

**EXPLANATORY MEMORANDUM TO
THE OFFENDER MANAGEMENT ACT 2007 (ESTABLISHMENT OF
PROBATION TRUSTS) ORDER 2008**

2008 No. 598

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order establishes the first six probation trusts on 1st April 2008. These are: Dyfed Powys Probation Trust, Humberside Probation Trust, Leicestershire and Rutland Probation Trust, Merseyside Probation Trust, South Wales Probation Trust and West Mercia Probation Trust. The principal purpose of the trusts is to enter into contracts for the provision of probation services with the Secretary of State under the Offender Management Act 2007 (“OMA 2007”).

2.2 Probation trusts are the public sector providers of probation services and are part of the new arrangements for the provision of probation services contained in Part 1 of the OMA 2007. The new arrangements are expected to be brought into force by geographical areas, with the first phase being brought into force on 1st April 2008. The six trusts established by this Order form the first phase.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The OMA 2007 received Royal Assent on 26 July 2007 and section 5, which gives the Secretary of State the power to establish by order probation trusts for the purposes specified, was commenced on 1st March 2008. This Order is the first use of the order-making power in section 5(1).

4.2 Section 5(2) of the OMA 2007 provides that the purposes of a trust must consist of or include the making or performance of contracts for the provision of probation services with the Secretary of State under section 3(2) of the OMA 2007. Section 5(3) also lists a number of other purposes that may be purposes of a probation trust, including entering into contracts with commissioners other than the Secretary of State (including other probation trusts) for the provision of probation services. Both these purposes are specified in article 3 of this Order as the purposes of the probation trusts established by this Order.

4.3 This Order is one of a series of Orders implementing the new arrangements for the provision of probation services in Part 1 of the OMA 2007. The new arrangements are to be implemented in phases, with the first phase being commenced on 1st April 2008. Related Orders prepared for the implementation of

the first phase are the Offender Management Act 2007 (Commencement No. 2 and Transitional Provision) Order 2008 which commences the relevant provisions of the OMA 2007 and the Offender Management Act 2007 (Consequential Amendments) Order 2008 which makes amendments to legislation to include references to the new probation arrangements. An Order replacing Her Majesty's Inspectorate of the National Probation Service for England and Wales (Specified Organisations) Order 2007 (SI 2007/1172) to reflect the change in the Inspectorate's name will also be made shortly.

- 4.4 It is expected that the second phase of the new arrangements will be brought into force in April 2009 and that the final phase will be brought into force in April 2010. Both of these phases will require an order establishing further probation trusts and a commencement order bringing into force Part 1 of the OMA 2007 for the relevant areas. Once the new probation arrangements are in place across England and Wales an Order made under section 38 of the OMA 2007 repealing references across the statute book to the existing probation structure of local probation boards under Part I of the Criminal Justice and Court Services Act 2000 ("the CJCSA 2000") will be required to complete the series.

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 Part 1 of the OMA 2007 implements the Government's policy to develop the way in which probation services are provided. The intention is to improve public protection and reduce re-offending with the support of a wider range of probation providers, including those from the private and third sector. Public consultation on the scale of these changes was undertaken before the OMA 2007 was introduced to Parliament, including a consultation paper on an alternative approach to probation in October 2005 ("Restructuring Probation to Reduce Reoffending") and a response to that consultation in March 2006 ("Working with Probation to Protect the Public and Reduce Reoffending") outlining plans for taking this policy forward. Further details on the public consultations can be found in the Explanatory Memorandum prepared for the Offender Management Act 2007 (Consequential Amendments) Order 2008.
- 7.2 Currently, the requirement to provide probation services rests exclusively with local probation boards, which were established by Part 1 of the Criminal Justice and Court Services Act 2000 ("CJCSA 2000"). These services include giving assistance to courts; the management of offenders (such as supervising offenders in custody or on licence); and the delivery of interventions (such as drug treatment requirements as part of a community order). Probation services can only be provided by another supplier if sub-contracted directly by the local probation board. The OMA 2007 places the statutory duty to ensure that sufficient probation

services are provided throughout England and Wales on the Secretary of State (section 2(1) of the OMA 2007), and enables the Secretary of State either to provide the services himself or to enter into contractual arrangements with organisations from the public, private or third sector for the delivery of probation services (section 3(2) of the OMA 2007).

- 7.3 Section 5 of the OMA 2007 provides for the establishment of probation trusts as the new public sector provider of probation services. As the then Offender Management Bill was progressing through Parliament, concern was expressed that certain key probation services should remain within the public sector in the short term and it was decided that the provision of assistance to courts should be retained within the public sector until Parliament agrees, via an order subject to the affirmative resolution procedure, that this work should be opened up to private or voluntary sector providers (sections 4 and 15 of the OMA 2007).
- 7.4 This Order establishes the first phase of 6 probation trusts as the public sector bodies with whom the Secretary of State will contract for the provision of probation services under the new arrangements for the provision of probation services. During the passage of the Offender Management Bill through Parliament it was made clear that the new arrangements would be established in phases, with a small number of probation trusts being established in the first phase to allow for lessons learnt to be incorporated into the implementation plans. As Baroness Scotland stated during Lords Committee stage,
“We believe that that is a cautious and sensible approach. There will inevitably be lessons to be learnt from establishing the first wave, but under our approach these can be readily incorporated into the later stages. This gradual approach will also allow areas performing less well sufficient time to improve their performance prior to becoming probation trusts” (Hansard 5 June 2007 4.30pm).
- 7.5 In keeping with this commitment, the financial year 2008/2009 has been designated a learning year (“the learning year”) for the trusts which will help to inform the wider establishment of probation trusts and the new probation arrangements. As Gerry Sutcliffe said during committee stage of the Offender Management Bill in the House of Commons,
“It is worth pointing out here that the Bill does not require all trusts to be created at once; that is not what we intend to do. As I said this morning, this is no big bang and we will not rush these reforms in overnight. We want a measured approach, balancing the need for urgent improvements with the system’s ability to cope with change” (Hansard 16 January 2007 (afternoon) column 104).
- 7.6 The six first phase trusts were identified from the 42 current local probation boards through an assessment process. Each board operates in a probation area, which is coterminous with the police area listed in Schedule 1 to the Police Act 1996 (section 4 of the CJCSA 2000). Before any area could express interest in being part of the first phase they were awarded a star rating based on their performance. Any area that did not achieve a two-star rating or above was ineligible to become a first phase trust. Expressions of interest were requested from the eligible areas and 23 areas signalled an interest. Of the 23 interested areas, 13 were asked to submit an application and after review of the applications, plus an interview process, the initial six were identified. One of the key strengths

of the six first phase trusts was their strong commitment to working collectively to ensure that learning from the whole process of becoming a trust could be shared.

- 7.7 The six selected local probation areas are: Dyfed Powys, Humberside, Leicestershire and Rutland, Merseyside, South Wales and West Mercia. In the selected areas local probation boards will be abolished and the new probation arrangements in the OMA 2007 will be established on 1st April 2008. The 6 probation trusts established by this Order are part of these new arrangements. Staff currently employed by the 6 local probation boards will become employees of the equivalent probation trusts via a staff transfer scheme. The chief executive officer of the trusts (formerly the chief officer of the local probation boards) will be appointed by the Secretary of State. Staff terms and conditions will be protected by this transfer scheme. The Local Government Pension Scheme will extend to probation trusts so staff pensions will be similarly protected.
- 7.8 The principal purpose of the trusts established by this Order is to enter into contractual arrangements with the Secretary of State under section 3(2) of the OMA 2007 for the provision of probation services. These contracts will be the main mechanism for setting out what trusts do in detail, including specifying the geographical area for which a trust is to act. The other purpose of the trusts established by this Order is to contract with other commissioners (which could include other probation trusts) for the provision of probation services.
- 7.9 The Ministry of Justice has been working closely with the first phase trust areas to develop the trust environment. This has involved the production of a number of operational documents, including a minimum standard Governance Handbook. Given that the primary purpose of a probation trust is to contract with the Secretary of State there has been particular emphasis on the development of the contracts. A number of checks and balances have been built into the contracts to ensure that both parties to the contracts (the trusts and the Secretary of State) are able to work collaboratively to deal with any emerging issues including notice of change procedures and step-in rights. The contracts also include a service specification outlining the responsibilities of the trusts in delivering probation services and references to documentation such as probation circulars and national standards which set out the minimum requirements for any probation provision. A review of the contracts and their operational effectiveness will be planned for the learning year. At set intervals during the learning year, a review of key documentation such as the Governance Handbook will also be undertaken.
- 7.10 Contracts for the provision of probation services with private and third sector providers will also be taken forward, both at a local level with the trusts and at a regional or national level with the Secretary of State. All contracts will be let in accordance with the relevant public sector procurement rules and the provision of value for money. Probation trusts will take the lead in identifying relevant opportunities and contracting with private and third sector providers to deliver local services. This local delivery of services and partnerships will be complemented by national and regional contracting with other providers where value for money can be achieved.

- 7.11 It is expected that there will be further phases that introduce the new arrangements, including the establishment of further probation trusts in April 2009 and April 2010 as other local probation boards make the transition to trust status. As with the first phase of trusts, performance and provision of probation services will be a significant factor in deciding which areas transition. Further work to consider performance will be on going, with performance data being available by summer 2008. Alongside this performance data, issues relating to maximising the cost-effectiveness of trusts are being considered by the Ministry of Justice and will be resolved before the second phase of trust areas is announced.

8. Impact

- 8.1 A Regulatory Impact Assessment was prepared prior to the introduction into Parliament of the then Offender Management Bill.
- 8.2 The impact on the public sector has been identified and can be summarised as: *“The evidence from the custodial sector’s experience over the past decade indicates that the introduction of competition for the operation of prisons and related services has contributed towards increases in efficiency. This introduction - aligned with strong organisational leadership - has led to efficiency savings of up to 8.5%. While it is not possible to forecast perfectly in advance, we believe that the introduction of commissioning and contestability for probation services can emulate the improvements delivered within the custodial sector”.*
- 8.3 During the passage of the then Offender Management Bill through Parliament a number of amendments were made. One of these was the requirement to retain assistance to the courts as a public sector activity until, via an order subject to the affirmative resolution procedure, Parliament decides otherwise (section 4 and 15 of the OMA 2007). However, the legislation has provided a sufficient foundation to ensure that efficiency savings can still be realised. There are a number of probation services like interventions work for example, (which could include drug treatment requirements as part of a community order) that may be undertaken by alternative suppliers from the third and private sectors. A copy of the full Regulatory Impact Assessment is attached to the Explanatory Memorandum for The Offender Management Act 2007 (Consequential Amendments) Order 2008.

9. Contact

- 9.1 Angie Munley at the Ministry of Justice Tel: 020 7217 5594 or e-mail: angela.munley@justice.gsi.gov.uk can answer any queries regarding the instrument.