

## **RESPONSE FROM HOWARD LEAGUE SCOTLAND TO CONSULTATION ON PROPOSALS TO STRENGTHEN THE PRESUMPTION AGAINST SHORT PERIODS OF IMPRISONMENT<sup>1</sup>**

Howard League Scotland (HLS) welcomes the Scottish Government's review of the presumption against short periods of imprisonment. We supported the introduction of the presumption and were disappointed that the Scottish Government was unable to set the presumption at sentences of six months or less in line with the recommendation of the 2008 Scottish Prisons Commission<sup>2</sup>.

### **Why it matters**

Scotland's imprisonment rate is one of the highest in Western Europe<sup>3</sup>. As a recent editorial in The Daily Record<sup>4</sup> noted, *"That is not a badge of honour."* We rely on imprisonment to do too much with too many. 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.

Even a short period of weeks spent 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. Those sentenced to prison for periods of six months or less are more likely than not to be reconvicted within a year of release<sup>5</sup>. Short-term prison sentences are a waste of public money – something we can ill afford in these financially austere times.

Another impetus for tackling the over-use of short-term imprisonment stems from the recent enactment of the Prisoners (Control of Release) (Scotland) Act 2015<sup>6</sup>. Provisions contained in the Act will increase the number of long term prisoners held in Scottish prisons and therefore 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. (By way of comparison, the annual budget for community justice services in 2014/15 is £32.3m.)

On 26 May 2015, when asked how these additional costs would be met, the Cabinet Secretary for Justice replied,

*"...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."*

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<sup>1</sup> [https://consult.scotland.gov.uk/community-justice/short-periods-of-imprisonment/user\\_uploads/624951\\_v3\\_20150917.pdf](https://consult.scotland.gov.uk/community-justice/short-periods-of-imprisonment/user_uploads/624951_v3_20150917.pdf)

<sup>2</sup> <http://www.gov.scot/Resource/Doc/230180/0062359.pdf>

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

<sup>4</sup> <http://www.dailyrecord.co.uk/news/scottish-news/record-view-jailing-people-sake-6778916>

<sup>5</sup> <http://www.gov.scot/Resource/0047/00474253.pdf>

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

### **Extending the presumption**

Currently, the Criminal Justice and Licensing (Scotland) Act 2010 legislates for a presumption against prison sentences of three months or less. It is clear that this measure has had no significant impact on the size of the prison population and there is some evidence to suggest that it may have resulted in uptariffing, with more people receiving prison sentences of three to six months. ***Howard League Scotland supports increasing the presumption against short prison sentences to prison sentences of 12 months or less.*** If this change is introduced it should be monitored closely to ascertain whether it has reduced the prison population.

We note that the particular focus of this consultation is a review of the presumption and that any alteration to the time period specified in the legislation can be made by secondary legislation (in the form of a statutory instrument). However, there are other possibilities for future reform that we will refer to briefly towards the end of this document.

### **Will the presumption alone be enough to reduce the prison population?**

Howard League Scotland is of the view that even if the presumption against short-term prison sentences was to be increased upwards to sentences of 12 months or less, this measure alone will not be enough to reduce the size of Scotland's prison population.

### *Resources for custody vs. community*

There must now be a significant shift of resources from custody to community-based responses to offending. 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.

Many community-based services are reliant on short-term funding cycles. It is hard to understate the impact that this has not only on the sustainability of those services, but also the impact on staff turnover and morale, and the knock-on effect that this has on the experience of the service users. Short term funding also impedes the ability of these services to demonstrate their effectiveness. Any hesitancy on the behalf of sentencers about referring individuals to these services is hardly surprising when the precarious nature of their funding is often manifest.

Aside from funding for community-based services and interventions for those who have committed offences, in the years ahead we are likely to see budgets for mainstream community services coming under huge financial pressure.

The Scottish Prison Service (SPS) has seen its annual budget (excluding capital expenditure) rise from £330.9m in 2008/09 to £368.9m in 2014/15 (an increase of 12%). The budget for criminal justice social work, on the other hand, has remained frozen over the same period at £86.5m per annum. The annual budget for community justice services is £32.3m in 2014/15 and has decreased in real terms in recent years.

We note that the SPS transferred £1.5m of its unspent budget last year to the Scottish Government for allocation to women's community justice services. Whilst this is welcome, it represents just 0.004% of the SPS' annual operational budget. There will need to be a far greater rebalancing of resource to the community if we are to see a shift away from our over-reliance on prison in Scotland.

We remain to be convinced that the proposed reforms to community justice contained within the Community Justice (Scotland) Bill will deliver on this aspiration. As currently conceived, the draft legislation provides the proposed new organisation Community Justice Scotland with no significant levers to enable the necessary shift in focus and resources from custody to community.

***We must avoid at all costs a situation where courts are discouraged from imposing custodial sentences, but find that the community-based alternatives are unavailable or ineffective. An immediate and significant transfer of resources to community justice must go hand-in-hand with any increase in the presumption against short terms of imprisonment.***

#### *Tackling the over-use of remand*

We should always seek to use remand sparingly, not least because our justice system is premised on the principle of presumed innocence. In 2012/13 more people entered Scottish prisons to await a trial or sentencing than to be punished: there were 19,175 remand receptions and 14,668 sentenced receptions<sup>7</sup>. Those held on remand constitute a fifth of Scotland's prison population and the number of people held on remand has increased by 65% since 2000. Scotland's remand imprisonment rate is the highest of the three UK jurisdictions.

There is anecdotal evidence<sup>8</sup> to suggest the 140-day rule is being regularly breached and that this may be contributing to the over-use of remand.

There are huge geographic disparities in the use of supervised bail. For example, only eight individuals were placed on supervised bail in Glasgow in 2013/14 compared with 76 people in the city of Edinburgh. According to the Scottish Government, the unit cost of supervised bail is £3,002, whereas the annual cost of imprisonment per prisoner place is £37,059<sup>9</sup> (although others calculate this to be a substantial underestimate<sup>10</sup>).

<sup>7</sup> <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/PrisonsDatasets/prisdata1213>

<sup>8</sup> <http://www.scottishlegal.com/2015/11/13/constant-breaches-of-140-day-rule-oppressive-and-unconstitutional/>

<sup>9</sup> <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Publications/costcrimjustscot/costcrimjustdataset>

<sup>10</sup> <http://www.gov.scot/Resource/Doc/1102/0056826.pdf>

### *Challenging the iconic status of imprisonment*

Prison occupies an iconic status in the eyes of society. Its presence is visible, even if only from the outside, and – along with the police– the prison service represents one of the few public services that are available on a 24/7 basis.

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 hazards in cloaking imprisonment in the language of reform. In a recent article<sup>11</sup> published by Scottish Justice Matters, Professor Cyrus Tata of Strathclyde University noted that, *“One 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.”*

Professor Tata suggests that we should establish two principles when considering imprisonment: *“The first should clarify that the decision to imprison hinges on the seriousness of offending. The second principle should spell out that no one should be sent to custody for the specific purpose of rehabilitation, unless warranted by the seriousness of offending.”*

### *Other considerations and future reform*

The consultation asks whether the Scottish Government should consider legislative mechanisms to direct the use of remand. HLS is aware of changes to the Bail Act in England and Wales<sup>12</sup> that states that sentencers should not remand someone to custody if there is *‘no real prospect that the defendant will be sentenced to a custodial sentence in the proceedings’*. We understand that this measure has had some positive impact on the use of remand in England and Wales and we would therefore encourage the Scottish Government to consider whether this might be an appropriate measure to consider in Scotland.

The fact remains that the legislative basis for the presumption against short periods of imprisonment still permits sentencers substantial discretion over whether they decide to sentence someone to custody. As part of a longer term plan to reduce the use of short term imprisonment, we would like to see consideration being given to other policy initiatives 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<sup>13</sup>, which provides for those serving more than one year and up to eight years to apply for conditional release under strict supervision terms having served 50% of a sentence. This has been very successful and has led to a significant reduction in the number of prisoners<sup>14</sup>.

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<sup>11</sup> <http://scottishjusticematters.com/sentencing-allure-imprisonment/>

<sup>12</sup> <http://www.legislation.gov.uk/ukpga/2012/10/schedule/11/enacted>

<sup>13</sup> <http://www.probation.ie/pws/websitepublishingdec09.nsf/Content/Community+Return>

<sup>14</sup> [http://report.nat.gov.tw/ReportFront/report\\_download.aspx?sysId=C10402422&fileNo=005](http://report.nat.gov.tw/ReportFront/report_download.aspx?sysId=C10402422&fileNo=005)

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In Finland, the law envisages that all sentences up to two years will be commuted to intensive forms of community supervision<sup>15</sup>. This takes the pressure off the sentencing judge and is one reason for their low rate of imprisonment.

At a recent roundtable discussion hosted by the Scottish Consortium of Crime and Criminal Justice, it was noted that there was a lack of data on the types of offences that habitually attract prison sentences of 12 months or less. Others questioned whether the length of a prison sentence was the best proxy for the seriousness of an offence.

We would like to see consideration given to the issues set out above as part of ongoing work to reduce the size of Scotland's prison population.

Howard League Scotland  
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<sup>15</sup> <http://www.scandinavianlaw.se/pdf/54-17.pdf>