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REIMAGINING
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HOW CAN PRISON SENTENCING BE REDUCED IN SCOTLAND?

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CURRENTLY, Scotland has one of the highest proportionate rates of imprisonment in Western Europe, which the Justice Secretary, Michael Matheson, has described as "totally unacceptable". He wants to reduce radically the size of the prison population so that investment can be switched from incarceration to community penalties. Presently, extending the existing presumption against passing short custodial sentences appears to be the main tool in the Government's box. Yet, will extending the Presumption work? If not, what else can be done?

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 (e.g. Chiciros et al (2007); Scottish Government, 2011). It is also based on the view that imprisoning some people for some kinds of offences is unnecessary and disproportionate. Indeed this view can be traced back at least as far 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 (Scottish Prison Commission, 2008).

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. Yet sentence-length is a very crude proxy for offence seriousness and risk of serious harm. Arguably, it would be a more direct and clearer method to specify the target directly: the kinds of cases which, as a matter of proportionality, should be normally non-imprisonable. This is the sort of careful work which could be led by the Scottish Sentencing Council (see the article on the SSC in this issue).

That said, the immediate option being presented by the Scottish Government is to extend the presumption against short custodial sentences. Will it work?

What difference will Extending the Presumption Make?

Currently, there is a presumption against custodial sentences of three months or less. In its recent public consultation, the Scottish Government suggested that the Presumption 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 had little impact on sentencing decisions" (Scottish Government, 2015a). One reason is sentence inflation. Rather than passing sentences of say three months, some sentencers, appear to have passed slightly longer sentences. This phenomenon, predicted at the time of the passage of the legislation, has been found in other jurisdictions (Tata, 2013; Government of Western Australia, 2015).

So should the Presumption be extended?

No fresh legislation is needed: the current Presumption period could be increased by statutory instrument. So far so simple. But let us consider section 17 of the Criminal justice and Licensing (S) Act 2010:

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

This caveat could hardly be more permissive: do not impose a sentence of x months or less unless considered appropriate. Does any sentencer make a decision which she or he considers *in*appropriate?

Little wonder, then, that "there was little sign of [the Presumption] figuring prominently or explicitly in decision-making" (Scottish Government, 2015a).

True, under s17 a reason must be stated for imposing a short sentence, but this is hardly a challenging requirement. In such circumstances, the reasons given are likely to be terse, bland, and uninformative.

Therefore, an extension even to 12 months is unlikely to have much effect on sentencing practice: it will be a reminder to sentencers of the existing injunction that custody should be 'the last resort'.

So What Else Can be Done?

Relinquish the Policy of 'Custody as the Last Resort'

The prevailing approach that 'custody is the last resort' renders custody as the default. When other options do not seem to work, there is always prison. Prison is the only option which does not have to prove itself. While non-custodial sentences and social services seem so stretched, imprisonment appears as the dependable, credible and well-resourced back-stop. As one sheriff interviewee put it:

"really when I'm imposing short [prison] sentences, that's when we've run out of ideas!" (Scottish Government, 2015b)

The policy 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.

Create a Public Principle Defining what Prison Sentencing is Not For

Although it is uncomfortable to admit it, many people end up in prison not because their offending is particularly serious, nor because they are a risk of serious harm. They end up in prison because there does not appear to be anywhere else that can address their chronic physical, mental health, addiction, homelessness and other personal 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 a lack of help and support in the community. That is, surely, an indictment of our spending priorities.

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.

This phenomenon will become even more acute, unless action is taken to preclude it. We will soon see further deep cuts to community justice and community services. Meanwhile, prison regimes are improving. One cannot necessarily, therefore, blame individual sentencers, prosecutors, social workers for seeing imprisonment as the only 'safe haven' individuals presenting with deep-seated and complex needs. Yet in *policy terms* it is a senseless waste of resources and human potential.

A way to counteract this is to articulate a two-part public principle. First, the test for imprisonment should depend on the seriousness of offending and risk of harm. Secondly, addressing personal needs should not be a *ground for* imposing a prison sentence.. Such a principle could be set out in a Sentencing Guideline judgement and also through guidance to social workers. Importantly, this principle would also concentrate policy minds: a clear target to ensure that there is sufficient resourcing of community justice and services.

Devise more creative ways of dealing with breach of community orders

It is often noted that some individuals appear to choose not to comply with community penalties and so custody is inevitable to uphold the authority of the court.

Yet, whether we sufficiently understand the journey away from offending is important here. The lessons from the desistance research 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. Thus, the increased use of review hearings, (recommended by the Prison Commission and the Commission on Women Offenders), may be valuable.

Could Electronic Monitoring (EM) be used instead of custody in the case of many 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? EM could 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 (Nellis, 2014).

Nothing much will change unless and until we relinquish the policy of 'custody as a last resort' (of which the Presumption is one example). Such thinking in fact renders custody as the default, a back-up when 'alternatives' are thought to fail.

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

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See also blog posts on *http://scottishjusticematters.com/author/cyrus-tata/*

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