

JUSTICE COMMITTEE

PRESUMPTION AGAINST SHORT SENTENCES

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Short sentences: A problem – and a favoured reform target – almost as old as prison itself.

Short prison sentences have been considered a problem since the 19th century, for the same reasons they are considered a problem now: they ‘foster re-offending through alienating inmates from families and work’ (Killias, 2010 in a [Swiss study](#)). The poor experiences and outcomes of people on these sentences has been amply documented not least by my colleague [Dr Marguerite Schinkel](#), and yet they remain, over a hundred years later, a target of policy reform. Is sentence reform on its own going to be successful this time, or might there be something else about prisons, prisoners or society that needs to be addressed?

Research on short sentences is mainly research about serving multiple sentences.

There’s little research on the effects of serving one or a small number of short sentences. Research studies mainly report the effects of serving many short sentences, not intentionally as part of study design, but because this is a common pattern, especially in Scotland. This means research is telling us more about a particular group of people – typically who have an array of problems, a common history of experiencing inequality, and intensively overlapping statuses as victims and victimisers – and how their extensive sentence experience affects them, rather than reporting the specific effects of one or a small number of short sentences. We know very little about people who do only one or two short sentences. In other words, the legislation targets a sentence, rather than the group affected by them; it is not clear how this change, unaccompanied by other changes will help or hurt people.

The proposed legislation carries a risk of concentrating use of prison on those whom policymakers most want to remove from the prison ‘churn’.

The exception to the presumption remains ‘where no other method of dealing with the person is appropriate’. This is a common, if not the primary, rationale offered by judges for using such sentences precisely in the case of people who have already served short sentences. Hence, the people who judges believe are not ‘learning’ from these sentences – who also make up the group we know are damaged significantly by them – are also the ones most likely to continue receiving custodial sentences.

Is it the sentence or something more fundamental that doesn't 'work' for short-term prisoners?

Scotland's prison population for generations has been characterised by the use of short, often very short, sentences. The legislative reform appears premised on the idea that this fact on its own evidences poor use of prison. However, this is also how the prisons of Norway – a country with a much admired approach to punishment – are used, where the typical sentence is for 3-6 months. What the research evidence tells us is [it is the serial experience of short sentences, alongside the lack of services and opportunities in prison for those serving short sentences that causes the most damage](#) and obstructs people getting on with their lives.

My research with Dr [Beth Weaver](#) (Strathclyde University) found that people on short sentences were both harmed and helped during them. Many accumulated educational qualifications, undertook courses, kept in touch with family and a small number came off drugs in prison. People also lost contact with families and children, lost hope, lost housing, and acquired drugs habits (or were encouraged onto opioid replacement) in prison. In other words, 'effectiveness' is a complicated issue and the evidence shows both that it is possible to be helpful and harmful within short periods of time. Moreover, these harms of confinement apply to longer serving prisoners, and simply removing short sentenced prisoners from the population does not affect this.

My concern is that this legislation endorses and entrenches a positive role for institutional confinement in Scotland, for ever longer periods. The evidence for this is unconvincing; the evidence of damage caused by any period of imprisonment is strong. This proposal, without sustained attention on how the prison organises its services, and without focused attention on the overuse of remand and the lengthening of average time served in prison for a range of offences, is not convincing as a solution to the problems caused by Scotland's high prison population.

Community sentences are not an unproblematic 'alternative' to prison; they are a driver of prison population growth.

Community sentences are being promoted as a smart alternative to short prison sentences. However, community sentences are themselves drivers of prison population expansion. Each year 3000-4000 people have a CPO revoked. Once a person has failed a community sentence, they are substantially more likely to receive a custodial sentence, regardless of crime or period of non-offending, if they ever come before a court again. Hence, community sentences are a significant and independent 'cause' of prison sentences. Over the past 20 years, Scotland has expanded [both](#) its use of prison and community-based sanctions, against a backdrop of declining crime, increasing prosecutorial diversion/measures, and declining convictions.

What measures accompanying the proposed legislation will address these problems of net widening and up-tariffing, of which community sentences are a substantial contributor?

Most outcome comparisons between short prison and community sentences are not comparing like with like.

Comparisons of data between people serving different sentences, often have not been matched to compare those with similar criminal justice histories. Data on outcomes for those on community sentences comprises a substantial portion who have had little prison experience and/or are early in their criminal justice careers. Data on outcomes of those receiving short prison sentences over represents those with long criminal justice histories.

There also is little attention to comparability of 'dosage': how many hours and conditions of a CPO would be equivalent to a given prison sentence? We do not know. American research has tried to equate this with some difficulty. As a result it is difficult to compare a CPO with a prison sentence. It therefore also is difficult to measure the 'success' of the proposed legal change, if enacted. It will be important to assess the impact of the proposed legislation on community sentence practice – one might expect community sentences will become longer and with more conditions (thus increasing opportunities of breach and future custody).

Remand may be a more important population to focus on to reduce overall prison system size.

Around 20% of the prison population on any given day is in prison on remand. This is high compared to other countries in Europe and marks a shift from the remand rate in Scotland 20 years ago. Legislative attempts to reform remand and bail were followed by increases in this population – the consistently expansionist effect of reform ought to be thoroughly understood before embarking on new legislative drives. Reducing the remand population would have an impact reducing prison population numbers.

Moreover, it is concerning that previous Governments, academics and practitioners have expressed concern about the extensive use of detention for people prior to trial, and this population has only grown.

The proposed law is will have some effect, both anticipated and unanticipated.

The Government already knows that short prison sentences are not the main component of high prison populations in Scotland; reducing their use will not bring Scotland into line with its neighbours. Creating a minimal threshold for prison use raises the floor but does nothing about the already rising roof – the increasing length of longer sentences. The legislation does not directly address the central role that institutionalisation continues to play for a range of offences as well as social problems. The proposed legislation is not accompanied by other measures, including

outside of the criminal justice system, to address the causes by which many people end up in prison. The table (using Government data) shows sentences of 3 months or less were on a downward trend; when that presumption came in, sentences greater than 3 months increased suggesting upward drift before this sentence length settled down to follow the same pattern as the shortest sentence.

