

Sentencing & Penal Policy in the New Scotland: Consultation on Extending the Presumption Against Short Custodial Sentences

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Summary

In post-referendum Scotland it is widely suggested that this may be a moment to move away from Scotland's relatively heavy use of imprisonment. In its efforts to reduce radically the prison population there seems to be real intent by the Scottish Government to shift the emphasis from prison to community penalties. To try to achieve this, the Government has deemed it necessary first to restrict mandatory community support for and supervision of long term prisoners - a move which could make the overall task more difficult.

Currently the major tool in the Government's reform box seems to be the extension of the presumption against 'ineffective' and 'unnecessary' short custodial sentences. But will such an extension work? This paper argues that the extension of the presumption is likely to have little impact by itself.

Additional options include: relinquishing the policy of 'custody as a last resort' and instead making other penalties 'the ultimate sanction' (including for breach); creating a public principle which ensures that no one goes to prison for want of anything to address their needs; more creative use of Electronic Monitoring; making certain kinds of cases normally non-imprisonable.

A New Penal Era?

In its desire to ensure that Scotland has “the most progressive justice system in Europe”¹, the Scottish Government is committed to a radical reduction in the prison population. While successive administrations have made this their aim, there now appears to be greater intent. The Justice Secretary has said, for example:

“I truly believe that there is no good reason why Scotland should have such a high prison population. Of course, for some individuals - people who have committed the most serious offences and those who pose a risk to public safety - prison remains absolutely necessary. But for too long in this country prison has been seen as the default sentencing option when someone breaks the law.”²

Currently, Scotland has one of the highest proportionate rates of imprisonment in western Europe. The current Justice Secretary, Michael Matheson, has described this position as “totally unacceptable”.³ He wants to radically reduce the size of the prison population so that investment can be switched from incarceration to community penalties.

A Shrewd Political Plan?

Importantly, such a switch is expected to be achieved through a more sharply bifurcated penal policy. While the Scottish Government’s decision to cancel the building of a new Women’s Prison at Inverclyde has been celebrated as a victory by reformers, it is less well known that at the same time the Scottish Government pursued legislation which will result in significantly increased prison numbers.

¹ Michael Matheson (2015) ‘My vision of how Scotland can change the way the world treats female offenders’ *Sunday Herald* 24 May 2015

² Michael Matheson Apex Scotland lecture 2015

³ “Proposals for bold action on reoffending: Views sought on further measures to address ‘ineffective’ short prison sentences” Scottish Government news release 25th September 2015

Planned Increases in Long-Term Imprisonment

In 2015 the Scottish Government, eschewing any consultation process, pushed through new legislation purporting to abolish so-called 'automatic early release' – a term which derides the reality of guaranteed conditional support and community supervision of people released after long periods of incarceration, so aiding public safety.

The Prisoners Control of Release (S) Act 2015 will radically cut the mandatory period of support and supervision of those long-term (ie four year plus) prisoners deemed too risky to release through discretionary parole. The financial implications of the Bill are considerable. At the time of the passage of the Stage 2, the Scottish Government estimated that the annual additional cost of changing the current system of automatic early release for all long-term prisoners will rise from £4.6m in 2019/20 (when it begins to take effect) to £16.7m by 2030/31.⁴ To put this in context, the projected annual cost of these proposals in 2030/31 represents more than half of the Scottish Government's current budget for community justice (£31.8m in 2015/16).⁵ Importantly, this estimate does not appear to take account of the likely consequent increased use of Extended Sentences. As a direct consequence of cutting the mandatory period of community supervision to just six months, the Scottish Government appears to expect that judges may impose more Extended Sentences so as to ensure that individuals are monitored, supported and supervised for a longer period of time than six months.⁶

When asked in Parliament, the Cabinet Secretary for Justice indicated that these costs would be met by savings made by

⁴ Scottish Government Financial Memorandum amended at Stage 2 SP Bill 54A-FM [http://www.scottish.parliament.uk/S4_Bills/Prisoners%20\(Scotland\)%20Bill/b54as4-stage2-fm-rev2.pdf](http://www.scottish.parliament.uk/S4_Bills/Prisoners%20(Scotland)%20Bill/b54as4-stage2-fm-rev2.pdf)

⁵ Joint Briefing and Analysis at Stage 3 to MSPs: ref xxx

⁶ See the Scottish Government (2015) Policy Memorandum on Stage 1 of the Prisoners Control of Release (S) Bill paras 48-56 which concludes by stating: "[T]he Scottish Government considers that the reforms in this Bill...will potentially bring into sharper focus the merits of imposing Extended Sentences in individual cases."

"other changes that are to be introduced in the system, such as a presumption against short sentences, greater use of alternatives to custody, changes in sentencing practice...and alternatives to the traditional custodial estate".

So the thinking is that this intended increase in prison population can and will be counteracted by a radical approach to dealing with short-term prisoners.

The political strategy will be familiar to seasoned observers of penal policy: look tough on serious offenders in order to de-carcerate at the lower end.

Being tough on long-term prisoners is, of course, the easy bit. Now for the hard part: until now little headway has been made in Scotland in the quest to reduce the use of imprisonment at the lower end (nor south of the border which has tried similar political strategy).

Presently, extending the presumption against short custodial sentences appears to be the main tool in the Government's box.

Hitting the Target : Sentence Length or Case Seriousness?

Importantly, the argument for reducing the prison population tends to be based not only on its relative ineffectiveness compared to non-custodial sanctions in similar cases.⁷ It is also based on a claim about proportionality: that imprisoning some people for some kinds of offences is unnecessary, disproportionate, and therefore a waste of money. Indeed the view can be traced back at least as far

⁷ Care needs to be taken in comparing the levels of reoffending in custodially sentenced cases with community penalty cases. Some of the more expansive claims made by reformers fail to compare like with like. However, careful research has shown repeatedly that non-custodial sanctions (and where possible diversion are more effective (or at least ineffective) than imprisonment. See for example: See e.g. T Chicos K Barrick W Balles and S Bontrager 'The Labeling of Convicted Felons and its Consequences for Recidivism' *Criminology* 45(3): 547-581 Moreover, because it necessitates social exclusion, exacerbates a sense of social dislocation and stigmatises for life, imprisonment makes the subsequent attempts to move away from offending all the more difficult. See also Scottish Government (2011)*What works to reduce reoffending: a summary of the review of the evidence.*

as the 2008 Prison Commission report which argued for the reduction in the use of short prison sentences on grounds of proportionality and that prison should be reserved for those committing the most serious offences and those posing a risk of serious harm.⁸ So in other words the real problem is not short-terms of imprisonment per se. Rather, it seems that the Presumption policy is using length of imprisonment as a *proxy* for those cases deemed less serious or posing a lesser risk of serious harm. But length of sentence is a very crude proxy for seriousness of offending and risk of serious harm. Arguably, it would be a more direct and clearer method to specify the kinds of cases which, as a matter of proportionality, would be normally non-imprisonable. This is the sort of careful work which could be led by the Scottish Sentencing Council in drafting Sentencing Guidelines.

That said, the immediate option being presented by the Scottish Government is to extend the presumption against short custodial sentences. So let us examine the likely impact of extending it.

What difference will Extending the Presumption Make?

Currently, there is a presumption against sentences of three months or less. The question being posed by the Scottish Government is whether this should be extended from three to six, nine or even 12 months. According to the Government's own commissioned research, the three month presumption has "has had little impact on sentencing decisions."⁹ One reason is sentence inflation. Rather than passing sentences of say three months, some sentencers, appear to have passed slightly longer sentences.¹⁰ This

⁸ Report of the Scottish Prison Commission (2008) *Scotland's Choice* (Scottish Government) part 3

⁹ Scottish Government (2015) Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment, p1

¹⁰ Scottish Government (2015) *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* Table 7.1 pp116-7. See further C Tata

phenomenon, predicted at the time of the passage of the legislation¹¹, has been found in other countries.¹²

If the presumption against sentences of three months has not worked should the presumption be extended?

In the same way as the three month presumption has had made little net difference, so a longer period is unlikely to make much difference. Indeed, given that the main effect has been inflationary it would seem futile to extend it to anything less than 12 months – consistent with maximum summary powers. Yet even if the presumption is extended to twelve months, it may still not achieve much.

To understand the problem, let us remind ourselves of two things. First, fresh legislation is not being suggested by the consultation. An extension to the presumption will be achieved by altering the number of months by statutory instrument. Secondly, we therefore need to examine the relevant legislation. Section 17 of the Criminal Justice and Licensing (S) Act 2010 states:

“A court must not pass a sentence of imprisonment for a term of 3 months or less on a person *unless the court considers that no other method of dealing with the person is appropriate.*” (emphasis added)

All legislation contains caveats, of course. Yet, the caveat in section 17 could hardly be more permissive: the sentencer must not impose a sentence of x months or less unless s/he considers it

(2013) ‘The Struggle for Sentencing Reform’ in A Ashworth and J Roberts (eds) *Sentencing Guidelines* (Oxford University Press) and Evidence of ‘sentence creep’ was also found in Western Australia where there legislation sought to prohibition of sentences up six months or less (Government of Western Australia Department of Corrective Services (2015) *Briefing Note on the Prohibition of the six Month Sentence*).

¹¹ Sentence inflation was predicted at the time of the passage of the Bill: Scottish Parliament Justice Committee, *Official Report on Oral Evidence on Criminal Justice & Licensing Bill* (2009) col 218–220.

¹² C Tata (2013) ‘The Struggle for Sentencing Reform’ in A Ashworth and J Roberts (eds) *Sentencing Guidelines* (Oxford University Press). Evidence of ‘sentence creep’ was also found in Western Australia where there legislation sought to prohibition of sentences up six months or less (Government of Western Australia Department of Corrective Services (2015) *Briefing Note on the Prohibition of the ox Month Sentence*).

appropriate. Does any sentencer, (or for that matter anyone), make a decision which she or he considers *inappropriate*?

To put it crudely, the legislation states: don't do something unless you consider that you should do it. Little wonder then that "there there was little sign of [the presumption] figuring prominently or explicitly in decision-making".¹³

It should be recognised that section 17 includes a requirement that where a court passes a sentence in excess of the presumption limit,

"the court must: (a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and (b) have those reasons entered in the record of the proceedings."

However, this is hardly a challenging requirement. Compliance can be fulfilled simply by noting a non-custodial sentence was 'not appropriate'. Indeed, consistent with previous research we should expect that in such circumstances the reasons given for such decisions are likely to be bland, uninformative, and routine.¹⁴

So we should expect that the extension to 12 months is unlikely to have much effect on sentencing practice: at best it is a reminder to sentencers of the existing injunction that custody should be 'a last resort'.

Why, then, do sentencers believe it is appropriate to pass short custodial sentences? The answer lies not, as is sometimes suggested, as a wilful disdain for the intention of Parliament nor with a wholly irrational fixation with custody.

There are two main reasons in the minds of many sentencers: first, a widespread perception of insufficiently credible and community-based sentences *compared with* imprisonment; and secondly a feeling that there has to be 'a last resort' for those who do not

¹³ Scottish Government (2015) *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* at paras 52, 63, 7.25, 7.64, 8.25

¹⁴ C Tata (2002) 'Accountability for the Sentencing Decision Process – Towards a New Understanding' in C Tata and N Hutton (eds) *Sentencing & Society: International Perspectives* (Ashgate)

comply with community based sentences. Let us briefly examine these two concerns, and whether there is a viable way forward.

Concern 1: The Credibility of Community Sanctions

That non-custodial sentences are not considered by sentencers (or others) as credible, robust, visible, or immediate as imprisonment is hardly new. A major difficulty is that prison is perceived in our culture as 'the only real' punishment. Unlike community-based 'alternatives' prison is visible, easy to understand, and culturally iconic.¹⁵ Thus prison is synonymous with 'real punishment' everything else is judged as alternative against 'prison-like' criteria. Even the term 'non-custodial' tells us that these sanctions are defined as the *absence* of prison. So anything other than prison is, to some extent, destined to be judged as 'less credible'.

However, social (and practitioner) attitudes change and attitudes to what is 'real punishment' are, as we can see, *judged as relative to each other*.

The Policy of 'Custody as the Last Resort' Means Custody is the Default

The cultural centrality of prison to punishment is nourished and reinforced by policy and legislation which deems prison to be 'the ultimate sanction'. Indeed the prevailing approach that 'custody is a last resort' ends up meaning in practice that custody becomes the default. When other options don't seem to work, there is always prison. When one runs out of options, there is prison. The

¹⁵ See the now sizeable research literature exploring public attitudes to and knowledge about punishment and the criminal justice system. For example, the Scottish Crime and Justice Survey 2012-13 (Scottish Government). For an excellent international overview see Gelb, K. (2006) *Myths and Misconceptions: Public Opinion vs Public Judgement about Sentencing* (Sentencing Council of Victoria); and for a challenging and nuanced discussion see for example Hutton, N. (2005) 'Beyond Populist Punitiveness', *Punishment and Society* Vol. 7, No. 3, 243-258

language of 'last resort' in effect renders prison as the default. All other options have to prove themselves to be 'appropriate' and if they fail to do so, there is always prison. Prison is guaranteed and seen as ever-reliable. While non-custodial sentences and social services seem so stretched, imprisonment, on the other hand, appears as the dependable, credible and well-resourced default. As one sheriff interviewee put it:

" 'really when I'm imposing short [prison] sentences, that's when we've run out of ideas!'"¹⁶

The language and mentality of custody as 'the last resort' is a central problem. We need to relinquish it. Little will change unless and until we invert that thinking by beginning to specify certain circumstances and purposes as normally non-imprisonable.

Just as the death penalty (and other forms of corporal punishment) was once 'the ultimate sanction' and prison was seen as lenient, so making another sanction (for instance Restriction of Liberty Orders, or meaningful reparation to the victim) means it, in turn, will come to be seen as 'real punishment'. To move away from prison being seen as the only 'real punishment' we will have to relinquish the policy paradigm of prison as 'last resort'

Imprisonment and Personal Needs

Although it is uncomfortable for us to admit it, as a society in many instances prison continues to be used not because seriousness of offending (harm or denunciation) demands it, but because nothing else seems to be appropriate. For instance, as a society we are using imprisonment in part to access services for those who have not committed serious offences but because of the unpredictable and seemingly 'chaotic' lives of many of the poorest people in our communities. Many people end up in prison not because their offending is particularly serious, nor because they pose any significant risk of serious harm. They end up in prison because there does not appear to be anywhere else that can address their

¹⁶ Scottish Government (2015) *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* p128

chronic physical, mental health, addiction, homelessness and other personal and social needs. While non-custodial sentences and social services are so stretched, imprisonment, on the other hand, appears as the dependable, credible and well-resourced default. Indeed, it is not entirely uncommon for people to say that they would prefer to be in prison because of an apparent lack of help and support in the community.

The result is self-perpetuating: resources are sucked into the seemingly credible, robust and reliable option of imprisonment at the expense of community-based programmes which *appear as* weak, unreliable and poorly explained.

One cannot exactly blame individual judicial decision-makers for coming to the sincerely held judgement that the only way to address the needs as well as deeds of some individuals is to impose custody (whether through remand or through sentence) because the community based services are so stretched.

This phenomenon will become even more acute, unless action is taken to preclude it. Over the next few years we will see further deep cuts to community justice and indeed the very community services on which community justice relies. Meanwhile, prisons are better resourced than they were. Thankfully, prisons are not as degrading as they used to be and the regimes are more constructive. That is of course a good thing, but the unintended consequence of these two developments, (improving rehabilitation in prison combined with the perception of deteriorating community justice), is likely to be that more needy individuals who commit (or are accused of) relatively minor offences will end up in custody. One cannot necessarily blame individual judicial decision-makers, prosecutors, social workers for seeing custody as the only 'safe haven' for such individuals. Yet in policy terms it makes no sense and is a dreadful waste of resources.

A Public Principle about what Prison is Not for.

A way counteract this understandable (yet tragic) situation and preclude its likely to growth is to set out a public principle that no

one should be sentenced to imprisonment for their own needs (or rehabilitation). The test for imprisonment should hinge on the seriousness of offending. Of course, if while in prison, serious offenders can be rehabilitated that is a good thing. But no one should go to prison for want of services in the community. Such a principle could be set out in a Sentencing Guideline judgement and also through guidance to social workers prosecutors.¹⁷ This public principle should also help to concentrate policy minds to ensure that there is sufficient resourcing of community justice and services rather than allowing prison to be the place of 'last resort' for those with complex needs committing relatively minor offences.

A clear public demarcation about the proper roles of prison and community justice should also help to reduce a perception of the prison service seeking to annex traditional community justice territory.

Electronically Monitored Bail

In terms of efforts to reduce the use of remand, electronically monitored bail should be revisited. It seems strange that we resort to custodial remand when EM is available as a means of control which is less stigmatising, allows the maintenance of relationships, employment, training, and is far less expensive.¹⁸

Concern 2: Persistence and Breach

It is often noted that some individuals do not comply with community penalties and so custody must be the sanction to uphold the authority of the court's decision-making. This position is reasonable.

¹⁷ This argument is put forward more fully at <http://ow.ly/SQAEv>

¹⁸ Electronically Monitored Bail was introduced as a pilot in three areas in Scotland over ten years ago when its take up was very low (Barry, M., Malloch, M., Moodie, K., Nellis, M., Knapp, M., Romeo, R., & Dhanasiri, S. (2007) *An Evaluation of the Use of Electronic Monitoring as a Condition of Bail in Scotland*, Edinburgh: Scottish Executive Social Research). Arguably, with advances in technology it is time to look again at how it can be used to reduce the use of remand. See M Nellis ****

Yet, whether we sufficiently understand the journey away from offending is important here. The lessons from the (inaptly named) desistance approach are crucial: this shows us that the journey away from crime is far more contingent than we had previously realised. Offending is not something which can be switched off like a tap. Lapses and relapses are inevitable, and the confidence of the individual that decision-makers really want him/her to succeed is important.¹⁹

In this respect the increased use of review hearings (recommended by the Prison Commission and the Commission on Women Offenders) may be valuable. Such hearings can enable the judicial decision-maker and individual to build up a sense of mutual understanding and genuine respect so that neither sees the decisions of the other as arbitrary or dismissive. Currently, while the use of review hearings is permissible, they are conducted *in spite of* system incentives rather than because of them. Everyone has to get through their case load and the use of review hearings only adds to it.

Could Electronic Monitoring (EM) be used instead of custody in the case of individuals deemed unwilling or unable to comply? Can the more imaginative use of EM be configured as the 'ultimate sanction' to fill the space of prison? Currently, it does not appear to be possible to make EM a requirement of a Community Payback Order (CPO). CPOs and RLOs can be combined (and evidence suggests that such a combination may be particularly effective)²⁰ though it appears this is not well known and very rarely occurs.

An EM requirement should be a condition in a CPO, (up to 12 hours per day). If the CPO is breached, extra hours of curfew could be added (or a limited period GPS tracking), but custody could be excluded unless required by the seriousness of offending (denunciation) or risk of serious harm (incapacitation).

¹⁹ For a simple introduction to desistance, see for example, themed issue of *Scottish Justice Matters* 1(2) Dec 2013; and some of the policy implications are raised in a short paper by B Weaver and F McNeill (2007) *Giving up Crime: Directions for Policy* (SCCJR).

²⁰ H. Graham and G. McIvor *Scottish and International Review of the Uses of Electronic Monitoring* SCCJR

Electronic monitoring should provide some assurance about control and if combined with human and humane social work support be a less damaging (and expensive) way of responding to breach?²¹

Conclusions

To achieve a radical reduction in the use of custody for those committing less serious offences and posing less serious risk of harm, the presumption even if extended to 12 months is likely (at least in itself) to achieve little. There will need to be a much more radical approach from the Government (and the Sentencing Council).

Importantly, nothing much may change unless and until we *relinquish the mentality of custody as 'a last resort'*. Such thinking, as we have seen, in fact renders custody as the default, a back-up when 'alternatives' are seen to fail.

Instead, we need to *exclude* certain purposes (such as rehabilitation) as a ground of imprisonment, and begin careful work to specify certain kinds of cases as normally non-imprisonable.

²¹ Curiously, the CJ&L 2010 Act did not provide for the combination of EM with CPOs. See further Graham and McIvor (2015) *Scottish and International Review of the Uses of Electronic Monitoring* SCCJR and more generally Nellis, M. (2014a) 'Penal Innovation and the Imaginative Neglect of Electronic Monitoring in Scotland' *The Scottish Journal of Criminal Justice Studies* 20: 14-38.