

JUSTICE COMMITTEE

PRESUMPTION AGAINST SHORT SENTENCES

SUBMISSION FROM HOWARD LEAGUE SCOTLAND

Howard League Scotland (HLS) fully supports the proposed extension of the presumption against short sentences (PASS) to sentences of up to 12 months, with no exclusions.

Why it matters

There are two main considerations in support of extending PASS. One is that short prison sentences have been shown to be less effective than well-resourced non-custodial measures in preventing reoffending, whilst they are also more damaging to those on whom they are imposed (as Community Justice Scotland has shown in *Sentenced to Smart Justice*). The other is that this would help to work against Scotland's over-reliance on imprisonment as a punishment.

Scotland's imprisonment rate is one of the highest in Western Europe.¹ This contradicts the Scottish Government's aspirations for a "modern and progressive nation in which imprisonment is used less frequently",² and as an editorial in *The Daily Record* noted,³ "is not a badge of honour". Despite the recommendations of the Scottish Prisons Commission over a decade ago, we still rely on imprisonment to do too much, with too many – and have done so for too long.

In December 2018, nine out of Scotland's 15 prisons were at or above capacity; in April 2019 HMP Barlinnie was operating at 142% capacity.⁴ As at 21 January 2019, there were 5,877 single cells occupied within the prison estate, 710 of which were doubled up. Thus 12% of Scotland's single cells were occupied by more than one prisoner.⁵

HLS believes that prison should be reserved for those who have committed the most serious offences and who pose the greatest risk to public safety. Low level crimes that attract short custodial sentences are often linked to disadvantaged circumstances, mental health problems and addictions. We must do all we can to work against Scotland's "warehousing problem" (The Prisons Commission, 2008), where prison is used to address gaps in welfare and community provision.

¹<https://www.facebook.com/howardleaguescotland/photos/pb.277192162400057.-2207520000.1449750940./850803898372211/?type=3&theater>

²https://www.apexscotland.org.uk/wp-content/uploads/2015/09/apex_annual_lecture_2015_LoRes.pdf

³ <http://www.dailyrecord.co.uk/news/scottish-news/record-view-jailing-people-sake-6778916>

⁴ <https://www.bbc.co.uk/news/uk-scotland-48316321>

⁵ <https://www.gov.scot/publications/foi-201900000566/>

Even a short period in prison, whether post-sentence or on remand, is long enough to disrupt employment, medical care, housing and family relationships, but not long enough to tackle the underlying causes of offending behaviour (Kendall, 2002). Reintegration is difficult both practically and emotionally, with significant stigma attached to imprisonment.

“Short-term imprisonment disrupts families and communities, and adversely affects employment opportunities and stable housing - the very things that evidence shows support desistance from offending. That is clearly not a good use of public resources, and it is a waste of human potential” (Michael Matheson MSP, Cabinet Secretary for Justice, September 2015).

Another impetus for tackling the over-use of short-term imprisonment stems from the enactment of the Prisoners (Control of Release) (Scotland) Act 2015,⁶ which will increase the number of long-term prisoners and thus the size of the prison population. The Scottish Government estimates that these changes will incur an additional recurring annual cost of £6.82m in 2020/21, rising to £15.77m in 2030/31. Broader financial implications are covered below: but on 26 May 2015, the Cabinet Secretary for Justice said,

“... far too much of our resource in the criminal justice system is caught up in dealing with short-term offenders who go into and out of prison constantly. If we want to free up the resource in our prisons to allow them to deal much more effectively with long-term offenders—those who pose the greatest risk to our communities—we need to be much more intelligent about how we use our prison estate.”

The Scottish Government does not intend to set a specific target for the prison population.⁷ But whether Scotland imposes a specific target or not, the current growth in our prison population must be reversed.

Extending the presumption

The current PASS, set at three months, has had no significant impact on the size of the prison population: it seems to have had little or no impact on the sentencing practices of many Sheriffs, and might have resulted in some uptariffing, with more people receiving prison sentences of three to six months.⁸

⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/80130.aspx>

⁷ Michael Matheson, Cabinet Secretary for Justice:
<https://www.parliament.scot/S5ChamberOffice/WA20180612.pdf>

⁸ See the responses from Sheriffs reported in Scottish Government, *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and Presumption Against Short Sentences* (2015); <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences>.

Whilst a Community Payback Order (CPO) is not the only option available in place of short sentences, prisoners who are released from a short prison sentence are reconvicted almost twice as often in 12 months as those given CPOs.⁹ Completion rates for community sentences have increased from 64% in 2006-17 to 70% in 2017-18.¹⁰ It has also been noted that with 9 potential requirements within a CPO, multiple requirements are not the norm. The fall in the average number of requirements from 1.82 in 2011-12, to 1.59 in 2012-13, suggests that the opportunity to tailor CPOs is not being fully realised; and waiting times for treatment requirements can be longer than the length of the CPO itself.¹¹ There has also been limited take-up of progress reviews within CPOs by Scottish sentencers, despite their potential to improve completion rates and hence reduce the use of short term sentences.

Sentencers must be able to have confidence that such disposals will be adequately resourced: an extension of PASS will ultimately save resources, but it requires significant immediate investment in non-custodial provisions.

We are aware of calls for the extended PASS to exclude domestic abuse related offending, where short sentences would provide the respite required to allow victims to relocate. But this is an unrealistic timeframe in which to do so, and involves victims giving up family support, housing, friendships, jobs, school etc.

It must be made clear to sentencers where properly resourced community-based disposals are available, and the PASS should be emphasised in mandatory training. Written explanation of reasons behind sentences of less than 12 months should be more than cursory. The extended PASS should be monitored both to ensure there is no up-tariffing, and for its effect on the overall prison population.

Short-term sentences for women

The number of women in prison in Scotland remains virtually identical to a decade ago: on average 371 women were in prison during 2017-18, only one fewer than in 2007-8.¹² In 2017-18, 90% of women sent to prison in Scotland received sentences of 12 months or less.¹³ Little appears to have changed since the finding of the Commission on Women Offenders Report (2012): “many women in the criminal justice system are frequent reoffenders with complex needs that relate to their social circumstances, previous histories of abuse and mental health and addiction

⁹ <https://www.gov.scot/publications/reconviction-rates-scotland-2015-16-offender-cohort/>

¹⁰ <https://www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2017-18/>

¹¹ <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences>

¹² Table A.1, Prison statistics Scotland: 2013–14 (Edinburgh: The Scottish Government, 2015); Appendix 2, Scottish Prison Service Annual report and accounts 2017–18 (Edinburgh: SPS 439, 2018)

¹³ www.gov.scot/publications/criminal-proceedings-scotland-2017-18/

problems”.¹⁴ Women in prison have often been victims of much more serious offences than the ones they are accused of committing, with 7 in 10 women reporting that they had been a victim of domestic violence.¹⁵

Custodial sentences of any length particularly disadvantage women, families and children. Approximately 65% of women in prison in Scotland are mothers,¹⁶ and the imprisonment of a household member is one of ten adverse childhood experiences (ACEs) that have a significant negative impact upon children’s long-term health and wellbeing. With women more likely than men to be the primary carer, the impact upon children is even more pronounced. Only about 5% of children stay in their own homes if their mother is imprisoned,¹⁷ and women are more likely than men to lose their housing while in custody and then to be homeless upon release.¹⁸ The United Nations Convention on the Rights of the Child (UNCRC) 1989 requires that the best interests of children with a parent in the criminal justice system be considered at all times; the Children and Young People’s Commissioner for Scotland is currently pushing to incorporate this into Scottish law. The UK has also ratified the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders 2010 (the Bangkok Rules). These state that non-custodial sentences are preferable for women with dependent children and that if a custodial sentence is absolutely necessary, appropriate provision must be ensured for the child.¹⁹

Women can be imprisoned far from home, which can also unfairly disadvantage them, breaking community ties which are known factors in desistance;²⁰ by contrast, with “a community disposal ... they’re still in the community, they’re part of the community”.²¹ We therefore echo the findings of the All-Party Parliamentary Group on Women in the Penal System,²² of “overwhelming” evidence to support abolishing custodial sentences of less than 12 months for women: “prison makes things worse, not better, for women”.

¹⁴ Commission on Women Offenders, Final Report: (Edinburgh, The Scottish Government, 2012)

¹⁵ Scottish Prison Service (2018) Women in Custody 2017, Edinburgh: SPS

¹⁶ Scottish Prison Service (2016), Prisoner Survey 2015: Female Offenders, Edinburgh: SPS

¹⁷ Scottish Government (2015), International Review of Custodial Models for Women: Key Messages for Scotland, <http://www.gov.scot/Resource/0048/00487211.pdf>

¹⁸ Scottish Working Group on Women Offending as cited by Prison Reform Trust, available from: <http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf> [Accessed 26 April 2019]

¹⁹ United Nations (2010) Bangkok Rules, available from: <https://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>

²⁰ <https://www2.gov.scot/Resource/0048/00487211.pdf>

²¹ <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences/>; Interview 75, Sheriff.

²² <https://howardleague.org/wp-content/uploads/2018/10/APPG-report-on-sentencing-31-October-2018.pdf>

We strongly support the PASS being extended to 12 months for all prisoners. However, as alternatives to short custodial sentences, it is imperative that specialist services for women are properly resourced, in order to address the underlying causes of their offending behaviour. The recent withdrawal of funding from the successful Glasgow Women's Supported Bail Service, cited by The Prison Reform Trust as a positive example of a holistic approach to women's complex needs, serves as a reminder of the worryingly precarious funding of many important services, without which we have no hope of significantly reducing our prison population or the harms that prison causes.

Will the PASS alone be enough to reduce the prison population?

Reducing the prison population is only one reason in favour of extending PASS: the other, more important reason is that this move (given proper resourcing of non-custodial provisions) would benefit offenders, who would receive less harmful and more constructive sentences, and the public, since it would help to reduce reoffending. However, extending the PASS to 12 months will probably not by itself be enough to reduce Scotland's prison population, since judicial sentencing practices can be resistant to legislative change. The Scottish Government's research, *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* (2015), showed that the PASS set at 3 months did not have a marked impact on sentencing decisions: many Sheriffs saw it as at best a 'background factor' in their decisions, and at worst irrelevant, or a demonstration of lack of trust in them.²³ If such attitudes continue, and if the law requires only that Sheriffs not "pass a sentence of imprisonment for a term of [twelve] months or less on a person unless the court considers that no other method of dealing with the person is appropriate",²⁴ an extension of the PASS to twelve months might have little impact on sentencing practice: as Professor Cyrus Tata points out, Sheriffs are unlikely to make decisions that they consider *inappropriate*.²⁵

Even if an extended PASS can be made effective, it will have only a modest effect on the prison population: to achieve any significant reduction, we also need to reduce the number of long prison sentences imposed (especially life sentences),²⁶ and the number of prisoners on remand. The drop in the numbers of people released

²³ <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences>. 56% of the Sheriffs surveyed reported that PASS had 'made little or no difference' to their sentencing practices, 28% that it had led them to impose some 'slightly longer sentences' than they would otherwise have done (para. 7.31).

²⁴ The wording of the original PASS in Criminal Justice and Licensing (Scotland) Act 2010, s. 17.

²⁵ https://strathprints.strath.ac.uk/55969/1/Tata_SJM2016_how_can_prison_sentencing_be_reduced.pdf

²⁶ See Prof Dirk Van Zyl Smit's comments at <http://howardleague.scot/news/2018/march/scotland-must-reform-life-sentences>

on home detention curfew (HDC) is also of grave concern, with only 50 people being granted HDC during w/c 10 May 2019, compared to 309 at the same point in 2018.²⁷

Financial implications

We must avoid a situation in which courts are discouraged from imposing custodial sentences, but effective community-based alternatives are unavailable. A significant increase in resources for community justice must go hand-in-hand with an extension of the PASS.

As noted above, there is evidence that the existing PASS has had a very limited impact on Sheriffs' sentencing practice. One reason for this might well be the relative lack of properly resourced and supported non-custodial disposals. If an extended PASS is to be effective, a significant investment of resources in non-custodial provisions is therefore necessary: if we are to expect sentencers to send fewer people to prison for periods of 12 months or less, there must be credible, properly resourced community-based services both for those at risk of offending and those who have already committed an offence. Victims and the wider public too will, quite justifiably, want to know what interventions are being offered to those who might otherwise receive a short custodial sentence. In the medium to long term, this move should result in overall savings, since it will be possible to shift significant resources from the prison service to community-based programmes and provisions: but such a shift should only begin once the prison population has begun to reduce significantly.

Since the introduction of presumption against short sentences in 2011, the Scottish Prison Service (SPS) has seen its annual budget (excluding capital expenditure) rise from £318.0m to £346.2m - an increase of 8.9%. The budget for criminal justice social work, on the other hand, has remained frozen over the same period at £86.5m per annum.²⁸

Acknowledging that there has been a rise in the community justice services budget from £35.4m in 2018-19 to £37.1m in 2019-20, we share the Scottish Parliament Justice Committee's view that there is "a need to rethink the balance over time between the sums spent on incarceration with those provided for the prevention of crime" and that there should be an "assess[ment] [of] the potential additional expenditure required to tackle ... the management of offenders and an increased use of electronic monitoring".²⁹

We are not in a position to determine the budget required to provide individualised plans. However, as an example, *Electronic Monitoring: Uses, Challenges and*

²⁷ <http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

²⁸ <https://www.gov.scot/publications/scottish-budget-2019-20/> and previous years

²⁹ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20181101MMtoCabSecLordAdv.pdf

Successes (Scottish Government, 2019) found the cost of HDC to be less than that of imprisonment.³⁰ Its research conducted in 2009/10 had found that the weekly cost of imprisonment was £610, as compared to £126 per week for a person managed on HDC; taking into account the costs of HDC/release assessment/preparation, this equated to a saving of £1,234 per prisoner over a 4 week period and of £10,914 per prisoner over a period of 24 weeks.³¹ However, electronic monitoring and HDC are unlikely to be effective in reducing reoffending unless they are backed by other kinds of community-based support.

As we know, community disposals which best support desistance from offending are those which also take into account broader requirements pertaining to housing, mental health, drug and alcohol use. Whether these are provided by public or third sector organisations, we would agree with Community Justice Scotland's conclusion that "without additional support, current funding provision will be insufficient".³² Specifically, we would like to draw attention to the additional pressures incumbent upon local Criminal Justice Social Work (CJSW) departments, whose roles in supervisory elements of community sentences do not appear to have been taken into account in budgetary planning.

We also note the potential involvement of restorative justice in community disposals, and the (currently unknown) costs which would be associated with this service. (The Scottish Government's Programme for Scotland 2018-19 included a commitment to "have restorative justice services widely available across Scotland by 2023";³³ the Restorative Justice Action Plan is due to be published in Spring 2019.)

Many community-based services remain reliant on short-term funding cycles. It is hard to understate the impact that this has on the sustainability of those services, on staff turnover and morale, and thus on the experience of service users. Short term funding also impedes the ability of these services to demonstrate their effectiveness, unfairly disadvantaging smaller third sector organisations. It is not surprising that sentencers hesitate to refer people to these services when the precarious nature of their funding is evident.

Challenging the dominant status of imprisonment

Prison has a salient status in the eyes of society, as the default mode of punishment. We must challenge this view, making the case for robust effective non-custodial disposals for all but the most serious offences.

³⁰ Armstrong, S., Malloch, M., Nellis, M and Norris, P. (2011) Scottish Government Report 'Evaluation of the Use of Home Detention Curfew and the Open Prison Estate in Scotland'

³¹ Armstrong et al, *op. cit.*, p.93

³² https://www.parliament.scot/S5_JusticeCommittee/Inquiries/J-S5-18-PREBUD-13.pdf

³³ <https://www.gov.scot/publications/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/>

Scottish prisons have undoubtedly become more humane places than they once were, but no one should be under any illusion that imprisonment is benign. There are very real dangers in cloaking imprisonment in the language of reform. Professor Cyrus Tata has noted that, “[o]ne of the reasons why we are so attached to imprisonment derives from the enticing belief that a positive programme of institutionalisation can improve the lives of the people sent there”³⁴ (and a recent Freedom of Information request highlighted the woefully low uptake of purposeful activity for those people on short term sentences³⁵). Professor Tata suggests that two principles should constrain decisions to imprison: *“the decision to imprison [should] hinge on the seriousness of offending ... and no one should be sent to custody for the specific purpose of rehabilitation, unless warranted by the seriousness of offending”*.

Nor is imprisonment for relatively minor offences the best way to serve the other familiar aims of criminal punishment. As far as deterrence is concerned, it is known that certainty of punishment is a more important factor than its relative severity; demanding community sentences can be, and be seen by those serving them to be, no less ‘severe’ than short terms of imprisonment; and the need to protect the public against the kinds of offence for which sentences of less than 12 months are typically imposed is not urgent enough to justify the regular use of such harmful sentences.

Other considerations and future reform

The legislative basis for the PASS still leaves sentencers substantial discretion over whether to sentence someone to custody. Some sentencers will still perceive a need to impose a sentence of between 3 and 12 months, and might interpret the PASS more flexibly than was intended. It will therefore be important to find ways to persuade sentencers to take the PASS seriously: these might include, as noted above, judicial training, giving substance to the requirement that reasons for imposing a sentence of less than twelve months be provided in writing, and ensuring that sentencers are fully aware of the available non-custodial disposals—which also requires ensuring that such disposals are indeed available and properly resourced. But as part of a longer term plan to reduce the use of short term imprisonment, other policy initiatives should be considered, including those that have successfully contributed to a reduction in short term imprisonment in other jurisdictions.

For example, in 2011 Ireland introduced a Community Return Scheme:³⁶ this provides for those serving between one year and eight years to apply for conditional release under strict supervision terms after serving 50% of their sentence. This has been successful and has led to a significant reduction in prison numbers.³⁷ In

³⁴ <http://scottishjusticematters.com/sentencing-allure-imprisonment/>

³⁵ <http://www.sps.gov.uk/FreedomofInformation/FOI-6358.aspx>

³⁶ <http://www.probation.ie/pws/websitepublishingdec09.nsf/Content/Community+Return>

³⁷ http://report.nat.gov.tw/ReportFront/report_download.jsp?sysId=C10402422&fileNo=005

Finland, the law envisages that all sentences up to two years will be commuted to intensive forms of community supervision.³⁸ This takes the pressure off the sentencing judge and is one reason for their low rate of imprisonment.

Finland also applies fines more creatively, and uses them in 60% of all court cases. Fines are calculated in direct proportion to income, so that two cases can result in fines of very different cash amounts being issued. Fines are less intrusive and oppressive, with the lowest capacity for net-widening. More use could be made of properly calibrated fines, although this must also be accompanied by services and support for those who need them, and the enforcement process must be efficient, but not disproportionate.

In summary, Howard League Scotland remains in favour of extending the PASS, for all offences, to twelve months, as one of the ways to reduce Scotland's deeply troubling over-reliance on imprisonment, to reduce the harms suffered by those who are sentenced for relatively minor crimes, and to increase the rehabilitative and preventive efficacy of our criminal justice system.

³⁸ <http://www.scandinavianlaw.se/pdf/54-17.pdf>