



Prison Reform Trust submission to the Scottish Government consultation, Making Justice Work for Victims and Witnesses

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective penal 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:

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

www.prisonreformtrust.org.uk

Q5-6. Understanding sentencing

A sentencing framework underpinned by clear sentencing guidelines, produced and promoted by a statutory body, would allow sentencers in different courts to be consistent in their approach to sentencing, providing greater clarity for victims, witnesses, defendants and the public. In other jurisdictions, including England and Wales, guidelines set out sentence ranges reflecting different levels of seriousness and, within each range, a starting point for the sentence. They provide guidance on factors the court should take into account that may mean a more or less severe sentence should be imposed. Guidelines provide a structured approach to determining the appropriate sentence while still allowing for judicial discretion.

The Sentencing Commission for Scotland, chaired by the late Rt Hon Lord Macfadyen, recommended the creation of a statutory body, the Advisory Panel on Sentencing in Scotland (APSS), to be responsible for the preparation of draft sentencing guidelines.¹ The Criminal Justice and Licensing (Scotland) Act 2010

¹ The Sentencing Commission for Scotland (2006), The Scope to Improve Consistency in

contains provision to create a Scottish Sentencing Council which will provide a new sentencing guidelines regime for Scotland. The objectives of the Council outlined in the legislation are to:

- Promote consistency in sentencing practice;
- Assist the development of policy in relation to sentencing; and
- Promote greater awareness and understanding of sentencing policy and practice.²

The Prison Reform Trust welcomed the creation of the Sentencing Council for England and Wales. Its functions are similar to those recommended in its publication *Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis* (2008).³ That report called for the creation of a body to:

- Achieve greater consistency and stability in sentencing practice, thereby preventing any further upward drift in sentencing severity; and
- Reduce the politicisation of sentencing policy and practice, by acting as an institutional buffer between the political process and penal practice.

It envisaged three functions for a newly established Sentencing Commission:

- Providing guidance to sentencers leading to greater consistency in sentencing without restricting judicial independence;
- Gathering and providing information and statistics for monitoring, planning and policy development; and
- Community engagement, to inform and consult the public.

We would urge the Scottish Government to enact the provisions of the Criminal Justice and Licensing Act 2010 to enable the creation of a Scottish Sentencing Council.

Q15. Do you agree that we should amend the definition of vulnerable witnesses to match the requirement of the EU directive?

In principle, yes; however, consideration should be given to the likely timescale for the EU directive and any temporary arrangements that the Scottish Government might want to introduce in the meantime. Concerning paragraph 64: the aspiration

Sentencing, <http://www.scotland.gov.uk/Resource/Doc/925/0116783.pdf>

² <http://www.legislation.gov.uk/asp/2010/13/part/1/crossheading/the-scottish-sentencing-council/enacted>

³ Hough, M & Jacobson, J (2008), *Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*, London: Prison Reform Trust

should be for appropriate support according to personal need rather than “the same support”.

Q16. Do you agree the definition of a vulnerable witness - and therefore automatic entitlement to standard special measures – should be extended to include:

(a) Victims of sexual abuse

Yes

(b) Victims of domestic abuse

Yes

(c) Those witnesses defined as automatically vulnerable in the final version of the EU Directive on Victims

Yes

“Standard special measures” are generally aimed at making the court environment less intimidating, which may not, on their own, be sufficient to meet an individual’s personal support needs. Further consideration should therefore be given to ensuring that an individual’s personal support needs, for example, concerning communication and comprehension, are both fully recognised and met.

Q17. Do you agree that any witnesses who are automatically entitled to standard special measures should be able to opt-out of using them?

In principle yes; however for certain individuals, for example people with learning disabilities, the court must be satisfied that the individual understands the purpose of standard special measures and the implications of rejecting them. Depending on the particular circumstances of an individual’s vulnerability, it may be necessary for an appropriately qualified professional to determine their level of understanding.

Q25. Do you agree with the principle of extending the types of special measures available specifically to help meet communication support needs?

Yes.

Q26. If you agree in principle we should extend the types of special measures available to meet communication support needs, do you have any views at this stage on which option/model you would favour?

Witness profiles will enable a full appreciation of an individual's personal support needs, which may include the need for an intermediary. Limiting the option to intermediaries alone might mean that other support needs remain unidentified and unmet.

Q27. If the role of Appropriate Adults in relation to suspects is defined in statute, do you believe the same is necessary for their role in relation to victims and witnesses?

Yes. Support, based on individual need, should be defined in statute for all vulnerable people in the criminal justice system regardless of an individual's status as witness, victim, suspect or defendant. Provision - and access to provision - should be equitable.

In recognising the 'read-across' concerning the role of Appropriate Adult, paragraph 94 reinforces the argument that support should be made available to all vulnerable people within the criminal justice system regardless of their status as victim, witness, suspect or defendant. Appropriate Adults are currently made available for vulnerable adult and child suspects at the police station, and a supporter at the court. The role of the AA or supporter is equally relevant for vulnerable victims and witnesses.

Q30. Do you agree that victims (or parents, carers or relatives) should be given the opportunity to make written representations about what additional conditions might be included in the license when an offender first becomes eligible for temporary release?

In principle yes; providing that there are clear criteria for assessing the merits of proposed license conditions. Licence conditions should be preventative as opposed

to punitive and must be proportionate, reasonable and necessary. The purpose of consulting should be to assist with adopting reasonable measures to limit avoidable distress and harm to victims. It should not be for the purposes of further punishment or deterrence. License conditions should, where ever possible, enable offenders to take up opportunities for resettlement that will help them to lead a law abiding life on release.

Q33. What mechanisms could be used to ensure victims' interests are taken into account when sentencing policy is developed?

It is important that victims and members of the public, along with offenders and other people involved in the justice system, have the opportunity to engage in and be consulted on the formation of sentencing policy. A survey published by SmartJustice and Victim Support challenges many pre-conceived ideas that victims always want heavy penalties such as prison for people who commit non-violent crimes.⁴ Instead, they support a range of measures which they believe are more effective in stopping further offending. The poll, conducted by ICM Research, found that 8 out of 10 (80%) victims think that more constructive activities for young people in the community and better supervision by parents would be effective in stopping re-offending. Seven out of ten victims also want to see more treatment programmes in the community for offenders suffering from mental health problems, and substance misuse problems, to tackle the causes of non-violent crime.

Among the key findings from the poll, which asked how non-violent crimes like shoplifting, car theft and vandalism can be reduced, were:

- Two-thirds (62%) of victims think that going to prison does not prevent re-offending
- More than half (54%) were in favour of making offenders work in the community - in schools, old people's homes or parks - to stop them returning to crime

The Sentencing Council for England and Wales has developed a process of consultation on sentencing guidelines which enables the views of victims, members of the public, offenders and others involved in the justice system to be taken into account in the formation of sentencing policy. The process of formulating, consulting

⁴ SmartJustice (2006) Briefing: Crime victims say jail doesn't work, <http://www.smartjustice.org/pr16jan06.html>

and finalising sentencing guidelines produced by the Sentencing Council is outlined below:

Step 1

The Sentencing Council decides to consider a particular topic for a guideline. The Council may have decided on the topic itself, may be required by legislation to produce a guideline on the topic or may have received a proposal from the Lord Chancellor or from the Court of Appeal.

Step 2

The Council undertakes research into the topic.

Step 3

The Council forms preliminary views. When preparing guidelines, the Council considers the six issues that are described in section 120 of the Coroners and Justice Act 2009. A consultation paper and draft guideline are issued to the Lord Chancellor, the Justice Committee of the House of Commons and any other persons the Council considers appropriate. The consultation paper and draft guideline are published, and made available on the website. The normal consultation period is 12 weeks.

Step 4

The Council considers the responses received to the consultation paper and draft guideline. The Council then issues a definitive guideline, binding on all courts in England and Wales.

Step 5

The Council monitors the operation and effect of the guideline and draws conclusions. The guideline is also kept under review so it can be amended or developed as necessary.⁵

⁵ <http://sentencingcouncil.judiciary.gov.uk/guidelines/how-guidelines-developed.htm>

We would urge the Scottish Government to enact the provisions of the Criminal Justice and Licensing Act 2010 to enable the creation of a Scottish Sentencing Council, and adopt a similar method of consultation on sentencing guidelines.

Q34. Do you agree with the proposal to allow victims (or relatives in appropriate cases) to speak to a member of the Parole Board before a Life Prisoner Tribunal considers the release of an offender on license?

In principle yes; providing that the independence and impartiality of the Parole Board is protected and victims' expectations are based on clear, explicit information about the process. We support opportunities for victims to be better informed about the work of the Parole Board and seek assurances regarding any concerns they may have in their particular case. It is important to bear in mind that the Parole Board's main aim is to ensure that those prisoners who are no longer regarded as presenting a risk to public safety may serve the remainder of their sentence in the community under the supervision of a social worker. It is not the responsibility of the Board to consider the questions of punishment and general deterrence.

To ensure the impartiality of the judicial process, we agree with the proposal in paragraph 114 that the victim should meet with a member of the Parole Board who is *not* a member of the Life Prisoner Tribunal that will make the decision in the particular case. Provision will need to be made to guarantee safety and that the process is not unfair to the prisoner whose release is being considered. We would recommend that the scheme is piloted and its outcomes carefully monitored and assessed before it is considered for roll out nationally.

Q35. Do you agree with the proposal to allow Victim Statements to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed?

Yes; however, a Victim Personal Statement will usually have far more impact on the defendant if it is given as part of a restorative justice process. Offenders will sometimes say that statements read out by legal representatives or officials as part of the court process are the equivalent of "water off a duck's back". Hearing directly from a victim of the effect of a crime on them and those close to them is more likely to cause an offender to understand the harm they have done, take responsibility for their behaviour and work to make amends.

Q38. What more could be done to acknowledge and take into account the interests of victims and witnesses?

Victims, witnesses *and* offenders

'Making Justice Work' is important for victims, witnesses and offenders. The provision of support for vulnerable victims, witnesses, suspects and defendants, according to personal need, should be equitable and access to such support should be an entitlement by statute. The absence of the same range of special measures for vulnerable defendants as provided for vulnerable witnesses, potentially in the same trial, is anomalous. This principle of equivalence is fundamental in a just and humane criminal justice system.

It is important to note that many prisoners, former prisoners and ex-offenders have themselves been victims and should receive the same services as those who have not been convicted of offences. For example, research undertaken by the Prison Reform Trust in Scotland showed that prisoners with learning disabilities and difficulties were almost twice as likely to be subjected to bullying and 'harm' as were prisoners without such impairments.^{6 7}

It is a matter of concern that there is no systematic referral to the police when an offence happens in prison and the victim is a prisoner, unless the offence is extremely serious. Currently no support is available from victim services for people who are victims in prison. It should also be noted that many people who have been coerced or trafficked into criminal behaviour are in prison either on remand or serving a sentence. As the report No Way Out,⁸ published by Hibiscus and the Prison Reform Trust makes clear, they should be dealt with humanely and appropriately. For the majority this would mean being recognised as victims and being afforded support and protection. Those foreign nationals who are shown to be culpable, with little mitigation should usually be repatriated to a prison in their own country.

⁶ Loucks, N & Talbot, J (2007), No One Knows: Identifying and supporting prisoners with learning difficulties and learning disabilities: the views of prison staff, Scotland, London: Prison Reform Trust

⁷ Talbot, J (2008), Prisoners Voices – Experiences of the criminal justice system by prisoners with learning disabilities and difficulties, London: Prison Reform Trust

⁸ Prison Reform Trust and Hibiscus (2012), No Way Out - A briefing paper on foreign national women in prison in England and Wales, London: Prison Reform Trust

As the final report of the Commission on Women Offenders⁹ has highlighted and the Scottish Government acknowledged in its response,¹⁰ most women in prison are serving short sentences for non-violent offences and very many have been victims of serious crime such as rape, sexual assault and domestic violence. A comprehensive survey of children in custody Punishing Disadvantage,¹¹ produced by ICPR and published by the Prison Reform Trust, indicated that high numbers of children and young people in custody had themselves been victims of crime, abuse and neglect. While only 1% of Scottish children have been in care, 50% of Scottish prisoners have been in care; for Scottish prisoners convicted of violence the figure rises to 80%.¹²

Organisations such as Affect and Families Outside have highlighted the impact of imprisonment on the families and children of offenders. 48% of those who responded to the Scottish prisoner survey reported having children.¹³ The Scottish Government has estimated that in Scotland 27,000 children each year are affected by parental imprisonment.¹⁴ Research suggests that children with a parent in prison are “three times more likely to have mental health problems or to engage in anti-social behaviour than their peers. Nearly two thirds of boys who have a parent in prison will go on to commit some kind of crime themselves.”¹⁵

Restorative justice

The current adversarial approach to crime is expensive and produces poor returns in terms of victim satisfaction, reoffending rates and public confidence. Increased opportunities for restorative justice could help deliver improved confidence in and positive engagement with the criminal justice system. An ICM Research telephone poll of 1,000 members of the British public, conducted one month after the riots in English cities, show overwhelming popular support for constructive ways in which offenders can make amends to victims for the harm they have caused.¹⁶ Nearly nine out of 10 people (88%) agree that victims of theft and vandalism should be given the opportunity to inform offenders of the harm and distress they have caused. Almost

⁹ <http://www.scotland.gov.uk/About/Review/commissiononwomenoffenders/finalreport-2012>

¹⁰ <http://www.scotland.gov.uk/About/Review/commissiononwomenoffenders/scottishgovernmentsresponse>

¹¹ Jacobson, J et al (2010), Punishing Disadvantage: a profile of children in custody, London: Prison Reform Trust

¹² HM Chief Inspector of Prisons for Scotland (2010), Annual Report 2009-2010, Edinburgh: the Scottish Government

¹³ Scottish Prison Service (2011), Prisoner Survey 2011, Edinburgh: Scottish Prison Service

¹⁴ FOI request made to the SPS by Dr Chris Holligan, 26 January 2012

¹⁵ SCIE (2008) Children's and families resource guide 11: Children of prisoners – maintaining family ties. SCIE: London and Murray, J., and Fingleton, D., 'Parental Imprisonment: Effects on Boys' Antisocial Behaviour and Delinquency through the Life-Course.' Journal of Child Psychology and Psychiatry (2005) 46:1269–78.

¹⁶ Prison Reform Trust (2011), Public want offenders to make amends, London: Prison Reform Trust

three quarters (71%) believe victims should have a say in how the offender can best make amends for the harm they have caused.

The introduction, in 2003, of youth conferencing in Northern Ireland provides a model of restorative justice which could be rolled out nationally. Our report, *Making Amends: restorative youth justice in Northern Ireland*¹⁷ has shown that youth conferencing delivered a reduction in the number of children sentenced to custody and significantly lower reoffending rates than other disposals. Crucially, victims have been present in the majority of conferences, with 89% expressing satisfaction with outcomes and 90% saying they would recommend it to a friend.

It is concerning to note that there has been a decrease in the number of restorative justice warnings issued and conferences held by the police in Scotland between 2009-10 and 2010-11 of 28.5%. This follows a decrease between 2008-09 and 2009-10. Only Northern Constabulary reported an increase in the number of restorative justice warnings issued and conferences held, an increase of 23.3%. The remaining seven forces reported a reduction in the number of restorative justice warnings issued and conferences held. The largest reduction was reported by Strathclyde Police, where there were 42.2% less restorative justice warnings issued and conferences held.¹⁸

Q39-54. Compensation orders, victim surcharge and restitution orders

The Prison Reform Trust supports constructive ways for offenders to make amends to victims. If a strengthened compensation order, restitution order and victim surcharge are to be introduced they will need to be fair, proportionate and determined at the time of sentence. Financial reparation is likely to have more impact on an offender if it is given on a voluntary basis as part of a restorative justice process. On its own, a financial penalty is unlikely to prompt feelings in an individual of having made some amends for the crime(s) committed, damage done and distress caused.

The level of financial reparation will need to be matched to people's ability to pay and their circumstances. Many offenders are on low incomes, have high levels of debt

¹⁷ Jacobson, J. and Gibbs, P. (2009), *Making Amends: restorative youth justice in Northern Ireland*, London: Prison Reform Trust

¹⁸ <http://www.scotland.gov.uk/Publications/2011/10/25105642/29>

and rely on benefits for support. The Legal Services Research Centre (LSRC) has highlighted some of the correlations between people who offend and wider social factors. They found that people who had been recently arrested were significantly more likely to report civil law problems concerning, for example, employment (10% v 5%), rented housing (11% v 3%), homelessness (13% v 1%), and money/debt (21% v 6%). They were also more likely to have themselves been victims of crime (38% v 20%).¹⁹

The UK government's Social Exclusion Unit's 2002 report, *Reducing Re-offending by Ex-Prisoners*,²⁰ recognises the importance of finance, debt and benefits as one of the nine social factors involved in promoting successful resettlement. Research has shown that 54% of prisoners (58 people) had a total household income of less than £10,000 per year before going to prison, compared to 21% of employees surveyed. 40% of prisoners (53 people) were unemployed before going to prison. In comparison, the head of the household in 3% of households in England and Wales was unemployed in 2001.²¹

The Scottish government should be careful not to exacerbate the existing financial exclusion of many offenders. This could force them further into debt, making them easy prey for loan sharks and increase the likelihood of their reoffending. Research by the Prison Reform Trust and UNLOCK found that people in prison were ten times more likely to have borrowed from a loan shark than the average UK household. A third of people in prison did not have a bank account and that more than half had been rejected for a bank loan.²² The increased use of financial penalties could also have a disproportionate impact on the families of offenders and the families of women offenders in particular. Many women offenders have children or are the primary carer for disabled or elderly dependents. Each year almost 18,000 children are separated from their mothers by imprisonment²³ and at least a fifth of mothers are lone parents before imprisonment, compared to around 9% of the general population.²⁴

¹⁹ Pleasance, P., (2009b) *Criminal Offending, Social and Financial Exclusion and Civil Legal Aid*, London: Legal Services Research Centre

²⁰ Social Exclusion Unit (2002), *Reducing Re-offending by Ex-Prisoner*, London: Social Exclusion Unit

²¹ Buck, A, Tan, T and Fisher, C, (2007) *Putting Money Advice Where the Need is: Evaluating the Potential for Advice Provision in Different Outreach Locations*, London: Legal Services Research Centre

²² Bath, C & Edgar, K (2010), *Time is Money*, London: Prison Reform Trust and UNLOCK

²³ Wilks-Wiffen, S (2011), *Voice of a Child*, London: Howard League for Penal Reform

²⁴ Social Exclusion Unit (2002), *Reducing Re-offending by Ex-Prisoner*, London: Social Exclusion Unit

The Prison Reform Trust would suggest that Scottish Government examine the concept of 'payback' hours or a local community 'time bank' scheme. This could be developed with a charity and would allow people in prison to contribute to the community in kind, rather than being restricted to a somewhat detached financial arrangement. The Butler Trust Award citation in 2009 for the Castlemilk Community Timebank Team stated: "The team at HMP Shotts have developed links with a local community "time Bank" in which people can exchange their time and skills with others, without money changing hands. Prisoners' time spent in voluntary work (such as Listeners) is "banked" on behalf of the elderly and infirm so that they can "buy" help from other members of the scheme."

For further information please contact:

Mark Day

Head of Policy and Communications

Tel: 020 7689 7746

Email: mark.day@prisonreformtrust.org.uk