

Reducing the prison population

Penal Policy and Social Choices

A Report of the
Scottish Consortium on
Crime & Criminal Justice

Copyright © 2005, the author and Scottish Consortium on Crime & Criminal Justice

All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the copyright owners.

First published in 2005 by the Scottish Consortium on Crime and Criminal Justice
26 Lee Crescent, Edinburgh EH15 1LW

www.scccj.org.uk

ISBN: 0 9549389 1 7

Contents

Foreword	4
Introduction	5
Executive Summar	6
1 Policies and Principles	10
The context	10
Aims of punishment	11
Some principles	14
A presumption against imprisonment	14
International comparisons	15
Penal choices	17
2 Sentences and Sentencing	20
Sentencing choices	20
A rising prison population	21
Why the growth?	25
Community-based sanctions	27
Comparing effects	30
Sentencing boundaries	31
3 From Principles to Practice	35
Why imprison?	35
What guides sentencing?	36
Structuring discretion	37
Accountability	38
Public understanding	39
Penal policy and sentencing	40
Redefining alternatives	40
Reducing the prison population	42
Primary themes	44
Notes	45
References	48

Scotland's prison population has grown at a rapid rate in recent years. The social and financial costs of a large prison population are high. Imprisonment is very expensive. The pressure it puts on already disadvantaged families and communities adds to existing problems. The aim in this report is to further debate on how penal policy and sentencing could best contribute to reducing the prison population in Scotland whilst maintaining public safety and liberating resources for more fruitful long-term investment in crime-ridden communities.

There is no reason why Scotland's prison population cannot be greatly reduced. The report suggests some guiding principles that, if followed, would create a strong presumption against the use of imprisonment as a common method of punishment. Community-based sentences which have the confidence of the public and lead to outcomes of value to local communities would become the norm.

Scotland can choose to reduce its prison population. Instead of devoting more and more public money to building and maintaining prisons, these same resources could be devoted to public services such as education, child care, mental health and medical services – the very services that will have a far greater impact on reducing crime than imprisoning more and more of Scotland's citizens. With fewer prisoners and locally accountable prisons, prison staff would be able to use their skills more effectively to promote social inclusion.

The Consortium is very grateful to its Hon Director, Professor Jacqueline Tombs, who wrote the report, to its Hon Secretary, Dinah Aitken for her unfaltering assistance and to the member organisations* and the Scottish Executive for their financial support.

The Consortium works to promote a rational and socially inclusive approach to crime and punishment in Scotland. We hope that this report will contribute to achieving that goal.

Baroness Vivien Stern

Convenor

Scottish Consortium on Crime & Criminal Justice

* Member organisations include the Howard League for Penal Reform in Scotland, APEX, SACRO, Scottish Human Rights Centre, Families Outside and NCH.

The Consortium's aim in this report is to further the debate about how best to reduce the prison population in Scotland whilst maintaining public safety. Part 1 is about policies and principles. It outlines current policy developments relevant to the use of imprisonment and community sentences, examines the traditional aims of punishment, suggests some guiding principles that create a strong presumption against the use of imprisonment as a common mode of punishment and asks why Scotland, unlike most of the other countries in the European Union, has such a high rate of imprisonment. In conclusion, Part 1 emphasises that the size of our prison population is not inevitable but a matter of political and social choice. How these choices are made depends on what kind of society we want to live in.

Part 2 reflects on the evidence about sentences and sentencing. It begins by noting the sentencing choices that are available to the judiciary in Scotland and moves on to examine the growth in the prison population. The main features of the prison population are highlighted before moving on to consider possible reasons for the growth. In particular, attention focuses on how increases in custody rates and in the lengths of sentences passed by the courts have contributed to the rising prison population. The community-based sanctions available to the judiciary are also considered, as is the evidence comparing the effects of custodial and non-custodial sentences in terms of their impact on re-offending and more widely. In conclusion, Part 2 draws attention to the boundaries set on sentencing, not only by legal and procedural constraints but also by decisions made by procurators fiscal earlier in the criminal justice process, by the extent to which community sentences are available, known about and understood, and by the way in which the judiciary exercise their discretion in sentencing.

Part 3 concentrates on how the principles argued for in Part 1 could be translated into practice. It asks the question 'why imprison', considers what guides sentencing practice, how discretion in sentencing is structured and what accountability in sentencing means. It then reflects on the importance of public understanding to the likely success of penal policies aimed at reducing the prison population. The need to redefine 'alternatives', so that community-based sentences become the norm from which a prison sentence would require to be justified, is emphasised. Part 3 concludes by outlining a range of strategies that have been used elsewhere to effectively reduce prison populations and comments on their possible adoption in Scotland.

Part 1 Policies and Principles

The context

The criminal justice context in Scotland is characterised by:

- high rates of imprisonment compared with those in apparently similar countries,
- criminal justice policies and legislation ¹ that imply increased use of imprisonment whilst, at the same time, promotion of restorative justice practices,
- increased emphasis on the use of community-based sentences aimed at reducing the use of imprisonment, and
- a perceived need for more transparency and accountability in sentencing.

Aims of punishment

While the report does not attempt to answer the large question of what the aims of sentencing should be, three aims must be included – desert, public safety and reparation. Some notion of desert is important in two respects: first, in communicating society's disapproval and censure of the offence in question; and second, in setting limits to punishment in the sense that punishments should not be imposed that are any harsher than the offence deserves. In the interests of public safety, and even though the criminal justice system alone can only play a very small part in crime reduction, sentencing must also have some crime-reductive aim, whether by rehabilitation, deterrence or incapacitation. Sentencing should also be about reparation, especially given the increasingly wide support amongst practitioners, policy makers and members of the public for reparative sentences.

Some principles

The principles of parsimony, inclusion and rehabilitation could be treated as *key values* in deciding on modes and severity of sentences. These principles would then be used to set some constraints on sentencing policies and practices. They would not be expected to set absolute constraints on sentencing; the proper aims of punishment might demand sentences that are intrusive and burdensome, that to some degree exclude offenders and/or that make reintegration difficult.

A presumption against imprisonment

The principles of parsimony, inclusion and rehabilitation create a strong presumption against imprisonment as a common mode of punishment. Imprisonment is intrusive and oppressive – even a short prison term deprives the prisoner of liberty, privacy and personal autonomy. In terms of both its meaning and its effects imprisonment is exclusionary: the prisoner is physically excluded from the ordinary life of the community in a way that implies an exclusion from the community of citizens.

International comparisons

Scotland's high rate of imprisonment, one of the highest in the European Union, is despite having amongst the widest range of community-based sentences available anywhere in the world and against a backdrop of decreases in the crime rate during the 1990s. Scotland can choose to have a high or a low level of imprisonment depending on what sort of society it wishes to be. Making that choice depends on asking ourselves if we want to live in a society that increasingly depends on the use of prison as a method of dealing with social problems and conflict resolution.

Penal choices

Society therefore has very important choices to make about the behaviours to be regulated by the criminal law and the levels of punishment. These policy choices include decisions about how much of our limited public resources should be devoted to dealing with crime as opposed to housing, health,

education and employment and so on. Why, for example, should it be necessary for Scotland to have such a high rate of imprisonment as compared with the majority of other Western European countries?

Part 2 Sentences and Sentencing

Sentencing choices

Two sets of institutional arrangements – the sentencing powers of the criminal courts and criminal justice social work responsibilities for the delivery of a wide range of community sentences – set the parameters in which the current debate about sentences and sentencing is taking place. There are some legal restrictions on the use of imprisonment and detention, the two custodial sentences available to the judiciary in Scotland. In addition, sentencing options vary with the powers of the different criminal courts. Judicial discretion is, nevertheless, comparatively wide and unfettered in determining the length of a prison sentence.

A rising prison population

The size of our prison population is an increasingly major social problem. There is growing debate about the appropriate use of prison, especially in light of the negative and far reaching consequences it has not only on incarcerated individuals but also on their families, victims, communities and society in general. Moreover, for the most part, imprisonment is neither beneficial in terms of reducing re-offending nor compensatory to crime victims. Yet despite an overall fall in crime rates since the 1980s and the introduction of a range of new community sentences, the number of people in prison in Scotland has continued to rise.

Why the growth?

The growth in the prison population is not due to an increase in the crime rate nor is it due to more people appearing before the courts. A large part of the growth is due to increases in the custody rate together with the imposition of longer prison sentences. Courts are more likely to use imprisonment today than they did a decade ago and, when they do, they are more likely to impose longer sentences. These sentencing practices have not occurred in isolation. Increased punishment levels set by legislators, other procedural factors, such as changes in parole and automatic release, and some increase in drugs and violent crimes have also contributed.

Community-based sanctions

Community-based sanctions range from the least intrusive and oppressive, such as an admonition, through the more directly retributive and reparative financial penalties, to the more intrusive options aimed primarily at rehabilitation, such as drug treatment and testing orders, to those specified as direct legal alternatives to imprisonment, such as community service. The use of community sentences has increased significantly in recent years. This increase, however, has not had the effect of reducing the use of custody but has occurred alongside a large reduction in the use of financial penalties – overwhelmingly the use of the fine.

Comparing effects

In terms of reducing re-offending, the evidence shows that community sentences are at least as effective as prison. When other measures are also included, such as reduction in the seriousness or frequency of re-offending, community sentences fare even better. In other words, the more precise and focused the evidence is, the more it suggests that community sentences are more effective than imprisonment.

Sentencing boundaries

In addition to some legal and procedural constraints on the use of custodial and non custodial sentences, other boundaries are imposed:

- first, by decisions made by procurators fiscal earlier in the criminal justice process;
- second, by the extent to which community sentences are available and known about and understood, both by sentencers and by the general public; and
- third, by the way in which the judiciary exercise their discretion in sentencing.

Part 3 From Principles to Practice

Why imprison?

In making a decision about whether or not to imprison, legislators and sentencers should be guided by whether the offence is such a serious attack on the community's values that only prison can send the right message about it and/or by whether the offender is a serious and continuing threat to the safety of others. In cases where incapacitation could be justified, the principles of parsimony, inclusion and rehabilitation should guide decisions about sentence length and about the offender's treatment in prison and on return to the community. For example, given the evidence that sentence length is negligible in terms of its deterrent effect, long prison sentences could be reduced.

What guides sentencing?

Sentencing involves making a decision about the allocation of an appropriate penalty to a convicted offender. These decisions have a major impact on the overall distribution of sentences and on the size of the prison population. In Scotland there are some legal and procedural restrictions on the use of imprisonment and community sentences as well as the limits imposed by the criminal justice process itself and the resources available for community sentences. As in almost all jurisdictions, sentencing involves both regulation and judicial discretion.

Structuring discretion

Jurisdictions vary in the range and extent of sentencing regulation. At one end of the spectrum the Federal Sentencing Guidelines published by the United States Sentencing Commission leave very little room for judicial discretion. Scotland lies at the other end of the spectrum, as there are very few rules which constrain the exercise of judicial discretion in sentencing. Most European jurisdictions lie in between these extremes.

Accountability

One way of providing accountability for the use of judicial discretion is through the use of guidelines, though guidelines have their own problems. Another way is through the judiciary articulating the basis to their decisions. Neither guidelines nor giving reasons interfere with judicial independence in ensuring impartiality in decision-making within whatever parameters the legislature has provided.

Public understanding

There is an increasing amount of evidence to show that supplying information to the public designed to dispel misconceptions about criminal justice and sentencing has a positive effect. In addition, research shows that the public are more positive about community-based sentences when presented with arguments based on the values and principles underlying them.

Penal policy and sentencing

As far as the contribution that changes in sentencing can make to bringing down the prison population is concerned there is therefore a need to develop policies that aim to adjust the legislative framework, to reduce sentence lengths and to redefine alternatives to imprisonment.

Redefining alternatives

Community-based sentences should not be viewed as 'alternatives to custody', as if they were to serve the same penal aims as custody is typically taken to serve. Community based sentences should be viewed as the kinds of sentence that are most likely, for most offenders and most offences, to serve the sentencing aims of rehabilitation and deterrence, as well as 'retribution', within the constraints of the three guiding principles of parsimony, inclusion and rehabilitation. These principles create a strong presumption against imprisonment. Rather than starting with imprisonment as the default sentence and looking for 'alternatives', the starting point should be a range of community based sentences.

Reducing the prison population

There is no reason why Scotland's prison population cannot be reduced substantially even though this is clearly a politically difficult and contentious route to follow. There are a range of strategies that can be used to accomplish this aim. For example, the option to reduce sentence lengths whilst retaining the support of most of the judiciary is a realistic one. In addition, short sentences could either be shortened further or automatically suspended. The symbolic message would still be communicated.

Primary Themes

Three themes underpin the approach suggested in this report to reducing the prison population in Scotland. These are that:

- the criminal law must be seen as only one form of social control,
 - the presumption must be against imprisonment as a common mode of punishment, and
 - there must be sustained political leadership in reducing our reliance on imprisonment.
-

The context

- 1.1 The criminal justice context in Scotland is characterised by:
- high rates of imprisonment compared with those in apparently similar countries,
 - criminal justice policies and legislation ¹ that imply increased use of imprisonment whilst, at the same time, promotion of restorative justice practices,
 - increased emphasis on the use of community-based sentences aimed at reducing the use of imprisonment, and
 - a perceived need for more transparency and accountability in sentencing.
- 1.2 The concern to increase the use of community-based sentences as alternatives to imprisonment is not new. What is new in Scotland is the urgency surrounding the debate on alternatives in light of an ever expanding prison population. This urgency is reflected in the number of recent policy reviews which, while generally focused on the efficiency of the criminal justice system, are nevertheless relevant to the use of imprisonment and alternatives – Lord Bonomy's report 'Improving Practice: 2002 Review of The Practices and Procedures in the High Court of Justiciary' (Bonomy, 2002), Sheriff McInnes' report 'The Summary Justice Review Committee' (McInnes, 2004), Andrew Normand's report on 'Proposals For The Integration Of Aims, Objectives And Targets In The Scottish Criminal Justice System' (Normand, 2003) the Scottish Prison Service document on partnership working, 'Making A Difference' (SPS, 2002), the Scottish Executive's 'Prisons' Estates Review' (Scottish Executive, 2002) and the report 'Short Term Sentences: Report to the Criminal Justice Forum' (Scottish Executive, 2003a).
- 1.3 Indeed, concern about our rising prison population led to an 'Alternatives to Custody Inquiry' undertaken by the Justice 1 Committee of the last Scottish Parliament. That inquiry began after Justice 1 reported on the Scottish Executive's Prison Estates Review which had proposed the building of three new private prisons. Amidst a great deal of opposition to these proposals, the Executive announced its intention to build one new private prison – to replace an existing prison – and to upgrade other parts of the prisons estate. Two new prisons are currently planned. Justice 1 Committee's report ² made a number of recommendations based on its consideration of the appropriate use of custody, available community disposals, levels of service provision and resources, the effectiveness of community disposals, sentencing, and public perception of community disposals. Many of these recommendations are being followed through, though without any noticeable effect on the prison population.
- 1.4 Two recent policy developments, with direct relevance to sentencing and the prison population, have the potential to make more impact. The first is the Executive's establishment of a judicially led Sentencing Commission with a remit to review sentencing and make recommendations on the:
- use of bail and remand,
 - basis on which fines are determined,
 - effectiveness of sentencing in reducing re-offending,
 - scope to improve consistency in sentencing, and
 - arrangements for early release from prison, and supervision of short term prisoners on their release.
- 1.5 The second is the Executive's 'Consultation on Reducing Reoffending in Scotland' ³ which resulted in the recently announced 'Supporting Safer, Stronger Communities: Scotland's Criminal Justice Plan' (Scottish Executive, 2004e). The main focus of the Criminal Justice Plan is on reducing re-offending and the proposals to tackle this include:
- establishing a national advisory board for offender management, with members drawn from across criminal justice services, to develop a national strategy to reduce re-offending and take on responsibility for monitoring SPS performance on offender management,

- legislating to create a statutory requirement for SPS and local authorities to work together to reduce re-offending and ensure that they form effective local area partnerships to deliver integrated services for offenders in prison and in the community,
 - bringing local councils' criminal justice services together into new Community Justice Authorities to ensure these local areas partnerships are as joined-up as possible. These groupings will receive the community component of criminal justice funding and be responsible for ensuring these resources are used effectively across traditional council boundaries, and
 - giving Ministers new powers to intervene if either SPS or councils fail to get a grip of the problem.
- 1.6 The Executive is introducing a Bill in 2005 to give legislative effect to these proposals and to introduce a new option, 'home detention curfew', to be used for selected low-risk prisoners who will spend the last part of their sentence in the community, subject to curfew, during which they will be monitored by electronic tagging. Ministers have also restated their commitment to 'community-based alternatives to prison' and will introduce a new non-residential national programme, targeted at young male offenders, based on the 'Constructs' programme in West Dumbartonshire.
- 1.7 While these policy developments are likely to have some impact on the use of imprisonment, the direction of the net effect on the level of imprisonment is an open question. As Part 2 of this report shows, Scotland already has a wider range of community-based alternatives to prison than most other countries. Indeed, many criminal justice policies have specifically aimed to reduce the use of custody by increasing the availability and improving the quality and targeting of community based court disposals.⁴ For the most part, such policies have been largely based on the assumption that if more and better community sentences were available, sentencers would reduce their use of custody.⁵ Recent research on sentencing decision-making in Scotland, however, shows that this assumption is simplistic; that the factors that influence the use of community sentences are more complex and that offering a wider range of community sentences will not, in itself, lead to a reduction in their use of custody. In that study sentencers did not identify a lack of satisfactory community options as a factor tipping their decisions towards custody (Tombs, 2004). Other approaches are, therefore, required if we are to at worst halt the growth and at best shrink the prison population.
- 1.8 The remainder of this part of the report concentrates on issues of principle that need to be addressed in order to further the debate about reducing the use of imprisonment. Part Two considers the evidence about the prison population and the use of community sentences. Part Three reflects on how the principles outlined below could impact on future criminal justice policies and sentencing practices in ways that could reduce the prison population.

Aims of punishment

- 1.9 All sentencing – community and custodial – involves punishment and almost all, in theory at least, aims to achieve additional ends. The traditional justifications which underpin sentencing practices and penal policy include 'retribution', 'deterrence', 'incapacitation', 'rehabilitation', 'reparation' and, increasingly, 'restorative justice'. Broadly speaking, and following Mathieson's (2000) classification, the justifications for criminal punishment fall into two groups – those that relate to retribution, where the aim is to satisfy society that justice has been done, and those that relate to social defence, where the aim is to protect society from crime by incapacitation or changing the behaviour of the offender and potential offenders.

- 1.10 Justifications of retribution as an aim of punishment are based on notions of justice, fairness and desert. These justifications centre around two key issues – ‘proportionality’, that the punishment fits the crime, and ‘culpability’, the assessment of moral guilt. The literature on retribution focuses mainly on philosophical discussions of justice, notions of ‘just desert’ and debates about how proportionality can be assessed. Much of this debate stands or falls on the question of the moral evaluation of different kinds of crimes and how to anchor punishment scales. In practice, sentencers make assessments of proportionality on a daily basis, for example, about the length of prison sentences, the number of hours of community service and the amount of fines and compensation orders. They also make their decisions in light of assessments of culpability (see Tombs, 2004).
- 1.11 Social defence justifications for punishment concentrate on public protection, which is arguably achieved either through individual or general prevention. Individual prevention is supposed to be obtained through rehabilitation (changing behaviour to prevent offending), deterrence or incapacitation of the individual offender. General prevention is supposed to be obtained through the deterrent, educative or habit forming effect of punishment on others.
- 1.12 In general the research literature on the rehabilitative effect of criminal punishments shows that community and custodial penalties are not significantly different in terms of preventing reconviction,⁶ once demographic and criminal record variables are taken into account (Lloyd, Mair & Hough, 1994; McIvor, 2002). In addition, where significant differences have been found, community penalties work better for some people in terms of reducing re-offending (Moxon, 1998). The evidence on the impact of different kinds of community penalties is discussed further in Part 2. It should be noted here, however, that at the very least, the evidence shows that many offenders now sent to prison could be dealt with in the community without substantially increasing the risk of their reconviction.
- 1.13 Attempting to achieve the aim of rehabilitation in prison, where offenders are subject to isolation, rejection, deprivation and meaninglessness, is extremely difficult and becoming more so as the prison population grows. Efforts to carry out educative and therapeutic work with offenders are hindered by the widespread availability and use of illegal drugs and a range of problems associated with overcrowding – excessive burdens made on prison staff, lack of oversight and lack of purposeful activity. This does not mean that rehabilitative efforts should not be made for those offenders who have to be isolated in prison in order to protect the public; only that these efforts are much more likely to be effective if prison is reserved for those offenders who cannot safely be dealt with in the community.
- 1.14 Recent debates concerning restorative justice and reparation as a justification for criminal punishment are also relevant to rehabilitation. Restorative justice schemes, which are rapidly developing in Scotland as elsewhere, seek to achieve rehabilitation through persuading offenders to confront their offending.⁷ Restorative justice emphasises the value of processes fair to all stakeholders – including the victim – and for offenders. The research literature on the effectiveness of restorative justice is mixed, not least because of differing views that are held about appropriate aims, hence criteria of effectiveness – should effectiveness be judged in terms of, singly or in combination, victim satisfaction, reconviction rates or community acceptance? (See, for example, Ashworth, 2002).
- 1.15 Turning to the effectiveness of punishment in terms of individual deterrence, the reconviction rates of ex-prisoners indicate that prison has at most a limited impact in terms of individual deterrence. SPS figures show, for example, that 49% of all prisoners discharged in 2000 returned to prison within two years (Ash and Biggar, 2004). Incapacitation – taking the offender out of circulation – clearly deprives offenders from the opportunity to commit further crimes against society at large. However, the evidence shows that the
-

extremity of incapacitative sentencing policies in the USA has led to the highest imprisonment rates in the world without significantly affecting the criminal recruitment pattern of new generations (Blumstein et al, 1986). Moreover, there are diminishing returns from the incapacitative effects of prison sentences. Studies of the criminal careers of young men, who commit a very large proportion of all crime, show that their rate of offending rises sharply to a peak at about the age of nineteen and thereafter falls again rapidly. Given that the great majority of offenders stop offending by about the age of twenty-five – almost irrespective of how they are dealt with – lengthy custodial sentences may well be a very expensive way of housing those whose criminal careers are at an end (Bottoms, 2004).

- 1.16 As far as general prevention is concerned, the research literature provides no evidence of any preventive effect of the severity of punishment (see, Doob and Webster, 2003). This is the case for the actual as well as expected severity. There is, therefore, no evidence that increasing the severity of sentences will increase their preventive efficacy. While there is some evidence that the actual and expected probability of detection and punishment have modest effects (see, especially, von Hirsch et al, 1999; Ashworth, 2001), even here studies indicate that potential offenders – especially young people – pay more attention to the social costs to themselves associated with crime than to the probability of punishment (Schumann et al, 1987). Moreover, some areas of crime starkly illustrate the lack of effect of changing punishment levels, for example, drug related offences. Escalations in punishment levels have had little if any effect on serious drug and drug-related crimes.
- 1.17 In short, there are a number of rationales for sentencing evident in policy documents, political statements and sentencing practices. Incapacitation and deterrence continue to have an appeal for policy makers and politicians and retribution, in terms of proportionality or desert, retains considerable support (see, for example, the Halliday Report, Home Office, 2001). The 'what works' agenda revived interest amongst policy makers and politicians in rehabilitation and the effectiveness of rehabilitative programmes (see, for example, Raynor, Kynch, Roberts and Merrington, 2001; Vennard, Sugg & Hedderman, 1997). Sentencers use all the different rationales in a case specific manner and typically several at the same time in relation to the same case (Tombs, 2004) and the public generally want offenders to be given sentences that prevent them from re-offending in the future and that give something back to the community (see, for example, Stead, 2002; Spencer, 2004a and b).
- 1.18 What is clear from the evidence is that politicians, policy makers, the general public and, to some extent at least, sentencers themselves, still look to sentences to prevent future crimes. It is, therefore, not surprising that studies of effectiveness generally tend to measure the impact of sentences in terms of re-offending. It is also clear that all of these groups also hold to other aims of punishment. Indeed some, notably sentencers, would see crime prevention as what Ashworth (2003) calls a 'secondary function'. If then the primary aim is that sentences are proportionate to the degree of wrongdoing, measuring their effectiveness in terms of reconviction rates – as a 'proxy' for re-offending – is, at the very best, an evaluation of a secondary function. Moreover, in view of the recurrent finding of effectiveness studies that "different community and custodial penalties did not seem to be differentially effective in preventing reconviction, once demographic and criminal record variables were taken into account" (Tarling, 1994), reducing re-offending alone appears to be an inappropriate yardstick against which to assess sentencing practices. A more appropriate yardstick could be the cost-effective reduction of re-offending. Against that yardstick, community-based sentences are undoubtedly more cost effective than imprisonment.
- 1.19 While this report does not attempt to answer the large question of what the aims of sentencing should be, three aims must be included – desert, public safety and reparation. Some notion of desert is important in two respects: first, in communicating society's disapproval and censure of the offence in question; and
-

second, in setting limits to punishment in the sense that punishments should not be imposed that are any harsher than the offence deserves. In the interests of public safety, and even though the criminal justice system alone can only play a very small part in crime reduction, sentencing must also have some crime-reductive aim, whether by rehabilitation, deterrence or incapacitation. Sentencing should also be about reparation, given both the increasingly wide support amongst practitioners, policy makers and members of the public for reparative sentences (see Stead, 2002; Spencer, 2004a and b). The next section sets out some principles that might underpin a realistic approach to what sentencing can or cannot achieve.

Some principles

- 1.20 Current policy debates about sentencing and the use and appropriateness of imprisonment tend to evade questions of principle. Yet questions of principle, whether articulated or implied, imbue penal matters. Three principles – parsimony, inclusion and rehabilitation – have been identified as appropriate principles to guide future sentencing policies and practices.

Parsimony

- 1.21 The principle of parsimony (see Morris, 1974) suggests using the least intrusive, oppressive or costly sanction that will serve the aims of sentencing. A key implication of this principle is that if an offence is currently punished by a severe sanction, notably by imprisonment, we should ask whether it is clear that a lighter sanction, notably in the community, would be less effective.

Inclusion

- 1.22 Offenders are, and must be treated as citizens, as members of the political community. If the principle of inclusion is followed through then we would favour modes of sentencing that sustain, or at the very least do not appear to deny, that membership

Rehabilitation

- 1.23 Punishment must come to an end for all or at least almost all offenders. At a minimum, sentences should not detract from an offender's ability to integrate into ordinary life and should if possible assist in that process.

A presumption against imprisonment

- 1.24 These principles do not set absolute constraints on sentencing; the proper aims of punishment might demand sentences that are intrusive and burdensome, that to some degree exclude offenders and/or that make reintegration difficult. Following the principles means treating parsimony, inclusion and rehabilitation as *key values* in deciding on modes and severity of sentences. It also means that these principles would be used to set some constraints on sentencing policies and practices.
- 1.25 In particular, the principles of parsimony, inclusion and rehabilitation create a strong presumption against imprisonment as a common mode of punishment. Imprisonment is intrusive and oppressive – even a short prison term deprives the prisoner of liberty, privacy and personal autonomy. In terms of its meaning and its effects imprisonment is exclusionary: the prisoner is physically excluded from the ordinary life of the community in a way that implies an exclusion from the community of citizens, especially when it brings the loss of the right to vote; and those who have been imprisoned often find themselves excluded from many of the rights and benefits that others enjoy even after their release back into the community. Imprisonment also makes reintegration extremely difficult just because the prisoner has been removed from, and must therefore find a way back into, ordinary life.
-

-
- 1.26 A presumption against imprisonment does not mean that imprisonment cannot be justified. Sometimes, because of the seriousness of the particular offence, it is obvious that imprisonment is the only acceptable punishment. What a presumption against imprisonment implies is that the burden of proof must lie with those who would imprison to show why no lighter, less exclusionary sanction is adequate. Moreover, where legislators and sentencers face a real choice between imprisonment and other modes of punishment, the principles of parsimony, inclusion and rehabilitation would favour a non-custodial sentence.
- 1.27 It also follows that talking about 'alternatives to custody' can be misleading, since the implication here is that custody is the default sentence, and that the burden of proof lies on those who would argue for non-custodial sentences to show that they are as good as or better than custody. Instead, adherence to the three principles would mean that non-custodial sentences would be regarded as the norm and that the burden of proof would lie on those who argue for a prison sentence to show why such an exclusionary sentence was necessary.
- 1.28 In terms of criminal justice policy, the three principles could underpin the development of policies that promote harm reduction in sentencing. For example, as discussed in Part 2, the evidence is unequivocal in demonstrating the extent of the further harms caused by sentences of imprisonment – to prisoners and to their families. In this context there are developments in other countries, for example, problem-solving courts, which seek to sentence offenders in their communities and, at the same time, address the areas in offenders' lives – housing difficulties, welfare issues and substance abuse problems – related to their offending.
- 1.29 This problem-solving type of approach implies that the crime-reductive aims of sentencing should be ranked. Rehabilitation would be ranked first, above deterrence, because rehabilitation deals with the offender as a citizen who is to be restored to civic life whereas deterrence seeks obedience through fear. Deterrence would be ranked above incapacitation because deterrence treats potential offenders as responsible agents who are to be given a reason to desist from crime whereas incapacitation simply treats them as dangerous enemies to be locked up or otherwise coerced.

International comparisons

- 1.30 In January 2004 Scotland's prison population was 6,602; a rate of 129 prisoners per 100,000 of the national population. This rate of imprisonment, one of the highest in the European Union, is despite Scotland having amongst the widest range of community-based sentences available anywhere in the world and against a backdrop of decreases in the crime rate during the 1990s. The progressive rise in the prison population, overcrowding and the poor condition of the prison estate led to a consultation by the Scottish Executive in 2002 on the Future of the Scottish Prison Estate. Based on the trends in prisoner numbers, that consultation envisaged a prison population of almost 8,000 within the next ten years. At the time of writing the prison population is over 6,600.
-

Table 1.1 Prison rates: International comparisons

Country	Total prison population	Date	Estimated national population (millions)	Prison rate per 100,000 of national population
USA	2,033,331	31.12.02	290	701
Russian Fed.	846,967	31.12.03	142.3	595
New Zealand	6,058	Mid 03	3.9	155
Canada	36,024	End 01	31.8	116
Australia	22,507	Mid 03	19.7	114
England & Wales	73,688	30.1.04	52.74	140
Spain	56,244	16.1.04	40.96	137
Portugal	14,060	1.9.03	10.46	134
Scotland	6,602	30.1.04	5.1	129
Italy	56,574	30.9.02	56.3	100
Netherlands	16,239	1.9.02	16.16	100
Germany	81,176	31.3.03	82.56	98
France	55,382	1.4.03	59.7	93
Rep. of Ireland	3,366	10.9.03	3.97	85
Greece	8,841	1.12.03	10.6	83
Sweden	6,473	1.9.03	8.96	72
Denmark	3,908	25.11.03	5.4	72
Northern Ireland	1,235	29.1.04	1.75	71
Finland	3,604	1.11.03	5.21	69
Norway	2,914	1.9.03	4.57	64

Source: ICPS World Prison Brief, February 2004 www.prisonstudies.org

- 1.31 Table 1.1 provides a comparison of prison rates across a selection of western European and other countries. Though comparison is not direct⁸ Scotland's position relative to other countries in Western Europe is in no doubt. Other countries with similar social and demographic characteristics – most notably Norway and Finland – make much less use of imprisonment than Scotland. Only Portugal, Spain and England and Wales had comparable rates; at 134, 137 and 140 respectively. The United States has by far the highest rate at 701 per 100,000 of the national population.
- 1.32 Differences in the crime rates in various countries do not explain such variations in levels of imprisonment; there is no correlation between crime rates and incarceration rates on the international level (Waquant, 2004). Countries experiencing similar or higher crime rates than Scotland can have lower rates of imprisonment – for example, Sweden, the Netherlands and Australia. And some countries with only slightly lower crime rates can have dramatically lower prison rates, for example, Finland. It is also the case that some countries with lower crime rates, for example Spain, have higher imprisonment rates. In addition, variations in imprisonment rates can be explained, at least in part, by differences in sentencing policy and practice (Tonry and Frase, 2001; Tonry, 2003).

-
- 1.33 What the countries with the lowest imprisonment rates in Table 1.1 have in common – especially Norway, Finland, Denmark and Sweden – is that they have all explicitly pursued prison reduction policies at the same time as re-appraising the role of their criminal justice systems and increasing social welfare and educational provision. While the details differ in each country, the Nordic countries have premised their policies on the recognition that crime is a social problem requiring social policy – not penal – solutions (Coyle, 2003).
- 1.34 Indeed, though taking different approaches, most of the countries in Western Europe with prison rates between 60 and 100 per 100,000 have pursued prison reduction policies premised on two main assumptions: first, that prison should be used as a last resort and only for those who have committed the most serious crimes or who pose a major threat to public safety; and second, that the reach of the criminal justice system should be limited and not used as a means of attempting to solve social problems.
- 1.35 Some countries have pursued specific measures as, for example, in France where imprisonment for all minor offences has been abolished. Others have adopted a broader approach, as, for example, in Finland where, with public support, politicians, government officials, academics and judges have collaborated in implementing a long term reduction strategy. It should be emphasised, however, that the consensus in these countries about the limits of penal solutions is increasingly threatened by responses to the international trade in and use of illegal drugs and, in some, there is a growing tendency to use prison as a major weapon in what the USA calls the ‘war on drugs’ (Coyle, 2003).
- 1.36 In the USA, and in the countries with the highest rates of imprisonment, the ‘prison solution’ (Mathieson, 2000) is at the centre of criminal justice policy and debate. The political rhetoric is imbued with a presumption that there is an increased need to control certain already marginalised and impoverished population groups, such as drug offenders, primarily through legislation specifying stiffer sentences. Thus rises in prisoner numbers have been shown to relate to legislative and policy changes that have seen a greater use of custody and the imposition of longer sentences, especially in relation to drug offenders (Walmsley, 2000; Hough et al, 2003). Indeed, legislative and policy changes in Scotland over the last decade have contributed to increased use of custody and the imposition of longer prison sentences in relation to drug offenders (see Tombs, 2004).

Penal choices

- 1.37 In 2002 the heads of prison administrations from all Council of Europe member states emphasised that levels of imprisonment rarely have anything to do with levels of crime. Instead, and as sentencers in Scotland have also observed (see Tombs, 2004), levels of imprisonment are a matter of political and public choice. A society can choose to have a high or a low level of imprisonment depending on what sort of society it wishes to be (Coyle, 2003). Making that choice depends on asking ourselves if we want to live in a society that increasingly depends on the use of prison as a method of dealing with social problems and conflict resolution.
-

- 1.38 Society therefore has very important choices to make about the behaviours to be regulated by the criminal law and the levels of punishment. These policy choices include decisions about how much of our limited public resources should be devoted to dealing with crime as opposed to housing, health, education, employment and so on. Why, for example, should it be necessary to have such a high rate of imprisonment in Scotland, at an annual cost of £35,000 per prisoner (Scottish Executive, 2004e) as compared with the majority of other Western European countries?
- 1.39 In the Prison Estates Review Scotland is planning for a prison population of 8,000, which in less than ten years from now will give us the highest prison rate in Western Europe. As Andrew Coyle asks – why stop there? Why not 10,000; why not 12,000? Indeed, why not go to American levels? With about 5% of the population of the world, the United States now has 23% of all its prisoners. Twenty years ago there were half a million people in prison in the United States. Any commentator then would have found it unbelievable that today there should be over two million, despite the fact that for most of that period crime rates have been falling. This rise has been based on a series of political decisions, epitomised by clichés such as ‘three strikes and you’re out’, followed by ‘two strikes and you’re out’, ‘the war on drugs’, ‘zero tolerance’ and ‘truth in sentencing’. If Scotland were to go to American levels, it would have over 30,000 people in prison (Coyle, 2003).
- 1.40 There is another way. The relentless rise of the prison population in Scotland can stop if our politicians lead the way in helping our society to choose not to continue on that road. And that is precisely what Finland chose not to do. Finland and Scotland share much in common. They are both small northern European countries with concentrated urban communities, large sparsely populated areas and a tradition of strong welfare institutions. At 5.2 and 5.1 millions respectively, their populations are broadly similar. However, in one respect the countries are quite different. Finland’s prison rate is 69 whereas Scotland’s is 129 per 100,000 of their respective national populations. Finland is well below the Western European average for imprisonment, while Scotland is one of the leading imprisoning nations. This was not always the case.
- 1.41 In the 1950s the Finnish rate of imprisonment, at 187 per 100,000, was one of the highest in Western Europe, four times higher than its Nordic neighbours. Over succeeding decades its rate of imprisonment fell significantly: to 154 in 1960, 113 in 1970, 106 in 1980, 69 in 1990 and 55 in 2000. This did not happen by accident. Rather, the decrease was the result of deliberate, long-term and systematic policy choices. In the first place, there was clear political will and consensus to bring down the prison rate. This involved politicians, government officials and academics. The reforms were drafted and driven by a group of experts whose view of criminal policy was broadly similar. The judiciary was closely involved in developing these changes and in a number of respects sentencing practice changed in advance of new legislation. Importantly, crime control has never been a party political issue in election campaigns in Finland and the role of the media has been central, with a general absence of populist reporting on criminal justice matters.
- 1.42 In Finland courts have two basic sentencing options: the fine and imprisonment. A high proportion of convicted offenders are punished by a fine. If the court decides that a fine is not sufficient punishment, then a prison sentence is imposed. However, once a sentence of imprisonment has been passed, there are a number of options. If the sentence is up to eight months, there is an expectation that it will be converted into community service. All sentences of up to two years can be suspended with various conditions, such as attendance at a drug rehabilitation or similar course. In practice, 50% of all prison sentences are suspended.
-

1.43 The Criminal Sanctions Agency, which administers all custodial and community disposals, has two goals:

- to contribute to security in society by maintaining a lawful and safe system of enforcement of sanctions, and
- to assist in reducing recidivism by endeavouring to break the cycle of social exclusion that reproduces crime.

It also has two central values, which are:

- respect for human dignity and justness, and
- a belief in the potential for individual change and growth.

1.44 Most importantly, and even though the prisoner rate has been rising a bit in recent years, at the centre of the Finnish prison reduction strategy is the belief that the criminal justice system should not attempt to be a major source of social control. Other agencies are responsible for that task. The criminal law is only one form of social control. It is therefore crucial that the criminal justice system is viewed as having a very narrow and regulated function in relation to crime control.

Sentencing choices

- 2.1 The sentencing options available to the judiciary vary with the powers of the different criminal courts. The High Court hears the most serious cases including all cases of murder and rape and has no limits on the length of imprisonment or amount of fine. The Judge sits alone with a jury of fifteen. In the Sheriff Court, in serious cases – on solemn procedure – the legally qualified Sheriff sits alone with a jury. That court may impose sentences of up to 3 years imprisonment and can impose fines up to £5,000. In less serious cases, in the Sheriff Court on summary procedure and in the Stipendiary Magistrates Court (there is only one which is in Glasgow), sentences of up to 3 months imprisonment, or six months for a second or subsequent conviction for violence or dishonesty, and a fine of up to £5,000 may be imposed. Sheriff summary sentencing powers are greater than this for certain statutory offences where higher maximum sentences are specified in the legislation, for example, contraventions of the Police (Scotland) Act 1967 may result in 9 months in prison and certain contraventions of the Misuse of Drugs Act 1071, for example, concern in supply, can be sentenced to up to 12 months imprisonment on summary complaint. The Sheriff and the legally qualified Stipendiary Magistrate sit alone. Last, the District Court, the only lay court in Scotland, hears more minor cases and may impose up to sixty days imprisonment or a fine of up to £2,500. There will normally be one Justice of the Peace although there may be more.
- 2.2 There are some legal restrictions on the use of the two custodial sentences available to the judiciary in Scotland – imprisonment and detention. While judicial discretion in determining the length of a prison sentence is comparatively wide and unfettered – a point discussed in more detail in Part Three – there are legal restrictions on the imposition of a sentence of imprisonment.⁹ These are that a court may not impose a sentence of imprisonment on a person:
- who has not reached the age of 21.¹⁰ The appropriate sentence for young people aged 16 to 20 is detention in a young offenders' institution¹¹; or
 - who has not previously been sentenced to imprisonment or detention by a court in any part of the UK unless the court considers that no other method of dealing with the offender is appropriate.¹² There is a similar restriction in relation to the imposition of detention on offenders aged 16-21.¹³
- 2.3 Further legal restrictions are that:
- the court may not impose a sentence of imprisonment or detention in respect of any offence, nor failure to pay a fine, on an offender who is not legally represented in court and has not been previously sentenced to imprisonment or detention by a court in any part of the UK, unless denied legal aid because he or she is not financially eligible or has failed to apply for legal aid;
 - in certain limited cases, the High Court is required to impose a sentence of not less than seven years' imprisonment (or detention) on conviction on indictment for a third Class A drug trafficking offence. This obligation is, however, subject to the qualification that the court may impose a lesser sentence where there are special circumstances relating to the offender or any of the offences that would make it unjust to impose such a sentence¹⁴; and
 - no person may be sentenced to imprisonment by a court of summary jurisdiction for a period of less than five days.¹⁵
- 2.4 The latest statistics show that in 2002 custodial disposals were 3% of disposals made in the Stipendiary Magistrates Court and Lay District Courts, 16% in the Sheriff Summary Courts, 68% in the Sheriff Solemn Courts and 85% in the High Court (Scottish Executive, 2004b). The judiciary can also impose remand imprisonment. As noted in the sections below on the prison population, prisoners on remand – either prior to conviction or following conviction but prior to sentence – represent a large proportion of annual receptions into custody. Bail is used by the courts as an alternative to remand imprisonment. Various conditions can be applied to bail, for example, a condition of residence, exclusion from a certain area, a

deposit of money with the court. Figures show that re-offending whilst on bail is very uncommon – only 7% of those with a charge proved in 2001 were recorded as having offended while on bail (Scottish Executive, 2002a, Table 13) and bail supervision has been found to be effective in addressing the risk of re-offending while on bail for accused who might otherwise be held on remand (MVA, 1999).

- 2.5 All community sentences are in principle available in the Sheriff and High Courts, though not in the Stipendiary Magistrates or District Courts. More details on the circumstances in which the various sentences can be used are noted in the section below on community sentences. Here, however, it is important to note that the extent to which community options are available to and used by the judiciary depend, very largely, on criminal justice social work services and judicial awareness and understanding of the community options open to them.
- 2.6 In 1991 central government introduced national standards and objectives for the delivery of criminal justice social work services. The government provided 100% funding to local authorities for these services. Community sentences are currently provided and managed by criminal justice social work services in the 32 local authorities. These services were restructured in 2002 into 11 mainland groupings plus the islands. This reorganisation led to improvements in the delivery of criminal justice social work services and a significantly increased and important role for the voluntary sector. Nevertheless, as noted in Part One, the need for further change has been identified in Scotland's Criminal Justice Plan (Scottish Executive, 2004e).
- 2.7 These two sets of institutional arrangements – the sentencing powers of the criminal courts and criminal justice social work responsibilities for the delivery of a wide range of community sentences – set parameters in which the current debate about sentences and sentencing is taking place.

A rising prison population

- 2.8 At the centre of the debate is concern with what has become a major social problem – the growth in our prison population. The ongoing and projected further growth continues to generate debate about its appropriate use, especially in light of the negative and far reaching consequences that imprisonment has not only on incarcerated individuals but also on their families, victims, communities and the nation as a whole. Moreover, for the most part, imprisonment is neither beneficial in terms of reducing re-offending nor compensatory to crime victims. Yet despite the publication of countless official and semi-official reports and statements critical of the use of imprisonment as a punishment for many offenders, most notably for women, an overall fall in crime rates since the 1980s, and the introduction of a range of new community sentences, the number of people in prison in Scotland has continued to rise.
- 2.9 In Part One it was noted that levels of imprisonment are matters of choice. Prison populations are determined by choices that affect both the 'flow' of offenders into and the number or 'stock' of offenders already in prison. The flow is a product of the numbers of offenders sentenced or remanded by the courts to prison. The stock – the number of prisoners on any one day – is a "product of the flow into prison, coupled with the length of time actually served" (Hough et al, 2003). Prison population size can therefore be changed by policies and practices aimed at influencing both the stock and the flow. A range of early release measures that could be used to reduce the accumulation of those already incarcerated and various pre-court measures that could be taken to reduce the flow of offenders into prison – crime prevention, decriminalization and diversion. There are also ways in which the courts themselves could reduce the flow of offenders remanded and/or sentenced to prison through the use of bail and of community-based sentences.

- 2.10 Part Three discusses factors to be taken into account in developing a constructive prison reduction strategy. This part reviews what can be learned from the evidence on custodial and non-custodial sentencing practices, the comparative effectiveness of the different sentences in terms of reducing re-offending and other positive outcomes and the boundaries to what sentencing can realistically be expected to achieve.
- 2.11 Before commenting on reasons for the growth in the prison population over the past decade, the following paragraphs outline the broad contours of the stock of prisoners on 30 June 2002. On that day there were 6,544 prisoners – 6,251 males and 293 females – against an available prison capacity of around 6,100. Ethnic minority groups (including people awaiting deportation) accounted for 2% (104) of the prisoners; the proportion of ethnic minorities in Scotland as a whole was around 1.3%. Adult prisoners made up 87% of the population; adults are more likely to receive custodial sentences than young offenders and, when they do, they are likely to be given longer sentences.

Main crimes and offences

- 2.12 In relation to the main crimes and offences¹⁶ that prisoners were convicted for (Table 2.1) or were accused of (Table 2.2), it is notable that the proportions of females (29%) and males (15%) convicted of drugs offences who received a custodial sentence were much larger than the proportions of females (4%) and males (6%) remanded who were accused of drugs offences. By contrast, the proportions of females (36%) and males (29%) remanded who were accused of crimes of dishonesty were larger than the proportions of females (28%) and males (17%) convicted and sentenced to custody for these crimes. The larger proportionate contribution of non-sexual crimes of violence (including robbery) in the sentenced prison population can be attributed to the longer sentences that these crimes generally attract.

Table 2.1 Make-up of the sentenced prison population, 2002

	MALES			FEMALES		
Main crime/offence	2002	%	Main crime/offence	2002	%	
Non-sexual crimes of violence	2,024	40	Non-sexual crimes of violence	61	29	
Crimes of indecency	362	7	Crimes of indecency	2	1	
Crimes of dishonesty	856	17	Crimes of dishonesty	59	28	
Fire-raising, vandalism etc	63	1	Fire-raising, vandalism etc	6	3	
Other crimes ⁽¹⁾	894	18	Other crimes ⁽¹⁾	66	31	
[Drugs]	[747]	[15]	[Drugs]	[62]	[29]	
Miscellaneous offences	324	6	Miscellaneous offences	15	7	
Motor vehicle offences	293	6	Motor vehicle offences	3	1	
Other/unknown charge ⁽²⁾	271	5	Other/unknown charge ⁽²⁾	1	-	
Total	5,087	100	Total	213	100	

Notes (1) Includes drugs charges – noted in []. (2) Includes other jurisdiction charge.

Source: Prison Statistics Scotland 2002, Table 11 (Scottish Executive, 2003b).

Table 2.2 Make-up of the remand prison population, 2002

MALES			FEMALES		
Main crime/offence	2002	%	Main crime/offence	2002	%
Non-sexual crimes of violence	325	28	Non-sexual crimes of violence	21	26
Crimes of indecency	23	2	Crimes of indecency	-	-
Crimes of dishonesty	339	29	Crimes of dishonesty	29	36
Fire-raising, vandalism etc	24	2	Fire-raising, vandalism etc	5	6
Other crimes (1)	256	22	Other crimes (1)	12	15
[Drugs]	[68]	[6]	[Drugs]	[3]	[4]
Miscellaneous offences	123	11	Miscellaneous offences	13	16
Motor vehicle offences	71	6	Motor vehicle offences	-	-
Other/unknown charge (2)	1	-	Other/unknown charge (2)	-	-
Total	1,162	100	Total	80	100

Notes (1) Includes drugs charges – noted in []. (2) Includes other jurisdiction charge.

Source: Prison Statistics Scotland 2002, Table 11 (Scottish Executive, 2003b).

Increases in the prison population

- 2.13 While the vast majority of prisoners are male, it is in the female prison population that the increase has been dramatic. Between 1993 and 2002 the female prison population increased by 62% whereas the male prison population increased by 12%. The latest statistics (Scottish Executive, 2004c) show that this pattern of growth is continuing. Between 2002 and 2003, while the total prison population increased by 2%, the average daily female prison population grew by a further 7%.
- 2.14 As noted earlier, most prisoners are adults who are more likely than young offenders to receive custodial sentences and, when they do, are likely to be given longer sentences. In addition, over the period 1993 – 2002, the average daily population of young offenders in custody decreased substantially whereas the opposite was true for adults. The progressive rise in the prison population has therefore been a rise in the adult prison population. For this reason, the following discussion on overall increases in the prison population concentrates on adults. Thus Table 2.3, which gives the yearly average adult (21 and over)¹⁷ prison population from 1993 to 2002 and the percentage change on the 1993 figures, shows that the overall rise (of 14%) in the prison population is due to the 24% increase in the adult population; the young offender prison population decreased by 9% over the same period.¹⁸

Table 2.3. Average adult prison population

Year	Average ^{(1) (2)}	% change on 1993	Year	Average ^{(1) (2)}	% change on 1993
1993	4,470	-	1998	5,019	+13
1994	4,489	+ <1	1999	5,045	+13
1995	4,531	+2	2000	4,948	+11
1996	4,798	+7	2001	5,244	+18
1997	5,018	+13	2002	5,530	+24

Notes (1) Average adult sentenced population in custody plus average adult population on remand.
(2) Includes adults recalled from supervision/license. In the years before 1997, the figures include a small number of prisoners under 21 who were recalled from supervision/license or were 'other' prisoners (less than 1 in each category)

Source: Prison Statistics Scotland 2002, Tables 1 and 5 (Scottish Executive, 2003b).

The use of remand

2.15 The increased use of remand for adults between 1993 and 2002 has undoubtedly made an impact. The increase (of 29%) in the average daily remand population is due to an increase of 57% in the adult remand population; remands for adult females increased by 72%. Remands for young people decreased by 20% over the same period. Table 2.4, which gives the yearly average adult remand population from 1993 to 2002 and the percentage change on the 1993 figures, shows progressive increases over the ten years. ¹⁹

Table 2.4. Average population of adult remand prisoners ⁽¹⁾

Year	Average	% change on 1993	Year	Average	% change on 1993
1993	604	-	1998	657	+9
1994	640	+6	1999	727	+21
1995	625	+4	2000	665	+10
1996	670	+11	2001	718	+19
1997	673	+12	2002	947	+46

Notes (1) All remand prisoners in penal establishments aged 21 or over.

Source: Prison Statistics Scotland 2002, Table 5 (Scottish Executive, 2003b).

Table 2.5. Average population of adult sentenced prisoners ⁽¹⁾

Year	Average	% change on 1993	Year	Average	% change on 1993
1993	3,866	-	1998	4,362	+13
1994	3,849	-<1	1999	4,318	+12
1995	3,906	+1	2000	4,319	+12
1996	4,128	+7	2001	4,526	+17
1997	4,345	+13	2002	4,583	+19

Notes (1) Includes adults recalled from supervision/license. In the years before 1997, the figures include a small number of prisoners under 21 who were recalled from supervision/license or were 'other' prisoners (less than 1 in each category)

Source: from Prison Statistics Scotland 2002, Table 1 (Scottish Executive, 2003b).

2.16 From 1993 – 2002 the adult sentenced population increased by 19% or 717 people (Table 2.5).²⁰ Though the 57% increase in the adult remand population (343 people) made an impact, the rise in the sentenced population will have had a much more substantial and longer term impact on the growth in the prison population.

Why the growth?

- 2.17 The most obvious explanation for the rise in the prison population is that there has been an increase in the crime rate. Not so. The number of crimes recorded by the police in 2003 was over 25% lower than the number recorded ten years earlier – a time at which the prison population was significantly lower. This decrease in the recorded crime statistics (Scottish Executive, 2004c) is supported by the trends identified by the Scottish Crime Survey (SCS, 2002). Moreover, as noted in Part One, the international evidence shows that there is no direct correlation between levels of crime and levels of imprisonment; estimates have consistently shown that the prison population would have to increase by around 15% for a reduction in crime of around 1% (see Carter, 2003; Cavadino and Dignan, 2002; Home Office, 2001).
- 2.18 Another possible explanation for the growth in the prison population is that progressively more people have been appearing before the courts. However, from 1993 – 2002 the number of people proceeded against in court decreased by 23%, though there were slight increases recorded in 2001 and 2002 on the immediately preceding years. Similarly, the general trend in the number of people convicted has been down, though again 2001 and 2002 showed slight increases on previous years. These small increases do not, however, account for the progressive growth in the prison population over the period.
- 2.19 Some other changes in the pattern of convictions for different crimes and offences are, however, likely to be related to the increased use of custody. Over the last ten years there has been a substantial decrease of 48% in the number of offenders convicted for housebreaking. In contrast there have been large increases in the numbers of convictions for serious assault/attempted murder (+49%), for drug crimes (+23%) and for breach of social work orders (+126%). These are crime and offence categories where sizeable proportions of offenders generally go to prison. Taken together, the number of people convicted of these crimes and offences will undoubtedly have contributed to the overall growth in the prison population.

2.20 While some of the rise in the prison population can therefore be explained by increases in drug crimes and serious crimes of violence, the evidence suggests that increases in the custody rate at the courts – that is the proportion of those found guilty who are then given a custodial sentence – together with increased sentence lengths explain more of the growth (see Tombs, 2004). Overall, the custody rate for all crimes and offences was higher in 2002 than it was in 1993. Over that period increases in custody rates were especially pronounced for the following:

	1993	2002
Housebreaking:	41%	51%
Theft by opening lockfast places:	25%	40%
Fire-raising	28%	41%
Lewd and indecent behaviour:	25%	37%
Shoplifting	20%	28%
Other theft	18%	27%
Drugs	10%	15%

Source: Criminal Proceedings in Scottish Courts 2002 (Scottish Executive, 2004a, Table 9)

2.21 Increases in sentence lengths have also contributed. It should be noted, however, that identifying trends in sentence length is not straightforward. The rapid escalation in the proportion of offenders sent to prison means that those who previously might have been given a community sentence are now given short prison sentences. This has the effect of masking any increases in average overall sentence length. Nevertheless, the average length of prison sentences overall (excluding life imprisonment) rose between 1993 and 2002. In 1993 the average length was 259 days. By 1996 this had risen to 295 days and by 2002 it was 330 days (Scottish Executive, 2003b). The average sentence length imposed for adult prisoners in 1993 was 259 days; for young offenders it was 244 days. By 2002 the average sentence imposed increased for adults to 330 days and for young offenders to 295 days. For adult males the rise was from 268 to 334 days; the rise for adult females was almost double, from 136 to 267 days. Similarly, while the average sentence length imposed increased for young male offenders from 248 to 301 days, for young female offenders the rise was almost double, from 103 days in 1993 to 187 days in 2002.

2.22 With the exception of those offenders given prison sentences of 3 months or less, receptions for all other sentence length groups have gone up over the past decade. The increases in adult direct sentenced receptions between 1993 and 2002 are:

- 39% in those sentenced to over 3 months – less than 6 months;
- 28% in those sentenced to 6 months – less than 2 years;
- 36% in those sentenced to 2 years – less than 4 years;
- 51% in those sentenced to 4 years & over (excluding life); and
- 115% in those sentenced to life imprisonment.

2.23 The proportionate increases in longer sentences, together with large increases in the numbers of prisoners given longer sentences, have made a significant contribution to the growth in the prison population. The

figures for 2003 show that the upward trend with the longer sentences is continuing while the average daily population of remand prisoners and those sentenced to less than 4 years have remained unchanged on the previous year. Between 2002 and 2003 the average daily population of prisoners sentenced to 4 years or more increased by 5%; this rise accounts for virtually all of the 2% increase in the total prison population that year (Scottish Executive, 2004c).

- 2.24 From the foregoing figures it is reasonable to conclude that increases in the custody rate together with longer prison sentences account for a significant part of the growth in the prison population. While other procedural factors, such as changes in parole or automatic release, have also contributed to the rise in the prison population (see Tombs, 2004), the courts are more likely to use imprisonment today than they did a decade ago and, when they do, they are more likely to impose longer sentences. Sentencing practices have not, however, changed in this direction in isolation. Rather they reflect the increase in punishment levels set by legislators over the same time period.
- 2.25 Notwithstanding the increased levels of imprisonment that, to a notable extent, lie with drug and violent crimes, our prisons continue to incarcerate many non-violent and less serious drug offenders. In addition, despite proportionate reductions, large numbers of prisoners are sentenced to short terms or are received into custody on remand or for fine default. Moreover, as discussed in the next section, sentencing trends show that increases in the use of imprisonment have been paralleled by increases in the use of various community-based sentences with the exception of fines.

Community-based sanctions

- 2.26 Community-based sanctions range from the least intrusive and oppressive, such as an admonition, through the more directly retributive and reparative financial penalties, to the more intrusive options aimed primarily at rehabilitation, such as drug treatment and testing orders, to those specified as direct legal alternatives to imprisonment, such as community service. The circumstances in which a sentencer may impose various community sanctions are briefly summarised below.
- Absolute discharge – at the least serious end of the scale, sentencers can grant an absolute discharge under solemn and summary procedure provided that the penalty for conviction is not fixed by law. Absolute discharges can be referred to in subsequent criminal proceedings but in all other aspects a conviction is not recorded against the person.
 - Admonition – means that the offender receives a warning from the court and a conviction.
 - Caution – to find caution obliges an offender to lodge a specified sum of money in the court as a security for future good behaviour for up to 6 months in the District Court or a year in the Sheriff Court. If the offender remains of good behaviour over the specified period the money can be recovered with interest. Caution can be a condition of probation and can be used for any offence for which imprisonment is not being imposed.
 - Deferred sentence – can be made after conviction; there is no restriction on the length of time for which a sentence can be deferred and it can be deferred more than once. Deferred sentences can be used to ensure that an offender undertakes a specific task or service related directly to the circumstances of the offence, for example, making recompense to victims, and almost always includes a specific requirement to be of good behaviour. In practice, sentencers use deferred sentences when they know that there are outstanding charges to be dealt with, frequently in ‘roll-up courts’ (see Tombs, 2004).

- Disqualification [from holding or obtaining a driving licence] – a general power was introduced by the Crime and Punishment (Scotland) Act 1997 permitting the court to disqualify where a person is convicted of ‘an offence’. The court can also impose disqualification on fine defaulters where the offender is in default of payment of a fine, or any part of installment of a fine. ²¹
 - Fines – may be imposed in both solemn and summary proceedings. ²² Unless there is a statutory limit, the High Court’s power is unlimited. In summary proceedings the limits are determined by the powers of the court and a ‘standard scale’. Failure to pay a fine may result in imprisonment or detention. ²³ Two main problems have contributed to the large number of prison receptions for fine default. The first is fixing the appropriate level of fine – to reflect the nature and gravity of the offence and the offender’s ability to pay. The second problem is the imposition of alternative prison sentences for default. The international experience shows abolishing imprisonment for fine default and/or the use of ‘unit’ or ‘day’ fines, where the level of fine for particular offences is assessed in units defined in terms of the offender’s means, present constructive ways to overcome these problems (Tonry, 2003).
 - Compensation Orders – can be imposed to ensure that victims receive financial compensation from offenders in appropriate cases. ²⁴ Compensation orders cannot be made where the court discharges the offender absolutely, where it makes a probation order or where, at the same time, the court defers sentence. ²⁵
 - Probation orders – a probation order ²⁶ can be made following conviction where the court is of the opinion that it is expedient to do so, having obtained a report about the circumstances and character of the offender. An order must be for not less than six months and not more than three years and cannot be made unless the court is satisfied that suitable arrangements for the supervision of the offender can be made. ²⁷ Probation orders are supervised by local authority criminal justice social workers within a framework of practice provided by national standards. The court can specify additional requirements if they are thought to be reasonable, legally enforceable and capable of being supervised. A probation order can be combined with a community service order, a drug treatment and testing order or a restriction of liberty order. Failure to comply with a probation order may result in the offender being otherwise sentenced for the offence. If a person commits a further offence while on probation, the offender may be dealt with for the probation offence, as well as the offence committed while on probation. ²⁸
 - Drug Treatment and Testing Order – a DTTO ²⁹ can be made following conviction of some-one aged 16 or over where the court is of the opinion that it is expedient to do so. The order is imposed instead of a sentence for not less than six months or more than three years. The court can only make a DTTO where arrangements for its implementation are available in the local authority area. The court must have received a report on the offender from a local authority officer, be satisfied that the offender is dependent on, or has a propensity to misuse drugs and that the dependency or propensity requires and is susceptible to treatment, and that the offender is a suitable person to be subject to such an order. A DTTO requires that the offender submits, throughout the period, to treatment with a view to the reduction or elimination of dependency on or propensity to misuse drugs.
 - Restriction of Liberty Order – an RLO ³⁰ can be made following conviction of some-one aged 16 or over where the court is of the opinion that it is the most appropriate method of disposal. The order aims to restrict the liberty of the offender in the community and may, in addition, do this in a way that reduces the risk of re-offending where previous offending has been linked to specific locations
-

or events. An RLO can be made for any period of up to 12 months, though it may not exceed 12 hours in any one day and cannot be made unless the offender agrees to it. The order can be free-standing or be combined with community service or probation or with a DTTO. The court must be satisfied that compliance with that order can be monitored, typically by 'electronic tagging' of the offender.

- Supervised Attendance Order – an SAO can be used as an alternative to imprisonment for adults and for young offenders aged 16 and 17 in cases of fine default.³¹ The court can impose an SAO on a person aged 18 or over who has defaulted in paying any part of a fine, and where the court would otherwise have imposed a sentence of imprisonment, provided that the court thinks that an SAO would be more appropriate.³² If, however, the offender is under 18, the court is required to make an SAO where the offender has been fined, defaulted, and would otherwise have been imprisoned and the fine or installment does not exceed £500.³³ In addition, for young offenders an SAO may be imposed along with a fine, or imposed as a direct alternative to a fine. If the court thinks that the appropriate penalty would be a fine, the court fixes the amount and assesses whether the person is likely to pay the fine within 28 days. If the court thinks that the offender will, then it imposes the fine and makes an SAO in default of payment within 28 days.³⁴ If, on the other hand, the court reaches the conclusion that the person is not likely to pay the fine it is required to make a supervised attendance order.
- Community Service – is intended to be used as a direct alternative to imprisonment, thus only when an offender aged 16 or over is convicted of an offence punishable by imprisonment or detention.³⁵ CSO requires the offender to perform unpaid work for between 80 and 240 hours (or 300 in the High Court). The order cannot be made unless the offender consents and arrangements are in place for persons resident in the area where the work is to be carried out to ensure that the work is performed. CSOs are supervised by local authority social work departments. They are generally not available in the District Court although community service is an available sentencing option for the Stipendiary Magistrates sitting in the District Court in Glasgow.

2.27 Table 2.6 shows that over the past decade there has been a 41% increase³⁶ in the use of community sentences.³⁷ This increase, however, has not had the effect of reducing the use of custody but has occurred alongside a 33% reduction in the use of financial penalties – overwhelmingly the use of the fine³⁸ – and a 23% decrease in 'other sentences' (mainly admonition).

2.28 Some of the decline in the use of fines can be explained by an increase in pre-court disposals between 1993 and 2002, especially the increased use of 'fiscal fines'.³⁹ Pre-court disposals are likely to have taken a greater proportion of low-level or non-serious crime out of the criminal justice system; behaviours that would previously have been dealt with by a fine. As a consequence, the offences now dealt with in the criminal courts are likely to include a higher proportion of offences that would not attract a fine or at least a lower proportion of those that would previously have been dealt with by a fine. However, greater use of pre-court disposals only explains part of the reduction in the courts' use of fines. Some part of the reduction lies with the increased use of community sentences.

2.29 The declining use of fines has important but indirect consequences for the prison population. If offenders are given community sentences rather than fines, earlier in their criminal careers now than they would have been ten years ago, unless sentencing practices change significantly, offenders will exhaust the alternatives to imprisonment more rapidly than in the past. While statistics are not available to establish the extent to which this has happened between 1993 and 2002, criminal justice social work practitioners have expressed this and related concerns, in particular that community service is not being used as an

alternative to imprisonment but rather as a sentence in its own right⁴⁰; community sentences have, to some extent at least, displaced fines rather than custody. Part Three considers how to avoid this kind of displacement through the introduction of a unit fine system properly proportioned to offenders' means.

Table 2.6. Use of non-custodial penalties 1993 and 2002

	Community sentence ⁽¹⁾	Financial penalty ⁽²⁾	Other sentence ⁽³⁾
Male			
1993	9,422	98,572	13,549
2002	12,646	67,321	10,461
% change	+34	-32	-23
Female			
1993	1,379	18,575	4,532
2002	2,559	11,271	3,520
% change	+86	-39	-22
Total			
1993	10,801	117,147	18,081
2002	15,205	78,592	13,981
% change	+41	-33	-23

Notes (1) Community sentence includes POs, CSOs, RLOs and SAOs, see footnote 34.
 (2) Financial penalty includes fines and compensation orders.
 (3) Other sentence includes admonition or caution, absolute discharge, insanity, hospital, guardianship order, and remit to children's hearing.

Source: Criminal Proceedings in Scottish Courts 2002, Table 12 (Scottish Executive, 2004a).

Comparing effects

- 2.30 A major issue in comparing the effects of different court sentences, whether in absolute or relative terms, is the absence of an agreed measure of what would constitute 'effectiveness'. Most typically, where it has been possible to compare imprisonment with other community sentences, effectiveness has been conceived of in terms of reducing re-offending. In terms of reducing re-offending, the evidence shows that community sentences are at least as effective as prison. When other measures are also included, such as reduction in the seriousness or frequency of re-offending, community sentences fare even better. In other words, the more precise and focused the evidence is, the more it suggests that community sentences are more effective than imprisonment.
- 2.31 The following example, based on a cohort of offenders discharged from a custodial sentence or given a non-custodial sentence in Scotland in 1997, illustrates this point. Those who had served a custodial sentence were most likely to be reconvicted within a two year period (62%), followed closely behind by those who had been given probation (59%). Those given community service were less likely (45%) and those given a fine were the least likely to be reconvicted within a two year period (40%) (Scottish Executive, 2003c). However, the custodial sample in the cohort included those serving long prison sentences. It is likely that if a custodial cohort of those serving shorter prison sentences (say of up to 12 months) formed the basis of comparison, those given community service would show significantly lower reconviction rates than those given custody. This is likely because those serving less than 6 months in prison show higher return to custody rates than those serving longer prison sentences (Ash and Bigger, 2002).

- 2.32 In addition, while comparisons of imprisonment and community sentences in terms of reconviction – as a proxy measure for re-offending – generally show similar reconviction rates, offenders on community service consistently have lower reconviction rates than would be predicted by their criminal history, age and other relevant characteristics (Lloyd et al, 1995). May (1999), for example, found that reconviction rates among offenders given community service were better than predicted even when social factors such as unemployment and drug use were taken into account. Similarly, in Switzerland Killias et al (2000) found lower reconviction rates among offenders sentenced to community service than among those given short prison sentences.
- 2.33 If community sentences are at least as effective as custodial disposals in preventing re-offending, then there is a strong argument for their increased use. Community sentences are less exclusionary, less oppressive and less disruptive to the life of the offender, and, equally importantly the offender's family. Prison is also very expensive.
- 2.34 In addition, there is a growing body of research evidence that stresses the importance of the social context in 'desistance' from offending (Maruna, 2000). Desistance literature suggests that interventions with offenders must be conceived within the wider social contexts of both offending and desistance. Thus Farrall (2002) found that progress towards desistance related most to probationers' motivations and to the social and personal contexts in which various obstacles to desistance were addressed. While it is possible for custodial interventions to build a degree of human capital for prisoners, in terms of enhanced cognitive skills or improved employability, they cannot generate the social capital residing in relationships that facilitate or produce participation and inclusion. And it is social capital that is essential to encouraging desistance – "it is not enough to build capacities for change where change depends on opportunities to exercise capacities" (McNeill, 2002).

Sentencing boundaries

- 2.35 As noted earlier in this part, the sentencing powers of the criminal courts and criminal justice social work responsibilities for the delivery of a wide range of community sentences set parameters in which the current debate about sentences and sentencing is taking place. In addition to the legal and procedural constraints already referred to on the use of custodial and non custodial sentences, other boundaries are imposed:
- first, by decisions made by procurators fiscal earlier in the criminal justice process;
 - second, by the extent to which community sentences are available and known about and understood, both by sentencers and by the general public; and
 - third, by the way in which the judiciary exercise their discretion in sentencing.

The fiscal's decisions

- 2.36 Scotland's public prosecutor, the 'procurator fiscal', has discretion whether or not to prosecute, if so, by what charge or charges, by what type of criminal procedure (summary or solemn) and, where there is overlapping jurisdiction, in which court of trial. There is no right of election to jury trial. All of these choices made by the fiscal determine the sentencing options that are available in relation to particular offences and offenders.

- 2.37 It is also important to emphasise that, while the procurator fiscal has a responsibility to prosecute when it is in the public interest to do so, the discretion to prosecute or not is a principal feature of the law in Scotland. Over the past twenty five years conscious policy choices have been made to exercise this discretion in favour of using alternatives to prosecution. With the reports they receive (predominantly from the police but also from other reporting agencies), fiscals now make use of the full range of non-court sanctions available to them – taking no action in a large number of cases due to triviality or lack of evidence, using fiscal warnings, imposing fiscal fines, making conditional offers (for motor vehicle offences) and diversions to psychiatric and psychological services, to social work and related services and to reparation, mediation and restorative justice schemes.
- 2.38 During the 1970s the proportion of reports to the fiscal in which formal court proceedings were not instituted fluctuated between 7% and 12%, whereas by 2002 fiscals decided on non-court disposals in 41% of the total number of reports they received (Crown Office and Procurator Fiscal Service, 2003). This dramatic shift is a consequence of the development of a new prosecution policy following the recommendations made in two reports by The Stewart Committee on Alternatives to Prosecution in 1980 and 1983.
- 2.39 The Stewart Committee was established as a result of growing concern in the late 1970s about the public's confidence in the criminal justice system and the costs involved in prosecuting a large volume of minor cases – not regarded as 'real' crime – which resulted in slowing down the prosecution of more serious crimes. It was feared that respect for judicial proceedings at the more serious end might be eroded were such crimes to continue to be prosecuted. Similar arguments could be made to-day in relation to the large number of minor crimes and offences in Scotland which result, eventually, in short prison sentences. Given that a large number of new behaviour patterns have been drawn into the criminal policy orbit and criminalised or criminalised more harshly since the Stewart Committee, the role of the fiscal in diverting more offences from the criminal courts could be reassessed.

Availability of community sentences

- 2.40 While recent research shows that sentencers are generally satisfied with the range and quality of community sentences, some problems were identified, though the problems differed in different parts of the country (Tombs, 2004). By far the most frequently mentioned problems were in relation to breach procedures; problems which lay not only with criminal justice social work but also with difficulties in other parts of the criminal justice system – procurators fiscal, sheriff clerks and police.
- 2.41 A general problem concerned the adequacy of the resources devoted to community sentences. In particular sentencers believed that there was a shortage of staff to supervise Community Service Order (CSO) placements. There were difficulties with the availability of places and delays in obtaining placements. Another concern was that health problems were frequently cited in Social Enquiry Reports as 'closing off' the possibility of community service for an offender. Around a quarter of the sentencers suggested ways of redesigning CSOs. These suggestions included having the option of making CSOs longer, extending the time period over which an order could be completed, and creating more imaginative types of placement so that offenders with physical or mental disabilities could be assessed as suitable and not ruled out of the CSO option simply because they were unable to undertake tough physical work (Tombs, 2004).
- 2.42 Several sentencers also mentioned a lack of information on the availability of specific programmes and options in their areas and many were concerned that community service was frequently portrayed by the media as a 'soft option' and that the public thereby were misinformed. They suggested ways to make the
-

public more aware of the demands that community service made on offenders, all of which concentrated on increasing the visibility of the community focus. Moreover, they argued that a change of image for community service would have an impact on reducing the use of short prison sentences. While the majority of sentencers were content that the existing range of community sentence was sufficient, many argued for an overarching sentence, such as a 'community intervention order' to allow more flexibility in the content of community sentences (Tombs, 2004).

- 2.43 Sentencers also identified several facilities and/or programmes that were not available to them. Such facilities would not require the introduction of 'new' sentences but could be imposed as a condition of existing community orders. The most frequently mentioned were:
- residential drug and alcohol detoxification and treatment centres for offenders with severe drug and alcohol problems;
 - supported accommodation to act as a half-way house between custody and community sentences, especially for young offenders;
 - secure accommodation for those with mental health problems;
 - community orders focussed on education and training for employment;
 - community programmes for sex offenders; and
 - driving programmes for young offenders.
- 2.44 In short, while most sentencers were content with the quality of community sentences and were happy to use them, they stressed the need for more imagination in their content and flexibility in their use. They also noted that better public presentation of community sentences would make it more acceptable to use them instead of custody. However, more 'new' community sentences would not, in and of themselves, reduce the prison population. Some sentencers, for example, were concerned that the increased use of these sentences might be at the expense of the fine (Tombs, 2004).

Sentencing decision-making

- 2.45 As is discussed further in Part Three, there is no structured framework of guidance for sentencing in Scotland (see Hutton, 2003); rather sentencers exercise their discretion in sentencing relatively free from legislative restraints or specific guidelines. Recent research has focused on how this discretion is exercised in relation to the factors influencing the choices the judiciary make between custodial and community sentences.
- 2.46 That research (Tombs, 2004) shows that in making decisions about cases that lie on the borderline between a custodial and a community sentence, the factors that lead sentencers to impose a custodial sentence are the perceived seriousness of the offence and/or the offender's criminal record, that is, that the offender has run out of options because of previous convictions and/or 'failure' to respond to past community sentences. Sentencers stress that they only impose custody as a 'last resort'. While they regard community sentences as alternatives to imprisonment, most do not consider any community sentence as equivalent in penal weight to a prison sentence.
- 2.47 A decision in favour of a community sentence is typically based on a wider range of factors than a decision in favour of custody. The present circumstances of the offender – employment status and family responsibilities – together with the offender's response to prosecution – especially showing remorse – and an emphasis on personal mitigation are of particular significance. These wider factors are weighed up in relation to the perceived seriousness of the offence and/or the offender's criminal record.
-

- 2.48 Sentencers emphasise that the task in summary cases is quite different from that in cases taken on solemn procedure. In serious cases the sentencing task is rarely about making a choice between a custodial and a community sentence but rather about how long the custodial sentence should be. It is in summary cases that the concept of 'borderline' cases comes to the fore. However, given the pressure of summary business, particularly in high crime areas, there is little time to fully explore what community alternatives might be appropriate and available. A further major constraint on their decision-making is the time taken for cases to come before them caused by delays at earlier stages in the criminal justice process. It is not uncommon in summary procedure for cases to be more than two years old before the Sheriff hears them. This time delay impacts on decision-making in several ways, most importantly insofar as it reduces the options that are realistically open to sentencers (Tombs, 2004).
- 2.49 Sentencers appreciate that their sentencing practices have become more severe over the past decade or so. They attribute this increased severity to the interplay between several factors:
- a more punitive climate of political, media and public opinion about crime and punishment;
 - legislative and policy changes that have encouraged inflationary drift in sentencing;
 - changes in patterns of offending, especially those related to the seriousness of offending and dependent drug use; and
 - other changes in criminal justice practices and procedures (Tombs, 2004).
- 2.50 The implications of the research findings noted above for developing a prison reduction strategy are discussed in Part Three of this report which considers how the principles outlined in Part One could be put into practice.
-

Why imprison?

- 3.1 Part One suggests that three guiding principles – parsimony, inclusion and rehabilitation – create a strong presumption against imprisonment as a common mode of punishment. Moreover, sentencing policies and practices premised on this presumption would regard a community sentence as the standard against which any prison sentence would have to be justified as exceptional. This means that, where legislators and sentencers face a real choice between imprisonment and other modes of punishment, the principles of parsimony, inclusion and rehabilitation would favour a non-custodial sentence. In short, answering the question ‘why imprison’ would involve showing why no lighter, less exclusionary community sanction is adequate.
- 3.2 Part One also shows that making a presumption against imprisonment is strengthened by the evidence that many other countries, with similar social and demographic characteristics to Scotland, can maintain much lower rates of imprisonment without decreasing public safety. Further support is provided by the statistical and research evidence in Part Two showing that imprisonment is not any more effective than community sentences in serving most of the traditional aims of punishment. For example, in terms of rehabilitation, a large number of meta-analyses – that is, analyses incorporating and giving an overview over a large number of empirical studies of a similar kind – show extremely negative results as far as imprisonment is concerned (see, for example, Redono et al 2002; Lipsey and Wilson, 1998; Pearson et al, 1997; Wright, 1994). Imprisonment has also been found to have little effect in terms of general prevention (Wright, 1994; Paternoster, 1989) and collective incapacitation (Blumstein et al, 1986).
- 3.3 Even if retribution is the aim of punishment, in the sense that it is believed that the offender should suffer a kind of burden proportionate to his or her crime, for example, to communicate censure adequately, the burden does not need to be imprisonment. A fine or community service can be retributively adequate burdens. Nevertheless, if a retributivist perspective is taken, it is arguable that some crimes are so serious that only imprisonment can do justice to them. In such serious crimes a retributive and symbolically exclusionary sanction – prison – might be necessary to mark society’s extreme disapproval. Selective incapacitation is then the only aim of punishment that imprisonment can arguably achieve more effectively than a community sentence. This implies that a sentence of imprisonment would only be appropriate where this aim is paramount. For example, in the case of an offender’s dangerousness to others – which would require to be demonstrated through persistent serious criminal behaviour – incapacitation through imprisonment could be necessary to protect others from harm. Even in such cases, however, no one should be imprisoned for longer than could be justified as deserved retribution; desert should constrain incapacitation.
- 3.4 In making a decision about whether or not to imprison, legislators and sentencers would therefore be guided by whether the offence is such a serious attack on the community’s values that only prison can send the right message about it and/or by whether the offender is a serious and continuing threat to the safety of others. If the answer to both those questions is ‘No’ then, given the evidence that prison is no more effective than many non-custodial sentences as far as crime-reduction (whether by deterrence or rehabilitative/reformative programmes) goes, why imprison?
- 3.5 Even where the answer is ‘Yes’ to either or both of these questions, incapacitation would also require to be justified in terms of desert. In cases where incapacitation could be justified the principles of parsimony, inclusion and rehabilitation should guide decisions about sentence length and about the offender’s treatment in prison and on return to the community. For example, given the evidence that sentence length is negligible in terms of its deterrent effect, long prison sentences could be reduced. In addition, in

Scotland where the vast majority of prison sentences are for 6 months or less, there is considerable scope to reduce the serving of short periods of imprisonment.

- 3.6 Scottish sentencers, however, believe that the option to use short prison sentences is essential, even though they recognise that short sentences achieve little or nothing as far as individual offenders are concerned, other than for those few who might be new enough to the criminal justice system to experience a 'short, sharp, shock'. From their point of view, in such cases, a few days or weeks in prison may be sufficient. The point of a short prison sentence is symbolic; to mark society's disapproval of certain forms of offending behaviour. Some sentencers believe that this point could also be made through suspended sentences if that option were available in Scotland (Tombs, 2004). Similarly, intermittent or weekend custody could serve the same purpose.
- 3.7 The option to reduce sentence lengths whilst retaining the support of most sentencers is a realistic one and one which would contribute to reducing the prison population. Short sentences could either be shortened further or sentences under a certain length could be automatically suspended. The symbolic message would still be communicated if short prison sentences were automatically suspended. Sentencers also believe that further reductions in the prison population could be achieved by reducing the use of remand through 'tagging' on bail, by introducing a 'day fine' system and by use of custody plus supervision in the community (for those not presently covered) which could reduce the length of time spent in prison on medium length sentences (Tombs, 2004).
- 3.8 All of these options would have a part to play. Indeed, given that there has been no single cause of the rise in the prison population, there is unlikely to be a single effective way of reversing the rise. Nevertheless, the core of any prison reduction strategy will necessarily be concerned directly with sentencing decisions, and in particular with the decisions whether to imprison and for how long. Developing policies that make a presumption against imprisonment will need therefore to consider how best to change sentencing practices.

What guides sentencing?

- 3.9 Sentencing practice involves making a decision about the allocation of an appropriate penalty to a convicted offender. These decisions have a major impact on the overall distribution of sentences and on the size of the prison population. As noted in Part One, in Scotland there are some legal and procedural restrictions on the use of imprisonment and community sentences as well as the limits imposed by the criminal justice process itself and the resources available for community sentences. For example, Part Two noted that a major constraint on Sheriffs' sentencing decision-making is the time taken for cases to come before them caused by delays at earlier stages in the criminal justice process. This time delay – often of more than two years – is perceived as impacting on decision-making in several ways, most importantly insofar as it reduces the sentencing options that are realistically open. Moreover, given the pressure of summary business, particularly in high crime areas, there is often little time to fully explore what community alternatives might be appropriate and available (Tombs, 2004).
 - 3.10 The need to address problems caused by the pressure of summary business has been underlined recently by the Summary Justice Review Committee Report (McInnes, 2004). While many of the report's recommendations have the capacity to contribute to reducing the pressure of summary business, it will be important to ensure that resources are well targeted if much is to be achieved. In particular, any serious commitment to making proper use of community-based sentences will require more resources
-

devoted to the provision of information and training for sentencers about community sentences and increased court support and time for sentencers to fully consider options.

- 3.11 Another limitation on sentencing practice comes from maximum penalties laid down for certain statutory offences. However, given that most criminal offences in Scotland are common law rather than statutory offences and that even in statutory offences the maximum penalties are rarely used, maximum penalties can best be regarded as providing a ceiling. The maximum penalties indicate the desires of the legislature (Tombs, 2004) but they do not give sentencers any guidance about the appropriate penalty in a particular case (Hutton, 1999).
- 3.12 Thus in Scotland, as in almost all jurisdictions, sentencing involves both regulation and judicial discretion. Jurisdictions vary in the range and extent of sentencing regulation. At one end of the spectrum the Federal Sentencing Guidelines published by the United States Sentencing Commission leave very little room for judicial discretion. Scotland lies at the other end of the spectrum, as there are very few rules which constrain the exercise of judicial discretion in sentencing.

Structuring discretion

- 3.13 Most European jurisdictions lie in between these extremes. Many have comprehensive penal codes which provide a definition of offences and sometimes provide for a range of sanctions for those offences. In the Netherlands, for example, the state prosecution service uses a sophisticated Information Technology system to assess the seriousness of cases and associated levels of sanction. Scandinavian jurisdictions have narrative guidelines which provide judges with a principled approach to the assessment of seriousness of cases, and assert the priority of proportionality as an aim of sentencing.
- 3.14 Around half the state jurisdictions in the USA and the federal jurisdiction use a system of sentencing guidelines to attempt to reduce unwarranted variation in sentencing. These guidelines typically take the form of a sentencing grid which provides a comprehensive and detailed means of relating case seriousness to level of sanction. Contrary to popular opinion, these sentencing grids do not remove judicial discretion. Some guidelines are voluntary and some are prescriptive. In most prescriptive systems judges retain an element of discretion. They can depart from the guidelines, sometimes under a limited set of conditions, in other cases the only condition is that they provide a reason for their departure. The range of discretion also varies according to the breadth of the individual 'boxes' in the grid.
- 3.15 Those who favour the 'sentencing grid' approach argue that it can be systematic and comprehensive. It can calibrate sanctions for the full range of offences and thus compare, for example, sentencing for property offences with sentencing for offences against the person. It can take an overall view of the impact of previous convictions on sentence. It can look carefully at the 'custody threshold' and try to develop a consistent approach to the use of custody across all cases. There is, however, a growing consensus that the use of guidelines in the USA has had the unintended consequence of increasing the average length of sentences (Coultsfield, 2004, 26).
- 3.16 Other jurisdictions, including England and Wales, New Zealand, Australia and around half of the US state jurisdictions share similar characteristics to the common law approach in Scotland where judges exercise very wide discretion in sentencing. However, in England and Wales the Court of Appeal, together with the Sentencing Advisory Panel, has developed a sophisticated system of appellate guidance and the Sentencing Guidelines Council issues guideline sentences advised by the Sentencing Advisory Panel.
-

3.17 The use of guidelines involves a transfer of power in sentencing from the courts to the legislature, whether, for example, through the increased power given to prosecutors, or through the power to appoint the members of a Sentencing Commission, which can make changes to the values in the sentencing grid. While research shows little support amongst the Scottish Judiciary for the development of a highly structured 'sentencing grid' approach to guidelines, there is support for the Appeal Court to extend its role in providing sentencing guidelines (Tombs, 2004).

Accountability

3.18 Guidelines can promote changes in sentencing practices and, at the same time, provide a basis of accountability for the use of discretion. Whilst aiming to structure the use of judicial discretion, guidelines do not interfere with judicial independence in ensuring impartiality in decision-making within whatever parameters the legislature has provided.

3.19 Sentencing is, at its core, a 'human process' where decisions, especially in cases that lie on the borderline between a custodial and community sentence, centre as much on the personal situations, histories and attitudes of offenders and the lives of those affected by their actions as they do on the law. The sentencer has to assess the intentions and capabilities of the offender, the attitude towards the offence, and offending, such as the presence or absence of remorse and the determination to stop offending. These assessments provide the basis for judgements about responsibility and culpability. In other words, sentencers' decisions are framed within a set of explicitly ethical concepts (Hough et al, 2003; Tombs, 2004).

3.20 Judicial independence, however, does not mean that judges are prohibited from articulating the basis to their decisions. For example, judges could be asked to be more explicit about what they mean by their references to the 'gravity of the offence' when sentencing or to the way in which they evaluate social behaviours. The Sentencing Commission for Scotland could have an important part to play in developing useful guidance here and in other respects.

3.21 In particular, guided by the principles of parsimony, inclusion and rehabilitation outlined in Part One, the Sentencing Commission could play a key role in highlighting the importance of:

- (rough) equality and relative proportionality – that those guilty of roughly similar crimes should receive sentences of roughly similar severity whatever court they appear in;
- leaving sentencers a bounded discretion to decide what particular mode of punishment would be appropriate for the individual offender, always bearing in mind the principles of parsimony, inclusion and rehabilitation;
- decisions being informed by adequate knowledge of, for example, the availability and character of different kinds of disposal, and having adequate information, training and time to make sensible decisions;
- process values at the sentencing as well as at the trial stage – that offenders should be able to see that the sentence emerges from a fair and careful process in which all relevant factors are considered; and
- sentencers giving reasons for their decisions (as an aspect of process values and accountability).

3.22 The above suggestions for the Sentencing Commission would, however, require very careful consideration, not least because of what has been learned from the experience of sentencing commissions in the USA. Transferring authority from judges and parole boards to commissions made sentencing more of a political issue than it had been and led, in some cases, to outrageous crimes being used as evidence to support

long-term changes in penal codes. Before the advent of commissions, a public outcry often affected judges' behaviour, and when there was a spate of particular crimes or a vicious child abuse case, the next person to commit such a crime often received a harsher sentence in the hope of deterring similar future crimes. However, when sentencing commissioners and legislators feel they must show they are tough, the repercussions can go way beyond an increased sentence for one highly publicised case and result, for years to come, in harsher penalties for entire categories of crimes (Rothman, 2003).

Public understanding

- 3.23 From the available evidence, however, the key to embedding a presumption against the use of imprisonment in penal policies and practices lies not with sentencers alone but with the quality of the public debate about crime and punishment. It is orthodoxy amongst prison analysts, penal commentators and criminal justice practitioners, including many sentencers, that the shift in recent years towards more severe sentencing, with more active use of prison, is in large part a response to the climate of opinion about crime and punishment (Ashworth and Hough, 1996; Morgan, 2003).
- 3.24 But the climate of public opinion does not exist in a vacuum. The media, leading political figures and governments, for ideological reasons or in response to perceived public opinion, can decide to attempt to create a climate in which more or fewer people are likely to be sent to prison. The entertainment industry, in developing television programmes in which crime and the prison have become popular entertainment objects, has contributed to normalizing the 'prison solution' (Mathieson, 2000). Governments have directly contributed to this process by legislation making more activities criminal and by specifying increased levels of imprisonment for specific criminal acts. Political leaders have contributed more indirectly by, for example, creating a climate of public debate and expectation which make it likely that judges will send more offenders to prison or will send offenders to prison for longer periods.
- 3.25 In this context it is not surprising that public opinions about crime and punishment are largely based on mistaken assumptions and misunderstandings, notably:
- the mistaken belief among the majority of the public that recorded crime has increased rapidly;
 - that members of the public substantially overestimate the amount of recorded crime involving violence;
 - that large minorities are unaware of the upward trend in the use of imprisonment; and
 - that there is widespread ignorance of sentences available to the courts.⁴¹
- 3.26 Until relatively recently the body of research on public attitudes to punishment showed that the "public thinks that judges are out of touch with it, but the public is out of touch with the realities of crime and sentencing" (Ashworth, 2003, 299). There is, however, an increasing amount of evidence to show that the public can hold punitive and rational views at the same time (Hutton, 2004) and that supplying information designed to dispel misconceptions about criminal justice and sentencing has a positive effect on public views (Chapman, Mirrlees-Black & Brown, 2002; Gillespie & McLaughlin, 2003). In addition, research shows that the public are more positive about non-custodial sentences when presented with arguments based on the values and principles underlying them (Stead, 2002) and when they are given information about how these values and principles, such as fairness to the victim, offender and the public, have been reflected in the court outcome (Spencer, 2004a, 2004b).
- 3.27 Most sentencers in Scotland support measures to educate the public about all aspects of sentencing and many participate in education through, for example, talks in schools and public meetings. Most actively attempt to explain sentencing decisions in court so that they can be understood – even by those who

disagree with them. They believe that more should be done to educate the public about the legal and procedural constraints within which sentencing decisions have to be made – for example, that the procurator fiscal decides on charges and between summary and solemn procedure – and how these decisions constrain sentencing options. In addition, sentencers perceive community service as an arduous and very useful sentence and express dissatisfaction at the way in which community service is often portrayed to the public by the media. They believe that there is a need to educate the public and politicians about community service in particular and community sentences in general (Tombs, 2004). The criminal justice system as a whole therefore needs to do its part in public education by explaining its decisions at each stage in the process, particularly in prominent cases. All of this will assist in promoting a more open and informed climate of opinion about crime and punishment.

Penal policy and sentencing

- 3.28 We have seen that the rise in the prison population over the past decade or so can be attributed to various, interrelated factors. Sentencing practice has undoubtedly become more severe, reflecting (and reinforcing) a more severe legislative framework for sentencing, and a more punitive political and social climate. It is also the case that some changes in patterns of offending, especially in relation to crimes of violence and drug crimes, and sentencers' perceptions that such offending behaviour has become more serious, have encouraged sentencers to make greater use of custody (see Tombs, 2004). As far as the contribution that changes in sentencing can make to bringing down the prison population is concerned there is therefore a need to develop policies that aim to adjust the legislative framework, to reduce sentence lengths and to redefine alternatives to imprisonment.
- 3.29 Many changes in sentencing practice come about as a direct result of changes through the legislative and legal framework. The maximum sentences for offences are set out in statute and, whilst judges rarely pass sentences approaching the maximum, changes to the legislation are taken as an indication of the intentions of the legislature in calling for more or less severe penalties. Over the past decade legislative changes have contributed to promoting the use of more severe sentences (see Tombs, 2004). Legislative change in the opposite direction is therefore clearly central to any strategy to reduce the prison population.
- 3.30 There is also a need to focus on the scope for influencing sentence length. Given that sentence length has been pushed up by legislation over the past decade or so, reversals of such policies are possible. This, of course, depends on genuine political will to contain the prison population together with a commitment to seeking long term sustainable reductions. An initiative on any scale would require a policy embracing legislation and guidance from the Appeal Court.

Redefining alternatives

- 3.31 A long standing strategy for containing the prison population has been to strengthen the range and strictness of any community orders that can be made as an alternative to custody. Nevertheless, recent research has demonstrated that providing sentencers with a wider and more demanding range of community-based penalties will not necessarily prove to be, in and of itself, an effective way to discourage them from using custody (Hough et al, 2003; Tombs, 2004).
-

-
- 3.32 Scotland has amongst the widest range of community sentences of anywhere in the world. The experience in Scotland and elsewhere of providing community-based sentences as alternatives to prison demonstrates two kinds of problems. The first is that rigorously enforced community orders are likely to have high failure rates amongst the offenders facing short prison sentences, with high rates of imprisonment following breach. This, however, is a serious problem only if imprisonment is the sentence used for a breach. There are other approaches to dealing with breaches (see 3.36 – 3.38). The second problem is that the attractiveness of community sentences leads sentencers to use them not for offenders facing imprisonment but for offenders who would previously have received less elaborate community penalties or simply a fine (Morgan, 2002).
- 3.33 The idea that more and/or better alternatives alone will reduce the prison population is therefore misconceived. For what, after all, is an alternative to imprisonment? How can we conceptualise 'alternatives to imprisonment' independently of the judicial view that prison – the deprivation of liberty – is the 'ultimate sentence', qualitatively different from any alternative sentence no matter how rigorous? Legally conceived, an alternative to imprisonment is a non-custodial sentence acceptable to sentencers at times when the seriousness of the offence and/or pattern of offending would, in the absence of an alternative, have resulted in a prison or youth custody sentence.
- 3.34 There is, however, another way to conceive of alternatives to custody; a view that implies that we should view community based sentences not as 'alternatives to custody', as if they were to serve the same penal aims as custody is typically taken to serve. Instead, community based sentences should be viewed as the kinds of sentence that are most likely, for most offenders and most offences, to serve the sentencing aims identified in Part One – namely rehabilitation and deterrence, as well as 'retribution' – within the constraints of the three guiding principles of parsimony, inclusion and rehabilitation, which were seen to create a presumption against imprisonment. In short, rather than starting with imprisonment as the default sentence and looking for 'alternatives', the starting point should be a range of community based sentences between which the sentencer should decide in light of the aims and principles noted above. Only if and when it becomes clear that – for a reason that would need to be explained by the sentencer – no community based sentence will be appropriate should the sentencer even think of imprisonment.
- 3.35 Current policies concentrate on what might be done to encourage the use of alternatives to custody in relation to short term prison sentences, the remand population, female offenders and fine defaulters. There is no doubt that all of these areas require attention. The problem here, however, is twofold. First the familiar one that increased availability and use of alternatives to custody has run alongside increased use of imprisonment and decreased use of the fine. Second, that attempts to restrict the use of short prison sentences could have the effect of increasing sentence lengths.
- 3.36 A significant part of the prison population is made up of people breached for community penalties. This problem is further compounded by the fact that a history of breaches for community penalties makes sentencers less inclined to use alternatives to custody when sentencing for 'new' offences. Sentencers generally consider they have no option but to send an offender to prison where the offender has had previous experience of community sentences and has 'failed' and where there is nothing to suggest that a community based sentence would be any more successful the next time (Tombs, 2004). This raises several issues central to the use of community sentences.
- 3.37 First, there is a need to adopt a more creative approach to the use of community based sentences. Given the entrenched nature of the problems faced by many offenders, it is likely that many will require to be given a number of different types of community sentences before offending ceases altogether. A more refined understanding of 'success' and 'failure' is required; one that recognises that reconviction or
-

reoffending should not be the only indicators of success or failure. Signs of improvement should be the key criterion of success, for example, where the pattern of offending becomes less serious, less frequent and so on. Such an approach would involve emphasising the importance of a progressive use of community disposals in order to guard against the escalator that currently takes offenders through various community sentences into prison, either for breaching the community sentence or because previous such sentences have 'failed'.

- 3.38 Serious consideration should also be given to what sanctions should follow not only fine default but also breach of community penalties. Better policies for dealing with breaches of conditions of community penalties could undoubtedly reduce the prison population. There is evidence, for example, from experience with Drug Treatment and Testing Orders (DTTOs) that the Scottish judiciary are adapting to the idea of graded responses to breaches; this kind of graded approach could be applied to breaches for all community penalties. We also need to consider whether the use of custody should be prohibited for breaches of some community sentences as well as for fine default? In particular should the fine – originally deemed an appropriate penalty – be backed by imprisonment at all? Could fine default – debt – be backed up by a civil remedy?

Reducing the prison population

- 3.39 There is no reason why Scotland's prison population cannot be reduced substantially even though this is clearly a politically difficult and contentious route to follow. Other countries have chosen to reduce their prison populations and have succeeded. Finnish policy-makers decided in the late 1960s that the imprisonment rate of 160 per 100,000 could not be justified in comparison with rates in the other Scandinavian countries of 50-70 per 100,000 – and have held to the goal of reducing their own rate for over 30 years. By the mid 1990s the Finnish rate of 60-65 per 100,000 was in the middle of the Scandinavian rates. The Germans, in the late 1960s and early 1970s, thought that prison sentences under 6 months did more harm than good and decided to reduce their use. In one year, through the use of fines and prosecutorial diversions, the number of prison sentences of less than 6 months fell from 130,000 to under 30,000 and has fluctuated around that number ever since. Even in North Carolina – a conservative state – policy-makers decided in the 1990s that, primarily for cost reasons, prison population growth had to be restrained. North Carolina's imprisonment rate was 7th among the 50 states in 1985; by 2002 it was 35th (Tonry, 2003).
- 3.40 These are only a few examples of prison reductions, not necessarily the ones that Scotland would wish to pursue. There are, however, many realistic options to pursue if a country really wishes to reduce its prison population. These options are broadly of two kinds: front-door options, which involve sending fewer people to prison or sending them for shorter periods, and back-door options, which involve letting prisoners out sooner (Tonry, 2003).
- 3.41 Front-door strategies range from changing sentencing laws through to changing policies for dealing with breaches in conditions of community penalties. For example, sentencing laws could be rationalised so that judges are free to use community penalties where they consider them appropriate and guideline judgments from the Appeal Court could indicate reduced prison sentence lengths in appropriate types of cases. It would also be possible to further enhance the credibility and availability of community penalties. Existing community penalties – for example, Drug Treatment and Testing Orders, Community Service Orders – could be extended dramatically and new ones – Day Fines – could be rapidly introduced. Day Fines have been successfully used in a number of countries, especially in Germany, Austria, and Sweden, to reduce the use of short prison sentences. Similarly, suspended sentences, and strongly discouraging
-

prison sentences for 6 months or less, would also make an impact. Other front door options include intermittent confinement and diversion into drug treatment for all offenders whose drug dependence plays a significant role in their offending.

- 3.42 However, even diversion of a substantial number of offenders from prison would not in itself halt the growth in the prison population. Front-end diversion reforms are targeted for those offenders who are already serving the shortest prison terms (usually less than a year). Recent legislation enacting more severe sentences (see Tombs, 2004) has contributed to substantially lengthening prison terms for offenders convicted of the more serious crimes and for drug offenders. Consequently, it is this segment of the prison population that is piling up in the prisons. The problem here is that prisoners with long sentences are unlikely to be candidates for diversion from prison.
- 3.43 For these reasons it is also necessary to consider other 'back-door' methods to reduce the prison population. Indeed, the single most direct solution that would have an immediate and dramatic impact on the size of the prison population and would not affect public safety adversely would be to shorten prison terms. This kind of reform can be done swiftly and fairly through a number of existing mechanisms, such as re-establishing a broad-based parole system and generous remission programme, rapidly extending restriction of liberty orders to permit earlier release, and developing throughcare programmes for prisoners. Such back-door strategies, which can range from amnesties to changes in release mechanisms, have been successful in other jurisdictions (see Austin et al, 2003). The French, on a regular basis, decide that the prison population is too high and reduce it – often by as much as a third – through broad based amnesties and pardons. The deterrent effect of prison – to the extent that this exists – is not undermined since the timing of any amnesty is unpredictable.
- 3.44 More radical – both a front door strategy for admissions and a back door one for releases – would be to set an absolute prison capacity limit and, once it is reached, forbid admissions except when matched by one-for-one early releases. The examples – from the Netherlands, Denmark and Norway – show that it is possible to place convicted offenders on waiting lists. Where high risk offenders require immediate admission, lower risk offenders can be exceptionally released. Similarly, in several American states where the courts have decided that overcrowded conditions violate minimum constitutional requirements, early release mechanisms have been implemented. Indeed the Executive, following the judgment in Napier,⁴² introduced such strategies.
- 3.45 Except for very small changes, the strategies mentioned above require political leadership if we are to break out of our current fixation on prison. In Scotland, as noted in Part Two, we have a clear and recent historical example of how policy choices are crucial to changing the boundaries of criminal justice. Within ten years of the two reports from the Stewart Committee on Alternatives to Prosecution, the non prosecution ('no pro') rate went from 8% to 42% (Tombs and Moody, 1993). This happened as a result of policy choices being made. Given the large number of new offences created in the past 25 years, it is time to look again at prosecution and other criminal justice policy choices that affect imprisonment. There is much scope for further extension of alternatives to prosecution, notably the use of fiscal fines and conditional offers of fixed penalties as non-court sanctions. More widely, it is time to look at the statute book and consider what behaviours might be decriminalized and dealt with in other regulatory ways – for example, through alternative forms of dispute resolution such as mediation schemes, perhaps even in the civil justice system.
-

Primary Themes

3.46 In conclusion, three themes underpin the approach suggested in this report to reducing the prison population in Scotland.

- The criminal law must be seen as only one form of social control

The current high level of our prison population is consuming a very large and increasing amount of public money thereby reducing the amount available for essential public services such as education, child care, mental health and medical services – the very same services that will have a far greater impact on reducing crime than building more prisons.

- The presumption must be against imprisonment as a common mode of punishment

Penal policies and sentencing practices premised on this presumption would regard a community sentence as the standard against which any prison sentence would have to be justified as exceptional. Where legislators and sentencers face a real choice between imprisonment and other modes of punishment, the guiding principles of parsimony, inclusion and rehabilitation would favour the imposition of a non-custodial sentence. In those exceptional instances where prison is deemed necessary, the focus should be not on how long but rather on how short a sentence needs to be.

- There must be political leadership in reducing our reliance on imprisonment

Given that sentencers are responsive in their sentencing both to legislative change and the climate of opinion about crime and punishment, a clear Government strategy for reduced reliance on imprisonment would influence sentencers' behaviour. In effect this means a policy of 'talking down' sentences rather than the current environment which 'talks them up'.

-
- 1 See Tombs, 2004, Chapter 3 for details of the legislative and policy changes that have contributed to increased use of custody and longer sentences.
 - 2 See Justice 1 Committee, Inquiry into Alternatives to Custody Official Report, Vols 1&2, www.scottish.parliament.uk/official_report/just1-03
The results of another investigation, undertaken on a UK wide basis, are also of importance to furthering the debate on the use of non-custodial sentences. That investigation, an Independent Inquiry into Alternatives to Custody, chaired by Lord Coulsfield and sponsored by the Esmée Fairbairn Foundation's Rethinking Crime and Punishment Initiative, makes a number of recommendations relevant to reducing the prison population, ranging from those connected with sentencing through to local involvement in community sentences (Esmée Fairbairn Foundation, 2004).
 - 3 This consultation exercise, 're:duce re:habilitate re:form A Consultation On Reducing Reoffending In Scotland' www.scotland.gov.uk/consultations/justice/rrrc-00.asp, was based on major exercise which took the discussion on the consultation document all around the country.
 - 4 For a discussion of a particular policy example, the introduction of National Objectives and Standards for Social Work Services in the Criminal Justice system together with 100% central government funding to local authorities responsible for these services, see Paterson and Tombs, 1998.
 - 5 There is, nevertheless, some research evidence showing that the use of various alternatives can have a limited impact at the margins on the use of prison (McMahon, 1992).
 - 6 Reconviction is generally used as a proxy for reoffending in most of the research on the comparative effectiveness of different penalties.
 - 7 It should be noted that this is only one among many conceptions of the proper aims of restorative justice.
 - 8 Although the calculation of prison populations is relatively straightforward, when considering the figures in the table it should be borne in mind that these are subject to fluctuation due to the year, or the time of year, when the prison population was compiled.
 - 9 Criminal Procedure (Scotland) Act, 1995 Act, s. 204. Unless otherwise indicated, references to the 1995 Act are to this Act.
 - 10 1995 Act, s. 207(1).
 - 11 1995 Act, s. 207(2).
 - 12 1995 Act, s. 204(1). The court has an obligation to consider certain matters before determining that no other method of dealing with the offender is appropriate. These are that the court must (i) take into account "such information as it has been able to obtain from an officer of a local authority or otherwise about his circumstances"; (ii) any information before it concerning the offender's character and mental and physical condition; and (iii) its power to make a hospital direction in addition to imposing a sentence of imprisonment.
 - 13 1995 Act, s. 207(3). The court must states its reasons why no other disposal is appropriate and, except in the case of the High Court, those reasons must be entered in the record of the proceedings. Where a child is convicted on indictment and the court is of the opinion that no other method is appropriate, it may sentence the child to be detained: 1995 Act, s. 208.
-

- 14 1995 Act, s. 205B.
- 15 1995 Act, s.206 (1).
- 16 Appendix 1 notes the crimes and offences included in each of the main categories.
- 17 Young offenders are those aged less than 21 years. Adults are those aged 21 or over. Prisoners aged 21 up to the age of 23 may be held in young offender institutions, though at any time this will be a very small number.
- 18 Prior to the nation-wide introduction of the computerised Prisoner Records System from 1 April 1996 prison statistics were collected via manual statistical returns. This means that slight under-recording of prison receptions prior to 1996 is likely. It should also be noted that the presentation of the figures for the average daily prison population by sentence was changed in 1997. Neither of these changes, however, will have made a major impact on the upward trend from 1993-2002.
- 19 Measures to tackle the high use of remands in custody have become increasingly prominent over the past decade and the figures for 2002-3 have not increased on the previous year.
- 20 The average daily population of young offenders in custody decreased by 27% over the same period.
- 21 See Criminal Procedure (Scotland) Act 1995, ss. 248A and B.
- 22 See, generally, 1995 Act, ss. 211 – 226.
- 23 Section 219 of the 1995 Act sets out a scale of penalties which may be imposed either where the court imposes a period of imprisonment in default at the same time as fining the offender, or where no such period has initially been imposed. For example, failure to pay a fine not exceeding £200 should result in imprisonment for up to 7 days; failure to pay a fine of £1000 to £2,500 results in up to 45 days imprisonment; failure to pay a fine of £10-£20K results in imprisonment for up to 12 months. For serious fine defaulters, the penalty is up to 10 years for failure to pay a fine of over £100,000,000.
- 24 See, generally, the 1995 Act ss. 249-253.
- 25 1995 Act, s. 249(2)(a)-(c).
- 26 See, generally, the 1995 Act, ss. 228-234.
- 27 1995 Act, s. 228(2).
- 28 1995 Act, ss. 232 and 233.
- 29 1995 Act, ss. 234B-234K.
- 30 Restriction of Liberty Orders were introduced by the Crime and Punishment (Scotland) Act 1997. See also 1995 Act, ss. 245A-245I.
- 31 See, generally, 1995 Act, ss. 235-237.
- 32 1995 Act, s. 235(1) and (3).
-

-
- 33 1995 Act, s. 245(1) and (4).
- 34 1995 Act, s. 236(3)(a) and (b).
- 35 1995 Act, ss. 238-245.
- 36 For adults only the rise in the use of community sentences was even higher, +67%; for adult females it was +88%. The corresponding decline in the use of financial penalties for adults was -32% and the reduction in the use of other sentences was -21%. For young female offenders the broad pattern of increased use of community sentences (+78%) and decreased use of financial penalties (-33%) was sustained. However, there was no increase in the use of community sentences for young male offenders, though there were reductions in the use of financial penalties (-29%) and other sentences (-29%). This pattern is partly due to the reduction in the total number of young male offenders from 32,727 in 1993 to 24,881 in 2002. It also reflects an increase of almost 1% in the custody rate for young male offenders. For fuller details on these patterns see Tombs, 2004.
- 37 Community sentences include Probation Orders, Community Service Orders, Supervised Attendance Orders Restriction of Liberty Orders and Drug Treatment and Testing Orders. SAOs and RLOs were piloted in 1998 and DTTOs were piloted in 2000; none are fully introduced. In 2002, while the total number of convictions resulting in a community sentence was 15,200 (an increase of 12% when compared with 2001), these were mainly POs (9,200 including 1,300 with a requirement that the offender should perform unpaid work) or CSOs (5,000). Other community sentences imposed in 2002 included RLOs (495) and DTTOs (448).
- 38 Only a very small proportion of main financial penalties – between one and two per cent – are other than a fine and these are typically compensation orders.
- 39 See generally Table 1, 'Criminal Proceedings in Scottish Courts, 2002', Scottish Executive, 2004a. Fiscal fines were introduced by s56 of the Criminal Justice (Scotland) Act 1987. The fiscal fine is now firmly established as an alternative to prosecution in less serious cases that would otherwise result in prosecution in the summary courts. The variable levels of fiscal fines are currently £25, £50, £75 and £100, though prior to 1996-7 fiscal fines were fixed at a single level of £25. The number of fiscal fines issued has risen from 16,000 in 1993 to 35,000 in 2003 – see 'The Summary Justice Review Committee Report', McInnes, 2004, 109.
- 40 Scottish Parliament, Justice 1 Committee, 'Alternatives to Custody Inquiry', Submission by the Association of Directors of Social Work (Paper ATC45).
- 41 See Hough & Roberts, 1998; Mattinson & Mirrlees-Black, 2000; System Three Scotland, 2002; RCP Briefing, June 2003.
- 42 Robert Napier v The Scottish Ministers [2004] www.scotcourts.gov.uk/opinions/P739.html, 26 April, 2004.
-

- Ashworth, A. (2003) 'Sentencing and Sensitivity: A Challenge for Research' in L. Zedner and A. Ashworth (eds) *The Criminological Foundations of Penal Policy*, Oxford, Oxford University Press
- Ashworth, A. (2002) 'Responsibilities, Rights and Restorative Justice', *British Journal of Criminology*, 42 (4), 578-595
- Ashworth, A. (2001) 'The Decline of English Sentencing' in M.H.Tonry and R.Frase (eds) *Sentencing and Sanctions in Western Countries*, Oxford, Oxford University Press.
- Ashworth, A. and Hough, M. (1996) 'Sentencing and the climate of opinion', *Criminal Law Review*, November, 761-848
- Audit Scotland (2001) *Youth Justice in Scotland*, Edinburgh, The Stationery Office
- Austin, J., Irwin, J. and Kubrin, C. (2003) 'It's About Time: America's Imprisonment Binge' in T. Blomberg and S. Cohen (eds) *Punishment and Social Control*, New York, Aldine De Gruyter
- Barratt, V. (2004) *Prison Complaints Commission Annual Report 2004*, Edinburgh, Scottish Executive
- Beckett, K. and Western, B. (2001) 'Governing Social Marginality' in D. Garland (ed) *Mass Imprisonment*, London, Sage
- Bonomy, The Hon. Lord (2002) *Improving Practice: 2002 Review Of The Practices and Procedures In The High Court of Justiciary, Edinburgh*, The Stationery Office
- Bottoms, A., (2004) 'Empirical Research Relevant to Sentencing Frameworks' in A. Bottoms, S. Rex and G. Robinson (eds) *Alternatives to Prison: Options for an Insecure Society*, Cullompton, Willan
- Carter, P. (2003) *Managing Offenders – Reducing Crime: A New Approach*, London, Strategy Unit
- Cavadino, H. and Dignan, J. (2002) *The Penal System: An Introduction* London, Sage
- Chapman, B., Mirrlees-Black, C. and Brown, C. (2002) *Improving Public Attitudes to the Criminal Justice System: The Impact of Information*, Home Office Research Study 245, London, Home Office
- Coyle, A. (2003) *Proposed Correctional Service For Scotland*, unpublished report, London, International Centre for Prison Studies, King's College
- Doob, A. and Webster, C. (2003) 'Sentence severity and crime: accepting the null hypothesis' in M. Tonry (ed) *Crime and Justice: a Review of Research Vol 30*, Chicago, University of Chicago Press
- Duff, A. (2001) *Punishment, Communication, and Community*, Oxford, Oxford University Press
- Dunbar, I. and Langdon, A. (1998) *Tough Justice: Sentencing and Penal Policies in the 1990s*, London, Blackstone
- Farrall, S. (2002) *Rethinking What Works with Offenders: Probation, Social Context and Desistance from Crime*, Cullompton, Willan
- Frieberg, A. (2001) 'Affective versus effective justice: instrumentalism and emotionalism in criminal justice', *Punishment and Society*, 3 (2), 265-278
- Goldblatt, P. and Lewis C. (1998) *Reducing Offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research Study 187, London, Home Office
- Home Office (2003) *Searching for 'What Works': an evaluation of cognitive skills programmes*, RDS Findings 206, London, Home Office
- Home Office (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales ('The Halliday Report')*, London, Home Office

-
- Hough, M. (1996) *Problem drug Use and Criminal Justice: A review of the literature*, Drugs Prevention Initiative Paper 15, London, Home Office Central Drugs Prevention Unit
- Hough, M., Millie, A. and Jacobson, J. (2003) *The Decision to Imprison: Sentencing and the Prison Population*, London, Penal Reform Trust
- Hough, M. and Roberts, J. (1999) 'Sentencing Trends in Britain: Public Knowledge and Public Opinion', *Punishment and Society*, 1 (1), 11-26
- Hough, M. and Roberts, J. (1998) *Attitudes to Punishment: findings from the 1996 British Crime Survey*, Home Office Research Study 179, London, Home Office
- Hutton, L. and Levy, L. (2002) *Parole Board Decisions and Release Outcomes*, Edinburgh, Scottish Executive Central Research Unit.
- Hutton, N. (2003) 'Sentencing Guidelines' in M.Tonry (ed) *Sentencing Guidelines*, Cullompton, Willan
- Jamieson, J., McIvor, G. and Murray, C. (1999) *Understanding Offending Among Young People*, Edinburgh, The Stationery Office
- Lacey, N. (2003) 'Principles, Politics, and Criminal Justice' in L. Zedner and A. Ashworth (eds) *The Criminological Foundations of Penal Policy*, Oxford, Oxford University Press
- Lipsey, M. and Wilson, D. (1998) 'Effective Intervention for Serious Juvenile Offenders' in R. Loeber and D. Farrington (eds) *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions*, Thousand Oaks, Sage
- Lloyd, C., Mair, G. and Hough, M. (1994) *Explaining Reconviction Rates: A Critical Analysis*, Home Office Research Study 136, London, Home Office
- Mathieson, T. (2000) *Prison on Trial*, Winchester, Waterside Press, 2nd English Edition
- McInnes, Sheriff J. (2004) *The Summary Justice Review Committee: Report to Ministers*, Edinburgh, Scottish Executive
- McMahon, M. (1992) *The Persistent Prison? Rethinking Decarceration and Penal Reform*, Toronto, University of Toronto Press
- McManus, J. (2003) 'Foreword' in *The Parole Board for Scotland Annual Report 2002*, Edinburgh, The Stationery Office
- Morrison, Sheriff N. (ed) (2000) *Sentencing Practice*, Edinburgh, W. Green/Sweet & Maxwell
- Moxon, D. (1998) 'The role of sentencing policy' in P. Goldblatt and C. Lewis (eds) *Reducing Offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research Study 187, London, Home Office
- Normand, A. (2003) *Proposals for the Integration of Aims, Objectives and Targets in the Scottish Criminal Justice System*, Edinburgh, Scottish Executive
- Paterson, F. and Tombs, J. (1998) *Social Work and Criminal Justice: The Impact of Policy*, Edinburgh, The Stationery Office
- Raynor, P. (2004) 'Rehabilitative and Reintegrative Approaches' in A. Bottoms, S. Rex and G. Robinson (eds) *Alternatives to Prison: Options for an Insecure Society*, Cullompton, Willan
- Ramsbotham, D. (2003) *Prisongate: The Shocking State Of Britain's Prisons And The Need For Visionary Change*, London, Simon & Schuster
-

- Redono, S., Sanchez-Meca, J. and Garridon, V. (2002) 'Crime Treatment in Europe: a Review of Outcome Studies' in McGuire, D. (ed) *Offender Rehabilitation and Treatment*, Chichester, Wiley
- Roberts, J. and Hough, M. (eds) (2002) *Changing Attitudes to Punishment: Public opinion, crime and justice*, Cullompton, Willan
- Rothman, D. (2003) 'The Crime of Punishment' in T. Blomberg and S. Cohen (eds) *Punishment and Social Control*, New York, Aldine De Gruyter
- Ryan, M. (2003) *Penal Policy and Political Culture in England and Wales*, Winchester, Waterside Press
- Scottish Executive (2004a) *Criminal Proceedings in the Scottish Courts, 2002*, Statistical Bulletin CrJ/2004/1, Edinburgh, Scottish Executive
- Scottish Executive (2004b) *Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2002*, Edinburgh, Scottish Executive
- Scottish Executive (2004c) *Prison Statistics Scotland 2003*, Statistical Bulletin CrJ/2004/6, Edinburgh, Scottish Executive
- Scottish Executive (2004d) *re:duce re:habilitate re:form, Analysis of Consultation Responses*, Edinburgh, Scottish Executive
- Scottish Executive (2003a) *Short-term Prison Sentences: Report to the Criminal Justice Forum*, Edinburgh; Scottish Executive.
- Scottish Executive (2003b) *Prison Statistics Scotland, 2002*, Statistical Bulletin, CrJ/2003/6, Edinburgh, Scottish Executive
- Scottish Executive (2003c) *Reconvictions of Offenders Discharged from Custody or Given Non-Custodial Sentences in 1997*, Scotland, Statistical Bulletin, CrJ/2003/1, Edinburgh, Scottish Executive
- Scottish Executive (2003d) *Criminal Justice Social Work Statistics, 2002-3*, Statistical Bulletin, CrJ/2003/10, Edinburgh, Scottish Executive
- Scottish Executive (2002) *Prisons' Estates Review*, Edinburgh, Scottish Executive
- Scottish Prison Service (2002) *Making A Difference*, Edinburgh, SPS
- Spencer, F. (2004a) *Engaging With The Public Interest In Criminal And Youth Justice*, Edinburgh, Scottish Council Foundation
- Spencer, F. (2004b) *The Public Interest: Fairness in Criminal and Youth Justice*, Edinburgh, Scottish Council Foundation
- Stead, M. (2002) *What Do The Public Really Feel About Non-Custodial Penalties?*, Rethinking Crime and Punishment Briefing, London, Esmée Fairbairn Foundation.
- System Three Scotland (2002) *Public Attitudes Towards Sentencing and Alternatives to Imprisonment*, Edinburgh, Scottish Parliament
- The Scottish Office (1997) *Costs, Sentencing Profiles and the Scottish Criminal Justice System, 1995*, Edinburgh, The Scottish Office
- The Scottish Office (1994) *Prison Statistics Scotland, 1993*, Statistical Bulletin, CrJ/1994/5, Edinburgh, The Scottish Office.
- Tombs, J. (2004) *A Unique Punishment: Sentencing and the Prison Population in Scotland*, Edinburgh, Scottish Consortium on Crime & Criminal Justice
-

Tombs, J. (2002) *Making Sense of Drugs and Crime: Drugs, Crime and Penal Policy*, Edinburgh, Scottish Consortium on Crime and Criminal Justice

Tonry, M. (2003) 'Reducing the Prison Population' in M. Tonry (ed) *Confronting Crime: Crime control policy under New Labour*, Cullompton, Willan

Tonry, M. and Frase, R. (2001) *Sentencing and Sanctions in Western Countries*, Oxford, Oxford University Press

von Hirsch, A., Bottoms, A. E., Burney, E. and Wikström, P-O. (1999) *Criminal Deterrence and Sentence Severity: An analysis of recent research*, Oxford, Hart
