



Response to the Coulsfield Inquiry into Alternatives to Custody.

Introduction

1. The league is an independent organisation (and charity) whose members seek improvements to the criminal justice system in Scotland. Its aims are broadly to improve prison regimes, to reduce the unnecessary use of imprisonment, to work for the rehabilitation of offenders and improve the effectiveness of interventions. It believes that early intervention and prevention are important in these aims and as a corollary that imprisonment should be used only where it is the sole available means of achieving adequate protection of the public. This response does not seek to answer all the questions posed in the paper accompanying the invitation to submit views but only those on which the League feels it can contribute. Further information about the League and its activities in Scotland (in which it receives support from the Rethinking Crime and Punishment initiative of the Esmée Fairbairn foundation) can be found on its website at www.howardleaguescotland.org.uk

Prison Population

People given prison sentences

2. **Qn1.** The League believes that the inquiry should look not just at the prison population which is heavily influenced by the longer term sentences, but at the number of people given prison sentences as it considers that the number of individuals given prison sentences represents a better indicator of the extent to which prison is used as a disposal and therefore of the scope for considering alternatives.

Why imprison?

3. **Qn2.** The League is aware of the recently published RCP funded research in England & Wales examining factors relevant to sentencers when a decision to imprison or impose an alternative is 'on the cusp'. The Inquiry will also be aware that similar RCP funded research is presently being conducted by Dr Jacqueline Tombs involving members of the judiciary in Scotland at all levels. The Scottish research, which began a year after the work in England & Wales, will report in June 2004.

Suitability for other disposals

4. **Qn3.** It is unlikely that there will be significant numbers of prisoners sentenced to periods of more than 12 to 18 months imprisonment in Scotland for whom an alternative disposal is likely to be acceptable either to the courts or to the public at large and it is therefore that group of shorter term prisoners serving less than 18 months where it might have been possible to consider an alternative disposal.

Routes to greater use of alternatives

5. There are two possible routes to implementing greater use of alternatives to imprisonment and the League considers that both should be considered and pursued.

6. The first is **through action by Government (in Scotland the Executive) to substitute alternative disposals (in whole or in part) for those who have already received a prison sentence.** This is effectively the position for those released at half sentence under the provisions of the Prisoners and Criminal Proceedings (Scotland) Act 1993. It would be open to the Executive through subordinate legislation to allow release after a shorter (or longer) proportion of the sentence had been served. This method has the advantage that no fresh legislation is required if a simple change in the proportion of sentence qualifying for early release is sought. It suffers two disadvantages, however; first, that it may appear to undermine the sentencing decisions of the

judiciary as to the most appropriate disposal; and second, that some members of the judiciary may pass longer sentences to compensate.

7. The judiciary in Scotland – though not in England & Wales – has maintained in its public stance to previous legislative proposals (in particular the Crime and Punishment (Scotland) Bill which was intended to reduce ‘early release’ as a proportion of a custodial sentence) that in determining the length of a custodial sentence it does **not** take account of the policy of the Executive (or of Parliament) to reduce or remit any part of a sentence of imprisonment imposed. Government action to further reduce the custodial part of a prison sentences therefore appears as conflicting even further with the courts’ views as to the period best suited to the individual offender. But there have now been decisions in life sentence cases– principally that of O’Neill- which show a more pragmatic and some would say realistic view of the situation. Following O’Neill the High Court in Scotland is required to look at the reduction in the period of imprisonment resulting from release provisions in force in determining the length of the punishment part to be imposed as part of a life sentence. It also made clear that the decision as to the length of the punishment element of a life sentence was one for the court and no other body. Following the Conventions Right (Compliance)(Scotland) Act – which sought among other things to embody the O’Neill judgement in legislation – the decision in the more recent case of Ansari now suggests – erroneously - that the parole board may choose to extend the period of custody of an individual if it considers his punishment is inadequate. This leaves an unsatisfactory situation for life sentence prisoners and suggests that not all members of the judiciary in Scotland are fully acquainted with the release provisions in operation.

8. It is therefore difficult for the Executive to know how the judiciary would react to a change in the early release provisions. Views appear to be divided as to whether in the absence of specific statutory provision the judiciary would leave nominal prison sentence lengths unchanged or whether they would adapt sentences in order to produce the same periods in custody – which may of course thwart the purpose of any change. Past administrations on the other hand have not appeared to be prepared to direct the judiciary as to whether or not such a change in sentencing practice was required.

9. The League feels that both **judiciary and Executive should be prepared to discuss with one another the position on early release** and that the judiciary should explicitly recognise the legitimacy, role and rationale of Executive policy so that the latter can gauge accurately the effect of any changes.

10. The league feels strongly that the **Executive should pursue the use of supervision and monitoring (including electronic monitoring) as alternatives to custody for those serving shorter sentences where the release of the offender would not pose any significant risk to members of the public.**

11. The second route towards greater use of alternatives to custody is **through measures (including legislation) to influence the sentencing decisions of the courts.** Here too it must be acknowledged that any action by the Executive faces difficulty. Although the judiciary clearly accept the role of parliament in determining the maximum sentence, including imprisonment, which may be available for someone convicted of a particular crime they are much less inclined to accept that it is the role of government or Parliament to define the circumstances when a particular sentence will be imposed such as an automatic life sentence upon a second or subsequent conviction for a violent offence. It is not therefore clear that legislation which sought to exclude the use of custody in particular circumstances would be welcomed and implemented by the judiciary in the manner intended. Any such legislation would need to be both very carefully thought through and legislature and judiciary should agree how the underlying aim is to be achieved if the legislation is not to be abortive.

12. A further problem, however is that such legislative action is likely to be seen by many members of the public as being soft on criminals.

13. The alternative means to reduce the use of custody of simply seeking to influence the sentencing decisions of the judiciary by offering alternatives to custody to be employed at the courts discretion and subject to other qualifying criteria is possibly therefore preferred by government but the degree of adoption is then largely in the hands of the Judiciary which in the past has tended to use fresh disposals as alternatives

to custody for cases where they were unlikely to have imposed custody in any event. The League considers that if alternatives to custody are to have a greater impact than the Sentencing Commission being established by the Executive in Scotland should address the need for explicit co-operation between government and judiciary so that any new disposals aimed at reducing the use of custody do not founder because of 'net-widening'

Factors relevant to acceptable sentencing

What factors?

14. Q4. The factors relevant to the Scottish courts in considering sentence are well documented in, for example Sheriff Principal Nicholson's book on Sentencing. They can be categorised in a number of ways. Factors which relate to the **quality of the crime or offence itself and its consequences**; those which relate to the **circumstances of the offender** ranging for example from the history of previous convictions to any evidence of contrition such as immediate surrender to the police and thirdly factors relating to the **likely effect of the sentence on the convicted person** (ranging from incapacitation from further offending achieved by a prison sentence to behavioural change achieved by attendance on programmes) **and on others through deterrence**. The first two categories are of most importance in the severity of sentence while the third as it relates to the offender is of greater relevance to the type of sentence imposed. Where public protection is sought this can have a very marked effect upon severity of sentence even though this may not be the primary purpose in its being imposed.

Statutory framework

15. The statutory framework within which sentencing takes place is of equal if not greater importance to individual factors since it predetermines the range of possible outcomes. In some cases the statutory framework highlights an already recognised factor eg allowing the court to take in to account an early guilty plea sparing witnesses from giving evidence and saving court costs.

16. The views of the victim are rarely taken into account presumably on the grounds that they cannot be expected to take an impartial view of what would be appropriate and reparation is regarded as outside the purview of the criminal courts. Even where provision has been made by statute to allow the criminal courts to consider the victim's position such as with Compensation Orders the provisions are rarely used.

Perspectives on the importance of different factors

17. Q5&6. The Howard League recognises that the quality of the act and the offender's intentions are always going to play a part in the determination of sentence but feels that sentences should seek to achieve proportionality combined with restraint on the use of custody – custody should be used only in circumstances where it is the only manner in which adequate public protection can be achieved or where the particular circumstances of the crime are so serious as to merit it. The League does not consider that the category of a crime or offence should in itself lead to a custodial sentence and the court should always ask itself whether adequate punishment of the offender cannot be achieved without imposing custody. The League is therefore concerned at the recent emphasis in statutory provisions upon imposing potentially lengthy 'protection of the public' elements. These may punish an offender not for what he has done but what it is feared he may do. To that extent they are clearly unjust and unjustified.

Modification

18. Q7. The League is aware of the continuing movement in sentencing under the influence of decisions of the European court, towards custodial sentences being composed of a punishment part and a second public protection (or supervisory) element. This division was introduced initially for life sentences imposed at the discretion of the court but has now become the position for mandatory life sentences too here and more recently in England & Wales. A number of legal challenges to determinate sentences based on a similar proposition have been mounted and while these have so far been unsuccessful it seems likely that as

this area of law develops determinate custodial sentences will also come to be viewed as composed of a punishment part together with a further risk or public protection element during which the offender subject to a risk assessment being satisfactory, might be released in to the community. It seems to the League that there are two principal dangers inherent in this analysis of custodial sentences. First, at least at present, it leaves no room for reduction of the punishment element having regard to the behaviour of the offender in custody.

19. The Lord Chief Justice is clearly in favour of such reduction being possible at least for life sentences as is evidenced by his comments on many of the cases where he has, under transitional arrangements, been called upon to determine in place of the tariff formerly determined by the Home Secretary, the punishment element for existing life sentence prisoners. In these he has remarked upon the reduction in the period he has decided upon by virtue of the offenders behaviour in custody. In some cases he has remarked upon the possibility of reduction at subsequent review. There is, however no mechanism for such a review. The League considers that for all prisoners there should be the possibility of a reduction in the punishment part of their sentence. It notes that the Parole Board does not regard itself as concerned with anything other than the risk to the public of release after the punishment part of a sentence has been served and that it may not therefore be a suitable body to carry out this additional review function we suggest.

20. The second danger is that decisions made on the basis of risk assessments will be increasingly challenged. Indeed the robustness of the 'science' of risk-assessment is highly questionable both within and between the disciplines involved in developing and using risk assessment techniques.

The efficiency, effectiveness and adequacy of alternative disposals

21. Qs 12 – 19 The League refers the Inquiry to the First phase of the 'Alternatives to Custody Inquiry' undertaken by the Justice 1 Committee of the last Scottish Parliament. The Justice 1 Committee inquiry, which reported in March 2003 provides a detailed review of the use and effectiveness of community sentencing as an alternative to imprisonment in Scotland. Based on extensive written and oral evidence from a wide range of sources, including the League and the Scottish Consortium on Crime and Criminal Justice, the Justice 1 Committee report considers 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. The League refers the current UK wide Independent Inquiry to its response from the Scottish Consortium on Crime and Criminal Justice, which outlines in some detail the conclusions reached by Justice 1 on the efficiency, effectiveness and adequacy of community disposals.

Back up/Enforcement mechanisms for non-custodial sentences

22. **Q20.** The League would like to make two points in relation to this question. First, that serious consideration should be given to prohibiting the use of prison as a back up/enforcement mechanism for some community penalties as well as fines. In the case of fine default civil remedies should be pursued. In the case of other community penalties, the League would expect that prison would rarely be an appropriate response to failure to comply and that, given the wide range of alternative disposals now available, other non-custodial measures should be used to back up breaches. Second, if the community penalties are being used truly as alternatives to imprisonment then there will be a reduction in pressure on the population. In only a limited proportion of cases will failure to comply lead to prison – even if prison remains as the back up/enforcement mechanism – so there should still be a significant net reduction in the prison population following from an increase in community penalties.

Public Attitudes and the role of the media

23. Qs 22 – 27 The questions under this heading imply, in our view quite correctly, that the public regards crime levels in Britain as being higher than in fact they are and regard sentences, particularly community sentences as treating offenders too leniently. The League concedes that it is unlikely that the tabloid press is ever likely to reduce the extent of coverage it devotes to violent crime and is equally unlikely to become a source of informed comment on the nature and operation of community sentences. There are however sectors of the media which provide a more informed view and this will influence a narrower section of the public.

The League considers that it is desirable that the public be better informed and that to this end all the agencies involved in the Criminal Justice system including those such as the judiciary who are traditionally often silent on such matters should create and take every opportunity to present a fuller and more accurate picture of the situation.

24. The level of public misunderstanding contributes to the prevailing attitude that sentences are too lenient. Research has shown that when members of the public are fully informed of the circumstances of individual cases they will often suggest greater leniency than would a court. While sentencers cannot ignore public opinion nor should they be overly influenced by it, they do not have to consider election to office and should be prepared to take decisions which may meet criticism.

25. The consequences of a poorly informed public opinion are more serious in relation to politicians who understandably are more concerned to promote policies which will meet with public approval. The League is disappointed that the Executive in Scotland has shown no inclination to bring about a reduction in the prison population or set itself a target to do so. On the contrary it appears to be prepared to provide for an increase in prison population resulting from an upward drift in the use of custody. The Lord Chief Justice has voiced similar concerns about the position in England & Wales. Unless politicians are willing to lead, rather than follow public opinion, by setting policies they believe to be just and effective and explaining and justifying these to the public we can expect to see a continuing growth in the use of imprisonment despite evidence of its ineffectiveness,

HLS

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