

**JUSTICE COMMITTEE****PRESUMPTION AGAINST SHORT SENTENCES****SUBMISSION FROM DR HANNAH GRAHAM AND PROFESSOR FERGUS MCNEILL**

We welcome and support the proposed extension of the presumption against short prison sentences to 12 months and under. In this submission, we emphasise several key points:

- We support the extension of the presumption to 12 months for several reasons. One reason is the aim of reducing the ‘churn’ of short-term prison admissions. Another reason is seeking to mitigate potential up-tariffing in summary courts.
- We do not support specific offences/groups being exempt from the presumption as such. The judiciary will retain all sentencing disposals to decide when it is necessary to depart from the presumption, for example, in cases of violent or sexual offending.
- Community-based approaches are already credible and, in general, have better outcomes than custody, but they must be well resourced. Crucially, they should be used as a sentence in their own right, not as an ‘alternative’ or addition to custody.
- Two key questions should inform discussions of the presumption: (1) what is prison for? and (2) how does prison help or resolve any of the issues raised in these discussions?
- Wider sentencing and penal reform is needed to maximise diversion and decarceration. Our prisons are over-crowded. Realistically, the presumption is expected to have a modest and gradual influence (Conlong, Justice Analytical Services, 2019). On its own, it will not be enough to significantly reduce the very high prison population so it needs to be one among several strategies, grounded in evidence, experience, and in a clear-sighted vision for constructive justice.

**Short stints in prison are not an ethical and effective response to low-level offending**

Using short prison sentences for crimes that are not serious is short-sighted and costly. Sentencing of people whose main crime is shoplifting illustrates the issues. [Official statistics](#) show that, in the past five years, 9,020 custodial sentences under 12 months were imposed for shoplifting. This falls short of two oft-cited thresholds for custody: shoplifting is not in itself a serious crime, nor does it constitute a risk of significant harm requiring incapacitation on grounds of public protection. Each shoplifting crime incident has an estimated average cost of £141 ([Scottish Government, 2018a](#)). While precise calculations for short prison sentences for shoplifters are not available, the average annual cost per prisoner place is £35,325 ([Scottish Prison Service, 2018](#)). In contrast, the average unit cost of a Community Payback Order is £1,771, and electronic monitoring tagging is £965 ([Scottish Government, 2018a](#)). It is hard to see how the public interest is served by people

convicted of shoplifting serving months in prison only to be released to the same circumstances and with their risk of reoffending likely exacerbated by the collateral consequences of imprisonment.

Across Scotland, imprisonment rates vary significantly but are closely linked with inequality and neighbourhood deprivation ([Matthews, 2019](#)). Using Scottish Government analysis and Scottish Index of Multiple Deprivation data, McNeill (2019<sup>i</sup>) shows how the concentration of incarceration is marked for the five percent most deprived areas, which account for 19% of prisoners and have an incarceration rate 4.9 times higher than the rest of the country.

Between a third and half of adult prisoners are care experienced (SPS, 2017; [Who Cares? Scotland, 2019](#)). People with neurodevelopmental conditions are over-represented in Scottish prisons, including ADHD, autism spectrum disorder, learning difficulties and intellectual disability ([Young et al., 2018](#)). Relatively high numbers of prisoners have been victims of crime. According to the Scottish Prisoner Survey (2017), a third (37%) report having been a victim of knife crime; 30% report having been a victim of violence by their spouse/partner; and two in five (40%) report witnessing violence between parents/carers during childhood. In discussions of penal policy, binary constructions of ‘offender’ vs. ‘victim’ are misleading and unhelpful ([Drake and Henley, 2013](#)).

Incarcerating people in poverty or who have experienced other adversities exacerbates social inequalities; it harms the lives and life chances of Scotland’s people. Our money would be better spent tackling poverty and inequalities to build a safer and fairer society.

### **Why presume against imprisonment for crimes that are not serious?**

There are various reasons to presume against imprisonment, including reasons related to rehabilitation, desistance, procedural justice, human and fiscal costs, and (in)effectiveness.

It is now well-established that imprisonment does not in itself act as an effective deterrent. Research shows that people are more likely to be deterred by the *certainty* of getting caught (by Police) than by the *severity or form* of the punishment (prison versus community punishment). In some cases, imprisonment worsens rather than reduces risk of reoffending ([Nagin, 2013](#); [Cullen et al., 2011](#)). In Scotland, 52% of those given 3 to 6 month prison sentences were reconvicted within 1 year ([Scottish Government, 2018b](#)). Our colleague Marguerite Schinkel’s (2018) Scottish research with people who have served repeated short prison sentences shows that they ‘rarely view such prison terms as transformative or effective at rehabilitation or deterrence.’ Overall, her research finds that serial short prison sentences in Scotland tend to be ‘a waste of life and time.’

Access to and engagement with rehabilitative programmes and interventions in prison is an issue for people serving short sentences. A Scottish Prison Service (2019) FOI response shows low numbers accessing rehabilitative supports and offending behaviour programmes. HMIPS (2018a) express concerns about ‘insufficient treatment programmes available for short-term prisoners’, noting SPS have a ‘national waiting list for all offending behaviour programmes.’ HMIPS (2018b)

also say no specific accredited programme for domestic abuse and gender-based violence is available nationally. Programmes and interventions are one form of rehabilitation that can help foster change. Rehabilitative work can and should generate reintegrative momentum, building connections in the community, whereas short prison stints disrupt these possibilities (McNeill & Graham, 2019<sup>ii</sup>).

Scottish and international research on desistance indicates that people are best supported to desist from crime in the community (McNeill and Whyte, 2007; [Sapouna et al., 2015](#); Graham, 2016<sup>iii</sup>; Rodermond et al., 2016). Given opportunities and assistance, people desist for different reasons. Yet, by its nature imprisonment creates barriers to social integration and desistance. This body of evidence influenced the Scottish Prisons Commission (2008) recommendations to restrict use of imprisonment and take a different approach to sentencing and sentence implementation, promoting reparation and rehabilitation over retribution (McNeill, 2015).

Community-based sentences are credible and have better outcomes than custody (though comparisons are complex and not necessarily 'like with like'). Such approaches include: unpaid work, social work supervision, rehabilitative programmes, mental health, drug and alcohol treatment, problem-solving approaches, mentoring, employability and training initiatives, electronic monitoring ('tagging'), restorative justice, and compensation to victims. Reconviction rates are lower for Community Payback Orders (30.8%) and Restriction of Liberty Orders (electronic monitoring) (33.9%) compared to custodial sentences under 3 months (58.5%) or under 12 months (51.0%) (Scottish Government, 2018b).

Problem-solving court approaches can support change in the community. The Aberdeen problem-solving approach (PSA) works with people with complex needs and prolific offence histories, assessed as high risk of reoffending. It uses structured deferred sentences (up to 6 months) with intensive social work supervision and support from community justice partners. Significant numbers of PSA participants had served between 3-20 custodial sentences in the five years prior to taking part – they had lived experiences of the 'churn' of short sentences. A research review of the PSA found positive emerging outcomes: reduced reoffending, reduced alcohol and drug use, improved housing situations, improved mental health and wellbeing, and improved social skills and relationships ([Eunson et al., 2018](#)<sup>iv</sup>). Problem-solving approaches enable distinctive collaborative cultures, good interdisciplinary relationships, and procedural justice (being heard and treated fairly, in fair processes that arrive at just decisions). Co-located problem-solving community justice approaches, such as the pioneering example of the [Neighbourhood Justice Centre](#), Melbourne ([Ross, 2015](#)), can lead innovation, improving both criminal and social justice. Better to invest in similar plans (for example, like the Inverness Justice Centre) rather than in more prisons.

Sustainable workloads and resourcing of community justice is relevant to the presumption's impact. It is not viable or desirable that justice charities and social enterprises, because of competitive tendering and short funding cycles, may not know if their services and workers will be funded in 12 months' time while they try to

contribute effectively to work with people on Community Payback Orders (orders that may last up to a maximum of 3 years).

Community sentences can communicate censure for criminal acts – to people with convictions and on behalf of victims and communities (Rex, 2005; [Canton, 2018](#)). In a modern, progressive society, prison must not be seen as the only or even the main form of punishment or censure, nor should community sentences be disregarded as ‘letting offenders off’ or a ‘soft justice’ response. Simultaneously, authorities and communities have responsibilities to those we censure, whether in the community or in prisons, to enable their re-integration and inclusion as citizens, and to tackle structural barriers to their desistance.

### **Learning from Scottish research on ‘Pervasive Punishment’**

While we broadly support the extension of the presumption and the use of community sentences, it is crucially important to note that criminal justice reform must extend to reducing Scotland’s penal population as a whole (in custody and community). European survey research published on [21<sup>st</sup> May 2019 by Aebi and Hashimoto](#) shows that, at 548 per 100,000 of the population, Scotland has the highest ‘correctional rate’ (proportion of the population in prison or on community supervision) in Western Europe; the rate for England and Wales is 459 and the median rate for Europe as a whole is 318. In 2018, the median rate of probationers per 100,000 population across Europe was 169; the figure for Scotland was 411 – the third highest probation rate in Europe (Aebi and Hashimoto, 2019).

McNeill (2019) notes that there are 10 times as many community sentences *per crime* today as there were in 1980, and yet the Scottish prison population also rose significantly over this period. He suggests that because we have failed to recognise the penal character, severity and consequences of community sentences, we have expanded their use and their intrusions carelessly in the name of diversion and decarceration. Yet these important projects depend on tackling, outwith the criminal justice system, the social problems that drive both crime *and* punishment.

In pursuit of decarceration, other drivers of the prison population deserve consideration and action: high use of remand; responses to non-compliance and breach; plummeting use of release on HDC licence; ending of automatic early release for long-term prisoners; and upwards drift of longer sentence lengths (see Conlong, Justice Analytical Services, 2019). In each of these cases, *and* in relation to community sentences, principles of parsimony, proportionality and productiveness (see McNeill, 2019) need to be applied. Where possible and appropriate, we need to pursue diversion from criminal justice itself; that requires examination not just of sentencing but also of Police and prosecutorial decision-making.

### **Improve public awareness of sentencing and the need for justice reform in Scotland**

Echoing recommendation 10 of the Scottish Prisons Commission, we advocate prioritising public dialogue and education about crime, justice and reintegration (in Scotland, see [www.distantvoices.org.uk](http://www.distantvoices.org.uk) and [www.mysentence.com](http://www.mysentence.com) for novel approaches; internationally, see [KrimTour](#), Sweden, and [Yellow Ribbon Project](#), Singapore; Graham and White, 2015<sup>y</sup>).

In the Scottish Crime and Justice Survey (2019), three quarters (76%) of adults said they did not know very much or anything at all about the criminal justice system. Levels of public confidence and attitudes to Scottish courts and sentencing are complex and influenced by personal and local factors (Wilson, 2012). Yet there is plenty of research to show: (1) public attitudes to sentencing and justice are not as punitive as media stereotypes and opinion polls imply, and (2) when made well aware of cases and factors considered in sentencing, and if there is local proximity, punitiveness and laypeople's desire for severe sentencing decreases (Balvig et al., 2015; Kääriäinen, 2018a, 2018b; Warner et al., 2018).

Ignorance of community sanctions, including community payback, is an issue in Scotland. McNeill (2011<sup>vi</sup>) explains: if people don't really know what it is, 'they don't know what it involves, they don't understand what it is trying to achieve... Problems of credibility and public support seem inevitable.' While we recognise recent communications efforts of Community Justice Scotland and the Scottish Sentencing Council's 'if you were the judge' resource, more needs to be done. Diverse voices, local participatory dialogue and procedurally just processes are crucial in community awareness-raising, offering assurance, building consensus, and changing hearts, minds and cultures in Scotland.

Members seeking more detail about our evidence submission are welcome to contact us.

**Dr Hannah Graham, Senior Lecturer in Criminology, SCCJR, University of Stirling.**

**Prof Fergus McNeill, Professor of Criminology and Social Work, SCCJR, University of Glasgow.**

---

<sup>i</sup> Fergus McNeill (2019) *Pervasive Punishment: Making Sense of Mass Supervision*, Bingley: Emerald.

<sup>ii</sup> Fergus McNeill and Hannah Graham (2019) 'Conceptualising Rehabilitation: Four Forms, Two Models, One Process and a Plethora of Challenges' (Chapter 2) in Pamela Ugwu-dike, Hannah Graham, Fergus McNeill, Peter Raynor, Faye Taxman, and Chris Trotter (editors) (2019) *Routledge Companion to Rehabilitative Work in Criminal Justice*, London: Routledge.

<sup>iii</sup> Hannah Graham (2016) *Rehabilitation Work: Supporting Desistance and Recovery*, London: Routledge.

<sup>iv</sup> Jane Eunson, Lorraine Murray, Hannah Graham, Margaret Malloch and Gill Mclvor (2018) *Review of the Aberdeen Problem-Solving Approach*, Edinburgh: Scottish Government.

<sup>v</sup> Hannah Graham and Rob White (2015) *Innovative Justice*, London: Routledge.

<sup>vi</sup> Fergus McNeill (2011) 'Probation, Credibility and Justice' *Probation Journal* 58(1): pages 9-22.