

**PRISONS AND SENTENCING REFORM:
DEVELOPING POLICY IN SCOTLAND**

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SCCJR & SPIF

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FOREWORD

There can be few more pressing issues facing policy makers than how to reform our criminal justice system to make it better equipped to address the twin challenges of an overcrowded prison system on the one hand, and on the other hand concerns about how any such reforms will impact on public safety and the incidence of crime in their communities. The seminar from which this report is drawn was convened to examine these related issues, and the organisers were delighted that the Scottish Centre for Crime and Justice Research joined with the Scottish Policy Innovation Forum to take forward this crucial debate.

The research reported in this publication and the issues that were discussed in the course of the seminar were intended to inform directly the ongoing policy debate. We were fortunate to have with us some of the leading researchers and practitioners in the area of criminal justice and we are extremely grateful to them for allowing us to reproduce here their papers and reflections on the issues covered in the seminar. We were also fortunate in those who attended the seminar and contributed fully to our deliberations. This included experts from key stakeholders including the Scottish Government, Scottish Prison Service and a number of other governmental and non-governmental organisations with a role in the criminal justice system. The result in the form of this publication is therefore an important contribution in the field, and one that we hope will provoke further thought and discussion.

Although the papers presented here are written by leading authorities in their field, the seminar and this subsequent publication are explicitly intended to be accessible to a non-specialist audience. I am an economist and so non-specialist in the area, but as chair of the seminar I found the proceedings both insightful and profoundly important to current policy debates in the area of prisons, sentencing and alternatives to custody.

We sincerely hope that this publication will be seen as an important contribution to criminal justice policy discussions in Scotland at this crucial juncture.

Professor Drew Scott
Scottish Policy Innovation Forum
University of Edinburgh

EXECUTIVE SUMMARY

This report is primarily designed for policy makers interested in prison and sentencing reform. It presents evidence about the situation in Scotland and ideas for future policy development in Scotland.

The ideas in this report are based on research and insights by academics who presented at an event on prisons and sentencing reform organised by the Scottish Policy Innovation Forum and the Scottish Centre for Crime and Justice Research on 12 December 2008.

Prison

- There are in excess of nine million men, women and children in prison around the world, almost half of whom are in three countries: USA, China and Russia.
- There is no evidence that differing rates of imprisonment can be fully explained by different crime rates.
- In almost all countries those who commit serious offences such as murder, rape and serious assault, go to prison.
- The significant differences in levels of imprisonment reflect different attitudes to the treatment of people who are at the margins of society, such as those who are mentally ill, drug and alcohol addicts or homeless.
- The Scottish prison population has risen in the past twenty years from 5,000 to 8,000 while overall crime rates have fallen.
- Scotland imprisons a larger proportion of its population each year than most other countries in Western Europe.

Remand

- More people in Scotland go to prison every year on remand (to await a trial or sentence) than to serve a punishment.
- The increase of those in the remand population is a recent development: it was only in 2004 that remand admissions began to overtake sentenced admissions.
- The situation is worse for female prisoners: for every woman going to prison to serve a criminal sentence, two women go to prison on remand.
- Many of those on remand will either not be found guilty or will be given a non-custodial sentence, raising questions about the original decision to imprison them.
- The problem of prison overcrowding in Scotland is directly related to remand: most prison accommodation for short-term and remand prisoners is

overcrowded (numbers of prisoners exceed design capacity of housing) whilst housing for long-term prisoners is least likely to be overcrowded.

- Remand is the most costly method of monitoring an individual prior to trial.

Sentencing and Imprisonment

- An assumption has been made that the increased use of custody reflects dissatisfaction with the rigour of community-based alternatives.
- However, research suggests that making community sentences more prison-like has actually boosted prison numbers in diverse and surprising ways.
- Many lawbreakers (especially women and drug users) end up in prison due to a failure to complete demanding community sentences.
- Often sentencers considered a community sentence inappropriate because they believed it would be too difficult for offenders to complete.
- It is paradoxical that policies have been designed to make community sentences more credible to judges, but community sentences are not being used because judges see them as too tough.
- Where cases were borderline between custodial and non-custodial sentences, the legal category of the offence was not the overwhelming determinant of the sentence – factors such as offending history and personal mitigation were at least equally influential.
- As long as prison can be used as back up when community sentences have “failed” or when judges have “had enough” of seeing some offenders, sentencers will continue to use prison as “the last resort”.

Community Payback

- To remedy the overuse of imprisonment, the Scottish Prisons Commission recommended developing a range of alternatives to prison and making ‘paying back in the community’ the default position for less serious offenders.
- Payback essentially means finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community.
- The notion of paying back by turning one’s life around is emphasised in the Commission’s report, framing rehabilitation as an act of reparation.
- To increase public confidence it might be more effective to appeal to shared beliefs about redemption, the need for second chances and beliefs that people can change rather than appealing to the desire for revenge and retribution, anger or bitterness.
- Social workers have tended to consider themselves as purveyors of alternatives to punishment rather than purveyors of alternative punishments.
- Where social injustice is implicated in the genesis of offending, the infliction of any form of punishment by the state can be seen as morally problematic because the state is complicit in the offending.

- Criminal justice social workers are faced with the challenge of both making community payback work in practice and communicating the concept to others in order to realise its potential and minimise its risks.

Policy Ideas

Based on our research we have identified a range of specific and general suggestions for the development of prisons and sentencing policy which are worthy of further consideration by policy-makers.

- Convene comprehensive meetings with courts and prosecutors over bail policies, to secure engagement and ownership of policy developments.
- Send postcards or text messages as court date reminders to address the problem of missed court dates.
- Change incentive structures to ensure there are financial and bureaucratic implications at the local level for putting someone on remand.
- Sometimes do nothing when there is pressure to act; an increase in crime is not the problem when it comes to prison overcrowding.
- Improve knowledge about remand and those on remand to improve policy decisions.
- Community Justice Authorities could be a useful vehicle for justice reinvestment. This would involve looking at the resources expended on the criminal justice system, evaluating the benefits of this expenditure and considering alternatives to give us a better return on our investment.
- Alternatives to prison need to be developed for use when community sentences have “failed” or when judges have “had enough” of seeing some offenders.
- Care needs to be taken when presenting community sentences as the tough option, as this can reduce their use as alternatives to prison.
- It is important to make emotive appeals to the public in order to increase public confidence in the criminal justice system, centred on shared beliefs about redemption, the need for second chances and beliefs that people can change.
- Further consideration should be given to the appropriate role of criminal justice social workers in providing alternatives to punishment.

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1. Method and Approach

*Darragh Hare, Scottish Policy Innovation Forum and
Claire Lightowler, Scottish Centre for Crime and Justice Research*

This report arises from a seminar about prisons and sentencing reform held in Glasgow University on 12 December 2008. The seminar was attended by more than 50 people from academia, government, the third sector and service providers.

There are numerous actors in the policy process, all of whom have much to contribute. Two of the most important contributors to this process are government agencies and the academic community. Scotland's universities are home to some of the world's leading scholars, and it is important that this thriving research base is brought to bear on the development of public policy.

The benefits of such interdisciplinary interaction are numerous. In particular, public policy becomes better informed by the latest academic research, and this research is sharpened by consideration of the practical challenges to policy formation and implementation. However, very often this type of discussion and consideration loses out to more pressing day-to-day commitments.

The Scottish Centre for Crime and Justice Research is an example of the strength of Scotland's research base. It was established to build academic capacity in Scotland and to inform developments in policy and practice. For SCCJR these goals are not exclusive but complimentary, as by focusing on the concerns of policy and practice and listening to the experience of policy makers and practitioners the quality of academic outputs are improved, and by focusing on securing academic excellence we can ensure that policy makers and practitioners have access to the best available evidence when making decisions. The partnership between SPIF and SCCJR in delivering a seminar on criminal justice policy was therefore very apt.

But well-rounded public policy is not achieved simply by discussion between academics and policy makers. In the case of criminal justice policy, service providers, law enforcement, social work services, the judiciary and a number of NGOs can all offer important perspectives, and these must be taken into account. It is therefore crucial to provide a space in which these groups can meet to share their ideas for policy solutions.

This type of interdisciplinary dialogue, although not a solution in itself, can go some way to ensuring that the various individuals and groups capable of designing effective policy solutions are given the opportunity to meet and discuss how this

might be achieved. There certainly seems to be an appetite for these discussions, and that is grounds for optimism.

About Us

The Scottish Policy and Innovation Forum (SPIF) is a network of academics, civil servants and representatives of the wider policy community that meets regularly to discuss new research and to propose solutions to current policy problems. It provides a space for interdisciplinary discussion, with the intention that policy is thereby better informed. For more information about SPIF, please visit www.scottishpolicyforum.org.

The Scottish Centre for Crime and Justice Research (SCCJR) was established in 2006 with the aim of producing high quality research which is both scholarly and of relevance to the needs of those involved in the formulation, development and implementation of criminal justice policy. For more information about SCCJR visit www.sccjr.ac.uk.

2. Fixing Scotland's Remand Problem

Sarah Armstong, SCCJR/University of Glasgow

Remand is the imprisonment of people prior to trial or after they have been convicted but are waiting to be sentenced. Just as Scotland imprisons more of its population every year than most other places in Western Europe, so it imprisons people on remand at unexpectedly high rates for a country of its size and crime rate. Intensive use of remand is a concern because it is costly, it raises questions about justice, it harms both prisoners and communities, and because there is reason to believe it is part of the explanation for Scotland's rising imprisonment rate.

Scotland has a remand problem. There are more receptions to Scottish prisons every year for those awaiting a trial or sentence than those serving a punishment.¹ This is a recent development (it was only in 2004 that remand receptions began to overtake sentenced ones) but marks a stable upward trend. The situation is especially bad, and getting worse, for women: receptions of female prisoners on remand has outnumbered receptions of sentenced prisoners for a longer period compared with male prisoners, and there is a bigger gap between them: for every reception into prison on a sentence, there are two remand receptions.² Many of those on remand will either be found not guilty or be sentenced to a non-custodial sentence, raising questions about the original decision to imprison someone.³

The significance of remand in prison admissions is mirrored by recent changes in the average daily population.⁴ The proportion of the Scottish prison population made up of remand prisoners has increased from one-sixth of prisoners ten years ago to one-

¹ 'Remand' in this piece refers both to those in prison awaiting trial and those in prison who have been convicted but are awaiting a final sentence. In 2007/08, there were 22,491 remand receptions, 18,227 sentenced receptions. Prison Statistics Scotland, 2007/08. 'Receptions' into prison is not the same as people admitted to prison. For example, where one person has been sentenced on the same day by two or more different courts, each of these will count as a reception; also, where a person is already in prison when receiving a further custodial sentence this will count as a separate 'reception'. However, the trend of increasing remand receptions, and remand prisoners as a proportion of all prisoners reflects the increasing importance of remand as a major purpose of Scottish prisons.

² Prison Statistics Scotland, 2007/08, Tables 16a and 16b.

³ HM Inspectorate of Prisons (1999), *Punishment First, Verdict Later: A Review of Conditions for Remand Prisoners in Scotland at the End of the 20th Century*, thematic report. Scottish Prisons Commission (2008), *Scotland's Choice: Report of the Scottish Prisons Commission*, p. 29, noting that between 21% and 42% of remand prisoners do not go on to receive prison sentences.

⁴ Prison populations are captured in two ways: through measures of 'stock' and 'flow'. Stock measures how many people are in prison at a given time; this is the 'average daily population' (ADP). Flow measures how many people pass through Scotland's prisons in a year; this is what admissions statistics measure. ADP underestimates the impact of prisoners who stay for very short periods, like those on remand, so it is important to know something about the flow of such prisoners.

fifth today.⁵ These patterns of practice mean that Scotland has little in common with other small, western European countries with well-established forms of democratic governance.⁶ Scotland's remand rate of 30 (prisoners per 100,000 population) is actually more like that of a small Eastern European country, such as Lithuania (with a national remand rate of 28), Moldova (30) or Slovakia (31).⁷

Remand should be used sparingly. Expansive use of remand creates problems for prisoners, for prison staff, for communities and for the countries in which it takes place. There is extensive research documenting the higher suicide rates of remand prisoners in Scotland, Britain and internationally.⁸ This is an especially worrying fact given Scotland's heavy use of remand for women and its historical problems with suicide among women prisoners.⁹ Remand prisoners also suffer significantly from mental health problems, and the typically more crowded and controlled environments of remand housing in particular intensify risks of both self-destructive and destructive tendencies, putting both staff and prisoners at risk of harm. A 2008 investigation by Audit Scotland reported that remand prisoners in Aberdeen were kept locked in dormitories for 22 hours per day, and young remand prisoners in Polmont were kept locked in cells 23 hours per day.¹⁰ The chronic and worsening problem of prison overcrowding in Scotland is directly related to remand: housing for short-term and remand prisoners is the most overcrowded part of the Scottish prison system; two of the only three prisons in Scotland not to be overcrowded are for long-term prisoners only.¹¹ Remand prisoners generally receive no programmes, education or work. They present prison staff solely with the challenge of maintaining order, a stressful and dissatisfying role.

Extensive use of remand also carries dangers for a nation's public and civic health. Overcrowded accommodation is a highly efficient vector of disease such as

⁵ Prison Statistics Scotland, 2006/07 and 2007/08.

⁶ The western European countries with similar sized populations as Scotland (i.e. between two and six million people) are: Denmark (remand rate of 22), Finland (9), Ireland (16) and Norway (15). ICPS, World Prison Population Brief.

⁷ It might also be compared to the larger Western European countries such as Greece (31), Switzerland (29) or France (27) – except for one significant difference: these nations have high percentages of foreign prisoners, ranging from 70% of the Swiss prison population to 20% in France, a fact that would lead us to expect higher remand rates where risk of absconding is a concern. Foreign prisoners make up only 2% of Scottish prisons, the lowest rate anywhere in Western Europe. ICPS, World Prison Population Brief.

⁸ J. Shaw, D. Baker, IM Hunt, A. Moloney, L. Appleby (2004), 'Suicide by prisoners - National clinical survey,' *British Journal of Psychiatry*, vol. 184 (March): pp. 263-267; T. Matschnig, S. Fruhwald, P. Frottier (2006), 'Suicide behind bars - An international review,' *Psychiatrische Praxis*, vol. 33(1): 6-13; SA Backett (1987), 'Suicide in Scottish prisons,' *British Journal of Psychiatry*, 151 (August): 218-21.

⁹ *Women Offenders – A Safer Way* (1998).

¹⁰ Audit Scotland (2008), *Managing Increasing Prisoner Numbers in Scotland*. [hereafter AS]

¹¹ AS.

tuberculosis; in the shadow of the swine flu pandemic, this is particularly worrying.¹² High levels of remand are also associated disproportionately with weak democracies: 'badly governed states with poor systems of public administration tend to have prisons that are disproportionately filled with pretrial detainees.'¹³

Finally, remand is the most costly way of monitoring an individual prior to trial. The Scottish Prison Service has calculated that just the process of checking a remand prisoner into jail costs £180 per person.¹⁴ This translates into over £3 million spent each year just on processing costs, four times more than Ireland spends, six times more than Norway, and ten times more than Finland.¹⁵

High remand populations are not explained by more crime. The increasing use of remand in Scotland might be assumed to reflect increases in crime or an increase in more dangerous criminals being brought to court. Neither assumption is borne out by the evidence, and instead we must confront the more likely explanation that remand populations are the result of policy choices and criminal justice agency behaviour. Remand admissions overtook sentenced ones during a period when Scotland was also enjoying a sustained decline in recorded crimes.¹⁶ Why would imprisonment of arrestees increase when there were fewer arrestees to (criminally charge and) imprison? The answer does not appear to be that the smaller number of arrestees presented a serious risk of danger to communities. A study of bail decisions for female accused, for example, found that the most common offence for which women were remanded was shoplifting.¹⁷

Changes in policy or political climate can be one reason that remand rates go up. Following the Sentencing Commission's review of Scottish bail practices during 2004 and 2005¹⁸, the Criminal Proceedings Act (Scotland) 2007 enacted a number of its recommendations aimed at reducing the use of remand, but which ironically created

¹² Timothy F. Jones, Allen S. Craig, Sarah E. Valway, Charles L. Woodley, AND William Schaffner (1999), 'Transmission of Tuberculosis in a Jail,' *Annals of Internal Medicine*, 131: 557-563; M. C White (2003), 'Commentary: Evaluating the tuberculosis burden in prisoners in Pakistan,' *Int. J. Epidemiol.*, October, 32(5): 799 - 801.

¹³ M. Schöntiech (2008), 'The Scale and Consequences of Pretrial Detention around the World,' *Justice Initiatives: Pretrial Detention*, New York: Open Society Justice Initiative, p. 31.

¹⁴ I.e., excluding the more substantial costs of housing, guarding and feeding prisoners. AS, p. 25.

¹⁵ Calculated by multiplying £180 times the remand admissions of these countries (Council of Europe SPACE I data).

¹⁶ Recorded crime is crime noted by police, i.e. where there was the possibility of arrest and therefore remand. From 2004/05, when remand admissions overtook sentenced admissions, recorded crime rates (per 10,000) declined for all major categories of crime. Recorded Crime in Scotland, 2007/08; Prison Statistics Scotland, 2007/08.

¹⁷ K. Brown, P. Duff and F. Leverick (2004), 'A Preliminary Analysis of the Bail/Custody Decision in Relation to Female Accused', Scottish Executive Social Research Report.

¹⁸ The Sentencing Commission for Scotland (2005), *Report on the Use of Bail and Remand*.

a burden on courts to justify a bail decision.¹⁹ The recent policy focus on knife crime means that the remand rates for those carrying weapons is on the rise²⁰; this does not necessarily reflect an increase in the number of people carrying weapons. Recent Government attempts to deal with the nation's high remand rates are given extensive negative coverage, adding another incentive to behave conservatively when it comes to bail.²¹

Fixing the problem. As an expensive option with significant social and individual consequences, use of remand should be 'fair, rational and sparing'.²² Scotland's use is not sparing, and does not appear to be rational or fair given the wide variability in rates of remand by area and court.²³ But how do we bring practice into line with principle? Many efforts, armed with the best expertise and intentions, have already been made with little positive effect. The first step, therefore, will be to break out of familiar patterns of policy review and reform. Towards that end, I argue for solutions that reflect integrity and imagination. By *integrity*, I mean ideas that are sustainable (realistic understanding of available resources) and justifiable (consistent with our values and understanding of the issues). By *imagination*, I mean working with a spirit of hopefulness and creativity in crafting initiatives. I conclude this article with a handful of ideas which aspire towards this; Thinking imaginatively and with integrity will require:

- *Thinking big:* Convening comprehensive meetings with courts and prosecutors over policies on bail seeking to engage these key stakeholders and allow them ownership of a change that will raise Scotland to the level of its western European counterparts.
- *Thinking small:* Sending postcard or text message reminders near the time of a court date is cheap and recognises that many failures to appear in court have more to do with the disorganised life of an accused rather than a malevolent intent to disobey the law.

¹⁹ While Section 23A(1) states that 'bail is to be granted' unless there exists a reason not to (referring to Section 23C), Section 23A(2) requires that in granting bail the court has to explicitly consider whether bail conditions would safeguard the public interest, creating pressure to impose more bail conditions which raises the risk of net widening (where more conditions provide more opportunities for breaching bail and thereby making it more likely the person will be remanded in any future arrest). The Government's Bail and Remand Action Plan (2005) also stated that the priority of its legislation would be to 'tighten the process of granting bail' and 'ensuring that the court gives reasons for all bail decisions'.

²⁰ STV, 'New knife rules paying off, says law chief', online article accessed on 19 March at: <http://news.stv.tv/scotland/79633-new-knife-rules-paying-off-says-law-chief/>

²¹ T. Gordon (2009), 'Government "pressurised courts to free more accused on bail"', *Sunday Herald* (15 March).

²² Schönteich (2008), op. cit., describing principles set out in the ECHR.

²³ Interviews of judges, prosecutors and social workers themselves reveal deep concern with the extent of variation in bail decisions. K. Brown et al. (2004), op. cit.

- *Changing incentive structures:* Instituting ‘booking charges’ for every remand admission payable by local authorities would create incentives at the local level to use resources to support bail rather than to rely on remand – a resource which is currently free to prosecutors but costly to taxpayers. (A similar idea could be tried by reversing paperwork burdens, for example by requiring completion of risk management forms to establish that inflicting the harms of remand on a given accused is justified.)
- *Doing nothing sometimes:* Avoiding the culture of constant revolution and the false belief that more bail conditions means more supervision or accountability requires standing firm against headline seeking media and cynical political positions about being ‘soft’ on crime. Crime is not the problem.
- *Improving knowledge:* We have limited information about key issues of remand, like how many remands are backdated as sentences, the profile of offences for remand admissions, the reasons why two courts make different remand decisions for accused of similar backgrounds. Improving the knowledge base would assist our ability to test the viability of these ideas and advance the cause of producing a system of justice which gets the results we want.

3. Sentencing and Imprisonment: Judicial Perspectives

Jacqueline Tombs, Glasgow Caledonian University

This paper draws on my research on judicial decision-making in relation to the use of imprisonment and community sentences²⁴. It considers judicial views on community sentences and on sentencing guidelines systems. In doing so, it identifies some important implications for sentencing policy, enshrined in the current Criminal Justice & Licensing (Scotland) Bill, to introduce the Community Payback Order and to create a Scottish Sentencing Council.

Community sentences

A major thrust of recent and contemporary sentencing policy has been based on the assumption that the increased judicial use of custody over the past twenty years reflects dissatisfaction with the 'rigour' of community-based alternatives. The thinking here is that if community sentences were more rigorous, more severe, sentencers would make more use of them and, thereby, reduce their use of custody. This assumption is overly simplistic; the factors influencing judicial use of community sentences are much more complex.

The refashioning of community sentences – aimed as they have been at making community sentences more prison-like in order to meet perceived judicial demands for more rigorous sentences in the community – have also resulted in a *transcarceralism* – a transfer of the privations of the prison into the community – which, in itself, has boosted prison numbers, in diverse and surprising ways. Essentially, what appears to have happened is that making community sentences more rigorous has meant, on the one hand, that some sentencers are deterred from using them, and, on the other, that some of the participants on community orders have failed to complete them, thereby incurring a greater risk of imprisonment should they offend in the future.

¹ The research involved extended interviews with forty sentencers throughout Scotland – with five Judges of the High Court, thirty four Sheriffs and a Stipendiary Magistrate. All Sheriffs were also asked to provide information about how they had made decisions in four cases of their own cases that they considered lay on the borderline between custodial and non-custodial penalties – two of which went to custody and two of which went to community sentences. The research into sentencing and the prison population in Scotland was funded under the Esmée Fairbairn Charitable Foundation's Rethinking Crime and Punishment (RCP) Programme and I gratefully acknowledge the Foundation's support. A related study of sentencing in England and Wales was also funded under RCP. For a summary of both studies see EFF 2005. See also Tombs 2004, 2005; Carlen and Tombs 2006; Tombs and Jagger 2006; Millie et al 2007; Tombs 2008.

Many lawbreakers – especially women and drug users – end up in prison as a consequence of failing to complete demanding community sentences or as a consequence of one or more of the following three sentencing rationales refined by judges in reaction to what they perceive as the dominant punitivism in penal policy:

- first, because non-custodial sentences are too tough it is better for an offender to go to prison than be set up to fail in a too rigorous community-based programme;
- second, and somewhat contradictorily, that there are no appropriately demanding programmes in the community; and
- third, that sentencers themselves must be seen to be tough or they will lose credibility.

Several sentencers had sent people to prison because they thought that community-based programmes were inadequate, under-funded and over-subscribed. But *even* when community facilities were available, the prison was sometimes considered to be the only appropriate place. A community sentence here was inappropriate not because judges considered such sentences to be too soft. Instead, they did not impose community sentences for precisely the opposite reason; community sentences were “too hard”²⁵, simply “too difficult”, for offenders to complete.

Most straightforwardly, sentencers said that community sentences were “very onerous” and that, because of poor health and/or perceived physical weakness, some offenders would simply be unable to meet the demands of a community sentence. In some cases, sentencers argued that the difficulty lay in the incompatibility between lifestyles and the requirements of community sentences; the conditions of community sentences could simply not be met and they did not believe in setting people up to fail. In short, the irony here is that at the same time as policies have been based on making community penalties ‘credible’ to judges, so demanding that they will impose them instead of the prison, the opposite is happening: sentencers are *not using* community penalties precisely because they now see them as being *too tough*!

Sentencing guidelines

Some policy thinking suggests that judges could be encouraged to reduce their use of imprisonment and increase their use of community penalties through the introduction of a sentencing guidelines system, even though the international literature is replete with examples of guidelines having had an *inflationary* effect on the use of imprisonment. There are also other concerns here about the introduction of policy driven guidelines. In particular, the judges I interviewed argued that policy driven guidelines would threaten judicial independence, erode judicial discretion and subvert the interests of justice by reducing the judiciary’s ability to individualise

²⁵ Double quotes are used when quoting the judges in my research study.

sentences. Time and again judges observed that sentencing is “more of an art than a science”, a “balancing exercise” between rules and values, where professional experience, intuition and subjective judgment are central. Guidelines attempted to narrow the space for “discernment and discretion” and were at odds with judicial conceptions of every ‘case’ – offender and offence – as unique and contextualised. Without exception, Scottish sentencers were emphatic about the need to maintain their ability to individualise sentences, to take account of a wide variety of factors in arriving at a “just sentence”, without being “haggled by guidelines”.

Policy Implications

In relation to sentencing guidelines, it is important to take account of the full range of factors upon which sentencers base their decisions. In my research, in those cases that judges considered lay on the borderline between a custodial and a non-custodial sentence, the legal category of the offence with which someone was charged was not the overwhelming determinant of the sentence. Instead, other factors, and in particular factors related to offending history and personal mitigation, were at least equally influential. Sentencing guidelines systems generally reduce the weight attached to characteristics of the offender and attach correspondingly greater weight to the offence. The sentencers I interviewed, however, emphasised the breadth of factors that currently fed into their sentencing decisions and offered persuasive arguments to the effect that judicial discretion served, rather than eroded, justice.

In relation to paying back in the community, it is important to appreciate that the new Community Payback Order will not, in and of itself, reduce the prison population. While it is impossible to foresee a time when it will not be necessary to contain in custody those individuals whose behaviour makes them too dangerous to be left at large, it is *not* difficult to imagine how our prison population *could* be greatly reduced. Above all, what is required is a decarceration strategy that precludes the use of imprisonment as the fall-back position. As long as prison can be used as a back-up when community sentences have “failed” or when judges have “just had enough” of seeing some offenders come before them, sentencers will, “in despair” or otherwise, continue to use the prison as “the last resort”.

4. Social work, payback and punishment

Fergus McNeill, SCCJR/University of Glasgow

The heart of the Scottish Prisons Commission's report, and the core of the choice that the Commission sets out, can be found in their first two recommendations:

1. To better target imprisonment and make it more effective, the Commission recommends that imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a significant threat of serious harm to the public.
2. To move beyond our reliance on imprisonment as a means of punishing offenders, the Commission recommends that paying back in the community should become the default position in dealing with less serious offenders.

The idea that we should pursue a parsimonious approach to imprisonment in particular and punishment in general is not a new one. According to a history of probation in Glasgow published in 1955, those that commissioned Scotland's first probation scheme in 1905 were motivated by the need to prevent the 'de-moralising effects of imprisonment'; effects that in their view harmed the welfare of the whole community. But a century of apparent penal progress later, we find rates of imprisonment in Scotland again rising to record levels, despite no concomitant rise in recent crime rates, and despite quite different trends in other similar jurisdictions.

The Commission's remedy for our over-consumption of imprisonment centres on a range of measures that it considers necessary to enact their second recommendation and make 'paying back in the community' the 'default position' for less serious offenders. Although we might certainly question the extent to which the development of sentencing *options* changes sentencing *practices*, many of these measures speak directly to the nature, forms and functions of criminal justice social work, whether in relation to its court services, the community penalties it delivers or its role in ex-prisoner resettlement.

Leaving the important question of resettlement aside on this occasion, the Commission's report seeks to recast both court services and community penalties around the concept of 'payback', which it defines as follows:

'In essence, payback means finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community. This might be through financial payment, unpaid work, engaging in rehabilitative work or some combination of these and other

approaches. Ultimately, one of the best ways for offenders to pay back is by turning their lives around' (Scottish Prisons Commission, 2008: 3.28).

Several ways of paying back are identified here and elsewhere in the report – restorative justice practices, financial penalties, unpaid work, restriction of liberty (meaning in this context electronically monitored curfews) and, perhaps most interestingly in this context, through 'paying back by working at change'. Notably the notion of paying back by turning one's life around represents a very neat, if underdeveloped, reframing of engagement in rehabilitation as an act of reparation. The report also recognises the need for offenders to opt-in to rehabilitative modes of reparation; their consent is required for both practical and ethical reasons.

In setting out a process for paying back, the Commission's report suggests that working out the best way for an offender to pay back, once the court has settled on the level or amount of payback required, is a task to be undertaken through dialogue between the judge, a court social worker and the offender. Proposals for the establishment of a 'progress court' to maintain this dialogue and to monitor and ensure that paying back actually occurs are also included.

Around the time of the publication of 'Scotland's Choice', the UK Government published a report on 'Engaging Communities in Fighting Crime', written by Louise Casey (the former 'ASBO Tsar'). Casey's report sought solutions to perceived problems of public confidence in criminal justice in general and community penalties in particular. She proposed the re-branding (yet again) of community service, this time as 'community payback'. Casey's concept of payback is quite different from the Scottish Prisons Commission's; it centres on making community service more visible and more demanding. She suggests that it should not be something the general public would choose to do themselves (in other words, it should be painful or punishing) and that offenders doing payback should wear bibs identifying them as such (in other words that it should be shaming).

In a recent paper exploring the available research evidence about public attitudes to probation in the light of Casey's recommendations, Shadd Maruna and Anna King come to the following conclusion:

'Casey is absolutely right to utilise emotive appeals to the public in order to increase public confidence in the criminal justice system. Justice is, at its heart, an emotional, symbolic process, not simply a matter of effectiveness and efficiency. However, if Casey's purpose was to increase confidence in community interventions, then she drew on the exact wrong emotions. Desires for revenge and retribution, anger, bitterness and moral indignation are powerful emotive forces, but they do not raise confidence in probation work -- just the opposite. To do that, one would want to tap in to other,

equally cherished, emotive values, such as the widely shared belief in redemption, the need for second chances, and beliefs that all people can change.²⁶

Looking south at these developments and thinking more particularly about the way that ‘payback’ is cast in the Scottish Prisons Commission’s report, some very meaty issues for criminal justice social work emerge, though the pace of change means there may be not much time to chew them over.

Historically, social workers have tended to consider themselves as purveyors of (usually rehabilitative) alternatives to punishment, rather than as purveyors of alternative punishments. Somehow the notion of punishing, as opposed to supporting, supervising, treating or helping – or even challenging and confronting – seems inimical to the ethos, values and traditions of social work. Certainly, that was once my view, but now I’m not so sure. The penal philosopher Antony Duff has argued convincingly that we can and should distinguish between ‘constructive punishment’ and ‘merely punitive punishment’²⁷. Constructive punishment can and does involve the intentional infliction of pains, but only in so far as this is an inevitable (and intended) consequence of ‘bringing offenders to face up to the effects and implications of their crimes, to rehabilitate them and to secure... reparation and reconciliation’²⁸. This seems very close in some respects to the ideas of challenging and confronting offending which have become widely accepted in social work in recent years, partly in response to political pressures to get touch but also, more positively, in response to the legitimate concerns of crime victims that their experiences should be taken more seriously.

But Duff’s work also helps us with a second problem, since he recognises (as social workers have done for decades) that where social injustice is implicated in the genesis of offending, the infliction of punishment (even constructive punishment) by the state is rendered morally problematic, because the state is itself complicit in the offending through having failed in its prior duties to the ‘offender’. For this reason, Duff suggests that probation officers or social workers should play a pivotal role in mediating between the offender and the wider polity, holding each one to account on behalf of the other. Again, this discomfiting space is one which many social workers will recognise that they occupy and through which, with or without official or public support, they seek to promote social justice within criminal justice.

²⁶ Maruna, S. and King, A. (2008) ‘Selling the Public on Probation: Beyond the bib’. *Probation Journal* 55(4): 337-351

²⁷ Duff, A (2001) *Punishment, Communication and Community*. New York: Oxford University Press.

²⁸ Duff, A (2003) ‘Probation, Punishment and Restorative Justice: Should Al Truism Be Engaged in Punishment?’, *The Howard Journal*, 42(1): 181-197, p181.

It may be therefore that Duff's work might provide some of the conceptual resources with which to populate the concept of payback constructively. To the extent that the new centrality of reparation compels criminal justice social work to engage in punishing offenders, his notion of constructive punishment and his insistence on the links between social justice and criminal justice might help to buttress a Scottish social work version of payback from drifting in the punitive and probably futile direction of its namesake south of the border. But we should not underestimate the challenges of holding on to the constructive potential of the concept of making good *by* and *to* offenders, and the importance of communication, dialogue and participation being part of the process²⁹. Maruna and King are surely right that 'selling' probation (or payback) to the public stands a better chance of succeeding if we pitch it in terms of our collective interest in second chances and changed lives, but we cannot underestimate the difficulties of making this pitch in conditions of insecurity – which politicians, the media and even justice professionals sometimes seek to exploit rather than to moderate. The challenge that criminal justice social work faces therefore, is not just working out how to make community payback work in practice, but also, more broadly and perhaps more fundamentally, how to engage and communicate with government, communities, offenders and victims so as to substantiate the concept, realise its potential, and minimise its risks.

²⁹ For more discussion, see Weaver, B. (2009) 'Communicative punishment as a penal approach to supporting desistance' *Theoretical Criminology* 13(1): 9-29.

5. Helping us all to feel safer: The use of imprisonment and alternative strategies

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There are well over nine million men, women and children in prison around the world – the equivalent of a medium sized country. Almost half of the total is in only three countries: the United States, China and Russia³⁰. The so-called penal exceptionalism of the United States means that more than three in 100 American adults are now in prison, on probation or parole³¹.

There are wide variations in rates of imprisonment between neighbouring countries and between some which would otherwise regard themselves as broadly comparable. Spain has a rate of 140 per 100,000 in Spain, while its neighbour France has 91; Slovenia has a rate of 66, while neighbouring Hungary has a rate of 147. In 1995 both the Netherlands and Denmark had rates of 66. Today the rate in Denmark is 63. In The Netherlands, on the other hand, by 2004 the rate had jumped to 123 per 100,000 and by 2008 it had fallen back to 100³². In England and Wales the rate of imprisonment has been rising inexorably year on recent year. In mid March 2009 the number of people in prison there stood at almost 83,000³³.

What are we to make of all of this? In the first place, there is no evidence that differing rates of imprisonment can be explained by differing crime rates. Speaking at a conference in Edinburgh in February 2008, Tapio Lappi-Seppala, Director of the National Legal Policy Research Institute in Finland, presented a persuasive set of explanations for differing rates between European countries. He examined the influence of increased punitiveness in some countries, measuring not only the rate of imprisonment but also the number of people entering prison, the average length of prison sentences and the probability of imprisonment compared to other available sanctions. He went on to examine the link between punitiveness and fear of crime (as distinct from crime itself). He also demonstrated the existence of a strong positive correlation between income inequality and prisoner rates among the Western European countries. Looking at Western Europe he contrasted Sweden and Denmark, which spend a high proportion of GDP on welfare and have relatively low

³⁰ Walmsley R. 2009. World Prison Population List (8th edition). London: ICPS

³¹ www.ojp.gov/bjs/correct.htm

³² World Prison Brief at www.prisonstudies.org

³³ www.hmprisonservice.gov.uk

imprisonment rates, with the obverse figures in Eastern European countries together with Western European countries such as the United Kingdom, Portugal and Spain³⁴.

Expressing this in another way, the reality in almost all countries is that those who commit serious offences, such as murder, serious assault or rape go to prison. Although there may be differences in the length of sentences, there is little argument about the need for prison sentences in these cases. The significant differences in levels of imprisonment, often between otherwise broadly comparable countries, reflect different attitudes to the treatment of people who are at the margins of society: those who are mentally ill, who are addicted to drugs including alcohol, who are homeless, who come from minority ethnic or other groups, who are foreign nationals. What we have been seeing in a number of jurisdictions in recent years has been an expansion of the criminal justice system into areas where it has not traditionally operated. Take as an example, the proportion of people who are in prison with identifiable mental illnesses. In many jurisdictions the lack of appropriate health and social support for many of these people means that they only come to the attention of the authorities once they are accused of committing an offence and at that point the relevant authority is within the criminal justice system, so the person goes not to the health system but to court. Given that a crime may have been committed, one can understand the commentators who assert that justice must have its day but they ignore two facts. The first is that prior intervention by a non-criminal justice agency may well have prevented the crime and saved its victims. The second is that the criminal justice system, acting through its agencies in the prison and criminal justice social work services, is not well equipped to deal with the individual's underlying mental health problems, with the consequence that he or she is likely to go on to commit future offences and to harm more victims.

Where does Scotland stand in this equation? Over the last 20 years the number of people in prison has risen from 5,000 to almost 8,000³⁵. As in a number of comparable countries, this rise has occurred at a time when overall crime rates have been falling³⁶. The recent report by the Scottish Prison Commission³⁷ acknowledged the key issue and did not shirk from the consequence. "(Our work) has brought us to what we believe is a crossroads where Scotland must choose what future it wants for its criminal justice system." The Commission recommended that Scotland should aim to have an average daily prison population of 5,000. It concluded, "Our report and our recommendations are not about saving money; they are about investing it wisely and securing better outcomes."

³⁴ http://conferences.holyrood.com/images/stories/Conferences/Prisons_08/downloads/

³⁵ www.sps.gov.uk

³⁶ Crime and Justice in Scotland 2006-07 (SCCCJ) available at <http://scccj.org.uk/documents/SCCCJAnnualReview08.pdf>

³⁷ Scottish Prisons Commission. 2008. Scotland's Choice: Report of the Scottish Prisons Commission. Edinburgh: Scottish Government

The concept of investing wisely in order to secure better outcomes is one which is attracting increasing interest in a number of jurisdictions. One version of this is known as Justice Reinvestment³⁸. In broad terms this involves looking at the amount of resources, financial and other, that are expended on the criminal justice system; evaluating what we as members of the public and taxpayers get from this expenditure; and considering whether there might be other ways of distributing these considerable resources to give us a better return on our investment.

The principle of justice reinvestment is now taking a variety of forms across the United States. In developing this new paradigm, support and advice has been sought from people with a wide variety of knowledge and expertise, including economists and urban geographers. An understanding that the criminal justice system on its own cannot accomplish successful reintegration and resettlement of offenders into their communities, what the American call re-entry, has led the U.S. Departments of Justice, Labor, and Health and Human Services to work together and to provide resources for the reorganisation of prisoner re-entry in most states around the country.

The possibility of using justice reinvestment as a vehicle for a radical review of the criminal justice machinery and of transferring investment to the machinery of social justice is now being discussed at varying levels in the United Kingdom with, for example, the House of Commons Justice Select Committee conducting an inquiry into it in 2008. The recent establishment of Community Justice Authorities has presented Scotland with a possible vehicle to develop this radical model for change. It is also just the type of initiative in which the Scottish Policy Innovation Forum, with its network of academics and individuals from across Scottish public life, could usefully involve itself.

³⁸ Allen R and Stern V. 2007. Justice Reinvestment: A New Approach to Crime and Justice. London: ICPS

CONCLUSION

This report is intended to be a contribution to current discourse on prisons and sentencing reform. We see ourselves as part of this process and seek to engage in dialogue with colleagues from policy and practice organisations and across academic disciplines to work towards improvements to policy and, eventually, to society. We are also to ensure that our research is informed by policy and practice developments, and is cognisant of the concerns of all stakeholders, not simply those of the academic community.

In publishing this report we are motivated by a desire to ensure that policy and practice developments relating to prisons and sentencing are informed by research and evidence. With this in mind, we welcome further opportunities to discuss the issues raised in this report and to be involved in informing developments in policy and practice.

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