

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

Yes, Barnardo's Scotland is supportive of the Scottish Government's proposals to extend the presumption against short periods of imprisonment. We have been working in and around the prison estate in Scotland for many years. We currently provide youth work, bereavement trauma and loss and parenting work in HM YOI Polmont, as well as youth work in HMP Cornton Vale and soon to be HMP Grampian. We also work with adults and their families in HMP Perth and HMP Glenochil and have recently taken over the running of the visitors centre at HMP Edinburgh. In addition we also provide community youth justice services and are members of a variety of National and Local strategic operational forums in relation to justice and community safety.

When we put young people in custody we take away all the responsibility for challenging and addressing their offending behaviour from other people such as parents, friends, neighbours and the wider community and place the burden of dealing with the behaviour on the State. While this may be appropriate for more serious offences, if we are to truly move towards a more socially just society, as is the Scottish Government's vision, we must build community capacity and relationships; this is being taken forwards through several Scottish Government initiatives including the Community Justice Bill and the Community Empowerment Act.

We therefore welcomed the vision recently set out by the Minister for Community Safety and Legal Affairs to shift resources from prisons to community-based disposals. We also welcome the review of funding mechanisms for community justice social work services, including the intention within the Community Justice Bill to create an innovation fund within section 27 funding, to incentivise best practice. As will be discussed in detail further on, we believe extending the presumption against short term sentences must be seen as part of the wider policy intention of the Community Justice Bill, in particular credible and effective community alternatives to custody must be available to Judges and Sheriffs.

We would also highlight that the principle of diversion was established to try and support alternatives to custody. If we can prevent re-offending or escalation of offending behaviour by using diversion this will ultimately save money in the long run. The benefits of the diversion technique are strongly highlighted by evidence from the Edinburgh Study of Youth Transitions and Crime which shows that any contact with the formal justice system is likely to increase a young person's likelihood for reoffending and that appropriately targeted diversionary strategies can increase desistance from serious offending.

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?

- a) 6 months***
- b) 9 months***

c) 12 months

We do not think that this particular issue can be looked at in isolation. The question of how long the presumption should be extended to is very dependent on the strength of the community alternatives. There is a very real danger of Judges and Sheriffs up-tarring people, particularly young people, if they are not confident in the alternatives being offered and they are working on a presumption against, for example, 6 month sentences. Our services have experienced situations where Fiscals are desperately trying to keep young people out of prison, but where social work is in practice unable to offer an alternative to custody that satisfies the Sheriff.

The length of the extension will also impact on the resources of criminal justice social work, if we are keeping a larger number of individuals out of prison there will need to be appropriate resources transferred to Local Authorities to support the higher volume of community disposals, though this should be matched by a fall in custody costs. Referrals back to the Reporter for young people could also be used more frequently. We are concerned that these do not happen as frequently as we would like because of the resources required from the Local Authority to place a young person, for example, in intensive or secure care. With Local Authority budgets being squeezed this may well be an issue going forwards unless a way is found to identify the savings to SPS generated by diversion.

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

We have some concerns about the unintended consequences of extending the presumption without implementing effective community sentences which command the confidence of Sheriff's and Judges. The effect of the 2010 presumption against 3 month sentences resulted in a decrease in the use of 3 month sentences but an increase in the use of slightly longer sentences. As mentioned above we would be very wary of extending the presumption without also strengthening the alternatives to custody, particularly for women and young people. Sheriffs and Judges must be confident in viable alternatives otherwise they will continue to use custody, and if the presumption is extended this may well result in longer terms of custody being used for lower tariff offences due to a lack of community alternatives.

YOI Polmont has been through some dramatic changes over the last few years making it a much more appropriate environment for the young men who reside there. However, regardless of these progressive changes, prison should never be seen as a preferable option because of the chance for rehabilitation or indeed because there are no other options.

We would also argue that alongside a presumption against short term sentences, and alternatives to custody, there should also be a much more robust and consistent assessment for collecting information on an offender. Criminal Justice Social Work Reports are designed to provide information and assessment including sentencing options for a particular individual, there are also risk assessment tools for young people designed to identify risk factors for recidivism; however there is no impact assessment and the reports do not often include information about available community alternatives.

Whether a Judge of Sherriff is considering a sentence of 3, 6, 9 or 12 months there should be some form of impact assessment for that individual. What will each sentence length mean to them, will they lose their house, their tenancy, their children, their benefits? What will be the risk factors when they come out? There are many issues around housing for individuals who have been in custody - if you are in for 12 weeks you are likely to lose your tenancy. It takes 6 weeks to access DWP benefits and individuals will now also have to work their way through the process of Universal Credit.

In our experience, the impact of a prison sentence can also increase the risk of re-offending – creating or escalating vulnerabilities. There are also practical issues relating to money, personal relationships with family, friends, and the community might have broken down leaving individuals with no emotional or practical safety net. Practical issues will also kick in such as needing a passport, ID or birth certificate to access housing support. Many people with an offending history will not have these things and will need financial and practical support to obtain them.

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?

A key area of work for Barnardo's Scotland is children affected by parental imprisonment. We would welcome consideration of the circumstances of individuals who have parental responsibilities when a Judge or Sherriff is deciding whether or not to impose custody. Parental imprisonment can have a hugely detrimental effect on children and young people and these effects are well documented, yet there is still a lack of recognition of this in Scotland. We believe more can and should be done to acknowledge the effects of parental imprisonment on children, particularly in court settings.

Criminal Justice Social Work Reports should be completed for all individuals likely to get a custodial sentence; these reports are designed to inform the Judge or Sherriff about the sentencing options for that particular individual. However, these reports are not always conducted and can vary hugely depending on who completes them. We would like to see a more robust assessment process, based on GIRFEC principles, which takes into account the potential impact of custody on any dependent children, a Judge or Sherriff should consider whether the negative impact on any children can be mitigated by using alternatives to custody, if appropriate. If custody is the only option for an individual, the assessment should highlight what supports need to be put in place for any dependent children.

Young people are particularly vulnerable and the majority of young people in Polmont and Cornton Vale will have come from deprived communities and chaotic backgrounds. A short spell in custody for a relatively low tariff crime could put a young person in contact with higher tariff offenders who will pass on these learned behaviours. Young men in particular are likely to learn about the next level of criminality whilst inside, they are also more often than not, very aware about what types of crime will get them sent back into custody, so they know what sort of behaviour to engage in on their release, for example an assault as opposed to stealing a car. We have worked with young men who have even asked the judge to jail them, because they feel being inside is often easier than being on the outside. An increase in the availability of appropriate community alternatives, therapeutic resources such as bereavement, trauma and loss services, training and employability services etc. will go some way to challenging this disappointing sense of helplessness and misguided aspiration.

Short spells in custody only reinforce these dangerous cycles, particularly for young people. We would therefore like to see a much more holistic impact assessment done for young people when they are sentenced, one based on GIRFEC principles which looks at the whole background of the young person and the potential impact of a custodial sentence including risk factors and protective factors.

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)?

The Criminal Justice Voluntary Sector Forum, of which we are members, highlighted that the Scottish Prisons Commission (2008, p3)¹⁷ recommended that, "*imprisonment should be reserved for people whose offences are so serious that no other form or punishment will do and for those who pose a threat to serious harm to the public.*" We support this view. As noted at the SCCJ event on the 11th of December:

"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" ¹

In addition, electronic monitoring or bail hostels could and should be used instead of short spells in custody, alongside investment in services which can work one-to-one with offenders to address their offending behaviour and move towards desistance. Sometimes communities and individuals may well need respite from persistent offenders, but this respite shouldn't necessarily come in the form of a short spell in custody. Particularly for young people, a few months in prison with no-one working with them to address their behaviour, will undoubtedly result in the same behaviour on release, this is simply a temporary fix.

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

As a general point we believe more needs to be done to shift the default position for sentencing away from custody. Although the overarching policy aim is to have 'custody as a last resort' this is not the case in practice and custody is used more often than not when there are no other options, or more worryingly when an individual is in need of support or care.

We are partners in two of the Shine Public Social Partnerships which provide mentoring services for female offenders; Criminal Justice Social Work can refer women to Shine who are at risk of breaching a Community Payback Order. Our experience is that non-payment of fines, particularly for women should not result in a custodial sentence of any kind, for several reasons.

Firstly, imprisoning already disadvantaged women who will inevitably never be able to pay the fine does not make financial sense as far as the State is concerned. Many women know they can't afford the fine so just say, "I'll do my ten days in prison" this period of imprisonment then costs the public purse, and the original financial penalty is never recouped.

For many women, the threat of a fine is not a deterrent, there is often no other option, e.g. shoplifting to feed children. In addition, women are usually the main caregivers, when a woman is sent to custody the majority of children end up leaving the family home, often being placed in unstable and unsuitable care arrangements until their mother is released. Even ten days in custody can have a detrimental effect on children, particularly with babies who can experience severe disruption in their attachment process, whilst separated from their mother.

We also believe that we should aim to work towards an end goal of having no under 18's in penal establishments, for any period. On the 22nd of November 2015 there were 38 convicted males, 1 convicted female, 18 untried males, and no untried females in custody, under the age of 18. The fact that there is only one female under the age of 18

¹ <http://www.scccj.org.uk/>

in custody is to be welcomed, however there are still 56 young men, or by definition children in custody.

Some under 18's will undoubtedly pose a risk to their communities, however there should be age-appropriate secure units which can accommodate these individuals, where they can be treated like the children that they are, using the principles of GIRFEC. However, this is not currently feasible because the secure estate is not fit for purpose; it is still being used in some cases for young people who pose a threat to their own safety. There is also the issue of resource for Local Authorities, particularly those who have high areas of poverty and deprivation as secure care is very costly.

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

Yes. We would very much welcome a legislative move towards a reduction in the use of remand, particularly for female offenders, the majority of whom do not actually end up with a custodial sentence. The Commission on Women Offenders found that, "*around only 30% of women on remand (either pre-trial or post-custody) go on to receive a custodial sentence*"² In South West Scotland where we provide mentoring for female offenders 48% of local women in custody are held on remand compared to 28% across Scotland.

In 2012/2013 there were 33,851 'receptions to penal establishments', of this number 19,175 were on remand and 14,662 sentenced.³ Individuals on remand are often the worst cases of the 'revolving door' they could be on remand for 9 months or even more in some cases, for lots of different offences, and spells on remand running concurrently, and they've never been able to access any support, services or programmes to address any of their behaviours.

As with short term sentences, a spell on remand will not usually provide enough time for prison staff to work constructively with an individual. The uncertainty of being un-tried may mean the individual is also reluctant to engage with any services offered to them as they may not believe they will be around for long, many programmes are not even available to remand prisoners, such as access to the throughcare Officer pilot scheme.

The knock-on effect of remand for families can be enormous; families can very suddenly be left without the financial and emotional support of a partner or parent. For young children in particular, they will not distinguish between remand and sentence, for them they will simply know their parent has been removed from their lives. The Bangkok rules on women's imprisonment state that women should not be remanded if they have a family to care for, yet this is still happening consistently across Scotland.

There are two key issues with the use of remand, one is that the use of remand should be drastically reduced and the second is the access that individuals get to services and support whilst on remand. Legislation or guidance could potentially be used to keep remand and convicted prisoners separate, as well as allowing them the same access to services and programmes as convicted prisoners, such as addiction, education and parenting programmes. Their time in custody should also be productive and purposeful, there should be a care planning process, especially for young people.

² Commission on Women Offenders (2012) Commission on Women Offenders Final Report, Edinburgh: Scottish Government. Available at: <http://www.gov.scot/Resource/0039/00391828.pdf>

³ <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/PrisonsDatasets/prisdata1213> (Table 8)

Although not convicted of any crime, there is no reason why SPS and partner agencies could not be working with individuals on remand with regards to any immediate issues they are presenting such as mental health, drug and alcohol problems, literacy, bereavement, trauma and loss etc.

For both women and men, remand does not allow access to throughcare, if the period on remand was less than 28 days no financial assistance is provided on release and at the very least it takes 6 weeks to access DWP benefits. If the remand period has been longer than 3 months the likelihood is that tenancies will have been lost as well.

Remand should not be used for minor infringements like not attending appointments; a small amount of resource like mentoring to support individuals to comply with orders would save a lot of money. Non-compliance with bail orders can often be as a result of chaotic lifestyles and this may result in the use of remand. Increased community resources can support individuals to comply with bail conditions, address presenting issues and vulnerabilities and negate the need for remand, therefore being more cost effective. Third sector organisations providing community services have a huge role to play here and can complement the role of statutory services in delivering community alternatives to custody.

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