



**INDEPENDENT ENQUIRY INTO ALTERNATIVES TO CUSTODY SPONSORED BY
THE ESME FAIRBAIRN FOUNDATION AND CHAIRED BY
LORD COULSFIELD**

SUBMISSION FROM SACRO

SACRO provides a wide range of services at all stages of the criminal justice continuum. These include services to enhance community safety by preventing the escalation of neighbourhood conflict through mediation, to services for prisoners on release. SACRO also works to influence practice, policy development and legislation in relation to criminal justice, youth justice and social policy, and provides training and consultancy services in Community Mediation and Restorative Justice to other organisations.

We draw the Enquiry's attention to the **submission from the Scottish Consortium on Crime and Criminal Justice** (of which SACRO is a member) that sets out the distinctive characteristics of the Scottish context. **We recommend that paper be read prior to this one.**

This response seeks to answer to the questions put in Annex B to Lord Coulsfield's letter dated 30 June 2003

THE PRISON POPULATION

1. Who are the persons who make up the prison population?

The average daily prison population in Scotland in 2002 was 6,400. Official estimates indicate the composition of the population as follows: -

(a) Lifers, Serious Drugs Offender (e.g. supply), other types of Serious Offences	3,500
(b) Remanded awaiting trial or sentence	1,200
(c) Less Serious Offenders including petty recidivists and fine defaulters	1,700

2. Why are these persons being sent to prison?

Category (a) above are serious offenders for whom a custodial sentence is either mandatory (e.g. murderers) or almost inevitable in the light of well-established sentencing practice and the need to protect the community.

Category (b) are prisoners yet to be convicted or sentenced and who, the court assesses, are too dangerous to be left at liberty or might hinder the course of justice if at liberty. The latter could be perceived in terms of their likelihood to breach bail conditions, interfere with witnesses or simply have no verified accommodation. SACRO's experience is that where there is a well-funded Bail Information Assessment and Supervision Scheme (e.g. Edinburgh) sentencers make use of it to reduce the number of unnecessary remands. In our experience over 80% of those on bail supervision complete successfully (i.e. they did not offend while on bail and attended for trial) and of the known court outcomes, only 11% received a custodial sentence following their court appearance at the end of their bail placement.

Category (c) are generally prisoners serving a few days for fine default or serving short sentences. 82% of all sentenced prisoners are sentenced to less than 6 months and are released after serving half that period.

There appears to be reluctance on the part of many sentencers to use community disposals (e.g. Community Service) more than once, although they are content to use custodial sentences repeatedly.

It is hoped that a forthcoming study of sentencers' options and views will improve our understanding of Scottish sentencing practice. (The Rethinking Crime and Punishment initiative has awarded the Scottish Consortium on Crime and Criminal Justice a grant for this purpose).

3. What group of prisoners might be considered suitable for some other disposal

In SACRO's view a very considerable proportion of remand and a short-term prisoners should be considered for an alternative disposal. If the remand population was reduced by 50% through increased use of Bail Supervision Services and the short-term prison population was reduced to 400, then the total average daily population could be reduced from 6,400 to 4,500.

FACTORS RELEVANT TO ACCEPTABLE SENTENCING

4. What are these factors?

The factors that are likely to be weighed by an individual sentencer in arriving at the sentencing decision include:

- Seriousness/gravity of crime or offence
- Circumstances of crime or offence
- History of previous offending
- Offender's attitudes (e.g. to victim)
- Suitability for the available range of disposals
- Risks of future offending and the protection of the public
- Victim impact
- Potential for reparation
- Possible deterrent effect

5. Are there different perspectives as to the relative importance of the factors?

There is statistical as well as anecdotal evidence to suggest that there are different perspectives on how much weight should be attached to each of the factors. The significant variation between sheriff courts across Scotland in terms of use of each type of disposal cannot be explained in terms of different levels of criminality or demographic composition. From discussion with sentencers, too, it is clear that for many the risk of future offending, and the interests of the victim have low priority. Some have more faith in community disposals than others and so are more likely to be interested in assessments as to suitability for them.

6. Is there underlying divergence of opinion as to the objectives of sentencing?

There are a range of general objectives of sentencing, which sentencers and literature of the subject refer to:

- Punishment/retribution/just deserts
- Individual deterrence
- General deterrence
- Incapacitation through incarceration
- Rehabilitation
- "Expressive" function – society's way of making clear what is unacceptable behaviour
- Restorative measures – to bring the interests of the victim into the sentencing equation
- Community safety – reducing the risk of future re-offending and/or reducing the risk of serious harm. Recent innovations include Extended Sentences and the imminent Orders for Lifelong Restriction.

It is difficult to be certain about judges' opinions about the objectives of sentencing but statistics that identify widely different practice would suggest they have different objectives from each other and from case to case. Through its work to promote community-based disposals, SACRO enters into frequent discussion with sentencers and we do discern different perspectives. It is clear that some have much more belief and confidence in community disposals than others, particularly as to the prospects of these reducing the risk of further offending. Others are reluctant to accord victims more than the role of complainer or witness so are resistant to the concept of restorative justice.

7. If so, what scope is there for modification?

SACRO's view is that there is considerable scope for modification. There needs to be public, political and legal debate about the objectives and factors which can make for sentences that are in the best interests of the public. The Scottish Parliament has the powers to introduce legislation to set the broad parameters for sentencers. Judicial education can raise judges' awareness of both the potential and the limitations of the full range of disposals. The Sentencing Commission (see below) could clarify both the objectives of sentencing and the weight to be attached to a broad range of factors. It might also consider what crimes might be reclassified and which might be deemed no longer suitable for a custodial sentence and advise the Parliament accordingly.

We propose four strategic approaches to change:

- That there be a presumption **against** custody for the less serious group of offence types referred to as category (c) in paragraph 1 above.
- That restorative justice be developed to become a key feature in sentencing
- That steps be taken to redress the balance in disposals, in favour of community vis-à-vis custody
- That ways be found to counter the inflation in sentence length that has taken place during the past decade. There is little evidence that longer sentences have a general deterrent effect as measured by crime rates.

8. What information is available to sentencers?

It does appear that all sentencers do not have adequate information about the range and nature of community disposals available locally. They will know that they can make a Probation Order but may not fully appreciate the range of associated programmes that can be delivered. National Standards require local authority criminal justice services to provide information but do not specify the level of detail required. Judges and sheriffs need systematic and accessible information on all the sentences available to their court.

9. Is it adequate on quality?

SACRO has not surveyed the quality across the 32 authorities but we expect the depth and range to vary.

The Justice 1 Committee of the Scottish Parliament, on the advice of SACRO and others, has recommended that a directory of community disposals should be made available nationally, given that the Sheriffs' Association has confirmed that it will be of great use to sentencers... the directory should be electronic to ensure that it can be easily updated. It should contain information on the evaluation of local programmes as well as comprehensive information on their availability. The directory should also contain information on progressing options for dealing with breach of community disposals." There is a pilot scheme providing information to the bench in Lothian but this should be extended across the country.

10. What is the effect of sentencing guidelines issued by the higher courts?

The High Court, sitting as the Court of Appeals, has made use of its powers to draw up guidelines only once, to our knowledge. In general terms there is no sentencing policy as such in Scotland. Sentencers do, however, take note of appeal decisions and previous sentencing practice. They are also likely to take account of the fact that the Crown may appeal against sentence.

11. Might there be a place for advice and assistance to judges and magistrates generally or in particular cases?

Yes, SACRO believes that judges should be given more guidance in sentencing and welcomes the establishment of the short life Sentencing Commission for Scotland, subject to the qualification below. On 1 September this year, High Court Judge Lord McLean was appointed to chair the new Commission. His remit includes examining:

- The scope to improve consistency
- The effectiveness of sentences in reducing offending
- The arrangements for early release
- The supervision of short-term, prisoners on release
- The basis on which fines are determined
- The use of bail and remand to meet the requirements of public safety and the efficient administration of justice.

SACRO hopes the Commission's deliberations will lead to a more rational and empirically based approach to sentencing. To date the Appeals Court of Scotland has appeared relatively reluctant to issue Guidelines to sentencers although their decisions in specific cases will be widely noted. It will be helpful if developments in England and Wales and elsewhere, are considered carefully with a view to establishing the impact of the different approaches to guidelines and the contribution that might be made by a Sentencing Advisory Panel.

The Commission's work should be assisted by the Sentencing Information System that exists for the High Court and which should be extended to the other courts. The High Court established this system 10 years ago to collate information about sentencing practice and we believe this must help sentencers and policy makers in our Parliament and Executive. It should also be used to better inform the media and the public as to what actually happens in our Courts.

The Commission is welcomed provided that it is independent of the Scottish Executive. It should not become, as some permanent Commissions elsewhere have done, a mechanism for unthinking reaction to tabloid created panics and the search for political advantage. Otherwise, sentence will relentlessly ratcheted up, as in the USA.

THE EFFICIENCY, EFFECTIVENESS AND ADEQUACY OF ALTERNATIVE DISPOSALS

12. What are the available alternatives and how are they used?

An extensive range of community penalties exists in Scotland, ranging from absolute discharge, admonition and caution at the lower end of the scale through a fine to those which entail active intervention with the offender, namely:

- Probation, with or without a range of conditions – an enduring and flexible option
- Community service - a good combination of punishment, reparation and learning opportunities
- Probation and community service combined – an intensive and demanding disposal

- Supervised attendance orders – an alternative to fines and to custody for a fine default which involves a fine on time during which constructive activities are carried out
- Drug treatment and testing orders – a constructive approach to drug related crime
- Restriction of liberty orders – with probation, can perhaps set useful boundaries for short periods

Information about the use of the disposals is published annually by the Scottish Executive (Costs, Sentencing Profiles and the Scottish Criminal Justice System, cp(s)a s306).

For the year 2001, looking at the High court, Sheriff Court, Stipendiary Magistrates Court and lay District Court together, the percentages for the main disposals were as follows:

Custody	Community Service	Probation	Fine	Others (admonish etc)	All
13.7	4.1	6.8	63	12.4	100

The comparable figures for 1991 were:

Custody	Community Service	Probation	Fine	Others (admonish etc)	All
7.6	2.9	2.7	75.7	11.1	100

These figures demonstrate that, even making allowances for the increase in diversion and fiscal fines, over this period the rise in the volume and range of community penalties that involve active intervention has been at the expense of the fine rather than custody. Indeed the custody rate almost doubled over the period.

13. Are they more or less effective in limiting re-offending than custodial sentences?

Assessing the effectiveness of community sentences is a complex matter. Scottish Executive statisticians (Statistical Bulletin Crj 2001/01) point out that information on convictions and reconvictions is not the same as information on offending and re-offending, or recidivism. Not all offences are reported to the police and some offences that are reported do not lead to the identification of an offender or a charge and a report to the Procurator Fiscal. For cases which are reported to the Fiscal no proceedings may be taken or alternatives to prosecution such as warning letters and fiscal fines may be employed. Some criminal proceedings are dropped after the prosecution has begun and clearly some accused are acquitted. Convictions and reconvictions are therefore only a sub-set of actual offending and re-offending and reconviction rates are only a proxy measure of re-offending rates.

Setting aside these difficulties, only limited data on recidivism in Scotland is available. Evaluations of community penalties have tended to focus on their effectiveness in terms of achieving immediate objectives rather than on long-term, follow-up studies of recidivism. A study of diversion from prosecution schemes identified the degree of success in providing an alternative to prosecution. An evaluation of community service orders looked at the extent to which it was a successful option as a direct alternative to custody. A recent study of supervision attendance orders established that they worked well as an alternative to imprisonment for fine default.

In a context where it is difficult to establish the impact of the various disposals on recidivism, another important measure is whether community sentences are perceived by judges and the community as appropriate and constructive responses to crime. That is, it is important to assess whether they help to "manage" crime in a way that is cost-effective and likely to have positive consequences rather than negative and damaging effects. An effective community based sentencing option will tackle offence related behaviour meaningfully in the community rather than simply exposing the offender to the damaging and excluding effects of imprisonment.

The small amount of comparative data that is available is somewhat inconclusive. The Scottish Executive published figures in 2001 about the reconviction rates of offenders discharged from custody in 1995 or given non-custodial sentences in that year. Those discharged from a custodial sentence (67%) or given probation (63%) were on average more likely to be reconvicted within two years than those given community service. This reconviction data is subject to the limitations referred to above and does not attempt to assess the frequency of re-offending or the seriousness of the new offences.

The most pessimistic interpretation of this data does suggest that community disposals are at least as effective and probably significantly better than custody. When cost and the known damaging effects of imprisonment are taken in to the equation the balance swings clearly in favour of community disposals.

14. In what sort of cases may the alternatives be expected to be effective and acceptable? Is effectiveness a function of the quality of sentencing decisions?

Community based sentences are most likely to be effective if targeted at those offenders who have not committed very serious offences and who do not present a high level of risk of harm to the public but are at a relatively high risk of re-offending. These offenders have the potential to change their attitudes and behaviour but do require some supervision and support.

In considering direct alternatives to custody, the target group is to be found in the 2,900 remand and less serious offenders categories cited in paragraph 1 of this paper.

Effectiveness is a function of the quality of sentencing decision in that the disposals must be targeted appropriately if they are to achieve their objectives.

- The fine, if it was linked appropriately to income and with efficient collection systems, would be most appropriate for offenders who are unlikely to become recidivists – this does not rule out fines for relatively serious offences.
- Community Service combines punishment and an element of reparation with potential positive outcomes for society and the offender. Repeated use is appropriate for petty recidivists.
- Probation continues to be a flexible tool in that it can range from 6 months minimal intervention to 3 years that may include lengthy and intensive supervision designed to address and reduce both volume and gravity of offending. Rigorous supervision and support in the community is likely to prove more effective than a short period of imprisonment. However, there is some evidence to suggest that intensive intervention with low risk offenders can be counterproductive so sentencers need to respond to clear assessments and conclusions from criminal justice social workers.
- There is also some growing evidence in the value of Drug Treatment and Testing Orders where substance abuse is at the root of the offending.
- Restriction of Liberty Orders can help to engage offenders in constructive activities if used in conjunction with probation.

Given that community based programmes will always be resource intensive, it is particularly important that they are not used in those cases where a fine would be an appropriate response. The statistical evidence at paragraph 12 above does suggest that probation and community service have to a large extent displaced the fine rather than custody. This may have the unintended consequence of pushing the offender more speedily up the tariff of disposals towards custody. For this reason, the role of the fine and how it may be effectively used, should be part of the debate on how to reduce the prison population.

15. Are there alternative disposals, which have not been worked out or put into operation?

SACRO takes the view that there is little to be gained from proliferation of new community penalties.

We recommend that the best way forward is to ensure that existing community sentencing options are properly resourced, targeted, and administered.

16. Are all of the possible alternatives in practice available in every part of the country?

No. The available range of probation programmes designed to address offending behaviour differs from one part of Scotland to another. While Diversion from Prosecution schemes are available across the country, only three have mediation and reparation components. Fully-fledged Bail Supervision schemes are available only in Edinburgh and Glasgow.

17. Is what is available adequate to do the job?

There is a widely held view that the resources available, despite the welcome major investment by the Scottish Executive in recent years, are still inadequate. Staffing levels required for rapid and effective implementation of statutory supervision are not always available and inadequate funding for Bail services and specialist programmes means that places are not always available when the Courts want them.

18. What is the effect of differences in the availability of support for different non-custodial disposals in different areas?

It is difficult to ascertain the effect of the variable availability of services without some comparative research into the use of the various disposals. But there can be no doubt that where, for example Bail Supervision schemes exist they are used as a direct alternative to custody. It is reasonable to assume that there would be fewer custodial remands in other areas if they were universally available.

19. Who is responsible for the provision of alternatives?

The Justice Department of the Scottish Executive allocates funds to groupings of local authorities, which are directly responsible for service delivery. These groupings deliver criminal justice social work services themselves and also purchase and/or work in partnership with voluntary sector agencies such as SACRO who provide a range of services to enhance the statutory bodies' provision.

BACK-UP/ENFORCEMENT MECHANISMS FOR NON-CUSTODIAL SENTENCES

20. Failure to comply with community penalties may lead to imprisonment and it has been suggested this may increase pressure on the prison system. Should failure to perform in accordance with the requirements of a community penalty lead to escalation?

As the question implies, there is a risk that breach of conditions of community disposals may lead to a custodial sentence, not thought necessary by the court in the first instance. However, enforcement measures are often necessary to secure the compliance of reluctant offenders who, initially at least, may not be motivated to engage in that can be demanding programmes.

There are several approaches that can reduce the risk of undesirable escalation.

First and foremost is the need to target the disposal accurately. Assessments should sift out candidates who are clearly going to be unable or unwilling to meet expectation of programme requirements of orders. Social Workers do understand that there is no point in setting someone up to fail.

Secondly, there sometimes appears to be a tendency to make multiple combined requirements – probation plus community service plus attendance at intensive programmes. The temptation for sentencers to make unrealistic demands needs to be avoided.

Thirdly, there is some advantage in allowing the supervisory officer discretion in determining precise requirements rather than specifying them in written conditions. This allows the criminal justice social worker to match expectations with the offender's circumstances and readiness to comply.

Finally, the supervisory officer is greatly assisted if the offender has reason to believe that conditions will be enforced and breaches dealt with speedily. In Scotland at the present time, breach proceedings do not generally get priority in court timetables so offenders soon learn that they can stave off compliance for some time. This leads to inevitable breaches after lengthy periods during which motivation has dissipated.

21. If not, how are non-performers to be dealt with?

There are positive results emerging from the Drug Treatment and Testing Orders and the Drugs Court in Glasgow. Two features are significant in this context. Firstly the direct involvement of sheriffs in the management of the case through regular reviews ensures there is no undue delay in addressing compliance problems. Secondly, in turn this means the sentencer has a better understanding of the whole circumstances of a breach and more willingness to deal with relapses by means other than custody e.g. changes to requirements, additional treatment, etc. This suggests that closer involvement of sentencers could help to manage breaches effectively without immediate resort to custody.

PUBLIC ATTITUDES AND THE ROLE OF THE MEDIA

22. Does the public have an accurate understanding of the levels of crime in Britain and the sentences actually imposed?

Public perceptions about crime and sentencing are based largely on media reports and political statements. The majority of people believe that crime levels are rising and this in turn contributes to increased fears about crime. Despite considerable evidence to the contrary from police statistics and crime surveys, people believe that crime is increasing rapidly. Almost half of those interviewed in a survey for the Scottish Parliament thought that there was a lot more crime now than five years ago, while just over a quarter thought that there was a little more. (March 2002 "Public Attitudes Towards Sentencing and Alternatives to Imprisonment": NFO System Three. Commissioned by the Justice Committee of the Scottish Parliament).

23. Do they have an accurate picture of the nature and operation of community sentences?

The same survey also showed that the public know very little about crime and the sentencing options available to the courts. Only one person in one hundred said that they knew a lot about the range of sentences available to Scottish courts while six in ten people admit that they do not know very much about what happens to people when they appear before the courts in Scotland. Eight in ten people revealed that they know very little about Scotland's prisons and tend to base their views on media and fictional representations of life 'inside'.

24. Do the media provide a balanced impression of the levels of crime and of sentences?

The media, in the main, tend towards headlines that play on people's fears about crime. This can be a vicious circle as the media also create this fear by only reporting 'bad news' and almost never reporting success stories. Tabloid newspapers in particular are very influential in shaping punitive attitudes. Through various media sources, people learn a lot about crime and policing but very little about punishment and sentencing.

There is however increasing evidence that the public do not believe that prison is effective as a deterrent. This factor needs to be built on, as people may be more receptive to the idea of alternatives to imprisonment for certain types of crimes.

Public perception of alternatives to custodial sentences is important and this is largely dependent on what the public, see, read and hear. Personal experience is also an influencing factor. There is therefore a need to present more information and stories about alternative sentences to which the public can relate.

25. What part is played by the experiences of victims? Is the contribution of victims too great or too little?

The best way to give prominence to the experiences and views of victims is to give them a more proportionate role in the criminal justice system. Where there are opportunities for restorative justice, the victim will have a central role and be able to influence public thinking through reports of their experience of the value of the process and its contribution to their perception of justice.

26. How far are sentencers influenced by media criticisms and public opinion? If the public, through the media, do in fact have an unbalanced view of crime and sentencing, what can be done to promote more accurate perceptions?

Research evidence points to an increasingly punitive climate within political and media debates about punishment. This appears to have played a role in tougher sentencing practice (The Decision to Imprison: Sentencing and the Prison Population, 2003, M.Hough). At least one Sheriff has stated to SACRO that he has to take cognisance of what he believes are the attitudes of the public as represented in the press. Helping to change public perceptions is best done by working more closely with the media and developing relationships with journalists to ensure a more balanced and realistic view of the use of alternatives to imprisonment. This may best be achieved by concentrating on particular groups of people e.g. mentally ill offenders or remand prisoners and presenting stories that get the message across.

27. What can be done to raise the public level of awareness of alternatives to custodial sentences and their confidence in them?

Improving the information that the public receives about alternatives to custodial sentences is very important. But it is not only the public that needs to be targeted. The legal profession also require more information about these alternative sentences.

More work should also be done with the media to ensure that their understanding is improved and that the type of information they want to run a story is made available. SACRO, since being resourced by RCP, have successfully produced case studies and former clients to speak to the media, which has made this approach a lot more effective. Human interest stories that people can relate to are more likely to get people's attention and change their perceptions. There are currently not enough stories about community alternatives that show the tangible benefits of this approach for communities. People do not necessarily want a harsher more punitive criminal justice system, but they do want a more effective one that ultimately leads to safer communities.



Rethinking Crime and Punishment, a strategic initiative of the Esmée Fairbairn Foundation