

# *A unique punishment*

Sentencing and the Prison  
Population in Scotland

Jacqueline Tombs

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Many thanks are due to Mike Hough, Andrew Millie and Jessica Jacobson who, in conducting an earlier study in England and Wales, provided the inspiration and foundation for this comparable study of sentencing decision-making in Scotland. The Scottish study draws heavily on their original research, both in its design and in the structure followed in this report.<sup>2</sup> I owe them a special debt of gratitude for sharing so much of their work with me and for giving me the opportunity to join them during their fieldwork in England and Wales.

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## **Jacqueline Tombs**

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1 The generic term used in the report for Judges, Sheriffs and Stipendiary Magistrates. Judges are more correctly known as Senators of the College of Justice and are also referred to as Judges of the High Court.

2 That study, also funded by the Esmée Fairbairn Foundation Rethinking Crime and Punishment Initiative, was published by the Prison Reform Trust in 'The Decision to Imprison: Sentencing and the Prison Population' (Hough, Jacobson and Millie, 2003).

Much discussion about sentencing and how the judiciary makes sentencing decisions is ill-informed and tendentious. Rarely does the public get an opportunity to learn how judges actually feel about the sentencing task and how they resolve the conflicting pressures put upon them to balance retribution, mercy and the reduction of future harm. This report provides a rare insight into those dilemmas and illuminates the complexity of the decision-making process. Forty sentencers were interviewed, from both rural and urban areas, and with very differing levels of experience. In particular they were asked to consider the factors that influenced them when considering cases on the borderline between prison and some other outcome.

The report adds greatly to our understanding of judicial decision-making and shows how in the absence of countervailing influences prison populations can steadily increase.

The Scottish Consortium on Crime and Criminal Justice is very grateful to the judiciary of Scotland for supporting this project so wholeheartedly, to the Esmée Fairbairn Foundation Rethinking Crime and Punishment project for their financial support and to Professor Jacqueline Tombs for undertaking the research and writing the report.

The Consortium works to promote a rational and socially inclusive approach to crime and punishment in Scotland. We hope that this thought-provoking report will make a major contribution to reaching that goal.

**Baroness Vivien Stern**

Convenor,  
Scottish Consortium on Crime and Criminal Justice

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## Summary

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This study addresses one of the central problems facing contemporary penal policy. The prison population in Scotland has been rising progressively. Prisons are overcrowded, the Scottish courts have ruled that prison conditions – notably ‘slopping out’ – constitute degrading treatment in breach of human rights and the Scottish Prison Service is spending £1.5 million a week on ‘upgrading’ the prison estate. Despite this, there has been little rational debate about the reasons for the rise and whether ways can be found to stop it. This study aims to contribute to opening up that debate.

### Key findings

- Scotland’s prison population grew by almost 1,000 prisoners over the ten year period of the study. At a rate of 129 prisoners per 100,000 of the general population, Scotland has one of the highest per capita prison rates in the European Union.
  - An important part of the growth in the prison population is due to more severe sentencing practices; sentencers are now imposing longer prison sentences for serious crimes, and they are more likely to imprison those appearing before the courts to-day than they were ten years ago. It is also, in part, due to increased use of remand and the decisions made in other parts of the criminal justice system.
  - More severe sentencing practice is due to the interplay of several factors: an increasingly punitive climate of political and media debate about crime and punishment; legislative changes; some changes in patterns of offending; and sentencers’ perceptions that offending has become more serious.
  - Sentencers consistently argue that they send people to prison only as the absolute ‘last resort’ – either because the offence is so serious that no other sentence is possible; or because the offender’s past convictions or failure to respond to past sentences rule out non-custodial options.
  - Personal mitigation, relating to an offender’s circumstances, condition and response to prosecution, plays a crucial part in cases that result in non-custodial sentences, but are on the borderline with custody.
  - Sentencers are not sending people to prison for lack of satisfactory community sentences. They are satisfied with the “broad palate” provided by existing community sentences though more imagination in the content and flexibility in the ability to “tailor-make” non-custodial sentences were desirable.
  - While sentencers were generally satisfied with the quality and range of community sentences, and with the management and enforcement of these sentences, they had concerns that some, especially community service, were underfunded.
  - Sentencers expressed concern about the media and public image of community sentences, especially of community service, as being “soft”. In general, they stressed that community sentences were “tough options”.
  - While sentencers were not unduly constrained by media and public pressure, they argued that they have a duty to ensure that their sentencing decisions reflect the norms of the wider society.
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## Key conclusions

Sentencers emphasised that reducing the prison population was a political decision; political leadership would be required to achieve this end. Any strategy likely to be successful would involve legislative change, 'talking down' the climate of media and public opinion about crime and punishment, and wider appreciation of the sentencing task. As far as sentencing is concerned, a combination of legislation and guidance from the Appeal Court could make a substantial contribution to reducing the prison population. Providing further new community sentences, alone, would probably result in 'net-widening' – where the new sentences would be used with offenders who would previously have been fined or served a conventional community penalty.

## The study

This study has been undertaken at a time when the Government in Scotland – the Scottish Executive, commonly referred to as the Executive – is committed to taking action to reduce reoffending and to address the problem of Scotland's high prison population. Though crime has fallen over the past decade, with the exception of some crimes of violence and drug crimes, the prison population has continued to rise. This study illuminates the part that sentencing has played in contributing to that rise. The main aim was to understand how sentencing practices affect the prison population and identify what might discourage sentencers from making use of custody and what might encourage them to make use of alternative community sentences. To this end the study focused primarily on the process by which sentencing decisions are made by sentencers, especially in relation to cases that are on the borderline between custody and community sentences. As a preliminary, the study examined Executive statistics on general sentencing patterns and trends in the use of imprisonment in the courts and reviewed other relevant research.

The core of the study comprised one-to-one interviews with sentencers throughout Scotland. Interviews were carried out with five Judges of the High Court, with thirty four Sheriffs from sixteen Sheriff Courts across Scotland and with a Stipendiary Magistrate. The Sheriff Courts provided a national spread covering urban and rural areas and ranged from those with the highest to the lowest use of custody. The full range of judicial experience was also represented – from Sheriffs with twenty five years on the bench to ones who had been sitting for two or three years. In addition to the interviews, all Sheriffs were asked to provide details of four cases which lay on the borderline between custodial and non-custodial penalties.

## Explaining the growth in the prison population

Executive statistics for the ten year period selected for study, from 1993 – 2002, indicate that, while no more accused persons are appearing before the courts than ten years ago, several interrelated factors account for much of the growth in the prison population.

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### *Increased custody rates*

- The High Court and the Sheriff Courts, which account for the vast majority of prison sentences, have increased their custody rates over the period.
- The increased custody rates in the Sheriff Summary Courts have made an impact on numbers of prisoners and in the Sheriff Solemn Courts the impact has been on the average lengths of sentences.
- Increased use of imprisonment for the large numbers of offenders convicted for shoplifting and 'other theft'<sup>3</sup> has had an impact on the prison population.

### *Increased length of sentences*

- Average sentence lengths imposed increased for all prisoners, especially for female prisoners.
- However, very short prison sentences – 3 months and under – generally decreased, and for women decreased substantially, over the period.
- There has been a steep rise in the use of long sentences for adults; the numbers of adults arriving in prison with sentences of 4 years and over, excluding life, increased by 51%, and those with life sentences increased by 115%.

### *Other factors*

- The 57% increase in the use of adult remands, 72% for adult females, has been a significant factor in the growth of the prison population.
- The large increase in the numbers of persons convicted for serious assault/attempted murder (49%) has contributed to the rise in the prison population since these crimes almost always result in custody and for long prison terms.
- The substantial increase in the numbers convicted of drugs offences (23%), together with increased statutory maxima for some drugs offences, will have affected the prison population as offences of supply typically attract custody.
- Changes in policy and practice for automatic release, parole and the release of life sentence prisoners have contributed to pushing up the prison population.
- The decline in the use of fines has had indirect consequences for the prison population. If offenders are given community sentences earlier in their criminal careers, they will exhaust alternatives to imprisonment more quickly than in the past.

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<sup>3</sup> The 'other theft' category includes theft of pedal cycles but excludes theft of a motor vehicle and theft by opening a lockfast place. Appendix 3 notes the main crime and offence categories used in Scottish Executive statistics.

## More severe sentences

The increase in custody rates and sentence length strongly suggest that sentencers have become more severe in their practices. Indeed, the majority of sentencers agreed that sentencing practice had become more severe. They argued that this could be attributed to legislative and procedural changes, changes in the climate of political, media and public opinion about crime and punishment and in response to more serious crimes being committed over the past decade. Around a quarter of the sentencers also suggested that various criminal justice changes – for example, in prosecution practices and in the impact of improved technology on policing – were likely to have contributed.

From the explanations given by sentencers and from other relevant research and statistical data, it is reasonable to conclude that much of the rise in the prison population in Scotland can be explained by the interplay between:

- 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;
- some changes in patterns of offending;
- sentencers' perceptions that there have been 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.

## Sentencing decisions

In interview and in relation to decisions about cases that lie on the borderline between a custodial and a non-custodial sentence, sentencers said that they used custody only as a "last resort". A custodial decision was typically based on the perceived seriousness of the offence and/or the offender's criminal record. Using prison as a 'last resort' meant either or both of two things – that no other sentence was appropriate because of the offence itself or that the offender had run out of options because of previous convictions and/or failure to respond to past community sentences. Moreover, the overwhelming majority of sentencers did not perceive alternative community sentences as equivalent in penal weight to a prison sentence. They viewed imprisonment as a "unique punishment" – something qualitatively different, 'out there' on its own. They considered that no 'alternative' could be fully equated with the deprivation of liberty.

In borderline cases, a decision in favour of a community sentence was typically based on a wider range of factors than a decision in favour of custody. Of particular significance were the present circumstances of the offender, for example, employment status and family responsibilities; the offender's condition, for example, suffering from severe mental or physical health or addiction problems; and the offender's response to prosecution, especially evidence of remorse.

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## Non-custodial penalties

The majority of sentencers spoke highly of the provision of criminal justice social work services. They did not identify a lack of satisfactory non-custodial penalties as a factor that influenced them to decide in favour of custody in any borderline case that resulted in a custodial decision. Sentencers noted that community service was an arduous and very useful sentence and expressed dissatisfaction at the way in which community service is often portrayed to the public by the media. They emphasised the need to educate the public and politicians about community sentences in general. In particular, they regarded community service as a "tough option" and argued for efforts to be made to change the image of community service in the eyes of the public.

## Conclusions

The analysis presented shows that several, interrelated factors have contributed to more severe sentencing practices; sentencers are making more use of imprisonment now than they did a decade ago and longer prison sentences are getting longer. These changes in sentencing practices have not, however, occurred in isolation. They have occurred within an increasingly severe legislative framework as well as within a more punitive social and political context, both of which impact crucially on sentencing decisions. Other key factors include some changes in patterns of offending, especially sentencers' perceptions of changes related to violence and dependent drug use, as well as changes in other criminal justice practices and procedures.

Taken together, these findings imply that the potential success of policies aimed at reducing sentencers' use of custody will depend on making changes to the context within which sentencing is carried out as well as making changes to sentencing practices themselves. Policies will be necessary at three levels of intervention.

- Changing the legislative and legal framework of sentencing to reduce custody rates and/or sentence lengths.
- Strengthening non-custodial penalties to influence sentencers to make more use of such penalties even for the most persistent and relatively serious offenders.
- Altering the climate of political and public opinion on crime and punishment in ways that would assist sentencers to make minimal use of custody.

What this means is that whilst changing the legislative and legal framework for sentencing, for example, by reducing the length of prison sentences, is the most direct and immediately tangible way to restrain sentencers' use of custody, this will not by itself be sufficient to sustain any limitation in the longer term. Measures are also required to move the political and public debate about crime and punishment onto a more rational and less punitive level. Such a move is not possible without determined and principled political leadership.

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This study has been undertaken at a time when the Government in Scotland – the Scottish Executive, after this referred to as the Executive – is committed to taking action to reduce reoffending and to address the problem of Scotland's high prison population. Though total crime has fallen<sup>4</sup> over the past decade, the prison population has continued to rise. Prisons are overcrowded, the Scottish courts have ruled that prison conditions – notably 'slopping out' – constitute degrading treatment in breach of human rights<sup>5</sup> and the Scottish Prison Service is spending £1.5 million a week on 'upgrading' the prison estate.

In the midst of expressed concerns about the extent of reoffending lies a sense of urgency about the growth in the prison population. Concern about prison expansion is reflected in recent policy reviews,<sup>6</sup> parliamentary inquiries into criminal justice matters,<sup>7</sup> and in the establishment, for the first time in Scotland's history, of a judicially led Sentencing Commission.<sup>8</sup> Other Executive commitments also reflect this concern, notably the further development of specialist courts such as Drug Courts and extending the availability and range of community sentences, especially of Drug Treatment and Testing Orders.<sup>9</sup> Above all, at the time of writing, the Executive's 'Consultation On Reducing Reoffending In Scotland'<sup>10</sup> has the potential to lead to action that could at least halt if not reverse the growth in the prison population.

The Reducing Reoffending consultation document stresses the financial and human costs of maintaining Scotland's large and rising prison population. For example, the document notes that in 2002-3 it cost an average of £29,839 per annum to provide a prisoner place, that the two new prisons planned to cope with the growth in numbers will cost £500 million each over the next 25 years, and that it is estimated that 13,000 children in Scotland each year are affected by the imprisonment of a parent. Responses to the consultation also underline the human and financial costs of imprisonment and suggest ways to reduce the prison population through the use of alternative community sentences and investment in communities rather than in prisons. The Scottish Prison Service response, for example, stresses that short-term prison sentences are ineffective and expensive and notes that, should the Sentencing Commission propose that custodial sentences of less than one year be abolished, the "SPS would concur."<sup>11</sup>

The arguments about the ineffectiveness of prison in terms of reducing reoffending are well established by criminological research. From reconviction rates, prison is certainly no better than community sentences (McIvor, 2002; Prime, 2002) and the weight of the evidence on deterrence suggests that the likelihood rather than the severity of punishment is what affects crime rates (von Hirsh et al, 1999). Even 'incapacitation effects' – keeping offenders out of circulation – have been found to be marginal (Goldblatt and Lewis, 1998). Yet the latest report from the Scottish Prison Complaints Commissioner highlights the 'alarming rate' at which the prison population continues to grow, exacerbating all the problems associated with overcrowding including the inability to provide rehabilitative, educative and therapeutic work and severe pressures on prison staff (Prison Complaints Commission Report, 2004).

It is within this context that current debate is intensifying about the reasons for the rise in Scotland's prison population and how it could be reduced. There are a number of possible ways to reduce prison populations, all of which depend on political choices. These strategies, which have been used by countries committed to reducing their prison populations, include 'front-door options', such as rationalising sentencing laws and 'talking down' the lengths and use of prison sentences, and 'back-door strategies', such as broad-based amnesties and changes in prisoner release mechanisms (Tonry, 2003).<sup>12</sup> This study, in revealing how sentencers approach the sentencing task, has implications for possible ways to reduce the use of imprisonment in Scotland.

4 Crimes of violence and drug crimes have, however, risen. See Chapter 2.

5 Robert Napier v The Scottish Ministers, [2004] [www.scotcourts.gov.uk/opinions/P739.html](http://www.scotcourts.gov.uk/opinions/P739.html), 26 April, 2004.

6 See Bonomy (2002); McInnes (2004); Normand, (2003); SPS (2002); Scottish Executive (2002); Scottish Executive (2003a)

7 See Justice 1 Committee, Inquiry into Alternatives to Custody Official Report, Vols 1&2, [www.scottish.parliament.uk/official\\_report/just1-03](http://www.scottish.parliament.uk/official_report/just1-03)

8 See the Sentencing Commission's remit on [www.scottishsentencingcommission.gov.uk](http://www.scottishsentencingcommission.gov.uk)

9 Other commitments include extending reparation by offenders and the role of restorative justice.

10 See 're:duce re:habilitate re:form' [www.scotland.gov.uk/consultations/justice/rrrc-00.asp](http://www.scotland.gov.uk/consultations/justice/rrrc-00.asp)

## Background to the study

In 1993<sup>13</sup> the average daily prison population in Scotland was 5,637. By 2002 it had reached 6,404 and by January 2004 it stood at 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 sanctions 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 7,000.

Table 1.1 provides a comparison of prison rates across a selection of western European and other countries. Though comparison is not direct, Scotland's position relative to other countries in western Europe is in no doubt.<sup>14</sup> 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 population.

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 crime rates similar to or higher than Scotland's 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, and of most immediate significance for the present study, variations in imprisonment rates can be explained, at least in part, by differences in sentencing policy and practice (Tonry and Frase, 2001; Tonry, 2003).

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. 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 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 (Coyle, 2003).

11 See [www.scotland.gov.uk/consultations/justice/rrrc-00.asp](http://www.scotland.gov.uk/consultations/justice/rrrc-00.asp), also, re:duce re:habilitate re:form Analysis of Consultation Responses, Scottish Executive (2004d).

12 A useful and full discussion of a range of strategies and options is given in Tonry (2003).

13 The ten years from 1993-2002 is the main comparative period. In 1993 the average daily prison population rose by 7% on 1992 continuing the upward trend from 1990. In 1993, the highest population recorded was 5,992. The prison population fell sharply by 600 to around 5,200 on 1 October as a result of the transitional arrangements set out in the Prisoners and Criminal Proceedings (Scotland) Act 1993. The 600 short-term prisoners who had served between half and two-thirds of their sentence were released under transitional arrangements set out in the Act. By the beginning of December the population had risen again to 5,390. The effects of changes in release policy and practice are discussed more fully in Chapters 2 and 3.

14 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.

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](http://www.prisonstudies.org)

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 marginalised and impoverished population groups, such as most drug offenders, primarily through legislation specifying stiffer penalties. Thus rises in prisoner numbers have been shown to relate to policy changes associated with greater use of custody and the imposition of longer sentences, especially in relation to drug offenders (Walmsley, 2000; Hough et al, 2003). Indeed, despite the concerns about the growth in the prison population outlined at the beginning of this chapter, and as subsequent chapters in this report show, legislative and policy changes in Scotland over the last decade have also been associated with increased use of custody and the imposition of longer sentences.

## Aims of the study

The study was designed to be comparable with an earlier study funded by the Rethinking Crime and Punishment Initiative on sentencing and the prison population in England and Wales (see Hough et al, 2003). The main aim was to understand how sentencing practices affect the prison population in Scotland and identify what might discourage sentencers from making use of custody and what might encourage them to make use of alternative community sentences.<sup>15</sup> In particular, the study aimed to:

- explain the rise in the prison population;
- identify the key factors that tip the balance away from or towards the use of custody;
- examine whether amended or new community sentences would reduce sentencers' use of custody;
- explore how the social and political climate affects sentencing decision-making; and
- identify possible strategies to reduce the prison population and the role of sentencing.

These aims were explored by a review of statistics on general sentencing patterns and trends in the use of imprisonment in the Scottish Courts,<sup>16</sup> mainly in the Sheriff Courts because they impose the largest numbers of custodial sentences. The primary focus of the qualitative study with sentencers was on the decision processes of Sheriffs in individual cases – especially in relation to cases that could be considered as on the borderline between custody and community sentences. This approach was adopted in order to gain a fuller appreciation of the complex issues that bear on sentencing and the use of custody.

## Methods

The research involved:

- an analysis of government statistics on sentencing and the prison population over the past decade;
- observation of decision-making in Sheriff Courts; and
- one-to-one semi-structured interviews with High Court Judges (5), Sheriffs (34) and a Stipendiary Magistrate covering :
  - their understanding of why the prison population has increased;
  - the aims of sentencing;
  - the nature of the sentencing decision-making process;
  - the social and political factors that impinge on sentencing decisions; and
  - their views on the range and quality of existing non-custodial penalties and any gaps in provision.

<sup>15</sup> The term 'community sentence', sometimes also referred to as 'community order', is used in Scotland and in this report to refer to probation, community service, supervised attendance, restriction of liberty and drug treatment and testing orders. When the term 'non-custodial penalty', sometimes referred to as 'non-custodial sentence', is used it includes these community sentences plus 'financial penalties' and 'other sentences'. The financial penalty category is composed overwhelmingly of fines but also includes compensation orders, and 'other sentences' is composed mainly of admonitions. Appendix 1 provides a note on all non-custodial penalties and the circumstances in which sentencers may use them.

<sup>16</sup> Appendix 2 notes the sentencing powers of the Scottish Courts.

In order to gain insight into the factors that influence sentencers in deciding whether or not to impose a custodial sentence, the interviews with Sheriffs included questions about how they had made specific sentencing decisions in borderline cases involving offenders aged 18 years or over<sup>17</sup> where they had recently passed:

a prison sentence after giving serious consideration to specific non-custodial options;  
and

a non-custodial sentence, having seriously considered a short prison sentence.

The interviews with Sheriffs were carried out across Scotland's six Sheriffdoms.<sup>18</sup> Sheriffs were interviewed at a total of sixteen Sheriff Courts to provide a national spread covering urban and rural areas. These courts ranged from those with the highest to the lowest use of custody. The full range of judicial experience was also represented – from Sheriffs with twenty five years on the bench to ones who had been sitting for two or three years. The Judges were interviewed in Edinburgh and the Stipendiary Magistrate was interviewed at the District Court in Glasgow.

## Outline of the report

This report concentrates on the results of the Scottish study. It does not make comparisons with the findings in England and Wales, though it follows, as far as possible, the structure and argument presented in 'The Decision to Imprison: Sentencing and the Prison Population' (Hough et al, 2003). A separate Rethinking Crime and Punishment Briefing drawing comparisons has been published.

Based on the available statistics, Chapter 2 examines sentencing and the growth in the prison population over the ten years from 1993 – 2002, especially in relation to the use of remand, the pattern of convictions, custody rates, the length of prison sentences, release policy and practice and the use of non-custodial penalties. It shows that, in addition to an increase in the use of remands and some changes in the pattern of convictions, two sentencing factors – increases in custody rates and in the lengths of the longer sentences – have contributed to the rise in the prison population. Chapter 3 considers reasons for these shifts in sentencing practices, primarily from the viewpoint of sentencers. In particular, it examines sentencers' perceptions of the extent to which changes in the legislative and policy framework and in patterns of offending have contributed to their increased use of custody and longer sentences. Chapters 4 to 6 concentrate on sentencers' decision-making. Chapter 4 focuses on sentencers' accounts of their use of custody and the ways in which they make decisions in 'borderline cases'. In Chapter 5 their views on alternatives to custody are considered. Chapter 6 outlines their perceptions of the political and social context within which they make their decisions and Chapter 7 reflects on the implications of the study for some possible prison reduction policies.

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<sup>17</sup> This age was selected because the peak age for a criminal conviction is 19 and because the offenders aged 18 and over are overwhelmingly dealt with in the adult criminal courts. The Children's Hearings System deals with the vast majority of young people who offend aged up to 16 years (and some aged up to 18 years if they are already in the Hearings system). There have been a number of recent developments, including the emergence of fast-track hearings and Youth Courts, which are likely to lead to broader changes in dealing with young offenders.

<sup>18</sup> For legal purposes Scotland is split into six regions called Sheriffdoms. Each Sheriffdom has a Sheriff Principal who in addition to hearing appeals in civil matters has responsibility for the conduct of the courts. Within these Sheriffdoms there are a total of forty-nine Sheriff Courts varying in size and design but all serving the same purpose. Most cases are heard before a judge called a Sheriff. The work of the Sheriff Courts falls into three main categories - Civil, Criminal and Commissary, and is administered by local Sheriff Clerks and their staff.



This chapter examines the rise of 14% in the total and 24% in the adult prison population between 1993 and 2002.<sup>19</sup> It shows how changes in the use of remand, pattern of convictions, custody rates, length of prison sentences, release policy and practice and the use of community penalties have contributed to the growth.

### The prison population

Chapter 1 noted that the size of the prison population is a matter of political choice. Two kinds of choice determine size; those that affect the 'flow' of offenders into prison and those that affect the 'stock' of offenders already there. The flow is a product of the numbers of offenders sentenced or remanded by the courts<sup>20</sup> and 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). Before examining changes that have affected the flow and the stock of prisoners between 1993 and 2002, 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.

In relation to the main crimes and offences<sup>21</sup> 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.

<sup>19</sup> The upward trend, which has been progressive since 1990, occurred for most types of crime and offence, though it was influenced by increased use of alternatives to prosecution for less serious cases. It was also influenced by the introduction of the Prisoners and Criminal Proceedings Act 1993. The transitional arrangements for early release resulted in a decrease of 600 in the number of short-term prisoners on 1 October 1993 – from 5,800 to 5,200. The upward trend, nevertheless, continued for that year and subsequently. See later in this chapter under Release Policy and Practice.

<sup>20</sup> The flow also includes fine defaulters. However, in Scotland, although fine defaulters make up a large number of prison receptions, they represent only a very small proportion of the average daily prison population because they spend only a very short time in prison. In 2002, the average population of fine defaulters was 61. Receptions of fine defaulters do, nevertheless, affect the flow and impact on prison staff time for other duties. Various measures have been introduced to reduce the number of prison receptions for fine default: between 1993 and 2002 prison receptions for fine default decreased by 26%.

<sup>21</sup> Appendix 3 notes the crimes and offences included in each of the main categories.

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	-
<b>Total</b>	<b>5,087</b>	<b>100</b>	<b>Total</b>	<b>213</b>	<b>100</b>

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)	-	-
<b>Total</b>	<b>1,162</b>	<b>100</b>	<b>Total</b>	<b>80</b>	<b>100</b>

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

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<sup>22</sup> 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%.

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)<sup>23</sup> 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<sup>24</sup> prison population decreased by 9% over the same period.

**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 increases noted above provide the background against which to assess the impact of changes in the use of remand, pattern of convictions, custody rates, sentence lengths, release policy and practice and the use of community penalties.

## The use of remand

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.<sup>25</sup>

<sup>22</sup> Scottish Executive, 2004c, 'Prison Statistics Scotland, 2003'.

<sup>23</sup> 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. The statistics discussed in this chapter include all groups of prisoners unless otherwise stated.

<sup>24</sup> 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 trend from 1993-2002.

<sup>25</sup> 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.

Table 2.4. Average population of adult remand prisoners <sup>(1)</sup>

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 <sup>(1)</sup>

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).

From 1993 – 2002 the adult sentenced population increased by 19% or 717 people (Table 2.5).<sup>26</sup> 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. This is why the study with sentencers concentrates on sentencing rather than remand decisions.

<sup>26</sup> The average daily population of young offenders in custody decreased by 27% over the same period.

## Convictions

This rise in the sentenced prison population is not, however, due to sentencers having to deal with more offenders. 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.<sup>27</sup> These small increases will not, however, account for the rising trend in the prison population over the period.

Table 2.6, which gives the number of people convicted for different crimes and offences in 1993 and 2002 and the percentage change on the 1993 figures, shows an overall decrease of 20% in the number convicted for crimes and an overall decrease of 25% in people convicted for offences.<sup>28</sup> However, other changes in the pattern of convictions for different crimes and offences are likely to be related to the increased use of custody. There has been a substantial decrease of 48% in the number of offenders convicted for housebreaking.<sup>29</sup> In contrast, there have been large increases in the numbers of convictions, of 49% for serious assault/attempted murder, 23% for drug crimes and 126% for breach of social work orders.<sup>30</sup> 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.

The statistics on convictions alone cannot indicate whether the seriousness of the crimes and offences within the categories has changed over the period in a way that would imply proportionately more use of prison sentences. For example, has a serious assault become more serious? While that question cannot be answered from the statistical trends Chapter 3, which examines judicial perceptions of changes over the past decade, provides further insights on possible differences in seriousness.

The statistics do, nevertheless, suggest that some of the rise in the prison population can be explained by the impact of proportionately more convictions for serious crimes of violence, drug crimes and breach of social work orders and the greater use of remands. Two other sentencing factors – the increased custody rate at the courts and the increased length of sentences passed by the courts – have also made a substantial contribution. The importance of these sentencing factors is discussed below before examining the impact of changes in relation to parole and automatic or unconditional release.

27 Scottish Executive, 2004a, 'Criminal Proceedings in the Scottish Courts, 2002', Table 3.

28 Contraventions of the law are divided for statistical purposes into crimes and offences, crimes generally being more serious. See Appendix 3 for the classification of crimes and offences used by the Scottish Executive Justice Department for Criminal Statistics.

29 Housebreaking includes business as well as domestic premises.

30 The category 'breach of social work orders' includes breach of probation, community service, restriction of liberty and supervised attendance orders.

Table 2.6. Persons with a charge proved at all courts by main crime/offence <sup>(1)</sup>

Main Crime or Offence	1993	2002	% change	1993 (%)	2002 (%)
<b>All crimes</b>					
Non-sexual violent crimes	2,022	2,189	+8	4	5
[Serious assault/att murder]	[856]	[1,276]	[+49]	[2]	[3]
Crimes of indecency	1,509	559	-63	3	1
Crimes of dishonesty	31,034	21,806	-30	59	52
[Housebreaking]	[5,219]	[2,736]	[-48]	[10]	[7]
Fire-raising, vandalism etc	4,896	4,129	-16	9	10
Other crimes	12,841	13,363	+4	25	32
[Drugs]	[4,675]	[5,763]	[+23]	[9]	[14]
<b>Total crimes</b>	<b>52,302</b>	<b>42,046</b>	<b>-20</b>	<b>100%</b>	<b>100%</b>
<b>All offences</b>					
Miscellaneous offences	48,762	35,996	-26	44	43
[Breach social work orders]	[2,197]	[4,974]	[+126]	[2]	[6]
Motor vehicle offences	61,742	46,908	-24	56	57
<b>Total offences</b>	<b>110,504</b>	<b>82,904</b>	<b>-25</b>	<b>100%</b>	<b>100%</b>

Notes (1) The figures in brackets are included in the figures for the main crime/offence category.  
Source: Criminal Proceedings in Scottish Courts 2002, Table 4(a) (Scottish Executive, 2004a)

## Custody rates

The custody rate at court is simply the proportion of those found guilty who are then given a custodial sentence (Hough et al, 2003). Table 2.7, which gives the custody rate for 1995 and 2002<sup>31</sup> and the percentage change on the 1995 figures, shows increases in the custody rates at the courts, with the exception of the Stipendiary Magistrates Court and the Lay District Courts. The increased custody rates in the Sheriff Summary and Sheriff Solemn Courts, which impose the majority of sentences in Scotland, reflect both a proportionate increase in the number of offenders given custodial sentences and in the length of sentences.

Table 2.7. Custody rate at all courts, 1995 and 2002 <sup>(1)</sup>

Court	1995		2002		% change
	%	n	%	n	
All courts	10	16,269	13	16,817	+3
High court	83	913	85	760	+2
Sheriff court					
Solemn	65	1,520	68	2,230	+3
Summary	14	11,539	16	12,675	+2
Stipendiary Magistrate	18	1,782	14	1,152	-4
Lay District <sup>(2)</sup>	1	515	see <sup>(2)</sup>		

Notes (1) Persons with a charge proved sentenced to immediate custody.  
(2) In 2002 statistics are grouped together for the Stipendiary Magistrate Court and Lay District Courts.  
Source: Costs, Sentencing Profiles and the Scottish Criminal Justice System 1995 Table 1; 2002, Table 1 (Scottish Office, 1997; Scottish Executive, 2004b).

31 1995 has been used in relation to custody rates in the courts because it is the earliest year for which separate comparable figures for the Sheriff Summary and Sheriff Solemn Courts are available.

Notable increases in overall custody rates<sup>32</sup> between 1993 and 2002 occurred for:

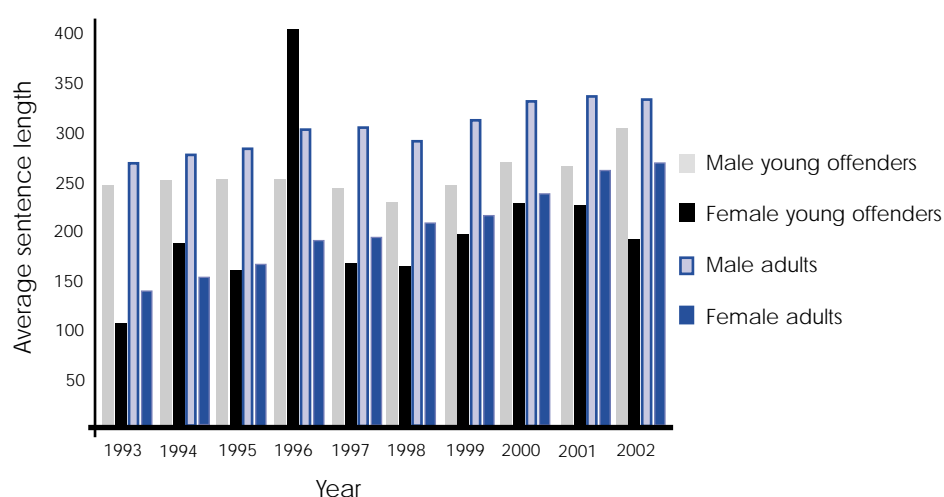
	1993	2002
Housebreaking:	41%	51%
Theft by opening lockfast places:	25%	40%
Fire-raising	28%	41%
Lewd and indecent behaviour:	25%	37%
Shoplifting	20%	28%
Other theft	18%	27%
Drugs	10%	15%

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

## Sentence length

As noted earlier, the size of the prison population on any given day is a product of the 'flow' of remand and sentenced prisoners from the courts together with the number of prisoners already incarcerated. The 'stock' of prisoners – the size of the total prison population – is a product of the flow into prison combined with the length of time prisoners actually serve. Sentence length is, therefore, "a key determinant of the size of the prison population" (Hough et al, 2003, 13). It is not, however, straightforward to identify trends in sentence lengths. For example, given the progressive rise in the proportion of offenders sent to prison, some who would have been given a community sentence in the past are now likely to be serving short sentences of less than six months. This would disguise the extent of increases in other sentence length categories.

Figure 2.1 Direct sentenced receptions by average sentence length imposed, 1993-2002<sup>33</sup>



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

<sup>32</sup> Sheriff Summary and Solemn Court figures are not separated (see Scottish Executive, 2004a).

<sup>33</sup> Figures exclude those sentenced to life imprisonment. It should also be noted that the Scottish Executive Prison Statistics bulletins count direct sentenced receptions differently from custodial court disposals published in the Scottish Executive Statistics on Criminal Proceedings in the Scottish Courts. There are two main reasons for this. First, in the case of backdated sentences if, after backdating, it is found that the custodial sentence has expired, neither the warrant nor the person sentenced will be taken to prison thus a reception will not be recorded though the sentence will be counted in the court statistics. Second, if a person is given one or more custodial sentences on separate sets of charges in the same court in the same day, these custodial sentences will be counted separately in the court statistics though only as one direct sentenced reception.

Figure 2.1 shows the rise in average sentence lengths (in days) imposed for all groups of prisoners received into custody from 1993 to 2002. 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 days in 1993 to 267 days in 2002. 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.

Table 2.8 shows sentence lengths imposed for adult prison receptions<sup>34</sup> in 1993 and 2002 together with the percentage change on the 1993 figures and Table 2.9 provides similar information for young offender sentenced receptions. These tables illustrate proportional changes within different sentence length categories.

**Table 2.8. Proportional changes in sentence lengths for adult prison receptions**

Sentence length	1993 adults	2002 adults	% change adults	% change males	% change females
<b>Total</b>	<b>9,444</b>	<b>10,408</b>			
< 30 days	310	304	-	-	-3
30, < 60 days	885	623	-4	-3	-5
60, < 90 days	1,229	1,146	-2	-2	-3
90 days	2,304	1,962	-6	-5	-3
>3, < 6 months	1,418	1,980	+4	+4	+4
6 months, < 2 yrs	2,384	3,059	+4	+4	+10
2, < 4 years	453	618	+1	+1	+3
4+ yrs (excluding life)	428	645	+2	+2	+4
Life	33	71	-	-	-
<b>Average sentence imposed (days) (1)</b>	<b>259</b>	<b>330</b>	<b>+27</b>	<b>+25</b>	<b>+96</b>

Notes (1) Excluding life sentences. - Where the proportional change was less than 1%

Source: Prison Statistics Scotland 2002 Tables 25, 25A and 25B (Scottish Executive, 2003b)

The proportions of adult (Table 2.8) and young offender (Table 2.9) sentenced receptions for very short terms in prison – 3 months and under – have decreased significantly between 1993 and 2002, most notably for young women. By contrast, there have been substantial proportionate increases in adult and young offenders received into custody with sentences of over 6 months, especially women. The proportion of adult women received into prison with sentences of 2 years to less than 4 years increased by 3% and the proportion sentenced to 4 years and over, excluding life, increased by 4%.

34 Changes in the use of the shorter sentence lengths are important in Scotland, where sentences have traditionally been shorter than in England and Wales. In 2002, for example, 82% of prison sentences were for 6 months or less.



Table 2.9. Proportional changes in sentence lengths for under 21 prison receptions

Sentence length	1993 under 21s	2002 under 21s	% change under 21s	% change young males	% change young females
<b>Total</b>	<b>3,052</b>	<b>2,205</b>			
< 30 days	52	77	+2	+2	-4
30, < 60 days	197	114	-1	-1	-3
60, < 90 days	362	208	-3	-3	-1
90 days	805	416	-8	-7	-18
> 3, < 6 months	463	358	+3	-	+4
6 months, < 2 yrs	925	802	+6	+7	+17
2, < 4 yrs	163	131	-	-	+3
4+ yrs (excluding life)	82	89	+1	+1	-
Life/Section 205 <sup>(1)</sup>	3	10	-	-	+2
<b>Average sentence imposed (days) <sup>(2)</sup></b>	<b>244</b>	<b>295</b>	<b>+21</b>	<b>+21</b>	<b>+82</b>

Notes (1) Section 205 of the Criminal Procedure (Scotland) Act 1995 re life sentences for young offenders.  
(2) Excluding life & Section 205 sentences. - Where the proportional change was less than 1%.

Source: Prison Statistics Scotland 2002 Tables 21, 21A and 21B (Scottish Executive, 2003b)

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. Between 1993 and 2002 there was a steep rise in the numbers of adult prison receptions for longer sentences. Those sentenced to 4 years or more increased by 51%, from 428 in 1993 to 645 in 2002 and those sentenced to life imprisonment increased by 115%, from 33 in 1993 to 71 in 2002. 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.<sup>35</sup>

The discussion above shows that over the past decade there has been a proportionate increase in longer prison sentences and an increase in the numbers of offenders who receive longer sentences. However, clearly identifying the trend in sentence length is not straightforward, though it can be further examined by looking at the breakdown of sentence lengths within crime and offence groups, "where one can assume a degree of homogeneity over time" (Hough et al, 2003, 14). Table 2.10 shows proportional changes in sentence lengths between 1993 and 2002 for selected main crimes and offences. These changes are complex and suggest different explanations will be appropriate for the proportionate changes in sentence lengths for different crimes and offences. Long sentences have become longer for housebreaking and shorter for fraud. In cases of theft of a motor vehicle, other theft and unlawful use of a motor vehicle, sentences have become longer but here the shift is from short to middle range sentences. There has been no overall change for serious assault/attempted murder though sentences for petty assault have become longer. Longer sentences for petty assault may reflect a perceived change in the seriousness of these crimes.

<sup>35</sup> Scottish Executive, 2004c, 'Prison Statistics Scotland 2003'. The statistics for the average daily population of prisoners sentenced to 4 years or more include life sentences and recalls from license.

The decline in longer and the growth in middle range sentences for robbery are more difficult to interpret. These changes cannot be explained by the custody rate for robbery since it was virtually unchanged between 1993 (68%) and 2002 (67%). It is possible that in 2002 the courts were imposing more middle range sentences on a new population of offenders sentenced for less serious robberies than those typically sentenced for robbery in 1993. Similarly, the mixed pattern of proportionate changes in sentence lengths for drugs charges is difficult to interpret. The proportion of very long sentences increased, middle range sentences decreased and short sentences increased. This suggests a bifurcation in sentencing where the more serious drugs charges received much longer sentences whilst the less serious were given shorter sentences. The introduction of Drug Treatment and Testing Orders will also have prevented some offenders from receiving middle range prison sentences and the growth in the proportion of short sentences will reflect the rise of 5% in the custody rate – some offenders on drugs charges who would previously have been fined or received community sentences may have been given short custodial sentences.

**Table 2.10. Proportional changes in use of long or short sentences in terms of selected main crimes and offences – 1993 to 2002 (1) (2)**

Sentence Length	Serious assault & attempted murder	Robbery	Housebreaking	Theft of a motor vehicle	Other theft	Fraud	Drugs	Petty assault	Unlawful use of a motor vehicle
< 30 days	-	-	-	+1	-	+3	-	-1	+2
30, <60 days	+1	-	-2	-1	-2	-2	-2	-3	-1
60, <90 days	-	-1	-5	+1	-2	+3	+1	-2	-3
90 days	-3	-1	-10	-6	-3	+8	-1	-6	-11
>3, < 6 months	-1	+2	+5	+3	+6	+9	+4	+6	+3
6, < 18 months	+3	+6	+3	+2	+1	-10	-5	+6	+11
18 months, < 2 yrs	+1	-	+3	-	+1	-2	-3	-1	-
2 yrs, < 4 yrs	-1	-	+5	-	-	-9	-	+1	-1
4+ yrs	-	-6	+1	-	-	+1	+6	+1	-
Longer or shorter sentences?	No overall change	Shorter	Longer	Longer	Longer	Shorter	Mixed	Longer	Longer

Notes (1) Where the proportional change was less than 1%.  
(2) The figures in the table do not include life sentences and a very small number of short sentences of 31-59 days and 61-89 days in 1993 because these were not recorded in the statistics for that year.

Source: Prison Statistics Scotland 1993, Tables 17; 2002 Tables 22 and 26 (The Scottish Office, 1994; Scottish Executive, 2003b).

## Release policy and practice

In addition to an increase in the use of remands and some changes in the pattern of convictions, two sentencing factors – increases in custody rates and in the length of the longer sentences imposed by the courts – have been shown to have contributed to the rise in the prison population. Decisions affecting the timing of release from prison as a proportion of sentence also affect the size of the prison population by impacting directly on the stock of prisoners at any given time. These decisions depend partly on the system of early release, which is the responsibility of the Executive and Parliament, and partly on individual release decisions, which are either automatic or the responsibility of the Parole Board for Scotland. Statistics to examine whether or not there have been changes over the past decade in the average lengths of sentences actually served are not available. Nevertheless, there have been changes in parole and automatic or unconditional release that have undoubtedly contributed, at least in part, to the growth in the prison population.

The Prisoners and Criminal Proceedings (Scotland) Act 1993 ('the 1993 Act') changed the early release rules for prisoners. Prior to 1 October 1993 prisoners serving 18 months or more could be released on parole after serving the longer of one year or one third of sentence, and all prisoners received remission of one third of sentence. After 1 October prisoners were categorised as either short term prisoners (those serving less than 4 years), or long term (those serving 4 or more years). Those serving less than 4 years became entitled to unconditional release after serving half their sentence while those serving 4 or more years became entitled to be considered for parole (or 'release on licence') after half their sentence and to automatic release but 'on licence' at the two thirds point. The effect of this change in policy was to bring forward early release from two thirds to half sentence for those serving sentences of less than 4 years who were not given parole, but to postpone possible release on parole from one third to half sentence for those serving sentences of 4 years or more.

The commencement of the 1993 Act had an immediate effect on short term prisoner numbers since it led to the release under transitional arrangements of all those who had served more than half their sentence. As noted in footnote 19, short term prisoner numbers fell by 600 on 1 October 1993 resulting in an immediate decrease in the prison population from 5,800 to 5,200. However, the main long term effect of the 1993 Act, in postponing the timing of parole eligibility for longer term prisoners, is likely to have meant that on average a longer proportion of sentence must now be served before release. Therefore, in addition to the trend of increases in the lengths of longer term sentences imposed by the courts, the effect of the changes in parole eligibility is likely to have inflated the prison population more than the changes for shorter sentences will have deflated it.

The 1993 Act did not affect the position of life sentence prisoners but other changes in practice and in law have also led to a rise in the numbers of life prisoners in custody in Scotland. First, Parole Board Reports reveal an unremitting rise in the length of time spent in custody by life sentence prisoners prior to first release. The length of time spent in custody by the majority of life sentence prisoners has risen from over 9 years in 1983 and over 11 years in 1993 to over 14 years in 2002.<sup>36</sup> This trend seems to reflect the adoption of a more risk averse practice on the part of the Parole Board<sup>37</sup> and further increases in the length of time served seem likely in light of the introduction of the Convention Rights (Compliance) (Scotland) Act 2001 ('the 2001 Act').

<sup>36</sup> Appendix C, 'The Parole Board for Scotland Annual Report 2002', 2003, Edinburgh, The Stationery Office.

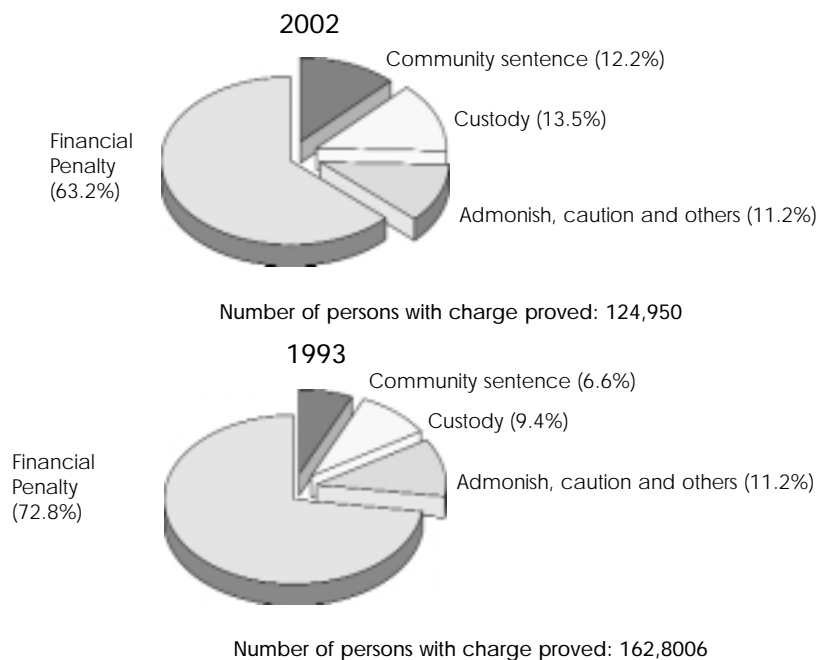
<sup>37</sup> See Hutton, L. and Levy, L., 2002, for the results of their study on 'Parole Board Decisions and Release Outcomes'. This research, based on recidivism rates among determinate sentence prisoners released on parole in Scotland and those considered as presenting too great a risk to be released on parole shows that the Parole Board overestimated the risk of re-offending posed by this latter group.

The 2001 Act, which introduced 'punishment parts'<sup>38</sup> for prisoners given mandatory life sentences and made the decision on release a quasi-judicial one to be taken by a tribunal of the Parole Board, was intended to have a neutral effect on time served. In practice, however, the courts have been imposing punishment parts that will have the effect of lengthening the time that many life prisoners will have to serve before release. If the Parole Board is also adopting a more risk averse practice<sup>39</sup> in considering the release of these prisoners then the effect will be compounded both through later first release decisions and by decisions to revoke life licences and re-imprison. While life sentence prisoners represent only a tiny proportion of all prisoners, the long periods they serve means that these changes will have an increasingly significant effect over time. A typical life sentence prisoner serving 14 years will occupy a prison cell for the same amount of time as over a hundred typical offenders sentenced in the Sheriff Summary Courts, where the average sentence length is around 3 months (97 days).<sup>40</sup>

### The use of non-custodial penalties

The changes between 1993 and 2002 – in release policy and practice, sentence lengths, custody rates, remands and the pattern of convictions – that have contributed to the rise in the prison population have occurred alongside a 41% increase in the use of community sentences.<sup>41</sup> Chart 2.1, which gives the breakdown for all penalties imposed in the Scottish Courts in 2002 and 1993, illustrates the proportionate growth in the prison population at the same time as the proportionate increase in community sentences.

Chart 2.1. Penalties imposed in Scottish Courts in 2002 and 1993



Source: Criminal Proceedings in Scottish Courts 2002, Chart 1 (Scottish Executive, 2004a)

38 An element of the sentence to specifically reflect punishment.

39 In his Foreword to the Annual Report for 2002, the Chairman of the Parole Board for Scotland notes that Hutton and Levy's research (2002) shows that the Board is 'rather conservative in the number of people who are not granted parole but do not offend on their subsequent release on non-parole licence. The Board's ultimate concern is, of course, public safety. If we are to err, therefore, it is better that we err on the side of keeping people in custody rather than releasing someone we consider to be an unacceptable risk.' See McManus, J., 2003, Foreword, in 'The Parole Board for Scotland Annual Report 2002', Edinburgh, The Stationery Office, p 1.

40 See Table 16, 'Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2002', Scottish Executive, 2004b.

41 Supervised Attendance Orders, Restriction of Liberty Orders and Drug Treatment and Testing Orders are not 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 Probations Orders (9,200 including 1,300 with a requirement that the offender should perform unpaid work) or Community Service Orders (5,000).

The rise in the use of community sentences reflects considerable investment over the period aimed at improving their quality and credibility as alternatives to custody. However, their increased use has not had the effect of reducing the use of custody. The reduction has been in the use of financial penalties – overwhelmingly the use of the fine<sup>42</sup> – rather than custody.

Tables 2.11, 2.12 and 2.13 provide breakdowns – for all offenders, adults, and young offenders respectively – in the use of non-custodial penalties. The tables show the breakdowns in 1993 and 2002 and the percentage change on the 1993 figures.

**Table 2.11. Use of non-custodial penalties for all offenders 1993 and 2002 <sup>(1)</sup>**

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

Notes (1) The non-custodial penalties within each of the three categories are described in Appendix 1.  
(2) Community sentence includes POs, CSOs, RLOs and SAOs, see footnote 34.  
(3) Financial penalty includes fines and compensation orders.  
(4) 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).

The increase of 41% in the use of community sentences for all offenders was highest for female offenders, +86% (Table 2.11). The overall increase paralleled an overall 33% reduction in the use of financial penalties; again this reduction was most marked for women, -39%. Other sentences (mainly admonition<sup>43</sup>) decreased by 23%.

42 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.

43 Admonition means that the offender receives a warning from the court and a conviction.

Table 2.12. Use of non-custodial penalties for adults 1993 and 2002<sup>(1)</sup>

	Community sentence <sup>(2)</sup>	Financial penalty <sup>(3)</sup>	Other sentence <sup>(4)</sup>
<b>Male</b>			
1993	5,156	77,743	8,781
2002	8,376	53,376	7,187
% change	+62	-31	-18
<b>Female</b>			
1993	1,047	15,867	3,495
2002	1,968	9,838	2,752
% change	+88	-38	-21
<b>Total</b>			
1993	6,203	93,610	12,276
2002	10,344	63,214	9,939
% change	+67	-32	-19

Notes (1) The non-custodial penalties within each of the three categories are described in Appendix 1.  
(2) Community sentence includes POs, CSOs, RLOs and SAOs, see footnote 15.  
(3) Financial penalty includes fines and compensation orders.  
(4) 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).

Table 2.12 shows that 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 (Table 2.13) 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.

What all groups of offenders share in common are large reductions in the use of financial penalties, the vast majority of these being fines. 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'.<sup>44</sup> 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.

44 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', Scottish Executive, 2004, 109.

Table 2.13. Use of non-custodial penalties for young offenders 1993 and 2002 <sup>(1)</sup>

	Community sentence <sup>(2)</sup>	Financial penalty <sup>(3)</sup>	Other sentence <sup>(4)</sup>
<b>Male</b>			
1993	4,261	19,504	4,631
2002	4,270	13,907	3,269
% change	-	-29	-29
<b>Female</b>			
1993	332	2,131	972
2002	590	1,426	766
% change	+78	-33	-21
<b>Total</b>			
1993	4593	21,635	5603
2002	4860	15,333	4035
% change	+6	-29	-28
Notes (1) The non-custodial penalties within each of the three categories are described in Annex 2.			
(2) Community sentence includes POs, CSOs, RLOs and SAOs, see footnote 15.			
(3) Financial penalty includes fines and compensation orders.			
(4) Other sentence includes admonition or caution, absolute discharge, insanity, hospital, guardianship order, and remit to children's hearing.			
- Where the percentage change is less than 1%.			
Source: Criminal Proceedings in Scottish Courts 2002, Table 12 (Scottish Executive, 2004a).			

In relation to the prison population the decline in the use of the fine has "indirect but important consequences" (Hough et al, 2003, 20). If, for example, offenders now receive community sentences earlier in their criminal careers than they did ten years ago then they will exhaust the alternatives to imprisonment much more quickly than they did 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 right.<sup>45</sup>

45 Scottish Parliament, Justice 1 Committee, 'Alternatives to Custody Inquiry', Submission by the Association of Directors of Social Work (Paper ATC45).

## Summary

Several interrelated factors account for much of the growth in the prison population.

### *Increased custody rates*

- The High Court and the Sheriff Courts, which account for the vast majority of prison sentences, have increased their custody rates over the period.
- The increased custody rates in the Sheriff Summary Courts have made an impact on numbers of prisoners and in the Sheriff Solemn Courts the impact has been on the average lengths of sentences.
- Increased use of imprisonment for the large numbers of offenders convicted for shoplifting and 'other theft'<sup>46</sup> has had an impact on the prison population.

### *Increased length of sentences*

- Average sentence lengths imposed increased for all prisoners, especially for female prisoners.
- However, very short prison sentences – 3 months and under – generally decreased, and for women decreased substantially, over the period.
- There has been a steep rise in the use of long sentences for adults; the numbers of adults arriving in prison with sentences of 4 years and over, excluding life, increased by 51%, and those with life sentences increased by 115%.

### *Other factors*

- The 57% increase in the use of adult remands, 72% for adult females, has been a significant factor in the growth of the prison population.
- The large increase in the numbers of persons convicted for serious assault/attempted murder (49%) has contributed to the rise in the prison population since these crimes almost always result in custody and for long prison terms.
- The substantial increase in the numbers convicted of drugs offences (23%), together with increased statutory maxima for some drugs offences, will have affected the prison population as offences of supply typically attract custody.
- Changes in policy and practice for automatic release, parole and the release of life sentence prisoners have contributed to pushing up the prison population.
- The decline in the use of fines has had indirect consequences for the prison population. If offenders are given community sentences earlier in their criminal careers, they will exhaust alternatives to imprisonment more quickly than in the past.

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<sup>46</sup> The 'other theft' category includes theft of pedal cycles but excludes theft of a motor vehicle and theft by opening a lockfast place. Appendix 3 notes the main crime and offence categories used in Scottish Executive statistics.



Chapter 2 identified factors that have contributed to the rise in the prison population over the last decade. Two of these factors relate to changes in sentencing practices: a higher proportion of offenders are being sent to prison than in the past and the length of long prison sentences has increased. Drawing primarily on the interviews with sentencers, this chapter examines two possible explanations for these sentencing trends.

The first possibility is simply that sentencers may have become more severe in their sentencing decisions. Comparing like with like, they may be more likely to pass prison sentences now than a decade ago and, when they do, they may be more likely to pass longer sentences. This may have happened in response to changes in the climate of political, media and public opinion about crime and punishment.<sup>47</sup> The second possibility is that changes in sentencing practices reflect differences in the nature of the offenders and offences appearing before the courts. Offenders may have longer records or have committed more serious crimes than those sentenced ten years ago. For example, as noted in Chapter 2, serious assaults may have become more serious; they may have more aggravating features – associated with the offence, the offender or both – than those committed in the early 1990s.

Both of these possible explanations are difficult to evaluate. First, it is not possible to know how sentencers would have treated exactly the same cases had they heard them ten years earlier. Second, due to the complexity and inaccessibility of databases, an attempt to evaluate whether offenders' records have changed over the time period would have required a study in its own right. Nevertheless, it is possible to make an assessment of whether sentencing has become more severe and whether there have been changes in the nature of offences and offending over the past ten years from the viewpoint of the sentencers who took part in the study and from an examination of shifts in the legislative and policy context that frames sentencing practice.

This chapter looks first at the question of whether sentencing has become more severe before moving on to examine the question of whether offending and offences have increased in seriousness. It then draws attention to other changes in criminal justice practices and procedures that some sentencers thought were likely to have contributed to the rise in the prison population. The chapter concludes with a brief overview of the factors that account for sentencers making more use of imprisonment than they did a decade ago and for their imposition of longer sentences.

## The severity of sentencing

Changes in the legislative and policy framework and the perceptions of sentencers themselves indicate that, overall, sentencing has become more severe over the past ten years.

### *The legislative and policy framework*

Many changes in sentencing practice are a direct result of legislative change. The maximum sentences for offences are set out in statute and, whilst the sentences passed by the courts rarely approach the maximum, changes in legislation are taken as an indication of the intentions of the legislature in calling for heavier – or lighter – penalties.

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<sup>47</sup> See Ashworth and Hough (1996) ; Dunbar and Langdon (1998); Frieberg, 2001; Hedderman (2003); and Morgan (2003).

Several legislative changes over the period covered by the study have had an impact on the severity of sentences. The main ones are:

- The possibility of prosecutorial appeals against sentence for convictions on indictment, sentencing discounts for guilty pleas<sup>48</sup> and the power of the High Court to issue sentencing guidelines, all introduced by the Criminal Procedure (Scotland) Act 1995.
- The doubling of the maximum sentence for causing death by dangerous driving and related offences, introduced by the Criminal Justice Act 1993.<sup>49</sup>
- The mandatory minimum prison terms for those convicted for the third time of trafficking in Class A drugs, introduced by the Criminal Procedure (Scotland) Act 1995, inserted in the Crime and Punishment (Scotland) Act 1997.
- The provision for automatic life sentences for a second serious violent or sexual assault in the Crime and Punishment (Scotland) Act 1997. Though this provision has not yet been brought into force, its existence is likely to have affected thinking about the appropriate sentence for such crimes.
- The introduction of racially aggravated offences by section 96 of the Crime and Disorder Act 1998.
- The raising of the maximum sentence from 2 years to 7 years for incitement of racial hatred by section 33 of the Crime and Disorder Act 1998. Section 33 introduced the offence of a course of racially aggravated harassment as specified in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

While these legislative changes are mainly directed at specific crimes and offences and/or offenders, most of which do not generally account for large proportions of the prison population, the introduction of increased maximum penalties and mandatory minimum sentences will have indicated that Parliament wishes sentencers to deal with these offences and offenders more severely than in the past. Moreover, given that the sentencers interviewed aimed to achieve a degree of proportionality (along with other aims) in sentencing, it is likely that, when sentencing offences with similar gravity and culpability, the increased penalties specified will have had "knock-on effects on other types of crime" (see Hough et al, 2003, 24). The legislative changes noted are therefore likely to have contributed, at least in part, to the rise in the prison population.

However, at the same time as legislative changes have encouraged increased severity in sentencing, the Government in Scotland has introduced policies aimed at reducing the use of custody by increasing the use of community sentences. The most significant of these policies was introduced in 1991 by National Objectives and Standards for Social Work Services in the Criminal Justice System together with 100 per cent central government funding to the local authorities responsible for these services. The main policy objectives specified were to reduce reoffending and to reduce the use of custody by increasing the

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48 Though until the decision by the Appeal Court in *Du Plooy and others v HM Advocate* on 3 October 2003 (see *Du Plooy* [2003] [www.scotcourts.gov.uk/opinions/XC109\\_03.html](http://www.scotcourts.gov.uk/opinions/XC109_03.html)) this power was not clear or consistently applied.

49 The maximum sentence was further increased to 14 years in the Criminal Justice Act 2003. This means that the maximum sentence has tripled in just over 10 years.

availability, improving the quality and targeting the use of community based court disposals on those most at risk of custody, especially young adult repeat offenders<sup>50</sup>; between 1993 and 2002 criminal justice social work budgets increased by £45 million and the use of community sentences increased by 41%. These increases did not, however, have the effect of reducing the use of custody. As observed in Chapter 2, the reduction was in sentencers' use of financial penalties – overwhelmingly the use of the fine – rather than custody.

Another possible influence on sentencing practices can be guideline judgements, though these can encourage less as well as more severe sentences (see Hough et al 2003, 25). While there have been very few guideline judgements in Scotland, there is potential for the Appeal Court to exert more influence on sentencing practices. The sentencers interviewed in the study said that they kept up to date with Appeal Court judgements<sup>51</sup> and some emphasised that they attempted to proof their decisions against appeals against sentence (see Chapter 4). In addition, several made specific reference to two judgements made since the power to issue sentencing guidelines was introduced by the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'). The first judgement, *Ogilvie*,<sup>52</sup> provides guidelines for sentencing in cases of downloading pornographic images of children. The other judgement, *Du Plooy*,<sup>53</sup> provides clear and specific guidance about sentencing discount in relation to guilty pleas. Subsequent to the Du Plooy judgement sentencers generally state what the sentence is in a particular case and what it would have been but for the early plea.<sup>54</sup> While it is too early to assess what the impact of Du Plooy will be on the length of prison sentences, it is possible that further influential guideline judgements could be made that would encourage sentencers to use prison sentences more parsimoniously and with regard to prison capacity.<sup>55</sup>

### *Sentencers' perceptions*

The Judges were unanimous in thinking that increased severity in sentencing was a key factor in explaining the rise in the prison population, though they differed in their explanations of why sentencing had become more severe over the past ten years. Three thought that heavier sentences were simply a response to more serious crime.

There has been a huge increase in cases dealt with by Judges. Longer sentences are not because Judges are taking a more serious view; just many more serious crimes. [Judge]

The other two Judges provided alternative explanations for greater severity in sentencing. One thought that the Sheriff Courts were responsible for the increased use of prison sentences and the other said that the explanation lay with judicial responses to public opinion.

The tendency with the public – fuelled by the media – is to expect higher sentences with serious crimes. There is a more aggressive streak running through society. The press go to victims for their views. Newer Judges, more in touch with the public mood, are sentencing more heavily than the older ones. Clerks also tend to be more severe. [Judge]

50 For a discussion of the policy and its impact, see Paterson and Tombs (1998).

51 When asked whether they used written guidance in sentencing the vast majority said they kept fully abreast of Appeal Court decisions through Greens Weekly Digest, the Scottish Courts website, Scottish Criminal Case Reports, the Scots Law Times and Sheriff Nigel Morrison's text book on sentencing – see Morrison (2000).

52 Ogilvie [2001] [www.scotcourts.gov.uk/opinions/C183\\_01.html](http://www.scotcourts.gov.uk/opinions/C183_01.html) re section 118 (7) of the Criminal Procedure (Scotland) Act, 1995.

53 Du Plooy [2003] [www.scotcourts.gov.uk/opinions/XC109\\_03.html](http://www.scotcourts.gov.uk/opinions/XC109_03.html), re section 196 of the Criminal Procedure (Scotland) Act 1995. Section 196 introduced the possibility of a court granting a sentence discount where a guilty plea is made.

54 Du Plooy occurred in the midst of the fieldwork. This change in practice was evidenced from observations of sentencing in the courts and during interviews with Sheriffs.

55 This has been done in Court of Appeal judgements in England and Wales – see, for example, Ollershaw [1999] 1 Cr App R (S) 65; Kefford [2002] 2 Cr App R (S) 495.

The majority of Sheriffs who responded to the question about possible explanations for the rise in the prison population (24 out of 29)<sup>56</sup> also thought that greater severity in sentencing had contributed and most of these Sheriffs argued that the growth could be explained by longer sentences for particular categories of crime, especially for drug crimes and for crimes of violence.

Several Sheriffs (10) thought that the main explanation for increased severity lay with changes in the wider political and social climate. Six of these Sheriffs said that the legislature had encouraged an atmosphere of "general punitiveness". The other four talked in more detail about the interplay between politicians, the media and public opinion. They believed that the more punitive social climate generated by politicians and the media had in turn exerted pressure on sentencers towards greater severity – where "public opinion is drawing up penalties".

Without consciously looking at it, the courts cannot avoid reflecting this change in the general attitude; look at the exponential increase in sentences for causing death by dangerous driving and incest. [Sheriff]

Another sizeable group of Sheriffs (9) thought that the main reason for increased severity lay with patterns of offending in different parts of the country.

Jurisdictions are different. This has an impact on the sentence you impose. Although you're dealing with the same sort of crime, the level and intensity in some areas...where it never stops....affects the sentences imposed. [Sheriff]

Five Sheriffs, however, argued that sentencing had not become more severe.<sup>57</sup> They were quite simply puzzled by the rise in the prison population.

It really puzzles me a lot. I find myself thinking that many offences - police assault, driving whilst disqualified, housebreaking, for example - are not as seriously regarded now as they were in the past. The standard answer is drugs...but we have a lot more penalties than we used to have. Sheriffs talk to each other a lot more. Everything should point to the population going down. I honestly don't know. [Sheriff]

Similarly, the Stipendiary Magistrate did not perceive any change in sentencing practices and, like some of the Sheriffs, was puzzled by the increase in the prison population.

Nevertheless, most sentencers thought that sentencing had become more severe due to legislative and procedural changes, changes in the climate of political, media and public opinion about crime and punishment and in response to more serious crimes being committed than a decade ago.

<sup>56</sup> Although a total of 34 Sheriffs were interviewed, five did not comment on possible reasons for rises in the prison population. Three said that it was inappropriate for them to comment because they had no remit in relation to regulating the size of the prison population.

<sup>57</sup> Three of these five Sheriffs sat in the same Sheriff Court.

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## The seriousness of offending

Over half of the sentencers thought that the nature of offending had become more serious over the past ten years. In discussing the seriousness of offending, sentencers talked about two main kinds of changes that would account for increased severity in sentencing practices. These changes were that:

- more repeat offenders were coming before the courts, and
- offences committed within specific crime and offence categories had become more serious.

### *Prolific offending*

Several Sheriffs (9) thought that an increase in the proportion of "repeat" or "persistent" offenders appearing before the courts had contributed to the rise in the prison population. They also said that most of these persistent offenders were dependent drug users.

The big change is so many offenders appearing again and again as a result of drug addiction. Before, it was too much to drink. Now, day in and day out, it is a severe heroin addiction problem. [Sheriff]

These Sheriffs were unanimous in their view that more offenders are appearing before the courts with longer criminal records than in the past because of the growth in illegal drug use and the relationship between dependent drug use and offending. While the relationships between dependent drug use and offending are complex (see Hough, 1996; Hough et al 2002; SCC&CJ, 2002), the number of dependent drug users increased rapidly over the period of the study (Audit Commission, 2002; Godfrey et al, 2002). In addition, research in Scotland has established that large proportions of arrestees test positive for heroin, other opiates and cocaine at the time of arrest (McKeganey et al, 2002), the criminal histories of suspected drug offenders at the time of apprehension are prolific (McGallagly and Dunn, 2001) and strong links have been established between drug dependence and continued offending behaviour - especially thefts, including shoplifting (Jamieson, McIvor and Murray, 1999).

The increased custody rates noted in Chapter 2 for various thefts and shoplifting may well reflect the perceptions of Sheriffs who attributed the rise in the prison population to an increase in the numbers of crimes and offences due to drug dependent persistent offenders. It was not the seriousness of the crimes or offences committed but the accumulation of prolific criminal histories that took such offenders to prison.

Pathetic souls on drugs involved in repeat offending. Their physical and moral character goes. They get remanded in custody. They get deferred sentences, probation, community service. They keep on offending, don't turn up and eventually go to jail. [Sheriff]

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### *Serious crimes and offences*

Most commonly, however, sentencers said that the main explanation for greater severity in sentencing was an increase in the seriousness of offences committed within specific crime and offence categories. Three Judges said that there had been a large increase in violent sexual crimes and one emphasised an increase in serious drug crimes.

Now, every case is rape, serious sexual abuse or drugs. When I started in the High Court [over a decade ago] it was all violence. Every case now is really sex or drug crime. It's an incredible shift – a very serious increase in serious sexual offending. There's no alternative to custody – no public support for any other sentence. And for drug dealers – in Class A – we must send them to prison. The Appeal Court says that anyone in the chain of supply should go to prison. [Judge]

The other two Judges did not, however, perceive an increase in the seriousness of the crimes coming before them. While social change had affected the nature and volume of cases, these Judges did not believe that, for example, violent crimes had become more violent.

I don't see any real change whatsoever in the seriousness of more serious cases. Almost all crimes of violence have a drink element; that has always been so. Sexual abuse cases have come out of the woodwork into the open, and some parts of Scotland have been targeted by the drug barons. The relentless punishing of drug crimes – a lot of that we didn't see before – and sexual abuse cases coming to light. That will tail off and if [sentencers] get knocked back by the Appeal Court, that will be taken into account in setting the tariffs. [Judge]

The majority of the Sheriffs (21 out of 34) believed that offending had increased in seriousness.

My perception is that relatively serious crime is more common now – my impression. I suspect that my sentences are, on average, tougher now than they were at the start of the last decade. This reflects the trend toward more serious crime – on the solemn side. Quite a lot would have been in the High Court previously...but there are still a lot of very minor things in the system. [Sheriff]

It's [the rise in the prison population] because there are very many more long sentences of imprisonment. If there are many more serious crimes and longer sentences, there would have to be a lot of short termers not sent to prison to equal a 25 year sentence. [Sheriff]

In addition, most of these Sheriffs pointed to the impact of illegal drugs on the nature of violence.

Major crimes – that's my view. There has been a huge increase in crimes of real violence as a consequence of drug wars and protecting turf – setting houses on fire, swords, guns, CS gas canisters. Crime has become much more serious – a different kind of violence; more insidious. [Sheriff]

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There has always been violence but the violence now is extreme because of drugs. Supplying drugs is a massive problem in this area. They [drug barons] have their code – extreme violence is used to send out their message. [Sheriff]

Two Sheriffs concentrated on their perceptions that violent crime in general had become more serious.

There are a lot more nasty cases coming before us – particularly by ladies – very nasty violent crimes. [Sheriff]

And one believed that a lack of respect for authority, stemming from "the nanny state", had led to much higher levels of lawlessness especially among younger offenders and that this explained the rise in the prison population.

Several Sheriffs (8) and the Stipendiary Magistrate did not, however, perceive any increase in the seriousness of offending. These sentencers argued that, from their observations, the rise in the prison population was not due to "more people committing more dangerous crimes" [Sheriff].

## The criminal justice system

As discussed above, the main explanation offered by the majority of the sentencers for the progressive rise in the prison population since 1993 was that sentencing had become more severe. This increased severity was attributed to legislative and policy changes, changes in the climate of political, media and public opinion about crime and punishment and an increase in the seriousness of the crimes and offences being committed. The other explanation for increased severity in sentencing, offered by several Sheriffs, was that sentences had become more severe because proportionately more offenders with longer criminal histories were appearing before the courts.

Around a quarter of the Sheriffs suggested that various criminal justice changes were likely to have contributed to the rise in the prison population. The main changes they referred to are noted below.

### *Policing*

Three Sheriffs said that policing had become much more scientific and that the use of CCTV, tape recording and forensic techniques in general, together with changes in the rules of evidence and procedure, had made it "easier to detect and prosecute crime". Such changes, they argued, had affected the prison population.

### *Prosecution*

Six Sheriffs said that changes in prosecution practices had contributed to greater severity in sentencing. Three of these Sheriffs spoke about the impact of the range of alternatives to prosecution available to procurators fiscal.<sup>58</sup> In particular they argued that, since the introduction in 1996-7 of higher levels in the fines that fiscals can offer accused persons<sup>59</sup>, proportionately fewer of the less serious crimes and

<sup>58</sup> Procurators fiscal are Scotland's public prosecutors and fiscal is the general term given to refer to them.

<sup>59</sup> Prior to 1996-7 the fiscal fine was fixed at a single level of £25. This was subsequently changed to variable levels of £25, £50, £75 and £100.

offences had been appearing before the courts. The statistical evidence, whilst not conclusive, lends support to their interpretation. For example, while there has been no overall increase in the number of fiscal fines, the use of higher level fines has increased at the expense of lower ones.<sup>60</sup> This implies that fiscals may be increasing the seriousness threshold for diversion from the courts, thereby increasing the average severity of those that remain to be prosecuted.

The other three Sheriffs talked about a growing tendency amongst fiscals to produce multiple complaints against accused persons based on the detail provided in police reports. This tendency, they argued, meant that offenders would acquire substantial criminal records much more rapidly than they had in the past which, in turn, would increase the likelihood of a prison sentence.

I'm aware of more multiple complaints – even on indictment. It's not unusual to find twelve charges – every detail is separately charged. This tendency leads to offences being committed almost in a passive way. Some-one is stopped by the police. They find a knife, some cannabis and a breach [of the peace] occurs. There are three offences instead of one. [Sheriff]

### *Structures and concepts*

Five Sheriffs argued that National Standards, which had encouraged improved arrangements for more rigorous supervision of community sentences, may have contributed to the increase in breach proceedings, thereby pushing up the prison population. While the published statistics indicate that only a small part of the increase in the prison population can be attributed to breach proceedings alone, that is where no further offending was involved, the very large increase in breach of community orders between 1993 and 2002 (126%)<sup>61</sup> will have made a more substantial impact than the statistics suggest. This is because breach proceedings will have contributed to perceived seriousness of offenders' records.

Two Sheriffs suggested that the growth in the size of the criminal justice system itself had created the growth in the prison population.

There are many more judges than there were ten years ago. More judges, more prison sentences. The whole weight of the business is bigger. [Sheriff]

And one suggested that the thinking behind the introduction of new procedural and practice arrangements had made an impact.

The concept of a bail aggravation, the concept of a license...creates a structure that encourages retribution. [Sheriff]

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<sup>60</sup> See 'The Summary Justice Review Committee Report to Ministers', Scottish Executive, 2004.

<sup>61</sup> See Table 2.6, Chapter 2.



## The rise in the prison population: an overview

Chapter 2 emphasised that the growth in the prison population is not due to an increase in the number of people appearing before the courts. Instead, a substantial part of the rise stems from sentencers making more use of imprisonment now than they did a decade ago and from increases in the lengths of longer prison sentences. The High Court and the Sheriff Courts, which account for the vast majority of prison sentences, increased their custody rates between 1993 and 2002. The increased custody rates in the Sheriff Summary Courts will have made an impact on numbers of prisoners and in the Sheriff Solemn Courts on the average lengths of sentences.

From the explanations given by sentencers for these sentencing trends and from other relevant research and statistical data, it is reasonable to conclude here that much of the rise in the prison population in Scotland can be explained by the interplay between:

- 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;
  - some changes in patterns of offending;
  - sentencers' perceptions that there have been 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, such as those noted by sentencers above.
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Chapter 3 discussed sentencers' explanations for the rise in the prison population over the past ten years. In addition to perceived changes in patterns of offending, they pointed to changes in the legislative and policy framework and to changes in the wider climate of public opinion about crime and punishment as explaining the increased severity in sentencing over the period. The chapter concluded by arguing that much of the rise in the prison population could therefore be attributed to the interplay of these factors. Nevertheless, the decision about which particular offenders go to prison lies with the courts. Understanding sentencing decision-making is therefore central to developing any strategy that seeks to affect the size of the prison population.

Two key sentencing decisions impact directly on the size of the prison population. These decisions concern whether or not to imprison and, if so, for how long. Whilst the research did not focus on decisions about sentence length, the findings on the factors that sentencers take into account when deciding on whether or not to imprison are discussed in the present and subsequent two chapters. This chapter concentrates on the decision to imprison. Chapter 5 examines sentencers' views on alternatives to custody and Chapter 6 considers their wider perceptions of the political and social context within which sentencing decisions are made.

In order to appreciate how decisions are made about whether or not to impose a custodial sentence, this chapter describes sentencers' explanations of the process involved in making sentencing decisions and their views on prison as a unique sentence. It explores what sentencers mean when they talk about using prison as a 'last resort' and how they account for decisions in 'borderline cases',<sup>62</sup> that is, cases on the borderline between custodial and non-custodial sentences. The chapter also outlines sentencers' views on the unavoidability of custody and the use of short prison sentences. It concludes by drawing attention to the differences they perceived in the sentencing task in summary cases as opposed to serious cases taken on solemn procedure.

### The decision-making process

All sentencers were asked to describe their general approach to sentencing. In particular they were asked whether the decision-making process involved was primarily structured or more intuitive and based on experience. Their descriptions ranged along a continuum of emphasis. Most commonly, sentencers (17 out of 40) described a process with structure, though they noted that intuition and experience also played a part. The next largest group (12) were those who argued that the process was not particularly structured and that experience and intuition – the "feel" of a case – were more influential in sentencing decision-making. Almost as many (11) said that their decision-making process was intuitive and based on experience.

Sentencers who said they adopted a structured approach, emphasised why having a structure was important.

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<sup>62</sup> The Judges were asked about borderline cases in general terms whereas the Sheriffs were asked to describe four borderline cases, two of which had led to custodial sentences and two of which had resulted in community sentences, and the main factors that had tipped their decisions towards or away from the use of custody. Details were received from Sheriffs on a total of 108 borderline cases; 48 of the cases went to custody and 60 resulted in non-custodial sentences. As with the Judges, the Stipendiary Magistrate was asked about borderline cases in general terms.

It is important to keep a structure in mind. Sentencing cannot be allowed to degenerate into mere impression. You should discipline yourself with a structure but structure is your servant; you are not the servant of structure. Structure is important because it allows you to stand back a bit. Inexperienced [sentencers] are not doing this. They are calling for Social Enquiry Reports, for example, when the offence is just 'shouting in the streets'. [Sheriff]

Most interpreted and described the structure involved in terms of stages in the sentencing task.

The process is structured but the 'feeling' you get from experience comes into it. If you're dealing with a guilty plea you look first at the indictment – all the features of the offence, aggravating and mitigating. Then you look at previous convictions. If the offender has committed similar acts before, then you're looking at a heavier sentence; if not, then lighter. Next, you note the stage of the case at which the accused pled guilty. Then, look at the Social Enquiry Report and any other reports. At that stage you say to the Clerk, here's the ball park figure – say 5 to 7 years. Then we go into court and hear what is said by the defence, the plea in mitigation, come out and go through the whole process again. [Judge]

I go through a structured process. The first thing to look at is the charge. The procurator fiscal's narration of the charge is important. I have an idea of how serious it is at that stage and move up or down the scale. I look at the previous convictions, if any, and whether analogous and recent. This shows something about the person. I look at other cases and think about what sort of decision I might make. Then I turn to the defence agent. Information coming from the defence agent can move the penalty up or down the scale. A very good plea in mitigation can sway me from a custodial sentence. I almost always call for a Social Enquiry Report. [Sheriff]

Several, in discussing the stages in the sentencing task, stressed that the process was structured by their perception of how the Appeal Court would be likely to view the sentence. A crucial factor was attempting to 'proof' their decisions against appeals against sentence. In addition, they mentioned that they took account of the guideline judgements<sup>63</sup> in *Ogilvie*<sup>64</sup> and *Du Plooy*<sup>65</sup> in appropriate cases. The first judgement provides guidelines for sentencing in cases of downloading child pornography and the second provides clear and specific guidance about sentencing discount in relation to guilty pleas. Subsequent to the *Du Plooy* judgement sentencers generally state what the sentence is in a particular case and what it would have been but for the early plea.<sup>66</sup>

Others conceived of structure in terms of the various factors taken into consideration in their decision-making.

The process is structured in the sense that you take account of all the factors you consider relevant in arriving at a sentence – the gravity of the offence, characteristics of the accused, interests of the victim and in some cases the public interest. It is a balancing exercise – this is where your judgement comes in. [Judge]

<sup>63</sup> Chapter 3 noted that there have been few guideline judgements in Scotland. Nevertheless, during interviews sentencers were asked for their views on sentencing guidance in general and guidelines in particular. Their views ranged from, at one extreme, three who said that discretion cannot be structured by any guidance or guidelines because the circumstances of every case are unique, to four who would welcome detailed guidelines of the kind used by Magistrates in England & Wales – two use these guidelines in their own sentencing practice. In between these extremes are a range of views on guidance and guidelines. Most would support the Appeal Court extending its role in providing guidelines on sentencing.

<sup>64</sup> *Ogilvie* [2001] [www.scotcourts.gov.uk/opinions/C183\\_01.html](http://www.scotcourts.gov.uk/opinions/C183_01.html), re section 118 (7) of the Criminal Procedure (Scotland) Act, 1995.

<sup>65</sup> *Du Plooy* [2003] [www.scotcourts.gov.uk/opinions/XC109\\_03.html](http://www.scotcourts.gov.uk/opinions/XC109_03.html), re section 196 of the Criminal Procedure (Scotland) Act 1995. Section 196 introduced the possibility of a court granting a sentence discount where a guilty plea is made.

<sup>66</sup> *Du Plooy* occurred in the midst of the fieldwork with sentencers and in the courts. This change in practice was evidenced from observations of sentencing in the courts and during interviews with Sheriffs.

There is quite a bit of structure. First, look at the details of the offence itself. Then consider all the other factors – prevalence of the crime, public interest issues, effects on victims – psychological impact, injuries etc. Then look toward anything that is directly mitigating, for example, provocation, to explain the offence. [Sheriff]

Of the sentencers who said that the process was "not particularly structured", most said that intuition and experience played the largest part in their decision-making.

You develop a feel for how things are. I'm conscious of preparing for how I'll explain my decision to the accused because I know that's what I'm going to have to do. You put on the one side all the factors that will mitigate; on the other side the factors that won't. That's as near to a structure as it gets. [Judge]

The process is not particularly structured. It's more of an art than a science; more intuitive than structured. The starting point is the seriousness of the offence. It's important to keep an open mind in everything you do so that you're not applying a policy. Some [sentencers] follow a tariff; for example, that a second time for housebreaking means jail. I can understand that. It gives a degree of internal consistency to one's own sentencing practice. I resist that tendency because I don't want to do an injustice to an individual. But I do follow some structure. If the offence is not so serious that it couldn't possibly be a non-custodial sentence, then I look to previous convictions and the Social Enquiry Report to see what assessment has been made of the likelihood of reoffending and likely compliance with non-custodial options. [Sheriff]

A few of the sentencers who thought the process was not particularly structured said that they would prefer to adopt a more structured approach. They felt unable to do so because of time pressures created by the volume of court business. Nevertheless, these sentencers emphasised that their decision-making process was "disciplined".

I'd like to say it's structured but very often there isn't time to be structured. But you are going through a disciplined process – looking at age of the offender, age of the offence, previous convictions, health, addictions, Social Enquiry Report and any other reports. The prosecution puts forward the case – type of offence, time of day, place, bail aggravations, previous convictions, whether on licence or under supervision. Then you hear from the defence about steps taken to address issues, personal background, recovery, remorse. [Sheriff]

The sentencers who said that their decision-making process was intuitive related this to their experience as sentencers.

I've been sentencing for [many years]. The decision comes from within. You see the case; hear about the facts from the Crown. In the High Court it's almost always custody. How long? A number springs to mind. You hear the defence and adjust at the margins. [Judge]

I believe that it's intuitive. The sentences I impose here could be entirely different from how I'd sentence if I was in [another court]. [Sheriff]

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The feel of the courtroom is a big part in sentencing. The longer you do it the more intuitive it is. I'm against structured sentencing. You've got to trust your judge. [Sheriff]

## Prison as a last resort

Regardless of how they approached the sentencing task, the overwhelming majority emphasised that they used imprisonment, as required by legislation, as a "sanction of last resort". They spoke about prison as the "ultimate penalty" and explained how carefully they considered whether or not a custodial sentence was necessary.

I try very hard to keep people out of custody. I send someone to prison only when there is no other sanction applicable. [Sheriff]

I look for another way if there is any possible one open to me. [Sheriff]

Typically, sentencers said that they would impose a custodial sentence only where the type and nature of the offence were considered to be so serious that no non-custodial sentence was possible, and/or that the offender's record of previous convictions and failure to respond to earlier sentences meant that a prison sentence was necessary. Even in these circumstances, some talked about their "heavy duty" and the difficulty they had in imposing prison sentences.

I'm not very comfortable with the penal aspect of sentencing. The whole debate is skewed; based on the assumption that if you punish some-one, you'll change them. I don't see the evidence of that happening. [Sheriff]

That [sending an offender to prison] causes me more trouble than anything. It's a terrible thing to send a young person to custody – to think your decision could ruin a life - the most difficult decision. [Sheriff]

It may be the defining moment of a person's life if you send them off to prison. To take someone away from their family, community, their life...especially a youngster – that's very hard. [Sheriff]

Without doubt sentencing someone to prison is the most difficult thing I do. Bluntly, I don't like sending people to prison. [Sheriff]

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## Prison as a unique punishment

In addition to viewing prison as the last resort, the overwhelming majority of sentencers (35 out of 40) argued that imprisonment was qualitatively different from any other sentence. Even although direct alternatives to custody were available to them, most did not regard these as equivalent in penal weight to a prison sentence.

Prison is something different. I'm certain of that. Community service is not in the same league. [Judge]

Imprisonment is in a different category. Community service is an 'alternative' not an 'equivalent'; these are different concepts. [Sheriff]

Community penalties are not fully equivalent. Even the most intrusive, punitive, higher tariff penalties are not as punitive as prison. [Sheriff]

It [prison] is totally different; no community sentence has the same impact on the quality of a person's life. [Sheriff]

Of course prison is fundamentally different; not equivalent in penal weight to any community sentence. Even the dreaded 'tagging' is not the same. [Sheriff]

Several sentencers emphasised that accused persons also regarded imprisonment as very different from any legally specified alternative to custody.

I do not think that prison is equivalent – not in the mind of the accused either. Restriction of liberty orders and drug treatment and testing orders can be demanding but prison is qualitatively different. People forget this. That we are asking ourselves – "do I have to send this person to prison?" – indicates it is the worst sentence. [Judge]

Prison is on its own. I'm aware of research that says offenders find some community sentences as hard as custody. I have not found that. Offenders hate going to jail; they like to avoid it. Custody is a uniquely severe and unpleasant disposal so far as offenders are concerned. [Sheriff]

Custody is the only sentence that the accused fears. Prison is by and large the only sentence that pleaders [defence agents] will ask you not to impose. [Sheriff]

I think a custodial sentence is different; it takes the sentencing process up to a higher plane. As a general rule, it's the one sentence the accused want to avoid. [Sheriff]

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The essence of a prison sentence, the deprivation of personal freedom, was the most common reason sentencers gave for the perceived qualitative difference between custodial and other sentences.

Prison is qualitatively different because it involves the deprivation of liberty; that's a very severe punishment. [Judge]

Imprisonment is in a class of its own because you're depriving some-one of their liberty. [Sheriff]

I'd see imprisonment as different. It brings so many consequences you can't anticipate. It's very, very different; the only sentence that people can be made to do. It takes away a person's free will. [Sheriff]

Tagging and community service are supposed to be equivalent but they're not. Shutting the door and locking someone up is not the same. Jail is reserved for when you've tried everything else. There's something 'awful' about taking away someone's liberty. People don't understand just how severe a punishment prison is. [Sheriff]

Two of the Judges and three Sheriffs did, however, argue that some community sentences could be regarded as equivalent to some prison sentences.

I do think that community service is and can properly be regarded as equivalent to a short prison sentence, that is, of between three and six months. [Judge]

Community service is a direct alternative to prison and I think of it like that. Sometimes I look at a strict probation order as an equivalent to a short custodial order. The duration of a probation order can be for much longer. For some people a non-custodial order can be very difficult. I am not convinced that custody is the most severe sentence. [Sheriff]

Community service is a big imposition; also the restriction of liberty order and a high tariff probation order. I regard all three as punishments. If they come back and are breached they can go to prison so I don't think one's a punishment and one's not. [Sheriff]

## Borderline cases

Sentencers' discussions of borderline cases, that is, cases on the borderline between custodial and community sentences, gave further insight into their views on whether or not to imprison. The Judges emphasised that borderline cases most often appear in the Sheriff Courts. Nevertheless, all said that they heard at least some such cases.

Three of the Judges said that an "appreciable number" of borderline cases came before them.

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They are not infrequent. That's where sentencing is most difficult. In many cases the question is – "how can I keep this person out of custody?" Judges are lucky. We are faced with this question a lot less than Sheriffs but at first instance and at appeal we are faced with the borderline question. The question is slightly different on appeal. Then it's – "did the sentencer exceed the discretion?" [Judge]

These three Judges gave examples of common features of borderline cases and spoke, in particular, about the youth of offenders. The other two, whilst arguing that borderline cases in the High Court were the exception because of the seriousness of the cases they typically dealt with, said that in some circumstances the personal characteristics of an offender could make a case borderline. These two Judges gave examples of offenders with severe drug dependence problems who were given drug treatment and testing orders.

Almost two thirds of the Sheriffs said that there were a "fair number" of borderline cases and that they occurred "regularly" in their courts. Two argued that every case was borderline, unless the nature of the crime or offence was very serious and a further three said that there were many such cases. By contrast, eight said that borderline cases were not very common but that there were some.

Not many but there are some, where right up until the last minute the decision is borderline – where you're thinking about custody, then community, then custody, then community – wavering until the last moment when you're about to sentence. Their lawyer, in mitigation, can sway you. Judges are just human. [Sheriff]

Seven Sheriffs, however, thought that the concept of a borderline case as one that could result in either a custodial or a community sentence was "flawed". Four of these Sheriffs preferred to think of cases where custody was "indicated" but where the offender could be "retrieved". Such cases would always be resolved in one direction – a community sentence would be given. These Sheriffs could not think of choosing custody where there was any choice at all and were therefore unable to provide any examples of borderline cases that had been tipped in favour of custody.

The other Sheriff who thought the concept was flawed said that there were cases where either a custodial or a non-custodial sentence would be:

...reasonable, rational and justifiable....where custodial and non-custodial are overlapping. They are not 'cusp' in the sense of being on the edge. I look for a division in my analysis of all the factors I take into account. Somebody else may take a different view. [Sheriff]

The remaining two Sheriffs did not think that borderline cases existed.

I have great difficulty in recognising the scenario. Only when you've heard all the facts can you reach a decision. Once you've heard everything the decision is clear. [Sheriff]

Nevertheless, most of the Sheriffs were able to describe four borderline cases, two which had resulted in custodial sentences and two in community sentences. The main factors that tipped their decisions in



these cases towards or away from the use of custody illustrate what using prison as a last resort means in practice. The cases included a wide range of crimes and offences. The most commonly mentioned were assaults of varying degrees of seriousness; around half were assaults to severe injury. Motoring (including driving whilst disqualified, dangerous driving and driving with excess alcohol) and drug offences were the next most commonly mentioned offences, followed closely by theft (including shoplifting), fraud and housebreaking. There was no consistent pattern in the kinds of offences given custodial and non-custodial sentences, with the exception of drugs cases. A notably higher proportion of these cases than those in other categories resulted in custodial sentences.

For all crime and offence categories mentioned there were, however, clear differences in the types of factors that inclined sentencers towards a decision one way or the other. In general, characteristics of the offence and the offender's criminal history were most influential in those borderline cases that resulted in custody (custodial borderline cases) whereas the offender's circumstances and condition were most influential in cases where custody was considered but rejected (non-custodial borderline cases).

Table 4.1 below gives a breakdown of the factors cited by Sheriffs as influencing their decisions in custodial and non-custodial borderline cases.

**Table 4.1. Factors taken into consideration in 108 borderline cases**

Factors (1)	Custodial cases	Non-custodial cases
Nature of offence (2)	32	7
Criminal history	28	12
Response to prosecution	7	15
Offender's circumstances	2	30
Offender's condition	4	26
Other (3)	9	17

Notes (1) Key factors which tipped decision towards or away from custody  
 (2) Seriousness of the offence, including offence-related aggravating or mitigating factors. This included the degree of harm done to victims.  
 (3) Includes reference to deterrence, the need to send a 'message' about certain offences, perceived risk of reoffending, Social Enquiry Report recommendations, attitude of the victim and other factors

For those cases that resulted in custody, decisions were based on two main factors:

- the kind or nature of the offence was deemed so serious that no sentence other than custody was possible, and/or
- the nature and pattern of the offender's past convictions and failure to respond to earlier sentences ruled out non-custodial options. The features of criminal history that put offenders at risk of custody included analogous past convictions, increasingly prolific patterns of offending and/or indications of an escalation in the seriousness of offending.

By contrast, the present circumstances and condition of the offender were the key factors in non-custodial borderline cases. Other factors, such as response to prosecution in terms of showing remorse, or criminal history such as having "no record of breaches" for community sentences, or not having "much of a record", were also cited as contributory. It should also be noted that, in three of the borderline cases involving downloading pornographic images of children, the critical factors that tipped the decision in favour of a non-custodial sentence were the condition of the offender together with the sentencing guidance provided by the Appeal Court in *Ogilvie*.<sup>67</sup> In these cases the Sheriffs said that the *Ogilvie* decision meant that they could only impose a short prison sentence and that such a sentence would serve no useful purpose. The offenders in question, who were elderly and/or suffering from mental health problems, would be more likely to be prevented from re-offending by a community sentence which could be imposed for much longer, giving a better chance of dealing with the offending behaviour.

Overall then, sentencing decisions were tipped away from the use of custody by a range of issues related to personal mitigation. Indeed Sheriffs' accounts of non-custodial borderline cases repeatedly emphasised the significance of personal mitigation.

You have an idea where it's going but then you hear the plea in mitigation; all the mitigating circumstances. You would be surprised how many times custody is not chosen – how often I move back from that. [Sheriff]

The factors that Sheriffs cited most frequently in non-custodial borderline cases were:

#### *Circumstances of the offender*

- Family responsibilities (for children or elderly/disabled relatives)
- Support from family, especially parents
- Stable relationship with partner
- Current employment/training or prospects of employment/training
- Accommodation

#### *Condition of the offender*

- Evidence of motivation to address problems causing offending behaviour (drugs, drink, violent tendencies and so on)
- Medical – physical and mental health problems
- Age – young or elderly offender

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<sup>67</sup> *Ogilvie* [2001] [www.scotcourts.gov.uk/opinions/C183\\_01.html](http://www.scotcourts.gov.uk/opinions/C183_01.html)

### *Response to prosecution*

- Demonstration of genuine remorse or the capacity to understand the consequences of the offence
- Evidence of co-operation with the courts and social workers, for example, not having a record of breaches
- Guilty plea

### *Criminal history*

- No previous convictions; not many previous convictions; no recent convictions; no related previous convictions.

## Accounts of sentencing

Sheriffs' accounts of borderline cases revealed that sentencing decisions involve social and moral reasoning as well as expertise in applying the law. The accounts given in the following two borderline cases illustrate that their judgements about the responsibility and culpability of an individual offender are based on assessing intentions, desires and capabilities as well as the offender's attitude to the offence and the motivation and determination to stop offending. In making such judgements, as Hough et al have argued, "sentencers' decisions are framed within a set of explicitly ethical concepts" (2003, 41).

### **Case study 1: Borderline case leading to custodial sentence**

This case involved two assaults. The offender was a man in his mid 20s with six previous convictions for assault. He pleaded guilty at trial.

After having had far too much to drink in a club in the city centre at night, the offender had become involved in a drunken street argument. The offender frequently drank far too much and became aggressive. The argument escalated in seriousness, the offender completely lost his self control and assaulted the victims by punching and kicking them. He had forced one victim onto the ground, stamped on him, and kicked him in the head. Neither of the victims was seriously injured.

The offender was sentenced to 2 months in custody on each assault charge; the sentences were to run consecutively. The SER had recommended probation with the condition of alcohol counselling. The Sheriff had considered imposing probation with two conditions – community service and alcohol counselling. He considered this because no serious injuries had been sustained by the victims. Custody was, however, thought to be unavoidable because of the offences (the violence was moderately serious) and the offender's criminal history of previous similar incidents. The offender had also had community service in the past – he completed 100 of the 120 hours – did not appear to have learned a lesson from earlier incidents and did not plead guilty until the trial. The mitigating factors taken account of by the Sheriff were, as argued in the defence agent's plea, that the offences were old - it was over a year since the offender had been charged – and that in the intervening time period, the offender had recognised that his violence was caused by his alcohol abuse. The offender had addressed his alcohol problem, had stopped drinking and was determined to stay out of trouble. On these grounds, the sentences imposed were short.

### Case study 2: Borderline case leading to non-custodial sentence

A Benefits Agency adjudications officer was convicted of a large fraud (£10,000). The offender, a woman in her late 20s, had used the computer system at work to set up false benefit claims.

The Sheriff imposed probation for 2 years, community service for 250 hours and a compensation order of £5,000.

The Sheriff had considered custody for 6 - 9 months due to the seriousness of the breach of trust, defrauding the public purse and the need to give an exemplary sentence in the public interest.

The non-custodial decision was based on the offender's condition and circumstances. Factors taken into account by the Sheriff in personal mitigation were that:

The offender was very remorseful, had been fully co-operative with the police and had entered an early guilty plea.

The social work department had provided a very supportive SER recommending probation and assessing the offender as presenting a low risk of reoffending

The defence agent made an impassioned plea for a disposal that would do no further harm.

The offender had suffered from severe depression following her mother's death 4 years earlier.

The offender had had an abusive relationship with a man who introduced her to drugs. After her mother's death, she had rapidly developed a very serious and expensive heroin addiction problem.

The offender had incurred huge debts because of her addiction and was under pressure from drug dealers.

The offender had recently undergone treatment for her addiction in a clinic and was now on a methadone programme in the community.

The offender wanted to make restitution and her father, who had recently been diagnosed with cancer, had agreed to repay half.

The offender planned to enroll for a college course leading to a career in drugs counselling.

In borderline cases presence of remorse contributed to tipping the balance towards a non-custodial option and, in explaining the sentencing decision-making process, several sentencers commented on the significance of "contrition" or "remorse". Several noted that they were dependent on the Social Enquiry Report for an indication and assessment of remorse in the discussion of the offender's attitude to the offence. They also emphasised that they would need to assess that an expression of remorse was authentic, that it was "truly repentant".

The nature of the response of the accused is important. Even in relatively serious cases, where you must take a very serious view in the public interest, evidenced contrition should be taken into account. The way in which contrition is carried through can indicate that another option [to custody] is possible. [Sheriff]

The language of morality was also used when sentencers referred to an offender being of "previously good character" or, by contrast, when they spoke, albeit rarely, about an offender being "a bad wee devil". In several borderline cases Sheriffs referred to the offence as "out of character", indicating that they believed the offender was essentially a law-abiding person who had acted under extreme distress or in most unusual circumstances. In such cases, evidence of remorse was very important in convincing the Sheriff that the offence would not be repeated. It also permitted a sentencer to show compassion.

One of the functions of punishment is also to show mercy. Sometimes, despite the gravity of the crime, the circumstances of the offender may influence you towards a non-custodial disposal... where there is hope that the offender can be rehabilitated. [Judge]

Sentencers emphasised signs of "hope" for offenders when they spoke about the factors that influenced them in borderline non-custodial decisions. They referred to steps taken by offenders to address the problems associated with their offending behaviour, for example, undertaking voluntary alcohol or drug treatment or good progress reports on an earlier probation order. They spoke about mending relationships with parents or partners or having work or training prospects as likely to lead to more stable lifestyles, all of which were thought to improve an offender's ability to comply with a community sentence. Similarly, an existing job, home, family support, or family responsibilities, were viewed as likely to improve the chance that a community sentence would be successful, not least because the offender had more to lose by re-offending.

By contrast, several sentencers said they frequently imposed a custodial sentence "in despair" of the offender. In such cases, the offender had been breached once or more in the past for failure to comply with a community sentence and, from the sentencer's viewpoint, there was nothing – no stabilising factor in the offender's life – to suggest that a non-custodial sentence would be any more successful the next time. Given that sentencers cited having a job, home and family as factors that could tip the balance in borderline cases in favour of a non-custodial sentence, "offenders who are already socially and economically disadvantaged are likely to suffer further disadvantage in the sentencing process" (Hough et al, 2003, 42). The differential impact of personal mitigation factors on offenders from different socio-economic groups was also evident in three non-custodial borderline decisions. In these cases the Sheriffs argued that the effects of custody would be "disproportionate" because it would lead to the loss of a job and home.

Several sentencers spoke about such disparities. They were fully aware that, in cases such as Case study 2 above, an offender's socio-economic background had had an impact on the sentence.

Some people would say that [the offender] is fortunate to be able to repay the money to avoid a custodial sentence. But £X will be recovered....I could have given an exemplary custodial sentence but it wasn't essential. If you're thinking of imposing a custodial sentence you must be satisfied that no other sentence is appropriate." [Sheriff]

Some Sheriffs also talked about a large part of sentencing in the Sheriff Summary Courts in terms of "processing social problems".

We're dealing with the management of drugs, alcohol and deprivation problems. The same issues and faces come back over and over again. My approach is to exhaust all the alternatives. I don't see any value in the short, sharp, shock. What's the point? It's only when I'm at the end of my tether that I use prison....at the end of the line...as a last resort... to take him [the offender] off the streets. [Sheriff]

The last resort for this and other Sheriffs who held similar understandings, will not, however, mean the same as the last resort for Sheriffs who did think that a "short, sharp, shock" in prison early in a criminal career could work. It is, therefore, "a relative rather than absolute concept" (Hough et al, 2003, 42). Nevertheless, however they defined it, all sentencers in the study were clear that they used custody only as a last resort, when the seriousness of the offences and/or the offenders' records left them no other option.

### The unavoidability of custody

All sentencers were also clear that sentencers' views on what constituted the last resort would differ and were aware of current Government concerns about possible ways to affect the size of the prison population, especially through reducing the use of short custodial sentences. They were therefore asked for their views on the use of short prison sentences, that is, sentences of up to six months, and the circumstances in which they were appropriate. While several sentencers said that short prison sentences were "a complete waste of time and money" and that they "don't do any good", all argued that the discretion to sentence to short periods in custody was necessary, at least in some circumstances with some offenders.

Over half of the sentencers said that short sentences could be useful, though they differed in how they conceived of that utility. Most of this group conceived of their utility in terms of the impact on offenders. Some argued that short sentences had an impact on preventing re-offending.

There are pages of offences and sentences before we give a short sentence. The fact that many - about 35% - are not being reconvicted from short prison sentences is a success. [Sheriff]

Others commented on the shock value of short sentences, especially for young offenders. Here the emphasis was on deterring individual offenders from future crime coupled with a concern not to have to send them to prison for longer.

There is nothing like the close of the prison gate in bringing home the seriousness of the situation...the short, sharp, shock. A short period for young offenders might shock them and stop them re-offending if they can be kept apart from more hardened criminals. A short sentence is preferable to having to impose longer sentences on young offenders. [Judge]

And a few noted that a short prison sentence could be useful in removing some offenders temporarily from the chaos of their lives by "getting them off the streets and away from drugs." [Sheriff]

The other sentencers who thought that short sentences could be useful did not conceive of utility in terms of having any positive impact on offenders. Instead, their utility lay in protecting the public and victims by removing prolific offenders from the community or as a straightforward punishment to mark the unacceptability of certain kinds of behaviour, for example, carrying knives.

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They [short sentences] do nothing to rehabilitate offenders but I also have to think of the shopkeeper, the victim. It comes down to retribution. [Sheriff]

Another group of sentencers (quarter) were much more doubtful about the utility of short sentences. They did, however, see a very limited degree of utility in very short sentences – of no more than a few days or weeks. Most of this group thought that the only possible justification for such very short periods was that they could act as a deterrent to a few offenders in some circumstances.

There are a very very limited number of cases in which they [very short sentences] might be helpful. The vast bulk of repeat offenders are not likely to be deterred by a short sentence. They can be useful in the case of someone who is generally responsible but is beginning to develop bad habits. A short, sharp shock can work. [Sheriff]

The remainder of the sentencers said that, as with other prison sentences, they used short sentences only as a last resort. These sentencers said that custody was unavoidable, that they were "driven" to impose a short prison sentence because of the circumstances of the offence and/or the offender's record. Even though these sentencers said that such sentences had no constructive impact on offenders, there was a point at which they simply had "no other option". This was because the pattern of offending had reached a point where what sentencers generally perceived as the most severe punishment was necessary.

I haven't been shaken out of the view that there are certain things that people should be punished for. There has got to be a time when you say – "right, that's just too much" – where you've simply got to give an unpleasant sentence. [Sheriff]

In discussing short sentences the majority of Sheriffs emphasised that the sentencing task in summary cases is qualitatively different from the task in cases taken on solemn procedure. It is in summary cases that the concept of a borderline case comes to the fore. Judges and Sheriffs were agreed that in serious cases the sentencing task is much more rarely about making a choice between a custodial and a community sentence but rather about how long the custodial sentence should be. The Judges stressed that Sheriffs had an "onerous decision" to make when sentencing an offender to custody for the first time. The majority of sheriffs emphasised, time and again, that a major constraint on their sentencing decision-making was time. They cited various reasons for this problem in the Sheriff Summary Courts but the most commonly mentioned were perceived increases in Bail Act offences, breach proceedings for community sentences, and, most importantly the time taken for cases to come before them. The delays were at earlier stages in the criminal justice process. It was not uncommon in summary procedure for a case to be more than two years old before the Sheriff heard it. This time delay was perceived as impacting on decision-making in several ways, most importantly insofar as it reduced the options that were realistically open to sentencers. Over half the Sheriffs further argued that, given the pressure of summary business, particularly in high crime areas, there was little time to fully explore what community alternatives might be appropriate and available. This problem was compounded by the number of outstanding charges against many offenders.

Several Sheriffs and Sheriff Courts had developed various ways to attempt to overcome these constraints on their decision-making. For example, some had developed 'deferred sentence courts' to deal with large numbers of cases where sentences have been deferred on the same offender on different convictions. Typically a probation order had been imposed on such offenders on one of the charges, whilst deferring on others. Such 'structured deferred sentences' were used because:

The main purpose of probation is to supervise and work towards the offender's rehabilitation. A structured deferred sentence means that I defer sentencing on the further charges until they've completed their probation. [Sheriff]

Other Sheriffs had used a similar approach with deferred sentences where offenders were on community service orders. However, these and other creative developments did not solve the time constraint and procedural difficulties due to the volume of cases, not least the volume of failures to appear.

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Chapter 3 noted sentencers' views that legislative and policy changes over the past decade had contributed to the growth in the prison population. The chapter observed that, at the same time as several legislative changes had encouraged increased severity in sentencing, the Government in Scotland had introduced policies aimed at reducing the use of custody by increasing the use of community sentences. In 1991 a new policy introduced National Objectives and Standards for Social Work Services in the Criminal Justice System together with 100 per cent central government funding to the local authorities responsible for these services (hereafter referred to as 'the 100% funding policy'). The 100% funding policy was largely introduced due to a perceived ineffectiveness of generic social work in relation to offenders (see Paterson and Tombs, 1998).

Prior to 1991, subsequent to the Social Work (Scotland) Act of 1968 which had abolished the probation service, local authority generic social work departments had been responsible for work with offenders. 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 in order to promote further improvement in their delivery. Nevertheless, the Government in Scotland has argued that more needs to be done in order to improve the effectiveness of community sentences in reducing re-offending. Thus, at the time of writing it is clear that further change to the organisation and delivery of criminal justice social work services is on the horizon, though the direction of change has yet to be decided.

The 100% funding policy was based on the assumption that increased use of imprisonment by sentencers reflected dissatisfaction with or lack of availability of community-based alternatives. The policy therefore aimed to reduce the use of custody by increasing the availability and improving the quality and targeting of community-based court disposals on those most at risk of custody, especially young adult repeat offenders.<sup>68</sup> Subsequent policy thinking has also been largely based on this assumption; that if more and better community sentences were available, sentencers would reduce their use of custody. The findings from this study, however, show 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. As discussed in Chapter 4, the overwhelming majority of sentencers not only viewed prison as the 'last resort' but also as a 'unique punishment'; one that no community sentence was equivalent to in terms of its penal weight. Sentencers all stressed that they already used a community sentence wherever possible. Thus, they did not identify a lack of satisfactory community options as a factor tipping their decisions towards custody. In not one of the forty eight borderline cases that resulted in custody was a lack of community options cited as a key factor in the sentencing decision.<sup>69</sup>

This is not, however, to suggest that sentencers' views about criminal justice social work services and the existing range of community sentences are irrelevant to sentencing decisions in general and borderline cases in particular. On the contrary, they are highly relevant. For example, while no borderline custodial decisions were made because of a lack of community options, during interviews several sentencers argued that there were problems about the availability of some community sentences, especially community service. They said that it was not uncommon for Social Enquiry Reports to indicate that places were unavailable or that there would be a substantial delay in obtaining a place. In such circumstances,

68 For a discussion of the policy and its impact, see Paterson and Tombs (1998).

69 In discussion of borderline cases, Sheriffs were prompted for availability (or lack of availability) of community options as one factor (among others) that could shape a decision about whether or not to impose custody.

sentencers said that they would defer sentence rather than resort to custody. This chapter therefore outlines their views on the strengths and weakness of existing community sentences and identifies types of community provision that they consider would be likely to reduce the use of custodial sentences.

### Views on criminal justice social work services

In general, the majority of sentencers spoke highly of the provision of criminal justice social work services in relation to existing community sentences. They were particularly satisfied with the quality of the service provided in Social Enquiry Reports, Probation Orders, and Drug Treatment in Testing Orders (DTTOs) (in the areas that DTTOs were available). Several mentioned that since the introduction of National Standards they had noticed a "dramatic improvement" in criminal justice social work services to the courts. They were confident that the conditions of community sentences were being monitored well and most Sheriffs said that there was good communication between the local criminal justice social work service and the court. Several mentioned having regular formal meetings with the local criminal justice social work service and some said they had frequent informal meetings with social work managers, such as a "lunch round table".

Some problems were, however, identified, though the problems differed in different parts of the country. A general problem, mentioned by Sheriffs in all six Sheriffdoms (court areas), concerned the adequacy of the resources devoted to community sentences. Half of the sentencers said there was a "resource problem", that criminal justice social work services were "underfunded and understaffed". In particular, in three of the six Sheriffdoms there had been insufficient staff to supervise Community Service Order (CSO) placements. This shortage had led to delays in finding appropriate placements in the community and concerns about the supervision of offenders on such placements.

I have anxieties that they [CSOs] are not being monitored. We will lose confidence if they are not properly resourced. [Sheriff]

By far the most frequently mentioned problem was, however, in relation to breach procedures. While the Judges were satisfied with breach proceedings, over three quarters of the Sheriffs said that they were "far too slow" and that this "diminished the potency of the court's sanction". Breach proceedings were frequently described in the following terms – "hopelessly bureaucratic", "seriously ineffective", "totally inadequate", "a shambles". The problems with breach proceedings were not attributed to criminal justice social work alone. More frequently, sentencers mentioned difficulties in other parts of the criminal justice system – procurators fiscal, sheriff clerks and police.

I'm concerned about the period of time it takes for breaches to come in; this isn't working. I can't be certain where the problem lies. The reasons are quite complicated but social workers alone aren't to blame. The papers often lie in the fiscal's office for months. Breaches are not a priority there. Some of the hold up is in the court – papers pile up on a [sheriff] clerk's desk. [Sheriff]

In two of the six Sheriffdoms, however, Sheriffs were satisfied with breach proceedings. They had asked the local criminal justice social work services to 'roll-up' all community sentences for any offender subject to breach proceedings and these were dealt with together in 'roll-up courts'.

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## Do sentencers want feedback on cases?

Two thirds of the sentencers were satisfied with the information they received about community sentences. This did not mean that they would not, however, welcome more. Four of the five Judges, while content with the information they received, said that in individual cases they generally only heard about "the failures". They noted that more information about the progress of individual offenders would be helpful; it would be "satisfying to hear more about the successes" as this "encourages judges". Nevertheless, they were concerned about the use of "overstretched resources" and the "additional burden" that this would place on criminal justice social workers. The other Judge argued that there was insufficient feedback on all community sentences with the exception of Drug Treatment and Testing Orders.

The majority of Sheriffs – all in two Sherifffdoms – were well satisfied both with the information on individual cases and with the general information they received from criminal justice social work. Several of these Sheriffs referred to being "actively involved" in community sentences through very regular meetings with other Sheriffs in the area and social work managers. Around a third of Sheriffs, however, said that they would appreciate more feedback, though the nature of the information they desired varied. Generally these Sheriffs felt that there was insufficient feedback in individual cases. Only four Sheriffs wanted more feedback in the form of aggregated statistics; for example by regular, say three monthly, reports summarising information on community sentences in their court.

Several Sheriffs identified specific areas for improvement. Some, mainly sentencers who had recently worked in courts in other parts of the country, spoke about variability in feedback provided in different courts. While content with completion reports for offenders who had been on probation they did not see completion reports for offenders who had been on community service orders. Other Sheriffs spoke about a lack of information on the availability of specific programmes in their areas. They emphasised a need for "more integration of contracted out programmes with social workers" and would like a booklet or compendium outlining the availability of community options. Another three Sheriffs said that they would like to know more about the content of community service order placements.

## Does current provision need to be redesigned?

Overall, the majority of sentencers were content with current provision, though areas for improvement were identified. Sentencers' comments in relation to Probation Orders were overwhelmingly positive; only a few Sheriffs expressed concerns about the effects of staff shortages on the supervision of offenders and two said that for a substantial period of time probation had become a "non-viable option" in that area. Comments on Community Service Orders (CSOs) were also generally positive. Most sentencers argued that community service was "very demanding" though a substantial number expressed more dissatisfaction with community service than with probation.

They argued that the problem of resources was most evident in relation to community service; there were difficulties with the availability of places and delays in obtaining placements. Lengthy delays meant that "the momentum is completely lost". 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

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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.

Several sentencers were concerned that community service was frequently portrayed by the media as a 'soft option' (see Chapter 6) 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". These suggestions included encouraging members of the community to become directly involved in community service placements by providing training courses. The public should "see" those working on community service placements in their own communities, for example, cleaning up the streets. It was important that offenders were "seen in the community as having to put right a wrong", though these Sheriffs stressed that "the approach of striped suits is completely wrong." Moreover, they argued that a change of image for community service would have an impact on reducing the use of short prison sentences.

If community service became credible with the public there would be a sea-change in the use of short periods of custody. [Sheriff]

The other community sentences in Scotland – Drug Treatment and Testing Orders (DTTOs), Restriction of Liberty Orders (RLOs) and Supervised Attendance Orders (SAOs) – are still in the process of being rolled out across the country. Some of the sentencers in the study had therefore not used any of these sentences and very few had used all. Most experience was with DTTOs, least with SAOs.

The majority of sentencers who had used DTTOs were very positive about the option to use a distinct community sentence for offending related to an offender's serious drug dependence and several thought that such orders should be similarly available for offenders with severe alcohol problems. Some reservations were expressed about the assessment of offenders' suitability for DTTOs – many had been rejected as "not bad enough". A few were also concerned about the integration of social work and health professionals in the treatment of offenders on DTTOs. Fewer sentencers had used RLOs. Of those who had, most welcomed their introduction, noting that they were "tough, almost equivalent to custody" and that they provided "flexibility" in dealing with offenders. They were especially suitable for accused on remand. Some, however, had reservations about their suitability for certain kinds of offenders, notably violent offenders, and were concerned about the restrictions placed on those who lived with an offender on an RLO. A few expressed concerns about how breaches had been dealt with by the commercial agency involved and what their relationship was with commercial agencies. Very few sentencers had used SAOs but those who had held mixed views.

## The role of the sentencer

Sentencers generally have no further involvement with the individual community orders they impose unless the order is breached. This is not the case with DTTOs where the sentencer is directly involved in reviewing such orders at regular intervals. Most of the sentencers who had used DTTOs made positive comments

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about the court review process. They argued that the process was useful for offenders as it linked them directly with the court, gave them their own voice and made them aware of the court's continuing interest in their progress. In addition, the process confirmed the authority of social work and health professionals and was personally rewarding. Sentencers valued being "directly involved in reformation" and, while not all were successful, it was "good to see offenders responding." They felt that "the court's dignity and authority" was maintained in the more informal review proceedings. Nevertheless, they noted that different skills were required and that sentencers would "vary in their capacity to deal with the offender directly." A few sentencers, however, had concerns about the role of the sentencer in DTTOs.

There is a place for DTTOs but there is a risk that the judge will cease to be an impartial figure. [Sheriff]

There is a danger of the judge getting too close. I don't think bonding between the judge and the offender is healthy. [Judge]

The court review process is a central principle of the recent emergence of specialist courts in Scotland, such as drugs and youth courts. In this context sentencers were asked for their views on the extension of this approach to a wider range of cases. While a substantial minority supported such extension in principle, they noted that this was likely to be impracticable due to the volume of court business and limited resources. The remaining sentencers were not in favour of extension. Several argued that the court's direct involvement in the review process should be limited to DTTOs. Judicial involvement was appropriate in these cases because the problem – drug dependence – was the reason for offending. Others, consistent with their views on DTTOs, thought that the judge would cease to be an impartial figure. Some argued that extending the court's review remit would undermine the professional discretion of those responsible for supervising community sentences. And a few emphasised that the principle of review had always been open to them – long before the advent of DTTOs or specialist courts – through the use of deferred sentences.

### Are more non-custodial options enough?

While the majority of sentencers were content that existing community sentences provided them with a sufficiently "broad palate to choose from", several (almost quarter) argued for an overarching sentence, such as a "community intervention order". These sentencers were in favour of more flexibility in the content of community sentences in order to "tailor the sentence" to the nature of the offence and the circumstances of the individual offender; for example, by combining "elements of punishment" such as some form of repayment to the community with education and treatment within one sentence.

In arguing for the ability to tailor-make sentences, sentencers identified a lack of several facilities and/or programmes available to them. They observed that these would not require the introduction of 'new' sentences but could be imposed as a condition of existing community orders. The most frequently mentioned 'absences' 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.

Sentencers also argued for other options that would require legislative, procedural and/or organisational change. Several (9) argued strongly for the introduction of suspended sentences which could be used on their own and/or in conjunction with community sentences and almost as many (8) said that they would welcome the option to sentence an offender to a short period in custody followed by supervision in the community. Several (7) expressed concern about the use of the fine and argued for the introduction of a day fine system. Four suggested that, similar to the role of the French *juge de l'application des peines*, separate sentencing judges could be appointed to oversee "everything connected with punishment". This would, in effect, "make the court the supervising agency." Only one sentencer mentioned the possible benefits of encouraging victim involvement through restorative justice approaches.

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.

There have been great advances in community penalties in recent years but we have to be careful that we don't 'trade up' what would previously have been dealt with by a fine. There is always the drift – watch you don't say to yourself – this might do them some good – we're not here to do good. We're here to be just. [Sheriff]

Related to this concern, a few sentencers expressed disquiet about progressive sentencing. As emphasised in Chapter 4, the overwhelming majority of sentencers were clear that prison was a unique sentence, qualitatively different from other sentences. A community order could be viewed as an alternative but not an equivalent sentence. In one of these sentencers words:

There is a need to re-examine the progression to prison. What is prison for? How far do we and should we use community sentences. How often? Why not again and again? [Sheriff]

Chapter 3 noted that, in addition to perceived changes in the nature of offending over the past decade, sentencers thought that changes in the legislative and policy framework and in the wider climate of public opinion about crime and punishment had contributed to increased severity in sentencing. In addition, Chapter 4 indicated that all sentencers in the study were aware of current Government concerns about possible ways to reduce the use of short custodial sentences. This chapter discusses the impact of the political and social context on sentencing decisions in more detail. In particular, the chapter examines how the sentencers in this study experienced political, media and public opinion pressures.

### Pressures from 'the centre'

Over a third of the sentencers<sup>70</sup> expressed concerns about the amount and nature of new legislation and its impact on sentencing. They noted, for example, that the law on breach of probation was "a shambles", that sentencing law had become "hugely complicated" and "increasingly confusing", that innovations were "piecemeal" and that the "whole sentencing process" needed to be simplified.

Legislation is consistently one-off. No-one seems to look at the whole thing [sentencing] in the round. We need to be freed up from the consequences of mistakes made [in the drafting of legislation]. [Sheriff]

Some Sheriffs also spoke about too much "advice" from the Executive. They said that many of the rules introduced by the Executive were "far too restrictive" and came close to compromising judicial independence. More than this, these rules compounded the problem of delay in a situation where the whole process was already "completely clogged up". They argued that the courts did not have the resources to deal with the "flood of business"; especially with increased sentencing powers. Some argued further that this overabundance of advice was related to attempts on the part of the Executive to influence the courts for cynical political gain. These Sheriffs referred to the Executive's recent establishment of a Sentencing Commission for Scotland as an example of this tendency.

This [the establishment of the Sentencing Commission] is another example of the Executive making populist decisions on the hoof. [Sheriff]

Several sentencers also spoke about the introduction of specialist courts in similar terms. These sentencers were "cynical about the reasons" for the introduction of 'fast-track' specialist courts. They thought that the reasons for their introduction were political rather than based on an objective assessment of why specialist courts rather than any other courts would be more successful.

I am extremely worried about the Youth Court and I'm sorry that Sheriffs agreed to co-operate with the Executive. We have to avoid association with political initiatives not introduced by statute. [Sheriff]

Yet others said that legislation was frequently passed to "look good to the public" when the politicians were aware that the resources were not there to back it up.

<sup>70</sup> A few sentencers said that it was their duty simply to "reflect the law"; they did not wish to voice an opinion on political aims and the impact of Government policy.

Another concern amongst sentencers was that the Executive increasingly looked to sentencers to solve problems that sentencing decisions could not solve. Many of these sentencers emphasised that, paradoxically, while in theory at least there were more options available to them than in the past, there was less they could do. This was largely attributed to the social, economic and addiction problems faced by many of offenders coming before the courts.

I'm not convinced that the problem lies at the sentencing end. Sentencing options are limited. Attention should be given to stopping people getting into the position where custody is inevitable. That's not a legal exercise; it's social policy. [Sheriff]

These sentencers felt that "politicians give an inadequate account of sentencing" and emphasised that to reduce the use of custody the Executive required to devote resources to wider social, educational, health and economic policies. The answer was not to continue increasing the number of offences on one side whilst increasing the range of community options on the other.

### Pressures from the media and the public

In talking about the public and media interest in sentencing decisions, several sentencers were acutely aware of being criticised by the media as not being tough enough with offenders. They spoke about having been "pilloried" by the press and were aware that the editorial policy of some newspapers made "judges fair game". These sentencers said that the press "write what they wish about a particular case" and referred to media reports as "insidious", "highly inadequate" and "out of context".

All the Judges and the majority of the other sentencers who were interviewed said that public opinion about sentencing was misinformed, largely as a consequence of cases being "misreported" and by the selective reporting of decisions in the more serious emotive cases.

We suffer from a lack of reporting in this [Sheriff] court. The press have a duty to keep an eye on us and report to the public. The reporters concentrate on the High Court. The public has a problem of not being told enough; they don't know what court reports are about. [Sheriff]

Several Sheriffs noted that this practice of concentrating more or less exclusively on very serious and emotive cases in the High Court, if there was a High Court sitting in the same area, reflected the desire to "sell" newspapers; the public were not being provided with "full coverage" of the range of sentencing decisions. These views of sentencers are consistent with the views of members of the public on this topic (see, for example, Spencer, 2004a).

Even in some of the Sheriff court areas where Sheriffs said they were content that local newspapers gave "reasonably balanced" reports of sentencing decisions, some had noticed reports were being cut back more and more, thus making reporting less accurate. Two Sheriffs mentioned that they had spoken to the court reporter about this problem and had been informed that it was a consequence of "editorial policy". Judges had also observed this tendency to cut back on detail.

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Tabloids are not interested in detail. Court reporters are increasingly concerned that their reports are being cut back in the way that they are. It's editorial policy. [Judge]

In this context, it is not surprising to note that there was widespread agreement amongst sentencers with the Judge who argued that what was required to better inform the public was "a responsible press writing accurate articles" about sentencing decisions.

The frustration expressed by sentencers about the media portrayal of their decisions was underlined in relation to the reporting of community sentences. Some sentencers argued that such press reports were frequently written "completely from the victim's viewpoint". Several were particularly disturbed by the media portrayal of community service and were concerned that the public impression of community service as a 'soft option' was misinformed.

The public is ill served by the tabloid press in portraying community service as an easy option. It is not. It is a very demanding and useful option. [Judge]

Almost without exception, sentencers stressed the need for measures to educate the public about sentencing and several mentioned the need to educate politicians. Several stressed that part of their duty to the public was to contribute to their education in sentencing matters. These sentencers spoke about their involvement in giving public talks and holding court open days. Some also mentioned explaining sentencing to young people undertaking sixth year studies courses in schools. In addition several, either from their own experience or from their knowledge of research,<sup>71</sup> noted that members of the public became more in favour of community sentences the more they knew about them.

A substantial minority of sentencers mentioned ongoing discussion within the profession about the need to develop specific mechanisms to provide the public with more accurate information, such as issuing short consumer friendly reports on decisions or appointing a press officer. A few also mentioned the need to inform sentencers as well as wider public that "victims, never mind the public, are amenable to non-custodial options". While not all shared the same view on a particular measure, such as the appointment of a press officer which some sentencers thought would create more problems than it resolved, the overwhelming majority of sentencers agreed that educating the public about sentencing was of profound importance to maintaining public confidence not only in sentencing but in the criminal law.

## Responding to the pressures

All sentencers stressed that their public duty was to dispense justice in accordance with the law, with generally accepted views of what is and is not acceptable behaviour and with what is and is not proportionate punishment (in addition to other crucial aims in sentencing including public protection and the rehabilitation of offenders). Nevertheless, from the interviews with sentencers and from observation in the courts, it was clear that how they interpreted that public duty varied. With differing degrees of emphasis and either singly or in combination, sentencers used the following strategies to help them assess and fulfil their obligations to the wider society.

<sup>71</sup> See, for example, Stead (2002) and Spencer (2004b).

- View legislation and/or Appeal Court decisions as reflecting the general will of society

Several sentencers argued that public opinion was reflected in the law. They argued that their duty in sentencing was to "reflect the law" by applying the legislation passed by Parliament and the guidance provided in Appeal Court decisions in order to "deal with people who break society's rules." One of the Sheriffs observed that "Parliament, the legislature – that is the 'public as a whole'. Our job is to consider things within the framework set by the legislature." Another said that he looked to the Appeal Court for guidance on reflecting the wishes of the legislature. These sentencers said that media or other representations of public opinion were of "very little" or "no" importance in sentencing. Such representations were flawed and uninformed.

- Pay special attention to local concerns and issues

The majority of Sheriffs said that taking account of community concern about the prevalence of local crimes was very important. One Sheriff remarked, "what the public see is what we do locally". Several noted that in their Sherifffdoms some communities were blighted with drug wars, others with young men stealing cars and racing on streets where people lived, and others with gang fights involving offensive weapons. In response to a marked increase in such crimes in communities they passed an "exemplary" punishment as a deterrent. They argued that such sentences represented an attempt to "control" the escalation in certain kinds of crimes as well as to protect the community. One Sheriff observed that, in the context of a dramatic rise in drug related violence in the area, a deterrent sentence aimed at control was essential as "you can't be seen by the drug community as letting them get away with it." Similarly, another Sheriff who gave a deterrent part as well as a punishment part when sentencing in such circumstances, emphasised, "I'm a servant of the public. A big crackdown will get the message from the court over; the message that this community totally rejects this kind of crime".

- Treat public opinion as a barometer in sentencing decisions

Several sentencers spoke about public opinion as important, not in deciding on an individual sentence but in a "more general way". They said they were "very aware" of public opinion and that it had a role in informing sentencing decisions. As one of the Judges noted, "I am very very aware but that doesn't unduly constrain me." Though public opinion did not constrain individual sentencing decisions, one Sheriff noted that it made him "cautious" and another observed, "it constrains the way I sentence, not the sentence I give. You look around and see if the press is in the court." In an important sense public opinion was viewed as providing a "barometer" or, as one Sheriff observed, "a check on whether you've got it right." Another noted that, "you ask yourself, what would the public think of this?" Thus, though public opinion was considered as part of the decision-making process, these sentencers emphasised that it did not "sway" them in individual decisions; rather awareness of public opinion prepared them in taking decisions likely to be "unfavourably commented on."

- Make sentencing decisions with regard to reasonable but not hysterical public opinion

Some of the sentencers who thought that public opinion had a limited role in sentencing drew a distinction between reasonable and unreasonable public opinion. These sentencers said that the "public is entitled to feel secure" and talked about the need to take account of public expectations "up to a point" but not when these were "unreasonable" and "unrealistic". Thus, one of the Judges observed that it was

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"very important to appreciate public views but also to appreciate that sometimes they can be very unreasonable". Similarly, a Sheriff remarked that it was "important to rise above public opinion when it takes the form of hysterical reaction". A few emphasised that sentencers could not, in the words of another Sheriff, "get too far out of line with public opinion" because if the public think sentencers' decisions are "daft" they will lose confidence. In a similar vein, one Sheriff said, "you have to massage [public opinion] and try to take it with you", and another commented "it is important to try to nurture reasonable public opinion. I don't belittle what is causing people grief but I'm not hearing enough reasonable and reasoned public opinion."

- Explain decisions so they can be understood – even by those who disagree with them

The majority of sentencers stressed that explaining their sentencing decisions in public was "the key" to understanding the reasons for particular sentences – for offenders, families, victims, the public and the media. They referred to writing down exactly what they intended to say before "spelling out" in court the details of the sentence they were imposing and why. This explanatory process included indicating how the criminal law and procedure constrained the sentencing options open to them. Some Sheriffs also emphasised that they tried to explain how the delay in a case getting to court affected the sentence. One Sheriff commented, "you may be sentencing an offender 3 years after the offence, he might have sorted himself out – what is the point now? The public don't appreciate that." They hoped that some of these explanations would be accurately reported "at least by the responsible media". One of the Judges commented, "I try very hard to explain the reasons for the sentence, particularly in cases where you know the sentence may appear too lenient or too severe."

- Be aware of but not influenced by victims

In talking about the importance of explaining sentencing decisions, several sentencers said that they were aware of but not influenced by victims' interests. They observed that many criticisms made by victims and by the press about sentences imposed in, for example, careless driving cases involving a fatality, were due to a lack of understanding of the legal and procedural restrictions on the Sheriff's powers of sentence. One Sheriff noted that in such cases, "I address the victim's family and explain that I can't send the offender to prison." Similarly, another spoke about the "benefits of explaining the sentence in a careless driving case where the family left knowing why the offender was fined £250 when their son was lying in a box."

- Recognise that as a member of the public yourself, you act on behalf of the public

Several sentencers argued that they were a member of the public and that because of this they had an understanding of how the public viewed crime and punishment. A few Sheriffs spoke about their integration in the local community. Some mentioned that they had lived in their court area for many years, took part in a range of community activities, shopped in the shopping centres where "organised shoplifting" occurred and knew the reporters in the courts as well as other members of the public. One Sheriff elaborated, "I live here; so does the lady who is the reporter to the [local newspaper]. I'm part of that public. People speak to me. I can use that. If there is a particular problem in this area, I can say something when sentencing. My comments in court are subject to public scrutiny. I can't control what is reported but I think it's a good thing to try to get through to the public mind."

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As Hough et al (2003, 56) have argued, "An implicit or explicit aspect of all of the above strategies was the assumption that, as a sentencer, it is necessary at times to distance oneself from the demands and expectations of politicians, the media and the general public". Sentencers frequently spoke about the need to "take a detached view" and to "be objective." As one Sheriff observed, "you don't sentence someone on the basis of public opinion." There were, however, several sentencers who spoke about the particular pressures they faced in relation to sentencing the offence of causing death by dangerous driving.

In recent years public pressure has led to legislation increasing the severity of penalties for the offence of causing death by dangerous driving (see Chapter 3).<sup>72</sup> Several sentencers spoke about sentencing in such cases as having "rocketed up". One of the Judges referred to "extreme public attitudes" and noted that this made it "particularly difficult not to respond." Another commented on the "serious pressure" exerted by the presence of the deceased victim's relatives wanting to see a harsh sentence. And, as noted above, several Sheriffs spoke about their experience of sentencing careless driving cases involving fatalities [where they did not have the option of custody] as being "very difficult" for similar reasons.

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72 For more on the sentencing of causing death by dangerous driving see the Sentencing Advisory Panel Advice on its website ([www.sentencing-advisory-panel.gov.uk](http://www.sentencing-advisory-panel.gov.uk)).

Chapter 1, in setting out the context, noted that the study has been undertaken at a time when the Government in Scotland is committed to acting to address reoffending and the country's rising prison population. In particular, it drew attention to the Executive's 'Consultation On Reducing Reoffending in Scotland'<sup>73</sup> which, in considering a range of policy options, has the potential to lead to action that could at least halt if not reverse the growth in the prison population. Whether that happens will depend on the policy choices made. There are a range of strategies that have been used successfully to achieve prison reductions in other countries (see Tonry, 2003).<sup>74</sup> While it was not the aim of this study to examine ways of reducing Scotland's prison population, its findings in relation to trends in sentencing practices and the ways in which sentencing decisions are made do, nevertheless, have implications for achieving that goal. This concluding chapter concentrates on the study's implications for *some*<sup>75</sup> possible policies to reduce the prison population, should this political decision be made.

The earlier chapters show that several interrelated factors have contributed to more severe sentencing practices; sentencers are making more use of imprisonment now than they did a decade ago and longer prison sentences are getting longer. These changes in sentencing practices have not occurred in isolation. They have occurred within an increasingly tough legislative framework as well as within a more punitive social and political context, both of which impact crucially on sentencing decisions. Other key factors include some changes in patterns of offending, especially sentencers' perceptions of changes related to violence and dependent drug use, as well as changes in other criminal justice practices and procedures.

Taken together, these findings imply that the potential success of policies aimed at reducing sentencers' use of custody will depend on making changes to the context within which sentencing is carried out as well as making changes to sentencing practices themselves. Thus, policies will be necessary at three levels of intervention (see Hough et al, 2003, 59).

- Changing the legislative and legal framework of sentencing to reduce custody rates and/or sentence lengths.
- Strengthening non-custodial penalties to influence sentencers to make more use of such penalties even for the most persistent and relatively serious offenders.
- Altering the climate of political and public opinion on crime and punishment in ways that would assist sentencers to make minimal use of custody.

The sentencers in this study, in explaining how they made sentencing decisions, provided several insights into how such policy interventions might have most effect and the following discussion draws on these insights.

73 're:duce re:habilitate re:form A Consultation On Reducing Reoffending In Scotland' [www.scotland.gov.uk/consultations/justice/rrrc-00.asp](http://www.scotland.gov.uk/consultations/justice/rrrc-00.asp).

74 A useful and full discussion of a range of strategies and options is given in Tonry (2003).

75 The policies referred to here are those connected with sentencing. Other criminal justice policies would also require to be part of a prison reduction policy. Moreover, attention should also be drawn to the growing body of research showing that broader social and economic policies, including national spending on welfare provision, are significantly related to prison rates. See, for example, Beckett and Western (2001).

## The legislative and legal framework

Chapter 3 drew attention to the impact of recent legislation in encouraging the trend towards more severe sentencing practices. Legislation that reduced rather than increased penalties could reverse that trend. Indeed, the most direct and immediately tangible way to impact on sentencing is through changes to the legislative and legal framework. Several sentencers in the study said that current sentencing law should be rationalised; it was overly complex and confusing and this undoubtedly had an effect on the use of custody. They cited instances where legislative change had "rocketed up" penalties, noted that the law on probation was "a shambles" and emphasised that the law on breach procedures was "hopelessly bureaucratic." In addition, the majority said that they welcomed guidance from the Appeal Court and that this was an important factor in their decision-making.

A combination of changes to the existing penalty structure together with guideline judgements focused on key sentencing decisions could therefore impact on prison reduction. Chapter 4 noted that two key sentencing decisions – whether or not to imprison and, if so, for how long – directly affect the size of the prison population. The focus for legislative and legal change should therefore be on how best to impact on either or both of these decisions in ways that would reduce the prison population.

In making decisions about whether or not to imprison, the sentencers in this study were clear that they were not influenced by a lack of confidence in alternative community sentences; the majority held positive views about community sentences. Instead, they said that prison was a unique punishment, not equivalent in penal weight to any alternative to custody. They were steadfast in their view that they used prison only as a last resort, because the seriousness of the crime and/or the offender's record meant that they had "run out of options." In this context there are two possible policy choices. First, it would be possible through legislation to remove the option of imposing a custodial sentence for some crimes and offences, though this study did not aim to suggest what these might be. Second, it would be possible, through legislation and/or guideline judgements, to redefine what constitutes a sufficiently serious crime or offence to merit imprisonment,<sup>76</sup> though again this study did not aim to suggest how this could be achieved.

The study of borderline cases did, however, reveal some important ways in which guideline judgements from the Appeal Court could influence decisions both about whether or not to imprison and about lengths of prison sentences. Several sentencers said that the guidance in *Ogilvie*<sup>77</sup> had been a key factor in reaching a decision in favour of a non-custodial sentence in relevant borderline cases. This was because they would be more confident that something positive could be achieved in these cases with a longer community sentence than a relatively short prison sentence. What the Appeal Court did in *Ogilvie* was to provide guidance on sentence lengths for different kinds of offences involving downloading pornographic images of children. The effect was to reduce the lengths of prison sentence from those previously imposed in such cases. In some cases, this meant that a sentencer would prefer to use a non-custodial sentence; in others, that the sentencer imposed a shorter prison sentence than would have been imposed in the past.

In general, the study's findings indicate that there is more scope for legislation and guideline judgements to influence sentence length. As noted in Chapter 4, Judges and several other sentencers described

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<sup>76</sup> In England and Wales this is referred to as the 'custody threshold'. Sentencers in this study said that such a concept, in the words of one Sheriff, "doesn't mean anything in Scotland because there are no guidelines from the High Court."

<sup>77</sup> *Ogilvie* [2001] [www.scotcourts.gov.uk/opinions/C183\\_01.html](http://www.scotcourts.gov.uk/opinions/C183_01.html), re section 118 (7) of the Criminal Procedure (Scotland) Act, 1995.

decisions about length of sentence as easier than decisions about whether or not to imprison. Moreover, Chapter 3 drew attention to sentencers' views that sentence length had been pushed up by the impact of legislation over the past decade. In principle, policies could operate in the other direction, for example, to reduce sentence lengths across the board. Such an initiative of this kind on any scale would demand a mix of legislation and guidance from the Appeal Court. Since the study focused on borderline cases and did not specifically address questions about the length of prison sentences, other than how sentencers' viewed the use of short sentences, the findings cannot assess how sentencers would respond to moves to bring down sentence length across the board.

Nevertheless, sentencers' views on the use of short prison sentences indicate that such a policy would be practicable. Chapter 4 referred to the reasons why sentencers wanted to retain the discretion to use short sentences. Many argued that short sentences were useful and could be very short without undermining their main purpose: that is, marking the gravity of an offence, and deterring relatively inexperienced offenders by giving them a "shock". Chapter 5 noted that some also felt that sentence lengths in general could be shorter if there was the option of something akin to 'custody plus', which exists in England and Wales. These sentencers said that if a similar option were available they would impose more short sentences – around 3 months – followed by supervision in the community. The introduction of such an option would, however, require guidance to minimise the risk that sentencers would use it for offenders who previously would have received only community sentences. As Hough et al have argued the "effects of this kind of 'net-widening' could be to push up, rather than bring down, the prison population." (2003, 60)

## Non-custodial penalties

Non-custodial penalties fall into two main groups – community sentences and financial penalties. Community sentences include probation, community service, drug treatment and testing, restriction of liberty and supervised attendance orders. Financial penalties include fines and compensation orders. While the study concentrated on community sentences, the interviews with sentencers revealed that a re-assessment of the role of financial penalties, mainly fines, should play an important part in any policy aimed at reducing the prison population. As shown in Chapter 2, the increased use of prison occurred alongside increased use of community sentences but decreased use of the fine. The study's implications for strengthening community sentences and revising financial penalties are discussed below.

### *Strengthening community sentences*

Chapter 5 emphasised that until now increasing the availability and quality of community sentences has been a main policy adopted in Scotland to address the rise in the prison population. The assumption underlying this policy is that if more and better community sentences were available, sentencers would reduce their use of custody. The findings from this study, however, show that the factors that influence the use of community sentences are more complex. Sentencers were generally satisfied with community sentences and all stressed that they already used them wherever possible. They did not identify a lack of satisfactory community options as a factor tipping their decisions towards custody. In not one of the forty eight borderline cases that resulted in custody was a lack of community options cited as a key factor in the sentencing decision.

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Thus, offering sentencers a wider range of high quality community sentences will not, in itself, lead to a reduction in their use of custody. On the contrary, as indicated in Chapter 5, it is likely that improved enforcement of community orders has made some, albeit modest, contribution to the rise in the prison population. This may have occurred for two reasons. First, because sentencers are now more positive about community orders than they were a decade ago, they may now use them not instead of a prison sentence but rather instead of a fine. Second, rigorously enforced community orders are likely to have a higher failure rate amongst offenders at risk of custody – the very offenders that the 100% funding policy targets – with consequently higher rates of imprisonment following breaches.<sup>78</sup> Indeed, some of the sentencers who said that community orders were much improved since the introduction of National Standards and the 100% funding policy in the early 1990s observed that better supervision and enforcement arrangements were likely to have contributed to the rise in the prison population.

This is not, however, to argue that strengthening community sentences has no contribution to make to a wider policy aimed at reducing the prison population. It does. It is, therefore, important that the problems with existing community orders that were identified by sentencers are addressed. Chapter 5 documented problems with breach procedures, a perceived lack of resources which affected, in particular, the availability and supervision of community service orders, and outlined sentencers' views on the need to improve the 'visibility', 'community focus' and image of community orders in general in the eyes of the public. In addition, their comments indicate three areas that require to be addressed in any wider strategy to reduce the prison population.

First, there is a need to extend provision of the community sentences that sentencers' viewed as "very close to custody". Chapter 5 noted that many sentencers were concerned about the adequacy of the resources devoted to community sentences, in particular to community service orders (CSOs). Above all they perceived a need for speedier and more widely accessible CSO placements. Sentencers regarded community service as a "tough sentence" and said that they would use it more frequently if a wider range of offenders were assessed as suitable in Social Enquiry Reports (SERs). At present, SERs frequently assessed offenders as unsuitable for community service due to physical and/or mental health problems. Sentencers expressed frustration that suitable placements could not be created for such offenders, of whom there were many. Albeit with limited experience, because Drug Treatment and Testing Orders (DTTOs) and Restriction of Liberty Orders (RLOs) are not yet available to sentencers throughout Scotland, sentencers also regarded both of these options as 'tough' and supported their expansion.

Second, there is a need to reconsider and rationalise policies on breaches of community sentences. Policies could be developed based clearly on the presumption that breaches of conditions should not ordinarily lead to revocation into custody but rather should be based on the use of graduated responses to successive breaches, similar to the model used in drug courts. Chapter 5 emphasised that sentencers mentioned problems with breach procedures far more frequently than any other problem with community sentences. These problems, which sentencers attributed to various criminal justice agencies and the bureaucracy inherent in bringing proceedings, if not addressed, are likely to have 'knock-on effects' on the confidence of sentencers in relation to other aspects of community sentences and in relation to the use of custody.

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78 See Hough et al, 2003, 61, for a fuller discussion of this point.



Third, as observed in Chapter 5, what sentencers wanted was not more new community sentences but more imagination in the content and more flexibility in the use of these sentences. Some, in arguing for an overarching community intervention order emphasised that what was needed was the ability to tailor-make sentences. They noted that attendance at facilities, such as residential drug and alcohol detoxification and treatment centres could be imposed as a condition of existing community orders. Sentencers also argued for other options that would require legislative, procedural and/or organisational change. Several sentencers believed that the option to use such sentences would undoubtedly reduce their use of immediate custody. Other absences included half-way houses between custody and community sentences, secure accommodation for those with mental health problems, community orders focussed on education and training for employment, community programmes for sex offenders and community driving programmes for young offenders.

### *Introducing day fines*

Chapter 2 referred to decreased use of financial penalties, mainly fines, over the same time period as prison and community sentences have increased. Whereas financial penalties accounted for 73% of all disposals in 1993, this had dropped to 63% in 2002, continuing a long term downward trend in the use of the fine. It was further observed that, while some of the reduction in the use of fines between 1993 and 2002 could be explained by an increase in pre-court disposals, especially the increased use of 'fiscal fines', some part of the reduction could be attributed to community sentences taking the place of fines.

Chapter 2 also noted that the reduction in the use of the fine has indirect though important implications for the use of custody. Chapter 4 observed that sentencers spoke about using prison only as a last resort when the offence itself was so serious that a custodial sentence was inevitable or when the offender's criminal record meant that they had no other option. Typically, failure to respond to earlier non-custodial sentences indicated to sentencers that they had no other option. If some offenders now receive community sentences instead of a fine earlier in the criminal careers than they did ten years ago then they will exhaust the alternatives to imprisonment much more quickly than they did in the past.

Some of the interviews with sentencers suggested that this was likely to be happening in some cases. Thus, in Chapter 5 it was noted that, in referring to gaps in the current provision of non-custodial sentences, several sentencers expressed concerns about the use of the fine and the enforcement options for those who fail to pay.

I'm deeply sceptical about the fine. Job Seeker's Allowance is £40 per week – live on that! My only option is to use a Supervised Attendance Order ingeniously to avoid a fine defaulter going to prison. [Sheriff]

Some of these sentencers were aware of the 'day fines' that have been successfully used in a number of countries to reduce the use of short prison sentences (Tonry, 2003) and suggested that their introduction in Scotland would be beneficial.

Unrealistic fines, which do not equate with an offender's means, are set by some Sheriffs. What has happened to the idea of 'day fines'? I was impressed by that system when I saw it in action in Germany. [Sheriff]

## The climate of opinion about crime and punishment

Chapters 3 and 6 observed that many of the sentencers in the study were conscious of making sentencing decisions within an increasingly punitive social and political climate. While they did not perceive pressures from the public and the media as impacting directly on their decisions in individual cases, they emphasised that they had a public duty to make decisions that uphold society's rules and the majority of Sheriffs said that taking account of community concerns about the prevalence of local crimes was very important. Thus, in making sentencing decisions they spoke about being 'informed' but not 'unduly constrained' by public opinion or about taking account of 'reasonable' but not 'hysterical' public opinion, whilst, at the same time taking 'a detached view'. Nevertheless, sentencers observed that they could not 'get too far out of line' with public opinion if public confidence was to be maintained.

Several sentencers argued that a shift in political and public opinion towards a less punitive approach to crime and punishment would be required in order to make a significant impact on reducing the use of custody.

There must be a shift in public opinion that certain offences have to result in custody; a change in people's concept of what prison is for. If people are not a threat to communities they should not be in prison. Prison is not necessarily the last answer – even for relatively serious offences. Try something else instead of jail. It's not only a question of resources; it's a question of attitudes. Public perception is all wrong that judges are soft – judges are getting harder. They are susceptible to the 'prison works' slogans. You're part of a system; you can't operate as if you're not." [Sheriff]

The development of more punitive social climate is not, of course, peculiar to Scotland but has been experienced in many other industrialised liberal democracies.<sup>79</sup> What is at issue here is what can be done to alter that climate insofar as it impacts on sentencing. One strategy which sentencers emphasised is to focus on educating the public and politicians about what sentencing involves. Several were directly involved in educating the public – for example in schools and at public meetings.<sup>80</sup>

Others emphasised the need to provide a context in which there can be a rational public debate about what sentencing is, could and should be.

The debate about sentencing is being conducted at the gutter level at the moment by politicians and the press. It's a debate about freedom. Where is this debate going to take place? [Sheriff]

We need a reasoned debate about sentencing. What is the purpose of sending people to prison? For public opinion to be informed there must be a reasoned debate. [Sheriff]

<sup>79</sup> See Hough et al, 2003, 63 for a fuller discussion of the evolution of the current more punitive climate surrounding crime and punishment.

<sup>80</sup> See Spencer, 2004a & b, for a view about ways in which there could be more informed public debate.

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We don't have a meta-narrative for sentencing in the post modern era. The uncertainties in society are mirrored by sentencing disposals. The myriad of sentencing options reflects the uncertainties of purpose. We're not sure who we should be punishing; we're not sure whether it was as a damaged child that the offender went wrong. There is uncertainty at the core of the whole process – about the cause. [Sheriff]

## The political will to contain the prison population

This chapter has shown that the potential success of policies aimed at reducing sentencers' use of custody depends crucially on making changes to the context within which sentencing is carried out as well as making changes to sentencing practices themselves. Whilst making changes to the legislative and legal framework for sentencing, for example by reducing the length of prison sentences, is the most direct and immediately tangible way to limit sentencers' use of custody, this will not be sustainable in the long term without taking measures to move the political and public debate about crime and punishment onto a more rational and less punitive level. Such a move is not possible without determined and principled political leadership. This is necessary to ensure public acceptance. There is a growing body of evidence showing 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). In addition, given that sentencers are responsive in their sentencing both to legislative change and the climate of opinion about crime and punishment (Tonry, 2003; Hough et al, 2003, 26), 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'. In the words of one of the sentencers in the study:

Reduce the prison population – this comes down to a policy decision. [Sheriff]

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## Appendix 1 Non-custodial Penalties

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**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.

**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 instalment of a fine.<sup>81</sup>

**Fines** – may be imposed in both solemn and summary proceedings.<sup>82</sup> 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.<sup>83</sup>

**Compensation Orders** – can be imposed to ensure that victims receive financial compensation from offenders in appropriate cases.<sup>84</sup> 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.<sup>85</sup>

**Probation orders** – a probation order<sup>86</sup> can be made following conviction where the court is of the opinion that it is expedient to do so, having obtained a report about 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<sup>87</sup> unless the court is satisfied that suitable arrangements for the supervision of the offender can be made. 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

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<sup>81</sup> See the Criminal Procedure (Scotland) Act 1995, after this referred to as the 1995 Act, ss. 248A and B.

<sup>82</sup> See, generally, 1995 Act, ss. 211 – 226.

<sup>83</sup> 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.

<sup>84</sup> See, generally, the 1995 Act ss. 249-253

<sup>85</sup> 1995 Act, s. 249(2)(a)-(c).

<sup>86</sup> See, generally, the 1995 Act, ss. 228-234.

<sup>87</sup> 1995 Act, s. 228(2)

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.<sup>88</sup>

**Drug Treatment and Testing Order** – a DTTO<sup>89</sup> can be made following conviction of someone aged 16 or over where the court is of the opinion that it is expedient to do so. The order is imposed 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<sup>90</sup> can be made following conviction of someone 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 Orders** – are closely linked to problems with fines. SAOs are alternatives to imprisonment for adults and for young offenders aged 16 and 17 in cases of fine default.<sup>91</sup> 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.<sup>92</sup> 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 instalment does not exceed £500.<sup>93</sup> 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 pay, then it imposes the fine and makes an SAO in default of payment within 28 days.<sup>94</sup> 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.<sup>95</sup> A 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.

88 1995 Act, ss. 232 and 233.

89 1995 Act, ss. 234B-234K.

90 Restriction of Liberty Orders were introduced by the Crime and Punishment (Scotland) Act 1997. See also 1995 Act, ss. 245A-245I.

91 See, generally, 1995 Act, ss. 235-237.

92 1995 Act, s. 235(1) and (3).

93 1995 Act, s. 245(1) and (4).

94 1995 Act, s. 236(3)(a) and (b).

95 1995 Act, ss. 238-245.

## Appendix 2 Sentencing Powers of the Scottish Courts

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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 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. 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. All courts, with the exception of the Lay District Court, have the power to impose any of the non-custodial penalties as described in Appendix 1.<sup>96</sup>

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<sup>96</sup> It should be noted that the non-custodial penalties described in Appendix 1 and the sentencing powers of the Scottish courts described here were the conditions that applied at the time the study was carried out.

Contraventions of the law are divided for statistical purposes into crimes and offences, crimes generally being more serious. The classification adopted by the Scottish Executive Justice Department for criminal statistics and used in this report is grouped as follows.

### CRIMES

*Non-Sexual Crimes Of Violence* – also referred to as ‘violence’.

Homicide – comprises murder and culpable homicide (including the statutory crimes of causing death by dangerous driving or causing death by careless driving while under the influence of drink or drugs.

Serious assault and attempted murder – referred to in the statistics as ‘serious assault’.

Robbery – includes offences involving intent to rob.

Other – includes threats, extortion and cruel and unnatural treatment of children.

*Crimes Of Indecency* – also referred to as ‘indecent’.

Rape and attempted rape

Indecent assault

Lewd & indecent behaviour – comprises lewd and indecent practices against children and indecent exposure.

Other – includes offences connected with prostitution, incest and sexual intercourse with girls under 16.

*Crimes Involving Dishonesty* – also referred to as ‘dishonesty’.

Housebreaking – includes business as well as domestic premises.

Theft by opening a lockfast place

Theft of a motor vehicle

Shoplifting

Other theft – includes theft of pedal cycles.

Fraud – includes statutory fraud except social security benefit fraud.

Other – includes forgery, reset and embezzlement.

*Fire-Raising, Vandalism Etc*

Fire-raising

Vandalism – includes malicious mischief, vandalism and reckless conduct with firearms.

*Other Crimes*

Crimes against public justice – includes perjury, contempt of court, bail offences (where the Bail (Scotland) Act applied) and failing to appear at court.

Handling an offensive weapon – comprises carrying offensive weapons, restriction of offensive weapons legislation.

Drugs – includes importation, possession and supply of controlled drugs.

Other – includes conspiracy and explosive offences.

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## OFFENCES

### *Miscellaneous Offences*

Common assault – also referred to as petty assault.

Breach of the peace

Drunkenness

Breach of social work orders – includes breach of probation, community service, restriction of liberty and supervised attendance orders.

Other – includes offences against local legislation, Revenue and Excise Acts, Licensing Acts, Wireless Telegraphy Acts.

### *Motor Vehicle Offences*

Dangerous and careless driving – prior to 1992 known as 'reckless and careless driving'.

Drunk driving – comprises driving or in charge of a motor vehicle while unfit through drink or drugs, blood alcohol content above limit and failing to provide breath, blood or urine specimens.

Speeding – includes the small number of motorway and clearway offences, as these are mostly speeding-related.

Unlawful use of vehicle – comprises driving whilst disqualified, without a licence, insurance, test certificate, vehicle tax and registration and identification offences.

Vehicle defect offences – comprises construction and use and lighting offences.

Other – Includes parking, record of work offences, neglect of traffic directions and failing to stop after accident.

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