

Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment

September 2015

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Ministerial foreword



Scotland has a comparatively high imprisonment rate by international standards - the imprisonment rate in Scotland is one of the highest in Western or Northern Europe. I am determined to change that situation by reducing the use of custody so that imprisonment is used appropriately as the option of last resort. This forms part of a wider discussion about the role of prison and where the use of imprisonment should be targeted.

This Government's vision for penal reform reflects the values of a modern and progressive Scotland. I would like our criminal justice system to use prison less frequently, and to have an even stronger emphasis on robust community sentences that focus on actively addressing the underlying causes of offending behaviour.

Imprisonment will always be required for those individuals whose offences are so serious that prison is the only appropriate form of punishment, and for those who pose a risk of serious harm. However, use of short-term imprisonment for individuals who do not fall into those categories is not effective - 60% of offenders imprisoned for 3 months or less are re-convicted within a year. Short-term imprisonment disrupts families and communities, and adversely affects employment opportunities and stable housing - the very things that evidence shows support desistance from offending. That is clearly not a good use of public resources, and it is a waste of human potential.

There are several important drivers to reducing the use of short sentences. The availability of robust community alternatives is a critical element, as are legislative mechanisms to influence sentencing decisions. The presumption against short periods of imprisonment, introduced by the Criminal Justice and Licensing (Scotland) Act 2010, provides that legislative vehicle.

The current presumption against sentences of three months or less has been in place since 2011. This presumption underlines our intention to move away from short sentences. In practice however, the three month limit has had little impact on sentencing decisions.

It is therefore my view that more can be done to strengthen the current presumption against short sentences so that it has a more direct impact on reducing short-term imprisonment.

This consultation seeks responses and views on two main points:

- First, should the current presumption against sentences of three months or less be extended and, if so, by how much?

- Secondly, is a more radical review of the presumption against short sentences and the use of short-term imprisonment including the use of remand required? For example, should we consider whether particular types of offences should never result in a custodial sentence?

These are wide ranging and complex issues and I would like to encourage responses and views from as wide a representation of Scottish society as possible.

Your responses will be critical in informing decisions on the future use of short-term imprisonment and the role of prisons in Scotland. They will also inform decisions around how we can deliver improvements within our criminal justice system, providing genuine opportunities for people to pay back to their communities and to become contributing members of Scottish society.

Michael Matheson, MSP
Cabinet Secretary for Justice

Chapter 1: Introduction

1. This consultation paper seeks your views on proposals to extend the current presumption against short sentences of three months or less, along with other proposals to reduce the use of short-term imprisonment.
2. As noted in the Cabinet Secretary's foreword, these proposals are one part of the Scottish Government's ongoing and wide-ranging work to reduce the use of short-term imprisonment in Scotland. This also includes: a continued emphasis on community alternatives to custody; developing a strengthened electronic monitoring service; establishing an improvement project focused on reducing the inappropriate use of remand and the use of short sentences; and increased access to community-based justice services.
3. Any proposed extension to the statutory presumption, or any other suggested changes to the use of short-term imprisonment, must be considered within the context of these wider measures which are designed to deliver effective community-based sentences that enhance public safety and promote rehabilitation.
4. This paper provides some background on the current presumption against short sentences and the impact that the presumption has had on sentencing practice in Scotland.
5. Chapters 4 and 5 of this paper set out specific questions around potential mechanisms to reduce the use of short-term imprisonment which we are seeking your views on.

Chapter 2: Background

6. The Criminal Justice and Licensing (Scotland) Act 2010 amended the Criminal Procedure (Scotland) Act 1995 to introduce, for the first time into Scottish law, a presumption against short periods of imprisonment. As it currently stands, the presumption provides that:

“A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.

Where a court passes such a sentence, the court must -

- (a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and*
- (b) have those reasons entered in the record of the proceedings.*

7. The presumption is intended to highlight to the court the need to only use short prison sentences as a last resort, and that community disposals should be favoured where possible. It is a *presumption*, not a ban, and it is for the sentencing judge to decide on the most appropriate sentence based on the facts and circumstances at hand in any given case.
8. The legislative provisions surrounding the presumption enable Scottish Ministers to substitute another number of months for the number currently specified in legislation. This must be done by secondary legislation, which in this case requires a draft statutory instrument to be laid before Parliament for approval:

“The Scottish Ministers may by order made by statutory instrument substitute for the number of months for the time being specified another number of months.

An order [substituting the number of months] is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.”

9. This consultation seeks views on proposals to extend the number of months, as well as on other proposals for further reducing the use of short periods of imprisonment.

Chapter 3: Impact of the current presumption against short sentences and sentencing practice in Scotland.

1. The Scottish Government is mindful of the principles put forward by the Scottish Prison Commission in their 2008 report¹ 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'

and that:

'to move beyond our reliance on imprisonment as a means of punishing offenders, the Commission recommends that paying back to the community should become the default position in dealing with less serious offenders.'

2. These are principles which the Scottish Government continues to endorse, and we believe that the current presumption against short sentences of three months or less should be extended in order to further reduce the use of ineffective short-term prison sentences.

Process evaluation into impact of Presumption against Short Sentences

3. This belief is supported by the findings of a recent process evaluation into the impact of the presumption against short sentences (along with the introduction of Community Payback Orders and the revised template for Criminal Justice Social Work Reports)², which indicated that the current presumption has had minimal impact on sentencing decisions.
4. This research included in-depth interviews with 16 Sheriffs across four case study areas, along with a survey of all 141 permanent Sheriffs. The Sheriffs interviewed indicated that the current presumption did not feature prominently in their decision making as sentences of three months or less were used relatively rarely; custody was always treated as a last resort; and that they would continue to impose short sentences where they felt them to be the only appropriate sanction.
5. Whilst the majority of survey respondents indicated that the presumption had made little or no difference to their sentencing practice, sizeable minorities thought that it had either made it more likely that they would give offenders a community rather than a custodial sentence, or that they would impose a longer custodial sentence.

¹ <http://www.gov.scot/Publications/2008/06/30162955/0>

² <http://www.gov.scot/Publications/2015/03/3800>

Current Sentencing Practice

6. These findings appear to be reflected in current sentencing practice. While custodial sentences account for a relatively small proportion of all court disposals (13% in 2013/14), 29% of these custodial sentences were for three months or less. A further 37% were for between 3 and 6 months, meaning that a significant proportion (66%) of custodial sentences imposed in 2013/14 were for 6 months or less, with only a very small proportion (1%) of these sentences imposed for crimes of violence or a sexual nature³. The proportional of all custodial sentences which are of 6 months or less has remained roughly consistent since 2010/11.
7. The total number of custodial sentences imposed in 2013/14 was just over 14,000, but that is not the whole picture. Although total prison reception figures are not currently available for 2013/14, figures for 2011/12 show that the 15,000 custodial sentences imposed in that year accounted for around 40% of the total receptions (37,000), with a further 22,000 receptions of individuals held on remand⁴. Further analyses have suggested that approximately 40-50% of remand cases do not subsequently result in a custodial sentence.
8. This would suggest that if we are to uphold the Prison Commission principles on targeting the use of imprisonment (i.e. for those committing the most serious offences and those posing a risk of serious harm), there is scope to review, and further reduce, the use of short-term imprisonment. An extension to the presumption against short sentences, supported by increased use of community alternatives, would provide one mechanism for doing that.

Impact on the Prison Service & Other partners

9. In addition to the impact on individuals, short-term custodial sentences make it difficult for the Scottish Prison Service (SPS) to invest time in the intensive rehabilitation of more serious offenders within the prison estate. Each time a person enters or leaves custody this can involve both considerable SPS resource along with the resources of other service providers involved in the individual's transition from the community to custody and vice-versa.
10. This process can be especially challenging when the custodial period is very short. A reduction in the use of short-term imprisonment should therefore reduce the 'churn' within the prison system, enabling prison staff to focus on support and interventions for longer-term prisoners, whilst simultaneously freeing up resources in the community.

³ <http://www.gov.scot/Publications/2014/12/1343>

⁴ <http://www.gov.scot/Publications/2012/06/6972>

Chapter 4: Proposals to change the length of the presumption against short sentences

1. The Scottish Government believes that the current rate of imprisonment in Scotland is too high, in particular when viewed against the rates in other comparable European countries. Scotland's incarceration rate (the rate per 100,000 of national population) is currently 145, which is one of the highest in Western or Northern Europe, and more than twice that of any of our Nordic neighbours⁵.
2. Evidence suggests that short prison sentences are ineffective in rehabilitating offenders, or reducing the risk of their reoffending. Statistics published in March 2015 show that individuals released from a custodial sentence of 6 months or less are reconvicted more than twice as often as those given a CPO⁶.
3. Community sentences may be more effective in reducing reoffending as they can provide more opportunities to address underlying causes of offending when compared with short-term prison sentences that provide only limited access to rehabilitation services. There is also evidence which indicates the possibility that, rather than reducing reoffending, imprisonment can increase long term reoffending by weakening social bonds and decreasing job stability⁷.
4. The proposals in this consultation paper to extend the presumption against short periods of imprisonment are designed to further reduce the use of short-term prison sentences and underline the point that prison should be reserved only for those who represent a genuine risk to the public.
5. As noted in Chapter 2 above, the presumption is not a ban, and therefore the effect of any increase in the length of the presumption will be in part dependent on the effect that this has on sentencing behaviour. The table below sets out estimates of the potential impact of the presumption on the number of prison places at different lengths (6, 9 or 12 months) and assuming a range of possible impacts on sentencing behaviour.

Reduction in use of custodial sentences:	Reduction in the number of prison places		
	Sentences of six months or less	Sentences of nine months or less	Sentences of twelve months or less
10%	60	100	130
20%	120	210	260
50%	290	520	660

⁵ <http://www.prisonstudies.org/world-prison-brief>

⁶ <http://www.gov.scot/Publications/2015/03/9783>

⁷ <http://www.gov.scot/Publications/2015/05/2480>

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

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

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

Chapter 5: Other proposals to further reduce the use of short-term imprisonment

1. The power to allow Scottish Ministers to amend the presumption is limited to substituting the number of months currently specified for a different number of months. Under the current legislative powers Scottish Ministers could not, for example, vary the presumption to rule out certain types of offences.
2. This chapter deals with other steps that could be taken by the Scottish Government to drive reductions in the use of short-term imprisonment. These steps would in most cases require additional (primary) legislation to enact.
3. The introduction of a presumption against short periods of imprisonment was recommended by the Scottish Prison Commission who suggested a specific list of circumstances to which a sentencing judge should have regard. The list included, amongst others, instances where the offence raised significant concerns about serious harm, or where the sentencing judge had concerns relating to the individual's offending history.
4. In legislating for the presumption the decision was taken that it would be sufficient merely to ensure that the court was satisfied that no other option would be appropriate, and that the reasons for that opinion be stated in open court and recorded in the minute of proceedings. We welcome views on whether further consideration needs to be given to this position.
5. Another possible option would be to introduce primary legislation which provides a more nuanced approach to the presumption against short sentences, for example by providing exclusions for certain offences. Such an option could allow for certain offences to only result in custodial sentences in exceptional circumstances, whilst also allowing for certain offences to be excluded from the presumption, and therefore individuals committing these offences could still be sentenced to short periods.
6. We also recognise that many of the issues relating to the use of short-term sentences (for example in weakening pro-social bonds or disrupting housing and employment) can also result from individuals being held on remand. There will of course always be a need for pre-sentence detention in cases where public safety is at risk, and public protection rightly remains at the heart of judicial decision making. Within that context we welcome any views you might have on steps that could be taken to appropriately direct the use of this form of short-term imprisonment.

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?

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)?

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

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?

Question 8: Do you have any additional comments on the use of short-term imprisonment?

Responding to the consultation

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

Consultation commenced on 23 September 2015 and will run for 12 weeks. If you wish to respond to the consultation, please provide your response by 16 December 2015.

Please send your response by e-mail using the **Respondent Information Form** to:

neil.robertson2@gov.scot

If you do not have access to e-mail, you may still submit your response by post with your completed respondent information form by sending it to:

Community Justice Policy Unit (GWR)
The Scottish Government
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Handling your response

We need to know how to handle your response and in particular, whether you are happy for it to be made public. Completing the attached **Respondent Information Form** will ensure that we treat your response appropriately. If you ask for your response not to be published we will treat it as confidential.

As the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998 any request made to it relating to the responses will be considered in terms of the appropriate legislation.

Following the closing date, all responses will be analysed and considered along with any other available evidence before a decision is made on the precise terms of any resulting order.

If you have given permission for your response to be made public and after we have checked that it contains no potentially defamatory material, your response will be made available to the public.

Comments and complaints

If you have any queries or comments about this consultation exercise please contact Neil Robertson via neil.robertson2@gov.scot

CONSULTATION QUESTIONS

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

- Yes
- No

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments

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

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

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

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

Comments

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

Question 8: Do you have any additional comments on the use of short-term imprisonment?

Comments

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RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode	Phone	Email
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3. Permissions - I am responding as...

Individual

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No



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