

## **A Sentencing Exception? Changing Sentencing Policy in Scotland**

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### **Introduction: Devolution and Criminal Justice**

This article reviews developments in penal policy and sentencing reform in Scotland over the last ten years or so. The establishment of a devolved Scottish parliament in 1999, and more recently the election of the first administration to be formed by the Scottish National Party in 2007 have had a significant impact on debates about criminal justice in general and sentencing in particular. The devolved government of Scotland was established in 1999 following the first elections to a Scottish Parliament. Prior to this, despite being part of the United Kingdom, Scotland had long maintained its own legal system, established church and education system and had developed a civic culture which valued “community, public provision of welfare and mutual support”, which was considered to be distinctively Scottish.

This ethos was evident in the Scots approach to criminal justice which is often characterised by the establishment of the Childrens’ Hearing System in the Social Work (Scotland) Act 1968. Children who offended (and those who were considered by social work authorities to be at risk) were referred to the Hearings, where a lay panel dealt with the case “in the best interests of the child”<sup>i</sup>. This system, firmly rooted in the welfare tradition, continues to operate today. McAra comments ,

“The capacity of the juvenile justice system to absorb and reconstruct challenges to its central welfare-based ethos is testament both to the elasticity of its key principles as well as to the continued support of key elites both within social work and the judiciary.”<sup>ii</sup>

Although Scotland has been very far from immune to more punitive policies which emphasise public protection and control and which have characterised policies adopted by the UK government in England and Wales, McAra argues that the welfarist ethos has continued to thrive in Scotland particularly in criminal justice social work<sup>iii</sup> and in the policies of the Scottish Prison Service. For example, the Prisons Estates Review<sup>iv</sup>, published by the Scottish Prison Service in 2001 drew attention to the overcrowded conditions in Scottish Prisons and recommended the construction of three new prisons. There was considerable parliamentary and public opposition to these plans which were shelved by the Government. The Justice 1 Committee of the Scottish Parliament conducted a review into alternatives to custody<sup>v</sup> and the report recommended that courts make greater use of community sanctions as an alternative to short custodial sentences which the committee agreed were of limited effectiveness. A report from the Criminal Justice Forum<sup>vi</sup>, a policy think tank within the Scottish Executive, came to similar conclusions in a report published in 2003.

The civic culture described above has also been fostered, quite deliberately, by the Scottish Consortium on Crime and Criminal Justice<sup>vii</sup> which was formed in 2000. This is a criminal justice advocacy group made up of retired criminal justice

practitioners and policy makers, representatives from criminal justice NGOs, academics and other interested individuals. The group was established to raise awareness of criminal justice research evidence, to promote a rational, evidence based approach to the development of criminal justice policy in Scotland and to lobby the Scottish Parliament. The Consortium publishes an annual report, which has developed into a comprehensive review of criminal justice matters in Scotland, as well as occasional briefing documents. The Consortium also gives evidence to parliamentary committees where appropriate, hosts seminars and workshops to build relationships between practitioners, policy makers, politicians and academics.

However, while concerns about the rising prison population were being expressed in Parliament, within the civil service and in wider public debate during the first few years of devolved government, the administration of the time, a coalition between the Labour Party (the party which formed the UK government at the time) and the Liberal Democrats, pursued criminal justice policies which followed closely the policies of the Labour administration which formed the UK government. Indeed, the crime problem was ‘talked up’ by ministers in Scotland precisely at the moment when published statistics indicated that crime was falling and had stabilised at 1992 levels. Some commentators have suggested that it was difficult for a Labour administration in Scotland to differentiate itself from the Blairite New Labour party in London, which was concerned that it would lose public support if the Scottish “branch” of the party pursued a more liberal policy. McAra argues that civic culture in Scotland went into a period of drift which represented a weakening of the welfare ethos which had been part of a distinctive political identity in Scotland based on ‘other-to-England’ (McAra 2008). However the evidence above suggests that the civic culture continued to exist, if not thrive, although the political conditions of the time did not offer much support.

### **The Sentencing Commission for Scotland**

The Labour /Liberal Democrat coalition administration set up a Sentencing Commission for Scotland which ran between 2003 and 2006<sup>viii</sup>. This body had a restricted and rather unsystematic remit, the product of horse trading between the coalition members, to examine the use of bail and remand, the basis on which fines are determined, the effectiveness of sentences in reducing re-offending, the scope to improve consistency of sentencing and the arrangements for early release from prison and supervision of prisoners on their release.

The Commission made recommendations in respect of early release and bail, some of which became legislation. The Commission also recommended the establishment of an Advisory Panel on Sentencing for Scotland which would have the power to draft advisory guidelines. The administration took no steps in this direction but this has been revived by the current SNP administration.

The Commission was also able to conduct some enquiries into the Sentencing Information System which was implemented in the High Court in 2002 as reported in a previous edition of this journal<sup>ix</sup>. The detailed results of these enquiries were not made public, but suggested that data entry to the system had not been entirely reliable and that judges were not making regular use of the system. The Commission recommended that the Scottish Executive, in consultation with the Lord Justice

General, should determine the future for the system. There has been no further action on this. It seems likely that the SIS has been allowed to atrophy, as was feared in the absence of an institutional home and a strategic plan for keeping the system up to date, and responsive to judicial needs.

### **Penal Policy under the SNP administration 2007-**

After the elections of 2007, the Scottish National Party formed a minority administration, the first time this party had formed a government. The Justice Secretary, Kenny McAskill an experienced criminal justice solicitor, began to take a different approach to penal policy in particular, an approach which was more sympathetic to the ethos of the civic culture described above. The development of the government's policy can be traced through a number of published documents. In November 2007 the government published the report of the Review of Community Penalties, Reforming and Revitalising<sup>x</sup>. This report argued that community penalties suffered from an image problem. The public perceived them to be "soft". The government response was to propose changes to community penalties which would demonstrate that community penalties were primarily retributive, that they were demanding and rigorously enforced, that they were more immediate and involved visible and meaningful "payback" to the community.

In July 2008 Scotland's Choice, the report of the independent Scottish Prisons Commission was published<sup>xi</sup>. The Commission was an independent body, chaired by a former First Minister of Scotland, a member of the Labour Party. This report set out a radical vision for a rational penal policy based on evidence from around the world of effectiveness. The report argued that Scotland had a choice between a continued rise in the prison population, further prison overcrowding, increased corrections budgets and little improvement in the safety and security of Scotland's communities or a more positive approach to penal policy which used scarce resources more effectively to reduce offending behaviour, have a smaller prison population which allows staff to deliver programmes which can produce change in behaviour, and enhance the safety of our communities. The report had twenty three major recommendations which range from prosecution to aftercare. The recommendations on sentencing include the establishment of a National Sentencing Council with the power to develop sentencing guidelines. This echoes a recommendation of the Sentencing Commission for Scotland. In September 2008, the Government published a consultation paper, Sentencing Guidelines and a Scottish Sentencing Council<sup>xii</sup>. This document presented a range of proposals about the remit, function and membership of the Council, the nature of the guidelines, the relation between the Council, the Government and the Courts etc. There were a total of sixteen questions for consultation.

The Justice Secretary has expressed his views in a number of speeches, inside and outside Parliament<sup>xiii</sup> and in press interviews. He has taken the view that that the size of the current prison population and the projected rate of growth are not sustainable. The Scottish prison population has been increasing steadily since 2000-01, reaching an average daily population of 7,835 during 2008-09. This represents an increase of 6 per cent from the previous year, and 31 per cent over the past 10 years since 1999-00<sup>xiv</sup>. Crime rates have decreased since the early 1990s and after a period of relative stability have fallen by 10% in the last two years to a level last seen in 1980. The

Justice Secretary wants to see greater use being made of community sanctions and less use of short prison sentences (less than six months). He favours the use of community payback sentences, whereby offenders give something back to the community as reparation for their offending. Prison overcrowding means that prison authorities are unable to deliver sufficient support to more serious offenders to help them to reduce their offending behaviour and reduce their risk of re-offending post-release. Although a number of US state jurisdictions have taken steps to reduce their prison populations in recent months<sup>xv</sup>, the policy adopted by the Scottish Justice Secretary, is highly unusual in UK politics and he has been criticised by opposition parties in Scotland as being “soft on crime”. The Justice Secretary has responded by accusing those opposition parties of “playing politics with the prison system”.

In December 2008, the Government published Protecting Scotland’s Communities<sup>xvi</sup>. This further developed the government’s approach to penal policy and announced their intention to introduce the Criminal Justice and Licensing Bill (Scotland) which would, amongst other things, create a judicially-led Scottish Sentencing Council. This body will “develop and oversee a national system of sentencing guidelines to bring greater consistency and transparency to the sentencing process.”

### **The Criminal Justice and Licensing Bill**

The Bill was introduced to the Scottish Parliament on the 5<sup>th</sup> March 2010. The Bill proposes the establishment of a Scottish Sentencing Council chaired by a senior judge, with the remaining membership comprised of one additional High Court judge, two sheriffs (judges from the intermediate court jurisdiction) a judge from the District Court, ( the lower court jurisdiction), a prosecutor, a senior police officer, an advocate and a solicitor (the two branches of the legal profession in Scotland), with one post being reserved for a representative of a victims’ organisation, and two posts for independent non-judicial members which will be filled by an open public appointments process. The Council will produce guidelines incrementally, much like the Sentencing Guidelines Council in England and Wales and unlike the proposals in New Zealand for an inaugural set of comprehensive guidelines. The Council will be able to use both narrative and numerical approaches to developing guidelines. Courts will be required to “have regard to” any applicable guidelines in sentencing an offender. The consultation document proposed that courts would be required to “adhere” to the guidelines. Most legal responses to the consultation objected to “adhere” so the wording in the Bill of “have regard to” represents a minor but significant change. Should they decide to depart from the guideline in any individual case, judges must state their reasons for doing so. There is no provision in the Bill which requires the Council to monitor judicial departures from guidelines.

The Bill proposes that both the Scottish Ministers and the High Court of Justiciary (which sits as the final court of appeal in criminal matters) can request that the Council consider producing guidelines on any matter. The Council must “*have regard to*” any request made by Scottish Ministers, and *must* review any guidelines referred to it by the High Court. The Council has the power to “provide advice or submit proposals about sentencing matters” to the Scottish ministers, to conduct research and to disseminate information about such matters.

Section 1 of the Bill provides a legislative statement of the purposes and principles of sentencing. These are the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences. These more or less reflect the terms of Section 142(1) of the Criminal Justice Act 2003 (England) and will be familiar to most readers of this publication. There is no attempt to prioritise any purpose over any other purpose. It is not clear what impact this is intended to have on sentencing practice.

The Bill was discussed by the Justice Committee of the Scottish Parliament. This is a cross party committee with no overall government majority, which was convened by the Conservative Justice spokesman. The Committee received over 90 submissions of written evidence and heard oral evidence from the Lord Justice General, the Sheriffs Association, Scottish Justices Association, the Chair of the Scottish Prisons Commission, the Association of Directors of Social Work, the Scottish Consortium on Crime and Criminal Justice, the Association of Chief Police Officers in Scotland, Victim Support Scotland, Scotland's Commissioner for Children and Young People, the Law Society of Scotland, the Faculty of Advocates, and a number of academics and other organisations.

The Lord Justice General argued that if there was to be a sentencing council it should have a judicial majority and any guidelines should be approved by the Court of Appeal in order to preserve appropriate separation of powers.

“Whatever may be asserted about the residual discretion of individual judicial office holders when passing particular sentences, the Bill’s proposals strike directly at the independence of the judiciary (and in particular of the High Court) as the arm of Government essentially responsible for the setting of sentencing policy. The proposals (as framed) are fundamentally unacceptable both on domestic constitutional grounds and because mandatory directions to the court by a non-judicial body undermine the judicial independence required of courts by Article 6 of the European Convention on Fundamental Rights and Freedoms.”<sup>xvii</sup>

The submissions from the other legal bodies, the Sheriffs Association, the Justices Association, the Law Society of Scotland and the Faculty of Advocates, reached similar conclusions to those of the Lord Justice General. There was little enthusiasm expressed for a sentencing council and guidelines although acceptance of the principle. There was unanimous agreement that judicial independence should be preserved by requiring approval of any guidelines by the High Court and ensuring that a judicial majority on the Council was enshrined in statute.

The report of the Justice Committee expressed scepticism about the value of stating the purposes and principles of sentencing in statutory form, approved the establishment of a sentencing council in principle, but only if it had a judicial majority and had any guidelines authorised by the High Court, in other words following the views expressed in the submissions from the legal profession. The Committee did not approve of the presumption against sentences of six months or less.

In the Stage 1 debate on the Bill in Parliament, the most contentious issue was the presumption against sentences of six months or less. The Liberal Democrats broadly supported the SNP government, the Labour and Conservative spokespersons argued that judges should retain the discretion to use such short sentences to provide respite to communities from persistent offenders. There was no objection to the principle of a sentencing council although the Liberal Democrat spokesman was concerned about the costs of such a new institution at a time of financial stringency and wanted to ensure that the final authority over any sentencing guidelines should remain with the High Court in order to preserve the proper separation of powers in this area.

A very large number of amendments were proposed for the second stage of the Bill in March 2010. The main changes to the sentencing parts of the Bill were as follows: The committee recommended that Section 1, which would have given statutory expression to the principles and purposes of sentencing, be removed altogether. The committee also recommended that the composition of the council be amended to ensure a judicial majority. Accordingly the places for the representatives from the police and prosecution service have been removed and the number of lay members cut from two to one. Perhaps the most significant change is that the Committee recommended that guidelines issued by the Council must be approved by the High Court, leaving final authority over sentencing with the courts. It is very likely that these recommendations from the Justice Committee will be accepted by the government prior to the final vote in the chamber.

## **Conclusion**

In a sense, the story of the development of this legislation is a familiar story of ambitious penal reform rhetoric being transformed into something altogether more modest. The proposals set out in the report of the Prisons Commission to instigate a thoroughgoing strategy to reduce the use of imprisonment and the prison population, strengthen the community payback sentence and establish a sentencing council which would have the power to develop sentencing guidelines to help achieve these ambitions, have been significantly diluted. As the SNP did not have a majority and depended on the support of the Liberal Democrats and was opposed by the not so unlikely coalition of Labour and Conservative parties which took a UK approach of supposed “toughness”, a watering down of the proposals of the Prisons Commission was entirely predictable.

However, the fact that the reforms got as far as they did is evidence that “welfarism” in Scottish civic culture is far from dead. The establishment of a statutory Scottish Sentencing Council provides for the first time an institution which has the authority to develop sentencing policy, although some penal reformers might have liked to see a different sort of council with more non-judicial members, greater independence from the High Court, resources to establish an inaugural set of guidelines and so on.

The Secretary for Justice in Scotland continues to be portrayed by political opponents from Labour and Conservative parties in particular as being soft because of his desire to reduce the prison population. In this respect it is interesting to note that many US jurisdictions, not noted for their penal laxity, have embarked on a wide range of policies designed to reduce the growth of prison populations on the grounds that high rates of imprisonment are not a cost effective way of keeping communities safe. Some

20 states have introduced measures such as changes to parole and early release, removal of mandatory minimum sentences and establishment of sentencing councils or working groups to address public concerns about expanding corrections budgets which have very limited impact on community safety<sup>xviii</sup>. As Clear and Austin<sup>xix</sup> have argued there is now a broad consensus shared by conservative and liberal commentators that the US prison population is too large. Their policy recommendations for reducing prison populations address what they call the iron law of prison populations which is that the prison population is determined by “the number of people in there and how long they stay”. They argue that measures such as making community programmes tougher or tinkering with re-entry programmes will not work. The only solution is to “change the laws that send people to prison and keep them there for lengthy terms. *That means reducing the number going in , their length of stay or both.*”

If guidelines produced by the Scottish Sentencing Council fail to address the issue of the rising prison population, a future Scottish Government may be forced to look at alternative methods for reducing the supply of prisoners to an overcrowded and increasingly expensive prison estate.

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<sup>i</sup> McAra, L (2008) Crime, Criminology and Criminal Justice in Scotland *European Journal of Criminology* 2008; 5; 481

<sup>ii</sup> McAra, L (2005) Modelling penal transformation *Punishment & Society*, Vol. 7, No. 3, 277-302 (2005)

<sup>iii</sup> For US readers, criminal justice social work refers to what in the US would be probation or community corrections.

<sup>iv</sup> Scottish Prison Service (2001) Prison Estates Review [www.scotland.gov.uk/consultations/justice](http://www.scotland.gov.uk/consultations/justice)

<sup>v</sup> [www.scottishparliament.uk/official\\_report/cttee/just1-03/jlr03-03-vol01-01.html#8](http://www.scottishparliament.uk/official_report/cttee/just1-03/jlr03-03-vol01-01.html#8)

<sup>vi</sup> Scottish Executive, Short Term Prison Sentences: A Report to the Criminal Justice Forum (2003), [www.scotland.gov.uk](http://www.scotland.gov.uk)

<sup>vii</sup> [www.scccj.org.uk](http://www.scccj.org.uk)

<sup>viii</sup> Hutton, N., (2008) The Sentencing Commission for Scotland in Freiberg, A., and Gelb, K. (2008) *Penal Populism, Sentencing Councils and Sentencing policy*, Cullompton, Willan Publishing.

<sup>ix</sup> Tata, C and Hutton N. (2003) Beyond the Technology of Quick Fixes: Will the judiciary act to protect itself and shore up judicial independence? Recent experience from Scotland. *Federal Sentencing Reporter*, vol 16 no 1 October pp1-9.

<sup>x</sup> <http://www.scotland.gov.uk/Publications/2007/11/20142739/0>

<sup>xi</sup> <http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf>

<sup>xii</sup> <http://www.scotland.gov.uk/Publications/2008/08/29100017/0>

<sup>xiii</sup> See for example Apex Scotland Annual Lecture 2008, Building on McLeish [www.apexscotland.org.uk](http://www.apexscotland.org.uk)

<sup>xiv</sup> By comparison, between 2000 and 2008 the state prison population across the US rose by 12%. Source, Greene, J., and Mauer, M., (2010) *Downscaling Prisons; lessons from four states*, The Sentencing Project New York. The rate of imprisonment in Scotland is 152 per 100,000 compared to 756 per 100,000 for the USA. Source: *World Prison Populations 2009*, International Centre for Prison Studies Kings College London.

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<sup>xv</sup> Porter, Nicole D “The State of Sentencing 2009: Developments in Policy and Practice.” The Sentencing Project, Washington D.C. [www.sentencingproject.org](http://www.sentencingproject.org)

<sup>xvi</sup> <http://www.scotland.gov.uk/Publications/2008/12/16132605/0>

<sup>xvii</sup> Written Evidence from the Lord Justice General to the Justice Committee.

<http://www.scottish.parliament.uk/s3/committees/justice/papers-09/jup09-14.pdf>

<sup>xviii</sup> op cit note xiv

<sup>xix</sup> Clear, Todd, R. and Austin, James, “Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations, Harvard Law and Policy Review no 3m 307-324.