

Prison Reform Trust response to Scottish Government Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment

Introduction

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The Prison Reform Trust's main objectives are:

- Reducing unnecessary imprisonment and promoting community solutions to crime
- Improving treatment and conditions for prisoners and their families

The Prison Reform Trust welcomes this consultation and the steps already taken by the Scottish Government to encourage greater use of non-custodial sentencing options. A growing body of evidence shows that robust community sentences are more effective than short prison sentences in reducing the cycle of offending, and can command the confidence of both the general public and the courts.¹ Courts need a flexible sentencing toolkit that recognises the specific needs of offenders including women, young people and those with mental health and learning disabilities. The presumption against short prison sentences is a welcome expression of the Scottish government's desire to reduce the prison population but to be effective must be backed up by guidance, training and the provision of high-quality preventative and court referred services.

Given the disproportionate number of women who are sentenced to short periods of custody for relatively minor offences we have focused on the issues relating to female offenders. As the Scottish Justice Secretary Michael Matheson noted recently, "*Scotland has the second highest prison population in Northern Europe, doubling between 2002 and 2012. This is completely unacceptable and does not fit with my vision of how a modern and progressive society should deal with female offenders.*"² His decision not to proceed with the building of a new women's prison at Inverclyde but instead to invest in community provision has been widely welcomed. The Prison Reform Trust, supported by a major grant from the Big Lottery Fund, is renewing its drive to reduce women's imprisonment across the UK and looks forward to working with the Scottish Government and other stakeholders to achieve this objective.

Question 1: Should the presumption against short periods of imprisonment of three months or less be extended?

Yes No

Comments

The Prison Reform Trust believes the time is right to extend the presumption, not only to reinforce its symbolic importance but to encourage the courts and government to think more creatively about how best to reduce offending in the long-term. Custody is the most serious sanction available to the courts and it is therefore a cause of concern that despite the presumption against them, the use of short sentences of imprisonment remains stubbornly high and accounts for a large proportion of the

¹ Prison Reform Trust (2015) Bromley Briefings Prison Factfile: Autumn 2015 London: PRT
<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Factfile%20Autumn%202015.pdf> pp 8-11

² Prison Reform Trust (2015) Why focus on reducing women's imprisonment? London: PRT
<http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women's%20imprisonment%20BL.pdf>

Scottish prison population. Approximately 66% of custodial sentences imposed in 2013/14 were for 6 months or less,³ a figure that rises to 76% for women offenders.⁴

Many offenders have complex needs that are compounded by short prison sentences. Prison staff have little time to address the known pathways to offending, prisoners may lose their employment, housing, or benefits whilst in prison and these problems are often unresolved when it comes to their release. In many cases short sentences can prolong or intensify the cycle of re-offending.

Non-custodial options are more likely to deliver better outcomes for the offender and their family as well as the wider community. Properly structured, supervised community sentences allow a person to take responsibility for their actions, access the support they need to tackle their offending behaviour, maintain family responsibilities and relationships and reduce disruption to their lives. They are also effective in reducing re-offending. Recent analysis by Hedderman and Jolliffe shows that outcomes for women who are sent to prison are significantly worse than for those given community orders, with 55.8% of women released from prison re-offending within a year, compared with 26% of those commencing a community order.⁵ The recent Evaluation of Sixteen Women's Community Justice Services in Scotland also suggests that "*the extended provision of community services supported women to make observable progress towards outcomes associated with desistance.*"⁶ It is the responsibility of government to ensure that credible community punishments are in place. Extending the presumption against short custodial sentences would send an important signal that there is no turning back from the commitment to reduce the use of such penalties, but must be supported by adequate provision of alternative penalties.

Question 2: If you agree that the presumption against short periods of imprisonment should be extended, what do you think would be an appropriate length?

6 months 9 months 12 months

Comments

In the view of the Prison Reform Trust, a six month or less threshold strikes the appropriate balance between the stated policy aims of the Scottish Government and the legitimate need to empower the courts with a robust sentencing toolkit able to respond to the unique circumstances of individual cases. In reaching this balance it is important to distinguish between two elements of the presumption; first, the scope of the presumption and second, the degree of discretion bestowed upon the courts in applying it.

An extension of the presumption from three to six months would significantly increase the scope of the initiative. This is reflected in the data cited in the consultation document. Custodial sentences accounted for 13% of all court disposals in 2013/14. Of these, 29% were for three months or less. A further 37% were for between 3 and 6 months, meaning that 66% of custodial sentences imposed in 2013/14 were for 6 months or less. A very small proportion of these sentences (1%) were for crimes of violence or a sexual nature.

This suggests that a presumption against prison sentences of 6 months or less has the potential to impact on 66% of all custodial sentences. But the courts will need to make far greater use of community penalties which presently account for only about 5% of court disposals.⁷ Improving the

³ Scottish Government: Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment

⁴ Criminal Proceedings in Scotland, 2013-14. Table 10(b) People receiving a custodial sentence by gender, main crime/offence and length of sentence, 2013-14

⁵ Hedderman, C and Jolliffe, D (2015) The Impact of prison for women on the edge: paying the price for wrong decisions. Victims and Offenders: An international journal of evidence-based research, policy and practice.

⁶ Dryden, R and Souness, C (2014) Evaluation of Sixteen Women's Community Justice Services in Scotland. Institute for Research and Innovation in Social Services p.iv

⁷ Table 1: Main Penalties for Persons with a Charge Proved in Scottish Courts, 2009-10

operation of community sentences will help ensure that such orders command the confidence of sentencers. The Scottish Government should also make explicit that the presumption against short prison sentences extends to breach proceedings which should rarely attract a custodial sentence.

The evidence to date suggests that more must be done to strengthen the presumption against short prison sentences, particularly in threshold cases where courts may otherwise favour immediate custody. Table 1 below sets out the use of immediate custody in 2009/10, broken down by court type.⁸

Table 1

		Type of court					
		High Court	Sheriff Court		Stipendiary Magistrates Court	District /JP Court	All Courts
			Solemn	Summary			
Custody	60 days and under	2	10	2,185	43	198	2,438
	61 days – up to 3 months	2	34	3,432	1	-	3,469
	Over 3 months – up to 1 year	22	840	6,327	-	-	7,189
	Over 1 year	597	1,971	18	-	-	2,586
	Life	49	-	-	-	-	49

Further data is needed to disaggregate the ‘over 3 months and up to and including 1 year’ category but this table does suggest that the lion’s share of short sentences were passed by the sheriffs courts. It would be helpful to understand why the presumption has not been more effective in altering the sentencing behaviour of the sheriff court which continues to send so many offenders to prison in summary cases, often for relatively minor and non-violent crimes.

The establishment of the new Scottish Sentencing Council provides an opportunity to develop detailed guidance on the presumption and the justification for setting it aside. We encourage the Scottish Government to work with the Sentencing Council and with the Judicial Institute for Scotland to review the training and guidance available to the sheriff courts on the presumption against short prison sentences and the discretion to set it aside. A robust ‘seriousness test’ is needed, and clear expectations on how to deal with cases where the threshold for custody has been met but there are nonetheless good reasons to favour a community service order or probation, for example, where an offender has sole or primary care responsibilities.⁹

Question 3: Do you have any specific concerns in relation to a proposed extension of the period covered by the presumption against short sentences?

Comments

The Prison Reform Trust supports an extension of the presumption against short periods of imprisonment to six months or less. There is a risk that if the presumption is extended too far it will

<http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/AddSen0910/>

⁸ Table 2: Distribution of Main Penalties for Persons with a Charge Proved, 2009-10

<http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/AddSen0910/>

⁹ Prison Reform Trust (2015) Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children London: PRT http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf; see also: Prison Reform Trust (2015) Prison Reform Trust submission in response to consultation by Mary Fee MSP on her proposed Bill to require a court to have regard to impact of parental custody on welfare and wellbeing of offender’s children. London: PRT <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/Mary%20Fee%20Consultation.pdf>

be frustrated by the courts, result in unintended 'up-tariffing' and divert attention away from the important objective of reducing the prison population in Scotland.

It should not be forgotten that the best way to deal with many less serious offences is to make sure that they do not reach court in the first place. At the point of arrest there needs to be options for police triage and liaison and diversion services. As we noted in our Report '*Brighter Futures: working together to reduce women's offending*'.¹⁰ police triage schemes have proved to be particularly effective in dealing with young people and women offenders. Collaborative working between the police, prosecutors and local women's centres / youth services can significantly reduce the numbers that are brought before the courts for minor offences. As the Angiolini Commission noted in the Report on Women Offenders, "*we have heard evidence that the use of diversion to social work is welcomed by those in the criminal justice system. There is also evidence from participants in schemes that it was helpful in resolving problems and reducing the risk of reoffending, whereas prosecution may have exacerbated their problems.*"

Where cases do reach the courts, sentencers need a robust suite of non-custodial sentencing options that command the confidence of sentencers and the general public. The use of probation and community service remains worryingly low in Scotland. We encourage the Scottish Government to explore options for making better use of non-custodial sentences, restorative justice and tagging technology if it gives courts the confidence to allow people to serve a sentence in the community rather than in custody, and supports the effective completion of community penalties.

To deliver the outcomes sought, the presumption against short prison sentences must be accompanied by a commitment to health, social care and other services. For example, youth services and women's centres that provide a range of practical and emotional support that address known pathways to offending and desistance, providing supervision and therapeutic support as part of a community sentence. The Angiolini Commission noted the effectiveness of women-specific services, in particular the '218' service in Glasgow and 'The Willow' in Edinburgh. The 218 service has shown positive outcomes such as an 83% decrease in drug and/or alcohol use and 67% of women reporting improvements in their health and wellbeing. An independent evaluation of the 218 Service, carried out by London South Bank University found that there is potential for the service to save £4.72m per year on the costs to society incurred by the offending and substance misuse of women referred to the service. This calculation was based on the current costs of delivering the service per year (£1.89m); a conservative estimate of the reduction in re-offending of a cohort of women offenders who had been involved with the 218 Service between 1 June 2007 and 31 May 2008 (21%); and the wider costs to Scottish society per problematic drug user in a year (£61,000).

We note and support the conclusions of the recent evaluation of women's community justice services in Scotland¹¹, and recommend that the Scottish Government consider these in conjunction with its review of the presumption.

Question 4: Do you think there are any specific circumstances to which a sentencing judge should be required to have regard when considering the imposition of a custodial sentence?

Comments

Prison Reform Trust agrees with the Scottish Government 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 threat of serious harm to the public.*" In sentencing decisions, the courts should have regard to the seriousness of the case and to the individual circumstances of the offender. This latter

¹⁰ Prison Reform Trust (2014) *Brighter futures – working together to reduce women's offending* London: PRT <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Brighter%20Futures%2025314web.pdf>

¹¹ Dryden, R and Souness, C (2014) *Evaluation of Sixteen Women's Community Justice Services in Scotland*. Institute for Research and Innovation in Social Services p.iv

consideration does not mean treating everyone in the same way but being sensitive to the individuals needs of the offender, which may be shaped by characteristics including gender, age or disability.

Female Offenders

Most of the solutions to women's offending lie outside prison walls. The evidence base for this position has grown significantly in recent decades with a series of authoritative inquiries and reports, most notably the 2000 report of the Prison Reform Trust's Committee on Women's Imprisonment (the Wedderburn Report), the 2007 Review of Women with Particular Vulnerabilities in the Criminal Justice System (the Corston Report), the 2011 report of the Women's Justice Taskforce (Reforming Women's Justice), and the Scottish Government's Commission on Women's Offenders in 2012. Each of these reports have demonstrated that prison is rarely a necessary, appropriate or proportionate response to women who get caught up in the criminal justice system.

Despite this growing evidence base we are concerned that the number of women sent to prison for relatively minor offences remains stubbornly high. In 2000, women made up just 3.5% of Scotland's prison population, by 2010 this had risen to 5% and while there have been slight reductions in recent years the women's prison population remains high. In the last ten years the number of women convicted of crime has gone up by 14% but the number of women in custody has more than doubled. 8 out of 10 women given a prison sentence were sentenced to less than 6 months and 43% of women leaving prison are reconvicted within one year.¹² In contrast, community sentences enable women to take control of their lives, care for their children and address the causes of their offending.

Because women are such a small minority of those in the criminal justice system in Scotland, and 5% of the prison population, they are easily overlooked in criminal justice policy, planning, and services. Four out of five women going to Cornton Vale have a mental health problem and seven out of ten have a disclosed history of abuse or trauma. It is unfeasible to think that women who have suffered an extensive traumatic history can access the quality of support required in as little as 3 months. Given these figures diversionary projects for women whose crimes do not warrant imprisonment of a sentence shorter than 6 months would prove to be more beneficial in supporting women to address some of the root causes of offending behavior and ultimately obtain the appropriate support in the community to make marked changes in their lives.

Offenders with dependent children.

The sentencing of those with dependent children, usually mothers, can have a profound impact upon the outcomes for the offender, their children and wider community. This insight is reflected in the United Nations Bangkok Rules which emphasise the need to consider alternatives to custody for women with dependent children.

The Prison Reform Trust has long called for greater awareness of the needs of offenders with dependent children. The consequences of imprisonment for women and their families are far reaching. Prisoners' families experience financial, housing, emotional and health problems as a result of the decision to imprison. Many lose their home and possessions while in prison and imprisonment has a lasting impact on women's capacity to find employment. Parental imprisonment also significantly increases the risk of anti-social behaviour in children further adding to the inter-generational cycle of much minor offending.

For these reasons we conclude that sentencing judges should have particular regard to the situation of offenders with dependent children when considering the imposition of a custodial sentence.

¹² Community Justice Authorities. Women in in the Criminal Justice System in Scotland: The Facts <http://www.cjalb.co.uk/uploads/women%20in%20the%20justice%20system%20leaflet.pdf>

Domestic and international case-law requires this but we have recently recommended further measures to reinforce the court's duty to investigate an offender's sole or primary caring duties and to take these into account at sentencing. The fact that a mother is likely to be imprisoned further from her home due to there being fewer women's prisons should also be considered. Where offenders, most commonly women, do have responsibility for dependent children the presumption against short prison sentences should weigh particularly heavily on the courts.¹³

Learning Disabilities

Prisons are currently not appropriately placed to deal with individuals with learning disabilities. The report, Prisoners' Voices presents the findings of a major survey of prisoners with learning disabilities and learning difficulties, which explored their experiences of the criminal justice system.¹⁴ The research highlighted that those with learning difficulties did not have their needs met appropriately. Prisoners had a poor comprehension of the criminal justice system and those with issues surrounding literacy and verbal communication and comprehension struggled to integrate into prison life as well as access to services at the same level as the majority of the prison population including visits with family, education and programmes to address offending behaviour. Prisoners with learning disabilities are more likely to spend time isolated than the rest of the prison population and experience higher levels of depression and anxiety.

For offenders with a learning disability the most appropriate and effective option to address offending behaviour is community based. Where the appropriate time and support can be given to the individual's needs, supporting them to build independent living skills, learn 'good' habits, and get access local services. Cornerstone in Glasgow offers a good example of this work in Scotland, further information regarding this work can be found at:
<https://www.cornerstone.org.uk/services.php?id=community-justice-services>

Mental Health

The Sentencing Council states that mental illness or disability can be a mitigating factor, and therefore, sentencing requirements should take into consideration the abilities and support needs of individual offenders.

Sentencers also need to be mindful that prison can exacerbate mental health conditions. When considering the implication of short sentences for those with mental health issues the implications can be worse due to the lack of time to either address mental health needs or continue care/treatment that prisoners had access to in their community. There can also be a detrimental impact for those with low level mental health problems as those with severe mental health issues are prioritised. 80% of women in Cornton Vale have a history of mental health problems, these extremely high figures could be tackled by working with those suitable in the community to address both their offending behaviour and their mental health issues.

¹³ Prison Reform Trust (2015) Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children London: PRT http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf; see also: Prison Reform Trust (2015) Prison Reform Trust submission in response to consultation by Mary Fee MSP on her proposed Bill to require a court to have regard to impact of parental custody on welfare and wellbeing of offender's children. London: PRT <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/Mary%20Fee%20Consultation.pdf>

¹⁴ Prison Reform Trust (2008) No One Knows: Prisoners' Voices. London: PRT <http://www.prisonreformtrust.org.uk/Portals/0/Documents/No%20One%20Knows%20report-2.pdf>

Question 5: Do you think there are specific offences to which the presumption should not apply (i.e. offences which could still attract a short custodial sentence)?

Comments Question

The granting of exceptions is likely to undermine the presumption and making it more difficult to apply in practice. Ultimately it is for the court to determine whether a prison sentence is appropriate in a particular case subject to the emphasis we place above on more detailed guidance and training.

Question 6: Do you think that there are any circumstances in which a custodial sentence should never be considered?

Comments

For the reasons outlined above the Prison Reform Trust are strongly of the view that the presumption against short prison sentences should apply to all sentences of six months or less. The creation of the Scottish Sentencing Council offers a timely opportunity to develop a new focus on and confidence in non-custodial sentences, most notably in relation to summary offences dealt with by the sheriff courts.

In thinking about the training and guidance issued to the courts there is a particularly strong case for strengthening the presumption against imprisonment and the circumstances in which it can be set aside in cases of breach of a community order where a custodial sentence was not deemed appropriate for the original offence, and for minor offences where the offender has sole or primary care of dependent children. In such cases, usually involving mothers, the outcomes for the offender, child and community are so poor that immediate custody should be used in exceptional circumstances only.

Question 7: Do you think that the Scottish Government should also consider legislative mechanisms to direct the use of remand? If so, do you have any views on what such a legislative mechanism might include?

Comments

In a 2009 Report the Scottish Centre for Crime and Justice Research (SCCJR) argued that "*Scotland has a remand problem*". In his 2013 response to the Scottish Parliament Justice Committee, the then Cabinet Secretary for Justice stated that, "*We are looking to work with the judiciary to ensure that it realises that remanding people is not the best or kindest thing to do...we need to make it clear that other facilities will be available and that judges do not have to resort to remand and all the medication, addiction, housing and other issues that follow and the difficulties that the Prison Service has to cope with. In short, we are taking a multi-agency approach, working with the judiciary and ensuring that support facilities are available in the community.*" More recently the need to reduce the number of women in custody on remand in Scotland was highlighted by the International Symposium held in Edinburgh to consider the future direction of custody for women in Scotland.¹⁵

It is therefore a cause of great concern that Scotland still has the highest remand rate of any of the three UK jurisdictions and the number of people on remand continues to rise. An average of 1,525 people were in prison on remand in 2014–15, compared with 1,476 the year before.¹⁶ The most recent Scottish Prison Service (SPS) data reveals that in July 2015 there were 1100 'untried' male adults and 64 'untried' female adults, 124 untried male young offenders (under 21), and three

¹⁵ Scottish Prison Service (2015) From Vision to Reality - Transforming Scotland's Care of Women in Custody, International Symposium to consider the future direction of custody for women in Scotland, Edinburgh 27-29 May

¹⁶ Prison Reform Trust (2015) Bromley Briefings Prison Factfile: Autumn 2015 London: PRT
<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Factfile%20Autumn%202015.pdf>

untried female young offenders held in prisons across Scotland.¹⁷ In addition there were 197 individuals who had been convicted in court and were being held in prison awaiting sentencing. In real terms this means that in July 2015 approximately 18.3% of prisoners in Scotland were not yet convicted or were awaiting sentencing. Data also suggests that the use of supervised bail varies across Scotland. Supervised bail schemes offer a cost effective alternative to remand that affords offenders the opportunity to avoid the disruptive circumstances of remand often including, a breakdown in relationship with family, loss of housing and where appropriate employment. More should be done make sure these schemes are available to the courts.

Government action is needed to reduce the remand population in Scotland. The Prison Reform Trust's report with Soroptomist International '[Transforming Lives: Reducing Women's Imprisonment](#)' recommended that the Scottish government should consider legislating to restrict the use of remand where there is no real prospect of the offender / defendant receiving a custodial sentence on conviction. It also recommended that the Judicial Institute for Scotland should review its training for JPs and sheriffs on women in the criminal justice system in accordance with the Angiolini Commission's recommendation. The introduction of the 'no real prospect test' in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 did result in a fall in the number of people held on remand, although since its initial positive impact the effect has been more muted. The Prison Reform Trust has sought further analysis and explanation of this from the Ministry of Justice. The amendment to the Bail Act has now been operational for 3 years in England and Wales and it should be possible to improve on the model using the evidence obtained. The Scottish Government is well-placed to pioneer such a development. There are exceptions to the presumption against custodial remand introduced by the 'no real prospect test' – relating to domestic violence offences and where the court believes a defendant should be held in custody "for their own protection".¹⁸ We would be happy to provide further information about the operation of the 'no real prospect' on request.

Conclusion

The Prison Reform Trust would welcome the opportunity to discuss this submission further and looks forwarding to supporting the Scottish Government's commitment to and initiatives for reducing the use of imprisonment.

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¹⁷ Scottish Prison Service Prison Population Bulletin
<http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

¹⁸ Schedule 1, Part 1, Section 3, Bail Act 1976