determine whether they may be disproportionately affected as a group of people with protected characteristics. However, the Government has not set out any information in relation to the potential impact of the Bill, or the wider Transforming Rehabilitation.

45 Clauses 5 and 7 of the Bill
46 Youth Justice Board, Response to the Ministry of Justice Transforming Rehabilitation consultation
47 Ministry of Justice, Transforming Rehabilitation: Summary of responses, May 2013, para 66
48 Youth Justice Board, Exploring the needs of young Black and Minority Ethnic offenders and the provision of targeted interventions, 2010, p.6
49 NACRO, Good Practice Guide: Liaison and diversion for BME service users, June 2009 p.3
Rehabilitation reforms, on people from black and minority ethnic communities. Without this information, we are unable to scrutinise fully the equality and human rights implications of the Bill.

The relevance of equality information in relation to gender

22. The changes proposed by the Bill, particularly the extension of licence and supervision periods to offenders sentenced to less than 2 years’ imprisonment and changes to community sentences, are likely to have a disproportionate impact on women offenders compared to men. Recent Ministry of Justice statistics on women in the criminal justice system reveal that:

- Women tend to serve shorter custodial sentences than men. A greater proportion of women in prison were serving sentences of twelve months or less than men (21% and 10%, respectively), and similarly for sentences of six months or less (15% and 7% respectively). A recent inquiry by the Justice Select Committee concluded that over 50% of women offenders receive ineffective short-custodial sentences.50

- Women have accounted for around 15% of all offenders under supervision in the community as a result of community and suspended sentence orders.51

23. According to the Prison Reform Trust, 71% (5,287) of all women entering prison under a custodial sentence in 2012 were sentenced to a period of less than 12 months. Under the Bill’s proposals, all these women will be subject to the new supervision periods. For men, the proportion was 57%. The Trust has questioned whether the Government has complied with its duty to have due regard to a number of equality considerations when developing its Transforming Rehabilitation reforms. The Trust is concerned about the impact of the Bill on vulnerable groups, particularly women, highlighting the lack of gender-disaggregated analysis in the Government’s Impact Assessment. In its view, the extension of statutory monitoring and supervision to offenders sent to prison for less than 12 months will disproportionately affect women as women are more likely to serve short prison sentences, and the likely disproportionate consequences of the Bill for women have not been given due regard, as required by the Equality Act.53

24. In its recent inquiry on women offenders, the Justice Select Committee concluded that there is a lack of evidence to demonstrate that the Government has taken into account the equality duty, in so far as it relates to gender, when designing its Transforming Rehabilitation reforms.54 Overall, that Committee considered that the reforms have been designed with male offenders in mind, finding that:

50 House of Commons Justice Committee, Second Report of Session 2013-14, Women offenders: after the Corston Report, HC 92, Summary, p.4
51 Ministry of Justice, Women and the criminal justice system, November 2012
52 Prison Reform Trust Submission to the Joint Committee on Human Rights’ Legislative Scrutiny of the Offender Rehabilitation Bill, para 24
53 Prison Reform Trust Submission to the Joint Committee on Human Rights’ Legislative Scrutiny of the Offender Rehabilitation Bill, para 26
“For too long, while the needs of female offenders have been recognised as different from those of males, the criminal justice system generally, and the National Offender Management Service in particular, have struggled to reflect fully these differences in the services it provides.”

25. On 25 October 2013, the Government published its response to the Report of the Justice Select Committee on women offenders. The Government does not accept that Committee’s findings that the Transforming Rehabilitation programme has been designed for male offenders. The Government response provides the following brief analysis of the implications for women offenders of the Offender Rehabilitation Bill:

“The once the provisions of the Offender Rehabilitation Bill are in force, those serving under 12 months sentences will, for the first time in recent decades, be subject to statutory supervision and all offenders will be subject to a licence period (or a combination of licence and supervision) of at least 12 months in the community. Proportionally, more women than men are serving short sentences so they will benefit particularly from this element of the reforms. However, there will continue to be effective alternatives to custody for rehabilitation support. We are introducing a new Rehabilitation Activity Requirement as part of a community order or suspended sentence order, enabling those managing offenders to deliver to them a package of rehabilitative support in the community, which can be tailored to their needs.”

The importance of equality information in assessing the impact of the Bill

26. Information from the Government on the impact of the Bill on protected groups of people, and in particular on women offenders, would assist us in our scrutiny of the Bill. Certain measures contained in the Bill may benefit women offenders. However, a number of concerns have been expressed about potential negative implications for women. For example, during debates in the Lords, Lord Woolf expressed concern that the proposals could lead to an increase in the use of short sentences and “undermine the objective of the Bill”. He warned that sentencers could see the new arrangements as “justifying short sentences” and as providing the “best of both worlds: both the punitive impact of imprisonment and supervision of the offender when he or she is released”. This could have a particularly serious impact on women offenders. Both the Corston Report and the CEDAW Committee have called on the UK Government to reduce the number of women offenders sentenced to short periods in prison. Baroness Corston has described the potential damage that could be caused during short-term sentences, particularly to single

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55 Ibid. Para 41
56 Government response to the Justice Committee’s Second Report of Session 2013–14
57 Ibid., p 20
58 Ibid.
59 HL Deb 20 May 2013 cc649–54
60 HL Deb 20 May 2013 cc649–54
Legislative Scrutiny: Offender Rehabilitation Bill

mothers: “A 28-day sentence is kind of a norm. That is long enough to lose your home and your children.”\(^{62}\)

27. Another example of the relevance of information about the potential impact of the Bill’s proposals on women offenders is that evidence suggests that only a small proportion of women offenders are assessed as representing a high or very high risk of harm to other people: these women constitute 3.2% of the female prison population and 1% of the probation caseload.\(^{63}\) The majority of women offenders, therefore, will be supervised in the community by private providers of probation services under the Bill’s new scheme.

**Questions to the Government about equality information**

28. Given the potential impact of the Bill on people with protected characteristics, we asked the Government for information about its assessment of the Bill’s impact on equality.\(^{64}\) The Government’s response did not provide any further analysis of the potential impact on protected groups. In reply, the Justice Secretary stated that:

> “In line with the Government’s duties under the Equality Act 2010, the equality impacts of the Offender Rehabilitation Bill and the wider programme of reforms set out in ‘Transforming Rehabilitation—a strategy for reform’ have been considered fully [...] I have no plans to publish an equality impact assessment of the Bill.”\(^{65}\)

29. In its response, the Government also appears to rely on its amendment, introduced at Lords’ Third Reading, to support its position that it has taken into account its equality duty in so far as it relates to women offenders.\(^{66}\) While the effect of the amendment will ensure that the needs of women offenders are taken into account in the new contracts for probation services (the substance of the amendment is considered below at paragraphs 44 to 54), this response does not explain the extent to which the particular needs of women offenders have been taken into account by the Government in its design of the other proposals contained in the Bill.

30. The provision of information by the Government in relation to its consideration of the Bill’s impact on protected groups has been piecemeal, lacking in detail, and has been produced only in response to parliamentary scrutiny of the Bill and the Transforming Rehabilitation reforms. This does not provide much reassurance that the Government has properly complied with its equality duty in the formulation of the policy. We acknowledge that there is no legal obligation on the Justice Secretary to publish an Equality Impact Assessment. Like the Government, we are interested in effective assessment of compliance with the duty rather than a formalistic box-ticking exercise. However, in formulating the Transforming Rehabilitation strategy and the Offender Rehabilitation Bill, the Government has a duty to assess the potential impact of the reforms on protected groups of people. We are concerned about the lack of


\(^{63}\) House of Commons Justice Committee, Second Report of Session 2013-24, Women offenders: after the Corston Report, HC 92, para 96

\(^{64}\) Letter from the Chair to the Lord Chancellor and Secretary of State for Justice, 10 July 2013, Q.2

\(^{65}\) Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q. 2

\(^{66}\) Ibid
evidence provided by the Government so far to support its assertion that the proposals have been considered fully in line with the requirements of the Equality Act 2010, and we call on the Department to publish the information which demonstrates this without delay. We would particularly like to see the Government’s analysis of the Bill’s potential impact on women offenders, young offenders and BME offenders.
2 Human rights issues raised by the Bill

Reform of probation services and the Government’s positive obligations

31. The Bill is focused specifically on legislative changes concerning the supervision of offenders in the community. The other main parts of the Government’s Transforming Rehabilitation strategy, as highlighted in paragraph 3 above, involve significant changes to the structure of the probation service. The Government states that Section 3 of the Offender Management Act 2007, which enabled the previous Government to reform the probation service into 35 Probation Trusts, provides the legislative basis for the Secretary of State to make further changes to the probation service, without the need for additional legislation. Some Members of the House of Lords questioned this in debate and criticised the lack of information available about the Government’s proposals, the lack of opportunity to scrutinise the changes, and the rapid timetable for implementation.67

32. We note that changes to the probation service contained in the Transforming Rehabilitation reforms are relevant to the Government’s positive obligations to take appropriate steps to safeguard the lives of those within its jurisdiction and to protect people from the risk of known offenders.68 There is a duty on probation services to take all reasonable steps to keep to a minimum each offender’s risk of harm to others. This has been highlighted by a series of official inquiry reports by HMI Inspectorate of Probation.69

33. The Government’s human rights memorandum and impact assessment did not contain any analysis of the human rights implications of the proposed changes to the probation service contained in its Transforming Rehabilitation package of reforms. Although these proposals are not provided for in the Bill, the proposals in the Bill will not operate in a vacuum. To analyse the effects of the Bill’s proposals properly, it is necessary to take into account the context in which they will operate under the wider Transforming Rehabilitation reforms.

34. In addition, on 24 June 2013, an article in The Guardian reported that allegedly leaked documents from the Ministry of Justice indicate that there is “more than 80% risk that the proposals will lead to an unacceptable drop in operational performance and delivery failures”.70 The Ministry of Justice has not published its risk assessment of the reforms.

35. We asked the Government for further information about the wider reforms in order to consider the potential impact on the Government’s positive obligation to protect people from threats to their life from known offenders.71 The Government responded by asserting

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67 HL Deb. 5 June 2013, cols. 1179-1184
68 Under the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR); Osman v United Kingdom (1999) 29 EHRR 791
69 HMI Probation’s general perspective on Public Protection and Safeguarding; "Risk of Harm Inspection Report: Getting There Now—A follow-up inquiry into the management of offenders’ Risk of Harm to others by London Probation Trust" October 2010
70 Guardian, Privatising the probation service will put public at risk, officials tell Grayling, 24 June 2013
71 Letter from the Chair to the Lord Chancellor and Secretary of State for Justice, 10 July 2013, Q. 22, pp 8–9
that the Bill accords with the UK’s positive obligation to protect life under Article 2 and that it will ensure that the UK continues to comply with those obligations as it implements its reform of the probation services.72

36. We also asked whether the Government considers that private sector companies and voluntary sector organisations will be exercising public functions for the purposes of the Human Rights Act. In the Government’s response, it confirmed that it considers that private providers do exercise public functions for the purposes of the Human Rights Act, stating that:

“We consider that companies who have contracted with the Secretary of State under section 3(2) of the Offender Management Act 2007 to provide probation services will for the Human Rights Act be hybrid bodies who are exercising functions of a public nature. Many of the acts performed by private contractors in providing services under the arrangements in place will be public in nature, and the provider will therefore be obliged to act in a way that is compatible with ECHR rights. This will include acts necessary for the core function of supervising offenders in the community.”73

37. Further, we asked the Government to outline measures to ensure that private companies will take all reasonable steps to assess and manage risk of harm to others, as required under human rights law. The Government stated:

“The National Probation Service (NPS) and the contracted provider will have a defined set of responsibilities in relation to risk management and enforcement. Providers will have contractual obligations to ensure that their organisation has risk management procedures in place [...] it is expected that contracted providers and the NPS will undertake a risk assessment at the outset of their involvement with an offender and this will lead to the development of a risk management plan [...] where there are indications that the risk of serious harm may have increased to high in respect of an offender, the contracted provider will be contractually required to refer the case to the NPS”74

38. However, there is particular concern about the impact on public protection of the division of responsibility between the public sector and contracted providers.75 The new public sector National Probation Service will be responsible for high-risk offenders, while private and voluntary probation providers will be responsible for low and medium risk offenders. Concern has been raised about the transfer of high and medium risk offenders between public and private probation services. The Howard League for Penal Reform said this could cause delays, create dangerous gaps in accountability, and prevent stable and continuous service provision.76 In a joint response to the Government’s consultation, the Probation Association and Probation Chiefs Association said that the proposals could increase the risk of harm to the public and that they could not be implemented in the

72 Ibid.
73 Ibid. Q.23 p. 9
74 Ibid. Q.24 pp 9–10
75 HL deb 20 May 2013 c 660; HL Deb 16 Oct 2013 co 606
76 Howard League for Penal Reform, Response to the Ministry of Justice consultation on Transforming Rehabilitation, 21 February 2013
timetable envisaged without running an excessive risk of causing serious damage to the delivery of the current service. The Associations said that splitting offender management between public and private providers would lead to a fragmentation of offender supervision and increase the risk of public protection failures. It highlighted the risk of harm as “dynamic”, and estimated that around 25% of cases would transfer between providers. They also stated that, if a division is to be made between public and private, it should be at low risk. 77

39. Evidence has shown that the strength of the offender-manager relationship is important in effectively managing the rehabilitation of the offender.78 There have been high profile failures of the probation service to protect people from the risk of harm, which have been attributed, in part, to a lack of continuity in the supervision of the offender, a reduction in supervision of high-risk offenders, and the transfer of offenders between probation services and even different staff within an individual service.79 Such findings are relevant to the proposed Transforming Rehabilitation reforms, which the Government has not acknowledged. The Youth Justice Board has also raised similar concerns about the Bill’s proposal to transfer young people from the juvenile system of post-release monitoring and rehabilitation to private probation providers under the new adult supervision regime. In its view, such transfers damage the rehabilitation process.80

40. We welcome the Government’s assurance that private providers of probation services are obliged to act in a way that is compatible with human rights law, particularly with regard to the duties to take all reasonable steps to assess and manage offenders’ risk of harm to others. This is essential to ensure the Government fulfils its positive obligations to take all reasonable steps to safeguard the lives of those within its jurisdiction, to protect people from the risk of known offenders.

41. However, we recommend that there should be statutory provision in the Bill setting out the providers’ duties (rather than reliance on contractual obligations with the private probation providers to guarantee compliance with human rights obligations). Such a provision could include the need to conduct risk assessments of offenders and to refer an offender to the National Probation Service where there are indications of serious risk of harm in respect of an offender. Such a provision in the Bill may better ensure that the private provider fulfils the positive obligations of taking all reasonable steps to protect others from the risk of harm. The text of such an amendment is set out below.

42. In addition, we recommend that the Government should develop clear guidance on the obligations of private probation providers to take all reasonable steps to assess and manage offenders’ risk of harm to others, and clear guidance on how the Ministry of Justice will monitor the performance of the contracted providers in this regard. This should be developed in consultation with relevant stakeholders.

77 Transforming Rehabilitation: Joint response from the Probation Association and The Probation Chiefs Association, 22 February 2013
78 Justice Select Committee, Eighth Report of Session 2010–12, The role of the probation service, paras 36 & 39
79 Sonnex Case, HC Deb 8 Jun 2009 c 517
80 Youth Justice Board, Response to the Ministry of Justice Transforming Rehabilitation consultation
43. At Report stage in the Lords, a non-Government amendment was passed inserting a new clause 1 into the Bill which provides that “no alteration or reform may be made to the structure of the probation service unless the proposals have been laid before, and approved by resolution of, both Houses of Parliament”. We welcome the opportunity for further consideration of changes to the probation service in new Clause 1 of the Bill, as this may allow a better opportunity for both Houses to scrutinise the human rights implications of the wider reforms to the probation service, particularly in relation to the state’s positive obligations to take all reasonable steps to keep to a minimum each offender’s risk of harm to others.

New Clause 12

Page 10, after line 10 insert:

“(1) Contracted providers of probation services must, in line with guidance from the National Probation Service, undertake an initial risk assessment with each offender, to be reviewed at regular intervals thereafter.

(2) Where there are indications, in line with guidance from the National Probation Service, that the risk of harm may have increased to high in respect of an offender, the contracted provider must refer the case to the National Probation Service to confirm the risk status.”

Specific needs of women offenders

44. In 2006, Baroness Corston was commissioned by the Home Office to examine the particular vulnerabilities of women offenders. The Corston Report made 43 recommendations. The Justice Select Committee has been critical of the Government’s failure to implement a strategy to give effect to the findings of the Corston Report. Baroness Corston drew attention to the lack of a written strategy for female offenders in a debate in the House of Lords in March 2012. One year later, on 22 March 2013, the Government published its Strategic objectives for female offenders, and established an Advisory Board for female offenders to be chaired by the Minister for Sport & Equalities, Helen Grant MP. The Justice Committee welcomed the production of a set of strategic priorities for women offenders, but has called for the Government’s policy to be given greater substance and accompanied by measures of success. The recent concluding observations of the UN Committee Against Torture on the UK called on the Government to implement urgently its strategy for women offenders, in accordance with the UN Rules of the Treatment of Women Prisoners and Non-Custodial Measures for Women

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81 Clause 1 HL Bill 35; HL Deb 25 June 2013 cc 658–71
83 HL deb, 20 March 2012, c 764
Offenders and with due attention to the recommendations contained in the Corston Report.86

45. Some of the findings of the Corston Report are relevant to the Bill’s provisions, particularly in relation to the rehabilitation for women offenders, and the use of short custodial and community sentences in relation to women. The Bill’s provisions to extend statutory support to prisoners sentenced to less than 12 months are likely to benefit many women offenders. The recent inquiry of the Justice Committee found that 62% of women leaving prison, after serving sentences of less than 12 months, are reconvicted within one year, which is higher than the equivalent rate for men, indicating that women offenders may, in particular, benefit from rehabilitation support after short custodial sentences.87 We welcome, in principle, the particular benefit that may result for the majority of women offenders from the Bill’s extension of supervision and rehabilitation support in the community to all offenders sentenced to under 12 months imprisonment, provided that the terms of the supervision and support take into account any particular need or vulnerability of the offender.

46. Throughout the Bill’s stages in the House of Lords, some Members argued that, while the extended supervision is welcome, the Bill should contain the requirement to have regard to the particular needs of women when setting supervision conditions, such as caring responsibilities, domestic violence and mental illness.88 There was concern that, unless supervision requirements accommodate the specific needs and circumstances of women, there is a strong likelihood that more women will end up in custody for breach, which is already a significant driver of women’s imprisonment.89 This would undermine the key recommendations of the Corston Report, namely to reduce the number of women in prison for minor offences and subject to short-term sentences.

47. Initially, the Government stated that such a legislative safeguard was unnecessary. Lord Ahmad of Wimbledon said that, under the Bill, all offenders sentenced to less than 12 months would have an assessment made of their risks and needs, and that the information from this would be used to draw up plans for their sentence in custody and the community, which would account for and address those particular needs.90 The Minister of State for Justice, the Rt Hon Lord McNally, also explained that the wider Transforming Rehabilitation reforms would open up the offender supervision market to organisations that specialised in women’s services and that the Payment by Results scheme would also provide an incentive to providers to meet the particular needs of offenders.91 However, the Justice Select Committee and the Prison Reform Trust have expressed concern that, in practice, the other Transforming Rehabilitation reforms may have a negative impact on women offenders.

86 UN Committee Against Torture, Concluding Observations on the fifth periodic report of the United Kingdom, May 2013, para 32
89 Prison Reform Trust Submission to the Joint Committee on Human Rights’ Legislative Scrutiny of the Offender Rehabilitation Bill, para 25
90 HL Deb 5 June 2013 cc 1204–13
91 HL Deb 11 June 2013 cc1548-58
48. At Report Stage, Lord McNally announced his intention to move a Government amendment at Third Reading to address the concerns expressed in relation to women offenders. The amendment was agreed without division.\(^{92}\) A new Clause 11 has been inserted into the Bill, which requires the Secretary of State to ensure that any arrangements for the supervision and rehabilitation of offenders will state that, in making those arrangements, he has complied with the public sector duty under Section 149 of the Equality Act 2010 as it relates to female offenders. The arrangements must also identify any provision that is intended to meet the particular needs of female offenders. Clause 11 applies to both public and private providers of probation services.\(^{93}\)

49. Lord McNally said:

“Service providers will be required to demonstrate that they understand and will respond to the particular needs of female offenders where these differ from those of men. This will include for example taking account of women’s family and caring responsibilities” and that the Government “will be looking for providers to come up with innovative ways to deliver gender-specific services that are responsive to local needs, and we will expect them to make links with partner agencies to provide holistic service at a local level.”\(^{94}\)

50. In addition, the Government response to the Justice Select Committee provides the following information in relation to the amendment:

“In order to win contracts, service providers will have to articulate in their bids that they understand and will respond to the different needs of female offenders. All bids will go through a robust evaluation process that will assess the extent to which potential providers are offering innovative and effective rehabilitation services to female offenders. Following the award of contracts, account managers within the Ministry of Justice will monitor provision to ensure that any key outputs for female offenders are delivered. As noted elsewhere in this response, the Government has added a clause into the Offender Rehabilitation Bill, placing a duty on the Secretary of State for Justice to ensure that contracts with the new probation providers consider and identify the particular needs of female offenders. This will help to ensure that consideration of the need to provide gender-specific services for female offenders informs future commissioning decisions.”\(^{95}\)

51. The Prison Reform Trust welcomed this amendment, stating that it is the first time that an express obligation to meet the particular needs of women offenders is recognised on the face of a criminal justice statute.\(^{96}\) Lord Woolf said that the amendment achieved a purpose, but it was not as clear as he would have liked.\(^{97}\)

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\(^{92}\) HL Deb 9 July 2013 cc159–63

\(^{93}\) Ibid.

\(^{94}\) HL Deb, 9 July 2013, c160

\(^{95}\) Government response to the Justice Committee’s Second Report of Session 2013–14, p 20

\(^{96}\) http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/192

\(^{97}\) HL Deb 9 July 2013 cc 159-163
52. The Government amendment may also go some way towards addressing some concerns raised about certain potential impacts of the Government’s wider Transforming Rehabilitation reforms on women offenders, including:

   — Women offenders are most likely to be managed by a new, private probation provider because the majority of them are deemed to represent a low risk of harm to the public, but despite these low risk levels, women are very high-risk in terms of need as a result of the complexity of factors that often underlies their offending behaviour requiring intensive support and specialist engagement. The Government’s amendment may go some way to address this concern if contractors are required to demonstrate how they will provide such support to women offenders.

   — The risk of perverse incentives caused by the Payment-by-Results scheme. The response to the Government’s consultation recognised that the Payment-by-Results scheme could lead providers to “develop homogeneous services that fail to address the requirements of some offenders with complex needs or particular protected characteristics”. The Prison Reform Trust identified this may be a particular problem for ensuring that appropriate provision is made for women offenders as while they are often classified as presenting lower risk of reoffending or harm, they tend to have higher levels of need requiring more intensive and costly support. Again, the Government’s amendment may go some way to address this concern, in so far as it relates to the potential impact on women offenders.

   — Providers of women’s services may be too small and specialist to compete with larger companies, such as Serco and G4S, for the award of Government probation contracts. Again, the Government amendment may go some way to addressing this as it requires all providers to demonstrate its strategy to address the specific needs of women offenders.

53. We welcome the Government’s amendment as a positive step in fulfilling its obligations to ensure that its reforms do not have an adverse impact on women offenders. The Bill now contains an express obligation that probation arrangements for the supervision and rehabilitation of women offenders must comply with the Public Sector Equality Duty, in so far as it relates to gender. The amendment places a statutory duty on the Secretary of State to ensure that the contracts with the new providers of probation services consider and identify the particular needs of female offenders. This amendment may also go some way towards addressing a number of wider concerns about the potential impact of the Government’s Transforming Rehabilitation reforms on women offenders, although this is difficult to assess fully as the Government has not

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100 Prison Reform Trust Submission to the Joint Committee on Human Rights, 28 June 2013, para 25

provided a full analysis of the potential impact on equality of the wider Transforming Rehabilitation reforms, as outlined above.

54. In its correspondence with us, the Government also provides an assurance that guidance will be produced for new providers on working with female offenders. We welcome the Government’s assurance that guidance will be issued to the new providers of probation services on working with women offenders. We recommend that the Government consults with relevant stakeholders when preparing such guidance. We also recommend that the Government develops clear guidance on how the Ministry of Justice will monitor the performance of its contracted providers in meeting the needs of women offenders, and we would ask the Department to report to Parliament on the impact on women offenders of the Transforming Rehabilitation reforms after 2 years have elapsed.

Offenders with learning difficulties

55. During the passage of the Bill in the Lords, the Government committed to produce Easy Read versions of supervision documents to help ensure that people with learning difficulties are able to understand their supervision requirements and what is expected of them. The Prison Reform Trust has highlighted that offenders with learning disabilities and difficulties often do not get equal access to the law or support to successfully complete prison or community sentences because information presented to them is not made accessible. The UN Convention on the Rights of Persons with Disabilities provides for equal access to justice for persons with disabilities and the right to information in accessible and usable formats for persons with disabilities. We welcome the Government’s commitment to producing Easy Read versions of licence and supervision condition documents to help ensure that people with learning disabilities and learning difficulties are able to understand their supervision requirements and what is expected of them. This is in line with the fundamental principle of legal certainty, and meets certain specific obligations under the UN Convention on the Rights of Persons with Disabilities.

Extending post-release support and supervision (Clauses 2–13)

56. The Bill amends the current sentencing framework to provide that all offenders sentenced to more than one day but less than two years in custody receive at least 12 months of mandatory supervision in the community after release. Supervision requirements, specified in the Bill, may be imposed on an offender during the supervision period. There are four sanctions that might be imposed for breach of a supervision requirement; a fine, unpaid work, a curfew, or, ultimately, a return to custody for a period of up to 14 days.

102 Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q.1
103 HL Deb, 5 June 2013, c.1202.In response to an amendment moved by Lord Bradley, supported by Lord Ramsbotham and Lord Woolf, HL Deb, 5 June 2013, cc. 1196–1204
104 http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/196; Prison Reform Trust Submission to the Joint Committee on Human Rights, 28 June 2013, paras. 39 & 40
105 Articles 13 and 21, UNCRPD
106 Clause 3 and Schedule 1 to the Bill
**Mandatory supervision: the right to respect for private and family life**

57. The Government acknowledges that the imposition of a period of supervision engages the right to respect for private and family life, as guaranteed by Article 8 ECHR.\(^\text{107}\) However, it provided little analysis of the compatibility of the mandatory supervision period with the requirements of Article 8. The human rights memorandum does not set out the legitimate aim of the measure, although the Explanatory Notes to the Bill confirm that the aim is crime prevention.\(^\text{108}\) The imposition of a 12-month supervision period for all offenders sentenced to less than two years in custody could, therefore, be said to further the Government’s positive obligations to take steps to protect the public from crime.

58. The necessity for the Bill’s provisions is, presumably, also related to the Government’s aim of reducing reoffending. At Lords’ Committee Stage, the Minister explained the need for the supervision period to apply to short sentences, as a large number of those sentenced to short sentences are repeat offenders:

“A significant number of offenders receive a sentence of 28 days or less. The latest statistics from 2012 suggest that around 13,300 adult offenders received such a sentence. The reason why many of those offenders receive sentences of 28 days or less is because their history of offending makes the offence more serious, therefore justifying a custodial sentence […] this is exactly the group we should be targeting for supervision.”\(^\text{109}\)

59. With regards to the proportionality of the measure, the Government’s human rights memorandum states that the courts will ensure that the custody, licence and supervision periods are proportionate.\(^\text{110}\) However, we asked the Government to provide a fuller assessment of why it considers the automatic 12-month supervision period meets the requirement of proportionality under Article 8 because the imposition of a 12-month supervision period will be automatic following any custodial sentence of more than 1 day. The courts, therefore, do not have any discretion in this regard. This raises questions about proportionality.

60. During Lords’ Committee stage, whilst welcoming the general principle of extending rehabilitation support to those who receive short prison sentences, some Members of the House of Lords suggested that the court should maintain a power to direct that there be no period of supervision in exceptional cases: for example, where there are significant physical or mental health issues or where the offender is extremely old. Without such judicial discretion, there may be some cases where the automatic period of supervision is disproportionate.\(^\text{111}\)

61. The Magistrates’ Association recommended that supervision should not be mandatory. The Association said it would be expensive and wasteful to enforce supervision where it was not needed, for example, for offenders who were highly unlikely to reoffend.\(^\text{112}\)

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\(^{107}\) Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 14  
\(^{108}\) HL Bill 2 EN 2013–14, para 139  
\(^{109}\) HL deb. 5 June 2013, col. 1186  
\(^{110}\) Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 14  
\(^{111}\) HL deb. 5 June 2013, col. 1185  
\(^{112}\) Magistrates’ Association, *Response to Transforming Rehabilitation consultation*, February 2013
Association also warned that the proposals could lead to an increase in short-term prison sentences. Courts might see the combination of punishment and rehabilitation provided by a period of custody and supervision under new short-sentence proposals as more attractive than a community order alone. The Magistrates’ Association suggested that courts could instead be given the power to impose both custodial and community sentences consecutively.113

62. We wrote to the Government about the proportionality of the use of detention for a sanction. The Government in its response to us explained that the courts, when sentencing, will consider whether a custodial sentence, with its new accompanying period of supervision, would be proportionate. If the courts do not consider that it would be proportionate, there are alternative sentencing options, such as fines or community orders.114

63. We acknowledge that the courts will take into account the new supervision period, and its requirements, when determining whether a custodial sentence would be appropriate in a given case. As the Government highlights in its correspondence to us, alternative sanctions are available to the courts in cases where a custodial sentence, with its accompanying period of supervision, would not be appropriate. However, we remain concerned that the new regime imposes a mandatory 12-month supervision period in all cases where the offender is sentenced to a term of imprisonment of more than one day. The court does not have any discretion in this regard. Such automaticity, regardless of the length of the custodial sentence, raises questions about proportionality. In our view, there should be scope for some judicial discretion to provide the courts with the option that, in certain instances, the supervision period may either be reduced or not be imposed at all, where it is considered disproportionate or unnecessary to impose a 12-month period. The text of such an amendment is set out below.

64. We also wish to highlight that information about whether the Government had considered any alternative policy options to the mandatory 12-month supervision requirement may in this instance have assisted us, and Parliament, better in scrutinising the proportionality of this measure.

### Suggested amendment to the Bill:

*Clause 2, page 2, after line 5 insert:*

(1B) The court may, on advice from the National Probation Service, and taking into account the particular circumstances of the offender and any risk posed to the public by the offender, direct that there either be a reduced period of supervision or no period of supervision in relation to the offender.

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113 Ibid. See also House of Commons Library, *Offender Rehabilitation Bill*, Research paper 13/61, para. 3.4

114 Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q.5
Imprisonment for breach of supervision requirements

65. The Bill provides for the possibility of a further period of detention of up to 14 days for a breach of a supervision requirement.\(^{115}\) Both the Prison Reform Trust and the Criminal Justice Alliance are concerned that the effect of this provision will be a disproportionate use of custody for minor criminal offences, and an increase in the use of imprisonment, not as a punishment for crime, but as a sanction for technical breach of the new supervision requirements. In the Government’s summary of responses to the Transforming Rehabilitation consultation, it acknowledged the concern that imprisonment should only be a last resort after all other sanctions have failed, and said that it proposed to adopt a range of sanctions to address non-compliance with supervision requirements, only recalling offenders to custody as a final measure. This does not, however, appear on the face of the Bill, leading to concern that the Bill will result in breaches of the principle of proportionality, by leading too easily to the use of imprisonment as a sanction in relation to conduct which is not criminal.

66. The Prison Reform Trust has stated that many people serving short prison sentences have complex and multiple needs which, in turn, increase the likelihood of breach. The Trust stressed that, if sanctions for breach were too onerous and inflexible, “even the most flexible licence conditions and supervision requirements for prisoners serving less than 12 months are likely to result in huge number of recalls.” To prevent this, the Trust suggested that supervision conditions should be proportionate and allow flexibility in dealing with breach, and that the option of recall to custody should remain a “genuine last resort”. The Trust also argued that “it will nearly always be cheaper and more effective to impose a community sanction rather than a short prison sentence”.\(^{116}\) The Howard League for Penal Reform also said that, in its view, a substantial number of offenders covered by the Bill’s new supervision period would likely breach their requirements due to “chaotic lifestyles”, and be recalled to custody as a result.\(^{117}\) Similarly, the Criminal Justice Alliance considers the use of imprisonment for breach of supervision requirements to be disproportionate.\(^{118}\)

67. Given the potential seriousness of the consequences for a breach of supervision requirements, it is essential that, in setting the requirements, due regard is had to the relevant needs of offenders, including women offenders, young offenders, those with learning disabilities, mental health or drug dependency issues. Otherwise, there is a risk that unsuitable supervision requirements may lead to further detention. For example, the need to reduce the number of women in prison for minor offences in the UK has been the subject of recommendations by the UN Committee on Discrimination Against Women, and was the subject of a number of recommendations in the Corston Report.\(^{119}\)

68. We wrote to the Government to ask how it proposes to give effect to its intention that imprisonment for breach of supervision requirements should only be a last resort, particularly as the figures in its Impact Assessment seem to contradict this intention. The

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115 Clause 4 and Schedule 2 to the Bill
116 Prison Reform Trust, *Response to Transforming Rehabilitation*, February 2013
117 Howard League for Penal Reform, *Response to Transforming Rehabilitation consultation*, February 2013
118 Criminal Justice Alliance, Submission to the JCHR, Offender Rehabilitation Bill, June 2013
updated impact assessment of the Bill estimates that around 13,000 offenders will be recalled or committed to custody per year under the Bill’s proposals. In its revised Impact Assessment, the Government’s best estimate is that the courts will impose a sanction on 100% of offenders who breach their supervision requirements, of whom 70% will be sentenced to further custody for 14 days.

69. The Government’s response to us states that it is for the courts to determine the most appropriate sanction in supervision requirement breach cases, highlighting that there are alternative sanctions available under the Bill. The Government does not want to place a ‘last resort’ requirement in the Bill as this may limit the courts’ discretion.

70. We note that the Bill’s provisions in relation to further custody for a breach of the new supervision requirements may lead to an increase in short-term prison sentences, which is supported by figures in the Government’s revised Impact Assessment. Questions arise as to the proportionality of the use of imprisonment as a sanction in relation to conduct which is not criminal. The Government has provided little information to us about the proportionality of such a sanction. In the light of the statistics provided in its revised Impact Assessment, which estimate high usage of custody as a sanction for breach, we are concerned by the risk that custody as a sanction for breach will not be used only as a last resort. However, we are confident that the sentencing courts will opt for the most appropriate sanction in a given case, including custody only as a last resort if the interests of justice so require, and that it is correct to trust this to the exercise of discretion by the courts rather than be too prescriptive in the legislation.

71. However, it is not clear in the Bill’s accompanying documents whether a further 12-month supervision period might be imposed following a term of imprisonment for breach of a supervision requirement. This matter was raised by Baroness Howe during the Lords’ Committee stages. In response, Lord McNally explained that recall to custody for breach of a supervision requirement would not lead to a further period of supervision. We welcome the Minister’s assurance that recall to custody for breach of a supervision requirement does not trigger a new period of supervision, and recommend that the Government makes this explicit in relevant guidance to courts and probation services about the operation of sanctions for breach of supervision requirements.

**Supervision requirements: access to a court**

72. The Government’s Human Rights Memorandum explains that “the Secretary of State will have a role in administering the supervision by determining at the end of the custody period which conditions should be imposed on individual offenders to achieve the rehabilitative purpose of the supervision period. This is similar to the existing process for imposing licence conditions.” The Government states that judicial review is adequate for the purposes of reviewing the lawfulness of supervision requirements imposed by the Secretary of State. This reflects the judgment of *R (on the application of Ahmed) v National...*
Probation Service and another, which held that judicial review provided a suitable opportunity to challenge an offender’s licence conditions.123

73. However, the relevant Probation Trust, which is part of the Ministry of Justice’s National Offender Management Service, is responsible at present for determining licence conditions. Under the wider Transforming Rehabilitation proposals for reform, private sector companies and voluntary organisations will supervise low and medium risk offenders post-release. We wrote to the Government to ask for clarification as to who will be responsible for administering the Secretary of State’s power to determine supervision conditions under Schedule 1.

74. The Government’s response confirmed that, under the provisions of the Bill, the Secretary of State is responsible for setting supervision requirements in relation to all offenders. Private and voluntary sector probation service providers will not exercise the Secretary of State’s power to set supervision requirements; rather, they will be responsible for supporting the offender to meet the supervision requirements and monitoring the offender’s compliance with them.124

75. We welcome the Government’s confirmation of the Secretary of State’s responsibility for setting supervision requirements in relation to all offenders. This is particularly important as there is a clear obligation on the Secretary of State to consider the equality duty when determining supervision requirements.

76. We also asked the Government whether the proposed changes to legal aid and judicial review will have any impact on an offender’s ability to challenge supervision requirements. The Government’s response confirmed that:

“There are no proposals that would restrict the right of offenders to challenge supervision requirements by way of judicial review. Civil legal aid will be available, subject to merits and means tests, for judicial review of supervision requirements.”125

77. Given the proposed changes to the availability of legal aid, and proposed changes to judicial review which will also restrict its availability, we welcome the assurance from the Government that there are no proposals that would restrict the right of offenders to challenge supervision requirements by way of judicial review. However, we are currently conducting inquiries into the implications for access to justice of the proposed changes to both legal aid and judicial review, in the light of which the Government’s assurance in relation to the availability of judicial review to challenge supervision requirements may need to be kept under review.

Supervision requirements and legal certainty: meaning of good behaviour

78. One of the supervision requirements that may be imposed during the supervision period is “a requirement to be of good behaviour and not to behave in a way which undermines the purpose of the supervision period”.126 This raises a question as to whether

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123 [2011] EWHC 1332
124 Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q. 6
125 Ibid.
126 Clause 3 and Schedule 1 to the Bill insert proposed new section 256AB(1)(a) of the Criminal Justice Act 2003
the requirement is defined with sufficient clarity and precision to satisfy the principle of legal certainty in order to enable offenders to understand what is expected of them by this requirement and what behaviour could amount to a breach.

79. The Government’s human rights memorandum refers to cases of the European Court of Human Rights that considered the meaning of “good behaviour” in the context of breach of the peace. In Steel v UK, the applicant was subject to a “binding-over” order following a breach of the peace. The order contained a requirement to be of “good behaviour”. The European Court of Human Rights considered that the “good behaviour” element of the order was “particularly imprecise and offered little guidance to the person bound over as to the type of conduct that would amount to a breach of the order.” However, the Court concluded that, due to the prior finding of breach of the peace, it was “sufficiently clear that the applicants were being requested to agree to refrain from causing further, similar, breaches of the peace”.

80. By contrast, in Hashman and Harrup v UK, the applicants were subject to “binding over” orders and were required to be of “good behaviour”. Importantly, they had not been found to be in breach of the peace. The Court distinguished their case from the position in Steel and concluded that the lack of any prior breach of the peace meant that it was not clear what conduct would amount to a breach of the order.

81. The Government considers that the Bill’s provision is analogous to the position in Steel because the offender has already been subject to a criminal conviction in relation to specific acts. The Government states that “the essence of the good behaviour requirement is that the offender is to refrain from committing acts during the supervision period which bear some connection to that offending behaviour (or undermine the purpose of the supervision period)”. The purpose of the supervision period is defined in the Bill as “the rehabilitation of the offender”.

82. The Government further explains that a “good behaviour” requirement already applies in the context of offenders released from custody on licence. The Government states that “when used in the relevant context, it is sufficiently clear to offenders what conduct will lead to a breach, and offender managers explain the nature of the requirement to offenders...that practice would apply in relation to the supervision period too.” The Government points to current guidance in relation to licence conditions which explains that “the ‘good behaviour’ condition can be used to deal with activities which are thought to be leading to reoffending”. The Government has confirmed that policy guidance will be issued in relation to supervision requirements.

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127 Applications no. 67/1997/851/1058
128 Ibid, para 76 of judgment
129 Application no. 25594/94
130 Ibid., para 34 of judgment
131 Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 26
132 Clause 3(2) of the Bill which inserts new s 256AA(5) into the Criminal Justice Act 2003
133 Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 27
134 Prison Service Instruction 2012/20
135 Ministry of Justice, Offender Rehabilitation Bill Human Rights Memorandum, June 2013, para. 28
83. It is essential that an offender is aware of what is expected and what could amount to a breach of this requirement, particularly as penalties for a breach may include: imprisonment for up to 14 days, a curfew requirement or a period of unpaid work.\textsuperscript{136} The broad definition of this requirement does mean that a potentially wide range of behaviour may amount to a breach. The Prison Reform Trust state that clear definitions of “good behaviour” and “rehabilitative purposes” are needed to ensure that the supervision requirements placed on the offender are transparent and easily understood.\textsuperscript{137}

84. We asked the Government whether there should be a link between the behaviour required by the “good behaviour” requirement and the type of offence, and whether this could be made clear on the face of the Bill. The Government response stated that:

“The good behaviour condition has been imposed as a condition of licences for many years and is well understood. The Government does not intend to explain its meaning further on the face of the Bill”\textsuperscript{138}

85. The Government’s response also confirms that NOMS will issue Probation and Prison Service Instructions to both public sector probation and other providers of probation services, including guidance on the approach to take in relation to the “good behaviour” requirement.\textsuperscript{139} The Government states that “decisions on bringing actions for breach of the good behaviour condition will be made in accordance with the guidance”.\textsuperscript{140}

86. We welcome the assurance that guidance will be issued by the National Offender Management Service to providers of probation services in relation to the “good behaviour” supervision requirement. However, we wish to highlight that, while the meaning of the “good behaviour” requirement may be clear to the service providers as a result of such guidance, there remains an issue as to whether this requirement is sufficiently clear on the face of the Bill for an individual to understand its meaning and how it might apply to him or her. We recommend that guidance prepared by NOMS is also available for offenders so that it is clearly understood as to what is expected by the “good behaviour” supervision requirement.

\textsuperscript{136} Clause 4 of the Bill
\textsuperscript{137} Prison Reform Trust Submission to the Joint Committee on Human Rights, 28 June 2013, para. 7
\textsuperscript{138} Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q. 11
\textsuperscript{139} Ibid.
\textsuperscript{140} Letter from the Lord Chancellor and Secretary of State for Justice to the Chair, 19 September 2013, Q. 10
Conclusions and recommendations

Introduction

1. Human rights law imposes positive obligations on the State to take all reasonable steps to protect the public from crime, including from re-offending by known offenders. Many short-term prisoners are also amongst the most vulnerable people in society, often experiencing drug and alcohol dependency, mental illness, homelessness, unemployment and poverty. The provision of positive support to rehabilitate such vulnerable individuals following a period of imprisonment is also likely to enhance the UK’s performance of its human rights obligations to the vulnerable. We welcome the Bill’s potentially human rights enhancing objectives of taking measures to protect the public from crime, at the same time as focusing on rehabilitation and extending positive support to those vulnerable people who receive short-term prison sentences. (Paragraph 8)

2. We repeat our general recommendation to Departments that, in our view, it is best practice for them to publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond. Such a memorandum can be based upon the ECHR memorandum prepared for the Cabinet’s Parliamentary Business and Legislation Committee. This would also enable our legislative scrutiny to be more focused. Additionally, we encourage Departments, as best practice, to publish a human rights memorandum in place of the relevant part of the Explanatory Notes to the Bill. This is done routinely by some Departments, such as the Home Office. (Paragraph 9)

3. We are not satisfied with the information and analysis provided by the Government in relation to the Bill’s compatibility with other relevant international standards. We expect human rights memoranda to go beyond assertions that all relevant human rights obligations have been considered, and we repeat our general recommendation that Departments should provide detailed information explaining why the Government is satisfied about the compatibility of a Bill with relevant international human rights obligations, not just the ECHR, in their human rights memoranda. (Paragraph 12)

4. We are disappointed that we did not receive any additional information from the Department about the Government’s amendment on women offenders, and we repeat our general recommendation that Departments should, as good practice, provide us with a supplementary human rights memorandum on Government amendments with significant human rights implications, such as the Government amendment relating to women offenders in this Bill. (Paragraph 13)

5. When scrutinising a Bill’s compatibility with human rights law, information about alternative measures can assist in determining whether the proposed measure is proportionate and strikes a fair balance between competing rights—in this instance between the rights of those who will be subject to extended supervision requirements and the rights of others to be protected from crime. It would be helpful if the
Government would provide in its Impact Assessments its analysis of relevant and alternative policy options, as this would assist Parliament in scrutinising the proportionality of the proposed legislative measures. (Paragraph 15)

6. The provision of information by the Government in relation to its consideration of the Bill’s impact on protected groups has been piecemeal, lacking in detail, and has been produced only in response to parliamentary scrutiny of the Bill and the Transforming Rehabilitation reforms. This does not provide much reassurance that the Government has properly complied with its equality duty in the formulation of the policy. We acknowledge that there is no legal obligation on the Justice Secretary to publish an Equality Impact Assessment. Like the Government, we are interested in effective assessment of compliance with the duty rather than a formalistic box-ticking exercise. However, in formulating the Transforming Rehabilitation strategy and the Offender Rehabilitation Bill, the Government has a duty to assess the potential impact of the reforms on protected groups of people. We are concerned about the lack of evidence provided by the Government so far to support its assertion that the proposals have been considered fully in line with the requirements of the Equality Act 2010, and we call on the Department to publish the information which demonstrates this without delay. We would particularly like to see the Government’s analysis of the Bill’s potential impact on women offenders, young offenders and BME offenders. (Paragraph 30)

Human rights issues raised by the Bill

7. We note that changes to the probation service contained in the Transforming Rehabilitation reforms are relevant to the Government’s positive obligations to take appropriate steps to safeguard the lives of those within its jurisdiction and to protect people from the risk of known offenders. There is a duty on probation services to take all reasonable steps to keep to a minimum each offender’s risk of harm to others. (Paragraph 32)

8. We welcome the Government’s assurance that private providers of probation services are obliged to act in a way that is compatible with human rights law, particularly with regard to the duties to take all reasonable steps to assess and manage offenders’ risk of harm to others. This is essential to ensure the Government fulfils its positive obligations to take all reasonable steps to safeguard the lives of those within its jurisdiction, to protect people from the risk of known offenders. (Paragraph 40)

9. We recommend that there should be statutory provision in the Bill setting out the providers’ duties (rather than reliance on contractual obligations with the private probation providers to guarantee compliance with human rights obligations). Such a provision could include the need to conduct risk assessments of offenders and to refer an offender to the National Probation Service where there are indications of serious risk of harm in respect of an offender. Such a provision in the Bill may better ensure that the private provider fulfils the positive obligations of taking all reasonable steps to protect others from the risk of harm. (Paragraph 41)
10. We recommend that the Government should develop clear guidance on the obligations of private probation providers to take all reasonable steps to assess and manage offenders’ risk of harm to others, and clear guidance on how the Ministry of Justice will monitor the performance of the contracted providers in this regard. This should be developed in consultation with relevant stakeholders. (Paragraph 42)

11. We welcome the opportunity for further consideration of changes to the probation service in new Clause 1 of the Bill, as this may allow a better opportunity for both Houses to scrutinise the human rights implications of the wider reforms to the probation service, particularly in relation to the state’s positive obligations to take all reasonable steps to keep to a minimum each offender’s risk of harm to others. (Paragraph 43)

12. We welcome, in principle, the particular benefit that may result for the majority of women offenders from the Bill’s extension of supervision and rehabilitation support in the community to all offenders sentenced to under 12 months imprisonment, provided that the terms of the supervision and support take into account any particular need or vulnerability of the offender. (Paragraph 45)

13. We welcome the Government’s amendment as a positive step in fulfilling its obligations to ensure that its reforms do not have an adverse impact on women offenders. The Bill now contains an express obligation that probation arrangements for the supervision and rehabilitation of women offenders must comply with the Public Sector Equality Duty, in so far as it relates to gender. The amendment places a statutory duty on the Secretary of State to ensure that the contracts with the new providers of probation services consider and identify the particular needs of female offenders. This amendment may also go some way towards addressing a number of wider concerns about the potential impact of the Government’s Transforming Rehabilitation reforms on women offenders, although this is difficult to assess fully as the Government has not provided a full analysis of the potential impact on equality of the wider Transforming Rehabilitation reforms, as outlined above. (Paragraph 53)

14. We welcome the Government’s assurance that guidance will be issued to the new providers of probation services on working with women offenders. We recommend that the Government consults with relevant stakeholders when preparing such guidance. We also recommend that the Government develops clear guidance on how the Ministry of Justice will monitor the performance of its contracted providers in meeting the needs of women offenders, and we would ask the Department to report to Parliament on the impact on women offenders of the Transforming Rehabilitation reforms after 2 years have elapsed. (Paragraph 54)

15. We welcome the Government’s commitment to producing Easy Read versions of licence and supervision condition documents to help ensure that people with learning disabilities and learning difficulties are able to understand their supervision requirements and what is expected of them. This is in line with the fundamental principle of legal certainty, and meets certain specific obligations under the UN Convention on the Rights of Persons with Disabilities. (Paragraph 55)
16. We acknowledge that the courts will take into account the new supervision period, and its requirements, when determining whether a custodial sentence would be appropriate in a given case. As the Government highlights in its correspondence to us, alternative sanctions are available to the courts in cases where a custodial sentence, with its accompanying period of supervision, would not be appropriate. However, we remain concerned that the new regime imposes a mandatory 12-month supervision period in all cases where the offender is sentenced to a term of imprisonment of more than one day. The court does not have any discretion in this regard. Such automaticity, regardless of the length of the custodial sentence, raises questions about proportionality. In our view, there should be scope for some judicial discretion to provide the courts with the option that, in certain instances, the supervision period may either be reduced or not be imposed at all, where it is considered disproportionate or unnecessary to impose a 12-month period. (Paragraph 63)

17. We also wish to highlight that information about whether the Government had considered any alternative policy options to the mandatory 12-month supervision requirement may in this instance have assisted us, and Parliament, better in scrutinising the proportionality of this measure. (Paragraph 64)

18. We note that the Bill’s provisions in relation to further custody for a breach of the new supervision requirements may lead to an increase in short-term prison sentences, which is supported by figures in the Government’s revised Impact Assessment. Questions arise as to the proportionality of the use of imprisonment as a sanction in relation to conduct which is not criminal. The Government has provided little information to us about the proportionality of such a sanction. In the light of the statistics provided in its revised Impact Assessment, which estimate high usage of custody as a sanction for breach, we are concerned by the risk that custody as a sanction for breach will not be used only as a last resort. However, we are confident that the sentencing courts will opt for the most appropriate sanction in a given case, including custody only as a last resort if the interests of justice so require, and that it is correct to trust this to the exercise of discretion by the courts rather than be too prescriptive in the legislation. (Paragraph 70)

19. We welcome the Minister’s assurance that recall to custody for breach of a supervision requirement does not trigger a new period of supervision, and recommend that the Government makes this explicit in relevant guidance to courts and probation services about the operation of sanctions for breach of supervision requirements. (Paragraph 71)

20. We welcome the Government’s confirmation of the Secretary of State’s responsibility for setting supervision requirements in relation to all offenders. This is particularly important as there is a clear obligation on the Secretary of State to consider the equality duty when determining supervision requirements. (Paragraph 75)

21. Given the proposed changes to the availability of legal aid, and proposed changes to judicial review which will also restrict its availability, we welcome the assurance from the Government that there are no proposals that would restrict the right of offenders to challenge supervision requirements by way of judicial review. However, we are
currently conducting inquiries into the implications for access to justice of the proposed changes to both legal aid and judicial review, in the light of which the Government’s assurance in relation to the availability of judicial review to challenge supervision requirements may need to be kept under review. (Paragraph 77)

22. We welcome the assurance that guidance will be issued by the National Offender Management Service to providers of probation services in relation to the “good behaviour” supervision requirement. However, we wish to highlight that, while the meaning of the “good behaviour” requirement may be clear to the service providers as a result of such guidance, there remains an issue as to whether this requirement is sufficiently clear on the face of the Bill for an individual to understand its meaning and how it might apply to him or her. We recommend that guidance prepared by NOMS is also available for offenders so that it is clearly understood as to what is expected by the “good behaviour” supervision requirement. (Paragraph 86)
Draft Report (Legislative Scrutiny: Offender Rehabilitation Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chair’s draft Report be now considered.

Paragraphs 1 to 86 read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 20 November 9.30 am]
Declaration of Lords’ Interests

No members present declared interests relevant to this Report.

A full list of members’ interests can be found in the Register of Lords’ Interests: http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm
List of Reports from the Committee during the current Parliament

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| Third Report | Legislative Scrutiny: Children and Families Bill; Energy Bill | HL Paper 29/HC 452 |
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| Fourth Report | Legislative Scrutiny: Justice and Security Bill | HL Paper 59/HC 370 |
| Fifth Report | Legislative Scrutiny: Crime and Courts Bill | HL Paper 67/HC 771 |
| Sixth Report | Reform of the Office of the Children’s Commissioner: draft legislation | HL Paper 83/HC 811 |
| Seventh Report | Legislative Scrutiny: Defamation Bill | HL Paper 84/HC 810 |
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<p>| Second Report | Legislative Scrutiny: Identity Documents Bill | HL Paper 36/HC 515 |
| Third Report | Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report) | HL Paper 41/HC 535 |
| Fourth Report | Terrorist Asset-Freezing etc Bill (Second Report); and other Bills | HL Paper 53/HC 598 |
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