

# **JUSTICE 1 COMMITTEE**

## **A COMPARATIVE REVIEW OF ALTERNATIVES TO CUSTODY: LESSONS FROM FINLAND, SWEDEN AND WESTERN AUSTRALIA**

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The Scottish  
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**Final Report commissioned  
by the Scottish Parliament Information Centre  
for the Justice 1 Committee**

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## **EXECUTIVE SUMMARY**

This report was commissioned by the Scottish Parliament Information Centre for the Justice 1 Committee. The international evidence from Finland, Sweden and Australia relating to the use of imprisonment and direct alternatives to custody will form the basis for a critical examination of proposed actions in Scotland to reduce its prison populations.

Scotland could reduce the use of short term prison sentences by adopting measures used in Western Australia, Finland and Sweden including the abolition of sentences of imprisonment of three months or less, the abolition of all prison sentences of less than six months, the translation of prison sentences less than eight months into a community sentence, the increased use of fines and intensive supervision with electronic monitoring as a direct alternative to prison sentences of up to three months.

In Western Australia, the Sentencing Act 1995 prohibited the sentences of imprisonment of three months or less, contributing to a depression in prison populations. The proposed action of abolishing short prison sentences in Scotland must be treated with caution. In Western Australia, preliminary evidence suggests that since the enactment of the further legislation abolishing six month prison sentences in May 2004, there has been an increased rate of imprisonment. There appears to have been an increase in the remand population and in the numbers imprisoned for fine default (in respect of fines imposed in lieu of short prison sentences). It also appears that the abolition of short sentences may have resulted in longer sentences being imposed than before the enactment to circumvent its provisions. The evidence suggests that the increase in Western Australia's prison population following the abolition of short sentences is a consequence of a higher number of receptions and longer periods served in custody. Further evidence from Western Australia should be awaited for greater clarification of the impact of the abolition of short sentences on rates of imprisonment.

There are two basic sentencing options in Finland: the fine and imprisonment. In Finland, alternatives to imprisonment are available as a sentencing option after the initial sentencing decision of fine or imprisonment has been made. For example, a sentence of imprisonment of up to eight months will be translated into community service based on the following formula: one day in prison equals one hour of community service. This mechanistic approach negates judicial discretion regarding the number of hours of community service. There is statistical evidence to suggest that community service has worked well. As the number of community service orders have increased so the number of unconditional prison sentences has decreased. In Sweden, the

number of people entering prison has significantly dropped since a new community-based sanction was made permanent in January 1999. Intensive supervision with electronic monitoring is used as a direct alternative to serving prison sentences of up to three months.

Scotland could learn lessons from Finland, a jurisdiction which once had a high proportion of its prison receptions consisting of fine default prisoners. Evidence suggests that the impact of reducing the number of day fines and raising the amount of day fines has led to shorter default sentences and has therefore contributed to reducing the average number of daily prisoners in Finnish prisons.

In Western Australia, as part of the Reducing Imprisonment Program, a number of strategies have been put in place to improve access to bail and to reduce the number of people remanded in custody or detained in prison when bail has been set. A key strategy that has been adopted is the appointment of bail co-ordinators at key remand centres. In Scotland, more information about the practices of bail supervision schemes and the patterns of bail breaches and their outcomes could improve our understanding of their impact on the number of receptions into Scottish prisons.

Recent Swedish evidence claims that the introduction of intensive supervision and electronic monitoring from 1999 has significantly reduced the number of women prisoners in Sweden by around 250-300 per year. The Scottish Executive in partnership with other agencies invested in the establishment of the 'Time Out' centre, called the 218 project, for women in the criminal justice system which opened in Glasgow in January 2004. The 218 project is a community resource managed by criminal justice social work services, operating as a key component of a network of community services for women. An evaluation of the operation and effectiveness of the centre is currently underway.

Ultimately the judiciary in Scotland decide whether to impose sentences of imprisonment or not. The Finnish approach indicates that the judiciary require a close involvement in the design and implementation of direct alternatives to imprisonment. If community-based sanctions are not robust in terms of giving clear messages to the convicted person and the public, then sentencers in any jurisdiction are unlikely to use them. In Finland, community sentences are direct alternatives to custody.

The international evidence supports the view that there are an adequate number of alternatives to prison in existence. Historically, Scotland has considered a wide range of alternatives to custody. The Drug Treatment and

Testing Order (DTTO) is one example of a direct alternative to custody that has proven effective at reducing re-offending for a key group within the Scottish prison populations. As a direct alternative to custody for high tariff offences, the DTTO in Scotland offers other countries lessons to be learned for reducing receptions into prisons.

It can be argued that where community sentences are being imposed as direct alternatives to custody, they contribute to reducing or depressing the rate of imprisonment in Scotland. In dealing with breaches of community-based sentences, 'net-widening' needs to be considered. In Scotland, where breaches of community-based sentences occur, a custodial sentence is imposed. The Reducing Imprisonment Program in Western Australia has made available that in the event of an offender failing to comply with a condition of their order a range of sanctions other than imprisonment should be promoted. The intention is that offenders will only be returned to prison when the nature of the breach justifies imprisonment and not when a relatively minor transgression – such as failing to meet a regular reporting obligation – is involved.

Echoing the situation in other Western jurisdictions, there is a limited but robust evidence base on the effectiveness of community sanctions in Scotland. Reduction in recidivism is a frequently used indicator of effectiveness with the acknowledged flaw that reconviction does not equate with reoffending as some offenders reoffend but are not subsequently reconvicted. The current international evidence suggests that community disposals are at least as effective in reducing offending behaviour as short term prison sentences and have a greater cost-effectiveness.

Any subsequent action to reduce the rising prison populations in Scotland will require the support of the public, the judiciary and the political will. Direct alternatives to custody that maintain comparable levels of security for the general public will ensure little opposition from the media and maintain public confidence.

In Scotland, a wide range of alternatives to custody have been considered and many community disposals are in operation. A number of refinements could be made to the processes and procedures of existing community disposals to ensure their performance and their position in the Scottish criminal justice system as direct alternatives to custody. Concerns about 'net-widening' have been raised in Scotland as in other European jurisdictions.

The international evidence suggests that significantly lower rates of imprisonment than those currently found in Scotland can be achieved by an approach with the following central strands:

- An emphasis that prison is not an universally effective sanction;
- A clear welfare steer;
- The need to avoid harm and
- The avoidance of net-widening.

There may be scope for 'new' community disposals in Scotland. However, it would be more effective to concentrate on the efficient and equitable use of existing sanctions. It is proposed, on the basis of the international evidence, that the procedures relating to community disposals as direct alternatives to custody could be enhanced. This underpinned by appropriate use of community disposals could contribute to lower rates of imprisonment in Scotland.

## **SECTION 1: BACKGROUND TO THE COMPARATIVE REVIEW**

### **1.1 Introduction**

Scotland, like a number of Western jurisdictions, has in recent years witnessed a steady rise in the daily prison population, despite greater proportionate use being made of high tariff non-custodial disposals such as probation and community service orders (Scottish Executive 2002a, McIvor 1999). The damaging effects on offenders and their families of even short periods of imprisonment have been widely recognised, suggesting that where possible, use should be made of non-custodial alternatives where this does not compromise public safety. Data from Scotland and elsewhere suggest that non-custodial sentences are, at the worst, no less effective than sentences of imprisonment in terms of reconviction (Scottish Executive 2003a, Lloyd, Mair and Hough 1995, May 1999). Moreover there is little dispute that, in comparison with imprisonment, non-custodial sentences are associated with markedly lower costs (Scottish Executive 2003b).

The majority of those serving custodial sentences in Scotland, however, have been sentenced for relatively minor, non-violent offences and a large proportion have been given sentences of six months or less. As far back as 1988 the then Scottish Secretary, Malcolm Rifkind, enunciated a commitment to ensuring that imprisonment was reserved for those who commit serious offences while non-custodial options, such as community service and probation, are used instead of short sentences of imprisonment (Rifkind 1989).

### **1.2 The Justice 1 Committee Inquiry into Alternatives to Custody**

In February 2002, following on from the Inquiry into the Prison Estates Review and the increasing concern over rising prison numbers, the Justice 1 Committee agreed to conduct an Inquiry into Alternatives to Custody. The Justice 1 Committee Inquiry into Alternatives to Custody gathered a large amount of information about the nature, operation and impact of alternatives to imprisonment in Scotland and, to a lesser extent, elsewhere in the UK. The remit of the Inquiry into Alternatives to Custody was to investigate the use and effectiveness of community sentencing as an alternative to imprisonment. The following specific questions were addressed:

*What currently exists?*

- Which community penalties are available to the courts in Scotland?
- What are the restrictions on their use?
- Which community sentences are not available in Scotland?

- Should these be introduced?

*Level of service provision*

- What levels of resources are deployed in the provision of community programmes?
- Are available resources adequate for the local needs brought to court?
- If there are any shortfalls, how much is needed and where will these resources come from?

*Effectiveness*

- How effective are community penalties in Scotland in addressing recidivism?
- What data is available?
- What data should be available?
- What comparative evidence is available?

*Allocation of community penalties*

- How are community penalties allocated?
- Are the right kinds of cases/offenders receiving appropriate community penalties?
- What are the obstacles that hinder the process of getting the right sanctions to the right offenders?

Three areas of particular concern to the Justice 1 Committee Inquiry into Alternatives to Custody were the predominance of short term prisoners in Scotland's prisons, the high number of fine default and remand prisoners and the lack of appropriate community based programmes and residential facilities for women offenders. In all three cases it was felt that community disposals could be an appropriate alternative and consequently should be actively promoted and resourced.

The Third Report of the Inquiry into Alternatives to Custody Volume 1 states in conclusion that

“The Committee has established that Scotland has a wide range of community penalties available, but that the prison population continues to rise. It is also clear that community disposals are at least as effective as short term imprisonment. A range of recommendations has been made by the Committee to promote community disposals as alternatives to custody, including more resources for community disposals to ensure that they are effectively delivered and that breach is dealt with rigorously, more research on the effectiveness of community disposals in order to increase public confidence in them, and effective communication

with sentencers about the availability, effectiveness and rigour of community disposals to improve judicial confidence in the sanctions. The Committee believes that it is vital that these recommendations are taken forward in the next Parliament” (p. 33)

### **1.3 Aims and objectives of the comparative review**

A comparative analysis of imprisonment rates and alternatives to imprisonment was beyond the scope of the Justice 1 Committee Inquiry into Alternatives to Custody. Although the Inquiry did hear evidence of progress made in other jurisdictions towards reducing their prison populations. The current Justice 1 Committee believed that such a comparative analysis would, however, be of value in informing its work on prisons and sentencing.

In accordance with the specification issued by The Scottish Parliament, the aims of the current comparative review were to:

- identify the use of alternatives to custody in a number of jurisdictions
- assess the effectiveness of alternatives to custody within the jurisdictions concerned
- assess the applicability of the approaches studied to the situation in Scotland

The first phase of the work was an analysis of sentencing patterns across different jurisdictions to identify those that have succeeded in reducing rates of imprisonment against a more general increase in prison numbers reported to the Justice 1 Committee as an Interim Report in June 2004 (Munro *et al* 2004). Based on the analysis presented in the interim report, the Justice 1 Committee agreed that three jurisdictions, Finland, Sweden and Western Australia would be scrutinised in more detail in the second phase of the research review.

From a comparative perspective, the policies, practices and experiences of Finland, Sweden and Western Australia were considered worthy of in-depth scrutiny for the following reasons. Finland has previously been used as a model for good practice in other jurisdictions. In the 1970s the prisoner rate in Finland was amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland’s prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000). Sweden provides an interesting jurisdiction to study as its prison population has remained more or less stable over the past 20 years. A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible. In contrast, Western Australia, traditionally punitive in approach, has begun to reduce its rate of

imprisonment since introducing a package of reforms. The package of reforms include legislative changes, administrative reforms, the expansion of diversionary options and court reforms which are being introduced in a phased manner to enable the impact of each reform on the prison population to be assessed.

#### **1.4 The scope of the report**

This report presents the findings from the second phase of the research review involving a more detailed analysis of relevant published material relating to Scotland, Finland, Sweden and Western Australia. Additional information enabling trends in prison populations in these jurisdictions to be better understood have also been collected. Section 2 presents a digest of the current position of alternatives to imprisonment in Scotland. Sections 3, 4 and 5 present the legislative changes, practices and experiences in Finland, Sweden and Australia in case study format before a close examination of what this comparative evidence can offer Scotland towards reducing its prison populations is presented in Section 6.

## SECTION 2: THE CURRENT SITUATION IN SCOTLAND

### 2.1 Rates of imprisonment in Scotland

Scotland has in recent years witnessed a steady rise in the daily prison population. Table 2.1 shows the number of receptions to prison and the average daily prison population for the years 1999 -2003. Prison receptions have increased by 5% over this period but with significant drops in reception numbers in 2000 and 2003. The average daily population has steadily increased (with the exception of 2000) by 8% during this time. Notably the prison population rate<sup>1</sup> (per 100,000 of the population) shows that the number of prisoners has increased from 118 as a proportion in 1999 to 129 in 2003<sup>2</sup>.

Table 2.1: Prison Receptions<sup>3</sup> and Average Daily Prison Population, Scotland 1999-2003

Scotland		1999	2000	2001	2002	2003
Prison Receptions	<i>E</i>	36063	32893	34709	38461	37773
Length of Sentence (mths)	<i>d</i>	2.0	2.1	2.1	1.9	2.0
Average Daily Population	<i>P</i>	6029	5869	6137	6404	6524
Prison Population Rate		118	115	121	129	129

Data from Scottish Executive (2004a)

Scotland's rise in prison numbers is not unique and mirrors the significant increase in the world prison population over the last few decades. The World Prison Population List (Walmsley, 2003) shows that over 9 million people are held in penal institutions throughout the globe. Just under half of these are in the United States<sup>4</sup>, Russia and China. Although this rise has not been

<sup>1</sup> For comparative purposes prison populations are usually given as the 'prison population rate (per 100,000 inhabitants)'. This is sometimes referred to as the 'stock' or the 'rate of imprisonment' and is calculated as the average daily population over the year. It is the most common way of summarising and comparing national prison populations yet it is in many ways, a limited and misleading index of prison use. Another key measure is provided by the committal rate or 'flow' and is calculated as the number of entries or receptions to a prison over a year. If we have both the annual daily population and the number of receptions (flow) we can calculate ( $d=P/E \times 12$ ) an index of sentence length (mths) (Munro *et al* 2004). This *Length of Sentence* varies across Europe from 22.9 in Portugal to 1.4 in Germany. Scotland is relatively short at 2.0.

<sup>2</sup> However, it is useful to point out here that the relative stability of the 'length of sentence' index (between 1.9 and 2.1) and the volatility of the prison receptions would suggest, not only that a large proportion of those entering the prison estate in Scotland are on short sentences, but that a reduction (or increase) in receptions will not affect the average daily population or prison population rate to a significant extent.

<sup>3</sup> 'Receptions' are not equivalent to 'persons received'. Where an offender has several sentences disposed on him by one court in one day this is counted as one reception. When several sentences have been disposed on the same offender by two or more courts in one day, two or more receptions are counted.

<sup>4</sup> The United States has now the highest prison population rate in the world (701 per 100,000 per head of population) followed by Russia (606) (Walmsley, 2003). In the United States the

consistent and variations can be seen across all jurisdictions,<sup>1</sup> it is clear from the published figures that the overall trend has been upwards. Within Europe, the Netherlands, previously known for its low prison rates, has experienced a rise of 205% over the period 1997-2001, the largest increase of any western European country<sup>2</sup>. Portugal, England and Wales, Italy, Ireland, Spain and Germany have seen growth rates of between 40 and 62%, while Scotland, Norway and Belgium have seen more moderate growth. Only Northern Ireland, Finland and Denmark have seen their prison population fall over this period, although Cyprus, Malta and Sweden's rates have fluctuated over this period they have managed to keep their prison populations relatively low (Munro *et al* 2004).

## 2.2 Imprisonment in Scotland

In the overview of the HM Chief Inspector of Prisons for Scotland the following profile of prisoners in Scotland was outlined<sup>3</sup>.

'Prisoners are overwhelmingly young, overwhelmingly male and overwhelmingly poor...Compared with the population as a whole, prisoners are fourteen times more likely to have been taken into care as a child, six times more likely to be single teenage parents, five times more likely to have no educational qualifications, twelve times more likely to have experienced long-term unemployment, fifty times more likely to suffer from three or more mental disorders, thirty times more likely to be homeless' (Scottish Executive, 2003c, p15)

The average prison population for 2003 was 6524. From this total 297 (5%) were female and 577 (9%) were Young Offenders (Scottish Executive 2004). Table 2.2 shows the offence status of those directly sentenced<sup>4</sup>. 'Non-sexual crimes of violence' is the highest proportion of offence at 41% followed by crimes of 'Dishonesty' at 16% and 'Crimes of Indecency' at 7%.

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prison population rate varies from the highest for Louisiana at 794 to the lowest for Minnesota and Maine at 141 (Harrison and Beck, 2003).

<sup>1</sup> The affects of distinctive local, cultural and political differences are especially noticeable in Europe, North America and Scandinavia. In Europe the median rate for southern European countries is 76.5 whereas for central and eastern European countries it is 200. Portugal (137), England and Wales (141), Scotland (129), Germany (98), Italy (100) and the Netherlands (100) were all above the European average (Walmsley, 2003). In Scandinavia the rate varies between Sweden at 68 and Iceland at 38 per head of population (CoE/SPACE/ICPS).

<sup>2</sup> The severity of this rise must be seen in the context of the Netherlands' figures beginning from a much lower base line than other European Countries (Munro *et al* 2004).

<sup>3</sup> Figures quoted refer to Home Office figures from England and Wales but it is argued that similar results would be found in Scottish prisons (Scottish Executive, 2003c)

<sup>4</sup> In this report 'direct sentence' refers to those prisoners not on remand or imprisoned for fine default.

Table 2.2: Sentenced prison population by offence, Scotland, 2003

Main Crime/Offence	Number	%
Non-Sexual Crime of Violence	2159	41
Crimes of Indecency	387	7
Crimes of Dishonesty	842	16
Fire-raising, Vandalism etc	55	1
Other Crimes	968	18
Miscellaneous Offences	306	6
Motor Vehicle Offences	264	5

Data source Scottish Executive (2004a)

The principle legislation relating to imprisonment in Scotland is the *Prisons (Scotland) Act 1989*, which is a consolidation of the *Prisons (Scotland) Act 1952*. The Act deals with almost all aspect of imprisonment, covering the administration of the prisons, issues of confinement, treatment, the detention of young offenders and the discharge of prisoners. The *Prisons (Scotland) Act 1989* has been further amended by the *Prisoners and Criminal Proceedings (Scotland ) Act 1993*, which covers matters relating to release from custody; and the *Criminal Justice and Public Order Act 1994*, which deals with a variety of issues including the privatisation of prisons and the responsibilities of prison Governors (Gibb and Duff, 2002).

Prisons in Scotland are managed publicly – with the exception of Kilmarnock Prison<sup>1</sup>– by the Scottish Prison Service (SPS) which is an executive agency of the Scottish Executive. SPS is managed by a Board consisting of a Chief Executive, a Deputy Chief Executive, four departmental Heads and two lay directors. The Chief Executive of SPS, who is personally responsible for the agency’s work, is accountable to the minister for Justice (The Scottish Parliament Information Centre, 2001). Prisons in Scotland are staffed by uniformed prison officers. Prison Officers have various powers and responsibilities relating to operational functions within the prison and the maintenance of order. All prisons in Scotland are within the remit of Her Majesty’s Inspectorate of Prisons for Scotland (Gibb and Duff, 2002).

The rights of prisoners are outlined in the *Prisons and Young Offenders Institutions (Scotland) Rules 1994*. These rules outline the legal position of prisoners in relation to a wide range of issues, such as: business and political activity, money and possessions, counselling, education, correspondence and telephone communication, religion, and tobacco (Gibb and Duff, 2002).

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<sup>1</sup> Although the majority of prisons are managed publicly, provisions exist that would allow the management of prisons to be ‘contracting out’ to private organisations. At present only Kilmarnock prison has been ‘contracted out’ (Gibb and Duff, 2002).

The Justice 1 Committee Alternatives to Custody Inquiry was particularly concerned about three areas of imprisonment in Scotland: the predominance of short term prisoners in Scotland's prisons, the high number of fine default and remand prisoners and the lack of appropriate community based programs and residential facilities for women offenders. In all three cases it was felt that community disposals could be an appropriate alternative and consequently should be actively promoted and resourced (Justice 1 Committee Alternatives to Custody Inquiry, Third Report, 2003).

### *2.2.1 Short term sentence in prison versus community disposal*

The Justice 1 Committee considered whether, given the evidence available, Scotland could reduce the use of short term prison sentences by replacing them with community sanctions. Evidence presented to the Committee showed that 82% of prisoners serve sentences of less than 6 months. It was accepted that such short periods in custody not only offered limited opportunities for rehabilitation but adversely affect significant areas of an offender's life such as employment, personal relationships and accommodation (Justice 1 Committee Alternatives to Custody Inquiry, Third Report, 2003).

### *2.2.2 Fine default and remand*

Evidence was also considered relating to fine default and remand<sup>1</sup>. The Justice 1 Committee Inquiry into Alternatives to Custody report (2003) argued that very few offenders should be sent to prison for fine defaults as the original offence would not in itself have led to a custodial sentence. Therefore, it was considered that it would be more appropriate to sentence fine defaulters to a community disposal. Similarly, it was accepted that people should only be remanded in custody when they are considered to be a danger to the public or if there are concerns that they will breach their conditions of bail. It was also emphasised that people should not be remanded in custody simply because doubt was cast on whether they will appear in court when required. In the later case, facilities such as residential bail support schemes should be made more available.

In 2002 those imprisoned on direct sentence only constituted 33% of the prison population. 67% of prisoners were either incarcerated for fine default<sup>2</sup>

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<sup>1</sup> It is interesting to note in this context that courts in Italy do not imprison people for the non-payment of fines (Manna and Infante, 2000), also in Germany in the early 1980's prison numbers fell dramatically, partly due to prosecutors reducing the number of people sent to prison on remand (Messner and Ruggerio, 1995.)

<sup>2</sup> Care should be taken, however, when considering the figures for fine default. Although they take up a large proportion of prison receptions, they represent a small proportion of the

(18%) or were on remand (49%). With regards to those in custody for fine default, not only would very few have committed crimes which would have merited a custodial sentence in the first instance but the average fine outstanding was comparatively low<sup>1</sup>.

### 2.2.3 Women offenders

The average daily female prison population increased from 277 in 2002 to 297 in 2003 this constitutes a rise of 7%<sup>2</sup>. There is widespread evidence that the majority of women in Scotland's prisons do not require to be there as they do not represent a danger to the public. A substantial number of these women are fine defaulters or are on remand. Figures for 2003 show that 18% of receptions of women offenders were for fine default<sup>3</sup> and 58% were on remand, only 23% were directly sentenced. Brown *et al* (2004), in a study examining decision making among sentencers on bail and custody found that 'shoplifting' and 'other theft' were the most common crimes for which female offenders were remanded; this was different to the profile of the male remand population where crimes of 'violence' and 'dishonesty' were more common. Most of the women remanded suffered from either alcohol or drug dependency or both. There was a perception among sheriffs that women who were remanded were more likely to be persistent offenders with a history of failing to appear at court, but who had committed relatively minor offences. The report suggested that extra bail conditions, possibly in conjunction with electronic tagging, could be a means to reduce the incidence of remand for women offenders.

Of the women who were directly sentenced 90% of prison receptions had a sentence of less than 2 years, 65% of those were under 6 months (Scottish Executive 2004b). Many of the women in custody have long histories of physical and mental abuse, have serious mental health problems and many other difficulties rooted in poverty which are unlikely to be addressed while in prison. (Justice 1 Committee Inquiry into Alternatives to Custody, Third Report, 2003). Many of these issues were raised in 1998 in *Women Offenders – A Safer Way* (SWSI, 1998) and again in 2002 in *A Better Way: The Report*

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average daily prison population. This is because they spend only a short period of time in prison. In 2003, fine defaulters only represented 61 of the average daily prison population (Scottish Executive 2004b).

<sup>1</sup> The average fine outstanding for young offenders in 2003 was £274 and for adult offenders it was £275 for males and £206 for females (Scottish Executive 2004b). In 2002-03 the average cost for a prison place was £29,839 (Scottish Prison Service, 2004).

<sup>2</sup> However, if we look at the figures over the past five years (with the exception of a drop in numbers in 2000), the average female prison population has risen by 40% (212 in 1999 to 297 in 2003) (Scottish Executive 2000, 2001, 2002a, 2003d, 2004b)

<sup>3</sup> Many of these fine defaults relate to the non-possession of a television licence (Justice 1 Committee, 3<sup>rd</sup> Report, 2003).

*of the Ministerial Group on Women's Offending* (Scottish Executive 2002b). Two of the earlier report's observations, that are relevant to this Inquiry were:

'Almost all women offenders could be safely punished in the community without any major risk of harm to the general population. A few women offenders are in prison because of the gravity of their offence for which they have been convicted, but the majority are in prison either on remand or because they have failed to comply with a community disposal' (SWSI, 1998, p42).

The characteristics that may make rehabilitation difficult on release from custody are the same characteristics that make the experience of imprisonment so difficult for women offenders. Having to confront the painful realities of their personal and social circumstances, without drugs to obliterate pain, may feel overwhelming. The prospects they face on completion of their (frequently short) periods in custody do not encourage hope for the future.' (SWSI, 1998, p43)

There is evidence that sentencers often send women to prison, not specifically for punishment, but in the conviction - due in part to the lack of appropriate programmes and facilities in the community - that they will be more likely to receive treatment there. Carlen (2002) writes in relation to this question, that:

'arguments against the merging of therapy and punishment in custodial settings are: that the desired therapeutic effects are often undermined by the security and other arrangements thought to be necessary to the good order of the prison; that the voluntary element, seen to be a necessity prerequisite to success in many types of treatment, is often absent and, even where seemingly present, difficult to assess in terms of source and strength of motivation; and that knowledge that a certain type of therapy is available in prison and not available to offenders outside may well result in an increase of custodial sentences not warranted by the seriousness of the offence, but emanating from a judicial desire to 'help' the offender.' (Carlen 2002, p13)

## 2.3 Sentencing

### 2.3.1 Role of the courts

As it is the courts that ultimately decide whether to sentence offenders to a community sentence the attitudes of sentencers towards community based alternatives to imprisonment are likely to be one of the single most important factors influencing their use.

### 2.3.2 Goals of sentencing

The criminal law of Scotland is not systematically codified, and therefore there is no single document or set of guidelines that could be identified as a Penal Code (Gibb and Duff, 2002). Consequently, with regards to the goals of sentencing and the philosophical principles of punishment, sentencers in Scotland are guided by the same principles as sentencers in other western common law jurisdictions (Hutton, 1999). These principles of punishment can be outlined in five broad categories:

*desert or retribution* - offenders should be punished because they have broken the law and therefore deserve a corresponding level of punishment.

*incapacitation* – the protection of society demands that some offenders should be removed from the community and incarcerated

*rehabilitation* - crime can be reduced by reducing re-offending through the treatment or assistance to offenders.

*deterrence* - punishment is necessary because society through the verdict of the courts needs to deter others from offending

*reparation or restorative justice* - the harm experienced by the victim can in some ways be repaired through reparation, and crime may be reduced by restoring the offender back within the community.

To what extent sentencers in Scotland adhere to these principles is difficult to assess as they are not obliged to make available any written justifications on the sentences that they have handed out. It is only when a case goes to appeal that a written judgement is necessary and in these cases the philosophical principles outlined above are rarely declared (Hutton 1999). It can therefore be argued, that in Scotland, sentencers exercise wide discretion in the allocation of punishment. Hutton (1999), quoting Nicholson (1992, p.177), argues that Courts in Scotland have:

‘traditionally adopted an individualised approach to questions of sentence, and have always tended to decide cases on their own

facts and circumstances rather than on the basis of any declared principles’.

Although in Scotland, judgments are made on an individual, case by case basis, much of the personal discretion available to a Sheriff or High Court Judge is constrained. Regardless of the fact that Scotland does not have a penal code as such, most legislation regarding criminal procedure and sanctions is statutory (Gibb and Duff, 2002). The *Criminal Procedure (Scotland) Act 1995* is the most important statute in this sphere. Part XI of the Act delineates a range of sanctions competent under Scots law. Although in term of sentencing guidelines the *Criminal Procedure (Scotland) Act 1995* only affirms that without prejudice to any rule of law, a court in passing sentence, having regard to any relevant opinion, shall pronounce an opinion on the sentence, which in turn will be appropriate in any similar case (*Criminal Procedure (Scotland) Act 1995*).

From 1981 to 2002 there has been a gradual increase in the proportion of custody and community disposals within the total number of penalties disposed by Scottish Courts<sup>1</sup>. Two tendencies appear to be at work to produce this shift. The proportional rise in custody and community disposals (Table 2.3) have been accompanied by a significant drop over this period of the total number of penalties imposed (Table 2.4); caused in this case by the decreasing use made by the courts of financial penalties.

Table 2.3: Court Disposals in Scotland 1981-2002 (%)

Percentage Spread	1981	1984	1987	1990	1993	1996	1999	2002
Custody	5%	8%	9%	8%	11%	12%	14%	15%
Community Sentence	2%	3%	4%	6%	7%	9%	11%	14%
Monetary Penalty	93%	89%	87%	86%	82%	79%	75%	71%

Data Source: Scottish Executive Court Statistics

Table 2.4: Court Disposals in Scotland 1981-2002 (N)

	1981	1984	1987	1990	1993	1996	1999	2002
Custody	10496	13761	14154	13026	15323	16923	16091	16817
Community Sentence	3738	5415	6418	8869	10801	12154	12541	15208
Monetary Penalty	187671	151000	141546	136831	118496	106799	84633	78918
<b>Total</b>	<b>201905</b>	<b>170176</b>	<b>162118</b>	<b>158726</b>	<b>144620</b>	<b>135876</b>	<b>113265</b>	<b>110943</b>

Data Source: Scottish Executive Court Statistics

<sup>1</sup> Custody figures from the courts do not match the reception figures from SPS statistics because of the different counting conventions used by each organisation.

Tombs (2004), in an analysis of sentencing trends from 1993 to 2003 and drawing upon interviews with five High Court judges, 34 Sheriffs and a Stipendiary Magistrate in Scotland, found that the rapid rise in prison numbers in Scotland was not linked to crime (over the period crime had fallen while the prison population had risen) but was a result of courts sending more people to jail for longer periods of time. The report outlined that the rise in prison numbers was due both to changes in the law and through sentencers' perceptions that offending had become more serious with longer sentences being imposed for serious crimes. This was brought about by an increasingly punitive atmosphere surrounding the political and media debate about crime and punishment. Sentencers argued that although they 'were not unduly constrained by media and public pressure....they had a duty to ensure that their sentencing decisions reflect the norms of the wider society' (Tombs, 2004:7).

Although Judges and Sheriffs were generally satisfied with the quality and range of community sentences, they stressed that that were in fact "tough options" and expressed concern about the media and public image of community sentences as being "soft", they were more likely to imprison those appearing before the courts now than they were ten years ago. The report also highlighted that sentencers had concerns that some community penalties, in particular community service, were under-funded and thought that more 'imagination in content and flexibility in the ability to 'tailor-make' non-custodial sentences were desirable' (Tombs, 2004:7).

The report concluded by stressing that the provision of further new community sentences alone would be unlikely to bring down prison numbers and would probably result in 'net widening' and that reducing the prison population was a political issue and required legislative change. The report emphasized that through the issuing of legislative guidance from the Appeal Court a contribution could be made to bring this about.

Sentencers in Scotland exercise considerable discretion. These discretionary powers are important to the effectiveness of a community alternative to custody as sentencers have to consider the individual circumstances of an offender when considering the appropriateness of the disposal. However it may be the case that, with regards to the principles of justice where Law must be rational, predictable and determinate, the individualising of a sentence may produce unfairness and also create harm. For instance, it could be argued that an offender judged as inappropriate for a community sentence is punished more severely than one judged appropriate if the crime committed is the same in both cases. Greater consistency and fairness in sentencing was the aim of the 'just desserts' philosophy which influenced the *Criminal Justice Act, 1991* and the earlier White Paper *Crime, Justice and Protecting the*

*Public (1990, cmd 965)*. The purpose of the 1991 Act was to create a 'cohesive legislative framework for sentencing, with the severity of the punishment matching the seriousness of the crime' (Moore and Whyte, 1998, p.5). However, it is important to stress here that a too rigid sentencing framework may also produce injustices as international evidence relating to American sentencing guidelines has suggested (Tonry, 2004).

## **2.4 Alternatives to custody**

As prison populations have risen across jurisdictions, there has been an international appetite to find ways to reduce rates of imprisonment including the provision of alternatives to custody. Many jurisdictions, including Scotland, have already become well known internationally as being in the forefront in the development of 'alternatives to custody'.

In November 1988, Malcolm Rifkind the then Scottish Secretary enunciated a commitment to ensuring that imprisonment was reserved for those who commit serious offences while non-custodial options, such as community service and probation, are used instead of short sentences of imprisonment.

There will always be those who commit serious or violent crimes and who pose a threat to society which requires them to be confined for significant periods. Nevertheless there are many good reasons for wishing to ensure that, as a society, we use prisons as sparingly as possible. While the use of imprisonment may be inescapable when dealing with violent offenders and those who commit the most serious crimes, we must question to what extent short sentences of imprisonment and periods of custody for fine default are appropriate means of dealing with offenders. Prisons are expensive both to build and to run and do not provide the ideal environment in which to teach an offender how to live a normal and law-abiding life, to work at a job or to maintain a family. If offenders can remain in the community under suitable conditions, they may be better placed to make some reparation for their offences (Rifkind 1989, cited in Moore and Whyte, 1998 p7).

In Scotland there are currently six principle community sentences available to the courts. These are monetary penalties, probation orders, community service orders, drug treatment and testing orders (DTTOs) and supervised attendance orders. With the exception of monetary penalties (although some probation orders also have as a condition the payment of a fine) sentences are supervised by Criminal Justice social work staff and are supported by a variety of other local interventions. Voluntary agencies frequently contribute to

the programmes. The following pages given an overview of the key community-based sanctions available to sentencers in Scotland .

#### *2.4.1 Fine*

The fine is the most frequently used disposal and accounted for between 91 and 71% of all disposals between 1981 and 2002 (see Table 2.3)

#### *2.4.2 Community Service and Probation with a condition of unpaid work (Section 229)*

Where a person over the age of 16 years is convicted of an offence for which he or she may be sentenced to imprisonment, the court may, as an alternative, order community service. In Scotland unpaid work in the community was first proposed by the Advisory Council on the treatment of Offenders in the Wooton Report (1970). The main purpose of this sanction was that it should constitute an alternative to a short prison sentence. The Community Service by Offenders (Scotland) Act, 1978, now consolidated in the Criminal Procedure (Scotland) Act, 1995 was passed to allow courts to make a disposal of a community service order (CSO). This order required an offender to perform a specified number of hours of unpaid service for the benefit of the community (Moore and Whyte, 1998). The first community service orders in Scotland were made as a requirement of probation but the 1978 Act enabled the courts to impose a community service order on its own. However, the opportunity to combine community service with probation supervision – Probation with a condition for unpaid work or Section 229 - was retained (McIvor and Williams 1999). This combined order is also intended as an alternative to a custodial sentence.

As mentioned above, a community service order requires that an offender undertake unpaid work for a specified amount of time. This time varies according to the severity of the offence and the procedure under which the offender is sentenced. For those offenders tried under summary procedure the order can be between 80 to 240 hours. For those tried under solemn procedure the order can be from 80 to 300 hours. A number of provisos apply to the making of a community service order under section 238 of the Act. Firstly, the offender must consent to the making of an order; the court must be notified that a scheme exists in the area; a report from the Social Work department on the offenders circumstances suitability for community service must have been considered by the court previous to the sentence, and lastly, the order must be an alternative to custody (Moore and Whyte, 1998). Any work ordered to be undertaken under a community service order must be

performed within 12 months. If the offender fails to comply with the order, he or she may be brought back before the court (Gibb and Duff, 2002).

A central concern of the Wootton Committee was that community service/unpaid work should be an alternative to a prison sentence (Home Office 1970). New legislative provision attempted to prevent the use of community service for a range of petty offenders, and to reserve this community based disposal for those at serious risk of a custody. The *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* required that a community sentence order be made as an 'alternative to a term of imprisonment or detention'. In 1995 the *Community Service by Offenders (Scotland) Act, 1978* was amended to indicate that community service must be used for a person 'convicted of an offence punishable by imprisonment' and 'the court may, instead of imposing on him or her a sentence of, or including, imprisonment or any other form of detention, make an order' (Moore and Whyte, 1998).

Evaluative studies on the effectiveness of community service in Scotland have shown that community service had only replaced a custodial sentence in fewer than 45% of cases and that although community service was less costly than custodial sentences, the costs of breaches made them significantly more expensive than previously thought (McIvor 1989). An evaluation in 1992 found that reconviction following a community service order was at least no worse than reconviction following either imprisonment or other disposals designed as an alternative to custody. However, the study pointed out a relationship between a positive experience of an order by an offender and the likelihood of reconviction. Offenders whose experiences had been rewarding were less often reconvicted in the three years after sentence. They were also less likely to be reconvicted of offences involving dishonesty (McIvor, 1992).

#### *2.4.3 Probation with Condition (Intensive Probation)*

Although in Scotland standard probation is not intended as an alternative to custody, probation supervision with added conditions<sup>1</sup> can be disposed as an alternative to custody.

#### *2.4.4 Drug Treatment and Testing Orders (DTTOs)*

Drug Testing and Treatment Orders were introduced in the UK by the provisions of the *Crime and Disorder Act 1998*. The order was intended to provide the courts with a community based disposal that would deal with

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<sup>1</sup> for example, probation with a condition of unpaid work (Section 229) or with an intensive condition for treatment.

serious drug misusers who commit crimes as a way to fund their drug use. Consequently, mandatory drug testing is an integral feature of the order. The legislation allows the court to require an offender to undergo treatment for his/her drug misuse. Drug Testing and Treatment Orders can be for a minimum of six months and a maximum of three years. The order may be a stand alone order or it may be disposed in combination with a probation order. In 2002 an evaluation was carried out on the effectiveness of the Drug Treatment and Testing Order in Scotland (Eley et al, 2002). The findings of this report showed that DTTOs had quickly become established as an additional option for the courts in effectively dealing with drug-related offending. The report also estimated that the DTTO was a cost effective order in terms of the costs saved in the reduction of drug related crime. In 2004 another evaluation was carried out on reconviction rates following the imposition of a drug testing and treatment order. This report found that rates and frequencies of reconviction were lower following a DTTO than in the period prior to the imposition of an order. It also found that those offenders who completed their orders successfully had lower rates and frequencies of reconviction than those whose orders were revoked (McIvor, 2004).

#### *2.4.5 Supervised Attendance Orders (SAO)*

The Supervised Attendance Order was introduced by the Law Reform (Miscellaneous Provisions) (Scotland Act) 1990 and first introduced to Scotland as a pilot in 1992. It was adopted across Scotland following legislative amendments in 1995. The Supervised Attendance Order was devised as a way of dealing with offenders, who have defaulted on their fines, in the community. Like Community Service the SAO is a fine on time. The order may only be made when the court considers a supervised attendance order more appropriate than the imposition of a period of imprisonment. In 2001 a national evaluation of the operation and impact of the SAO was carried out (Levy and McIvor, 2001). Although the report raised concern about the limited options available for dealing with breaches, it found that the SAO was a credible and effective alternative to imprisonment for fine default. SAO activities, if experienced as constructive by offenders, were effective both in terms of helping them access training and employment and in reducing the likelihood that they would re-offend. The report also found that the SAO compared to a custodial sentence was a cost effective alternative for offenders who default on the payment of fines (Levy and McIvor, 2001). As a means of further reducing the number of fine defaulters sent to prison, legislation has further been amended to create a Mandatory Supervised Attendance Order for fine default up to £500, therefore removing the possibility of imprisonment completely for this category of offender. Two pilot schemes have been set up in Ayr and Glasgow and are currently undergoing

independent evaluation. The Scottish Executive anticipate the evaluation to be completed in mid-2006.

In addition to the five principle sentences is the restriction of liberty order.

#### *2.4.6 The Restriction of Liberty Order (Electronic Monitoring or 'tagging')*

Electronic Monitoring (or tagging) was first developed in the United States from the early 1980s and in 1995 it was piloted in three regions in England and Wales. With the introduction of the Crime and Disorder Act 1998 it was further extended as an alternative to custody there on a much wider scale (Smith 2001). The relevant legislation for Scotland is the *Crime and Punishment (Scotland) Act 1997*, which introduced the restriction of liberty order, with electronic monitoring to encourage compliance. A restriction of liberty order requires an offender to be (or not to be) in a specified place for a specified period of time. An order can be for a period up to 12 months with a maximum restriction period of 12 hours within any one day. Restrictions from a specified area can be for up to 24 hours a day for up to 12 months. Like the DTTO, the order may be a stand alone order or may be disposed in combination with a probation order with a condition of drug treatment. Whilst the probation part of the order is supervised by local authority social work staff the restriction of liberty order, either alone or combined is managed by a private company.

In 2000 an evaluation was carried out on the pilots of restriction of liberty orders with electronic monitoring in three Sheriff Courts. The report found that the equipment for monitoring the order worked well and that the company responsible for the supervision of the order was helpful and efficient (Lobley and Smith, 2000). The order was used mainly as a high tariff sentence and it was estimated that the orders replaced a custodial sentence in about 40% of cases (Smith, 2001). Offenders and their families generally welcomed the orders as they believed them to be alternatives to custody. They were also positively viewed by Sheriffs and social work staff. The report raised concerns however, about the type of offender for whom the order was most appropriate and it was found that young offenders and those offenders with serious criminal records were less likely to complete the order successfully. With regards to the previous point, it was rare for orders to be completed without some violation of their requirements. Finally, the evaluation found that fewer orders were made than the supervising company had expected and as a result, staff did not work to full capacity. Consequently, it was suggested that for restriction of liberty orders to be cost effective the sentences they replaced would have to have been relatively long (Smith, 2001).

## 2.5 Effectiveness of community disposals

With the introduction in 1989 of 100 per cent funding and national objectives and standards for social work services in the criminal justice system greater attention was given to the effective targeting of community based social work disposals. In particular, importance was given to the identification and management of risk of re-offending and risk of custody (McIvor, 1996).

After the initial publication of the National Objectives and Standards, a supplement volume was added entitled, *Social Work Supervision – Towards Effective Policy and Practice*, this document outlined more explicitly a set of operational principles for the effective supervision of offenders. Principles outlined in this document were:

- Identifying and managing risk of re-offending and risk of custody
- Focusing on offending behaviour
- Tackling behaviour associated with offending
- Addressing underlying problems
- Re-integrating offenders within the community
- Using authority positively
- Ensuring diversity of practice (Moore and Whyte, 1998, p21).

Much of the literature on the effectiveness of community sentences highlight the difficulties involved in measuring effectiveness and consequently tend to concentrate on technical matters relating to consistency in producing comparative data and standard criteria against which the effectiveness of community sentences could be measured. Table 2.5 shows reconviction rates of offenders discharged from custody or given non-custodial sentences in 1997. The table shows that those discharged from a custodial sentence or probation are more likely to be reconvicted than those on community service or fined.

Table 2.5: Reconvictions of Offenders Discharged from Custody or Given Non-Custodial Sentences in 1997, Scotland (%)

Index disposal in 1997	Percentage reconvicted within			
	1 year	2 years	3 years	4 years
Discharged from Custody	48	62	68	71
Community Service	34	45	51	55
Probation	47	59	64	68
Monetary	30	40	46	49

Data Source from Scottish Executive Reconviction Statistics

However the robustness of such figures to offer evidence of the effectiveness of community penalties has been challenged. Bottoms (2002) emphasized the complexities of definition with regards to the effectiveness of community sentences and outlines four circumstances under which the term effectiveness may be understood:

- 'A community sentence is effective if it results in no further offending by the offender within a specified time period. [Simple non-re-offending]
- A community sentence is effective if it results in no further offending by the offender within a specified time period, and it is probable (using appropriate statistical comparisons) that had s/he been given a different penalty (e.g. a nominal penalty such as a conditional discharge) s/he would have been more likely to re-offend. [Comparative non-re-offending]
- A community sentence is effective if the offender completes it with no breach of the formal requirements of the order: for example, an offender given community service attends regularly at community service work sessions, and works hard and diligently during those sessions. [successful completion of order]
- A community sentence is at least partially effective if certain intermediate treatment goals are achieved: for example, an offender whose criminality has been closely linked to heavy drinking significantly reduces his or her alcohol consumption after attending a prescribed treatment programme for heavy drinkers. [Intermediate treatment goals]' (Bottoms, 2002, p88).

Bottoms suggested that in order 'to attend with full seriousness to the important question of the effectiveness of community penalties and full account of the nature and characteristics of the society in which we are attempting to enforce these community penalties' must be considered (Bottoms, 2002, p112).

## **2.6 Conditional release and parole**

While a repertoire of community-based sentences are a major constituent of alternatives to custody in Scotland, the significant contribution of parole arrangements should not be overlooked.

The key legislation relating to parole arrangements in Scotland is the *Prisoners and Criminal Proceedings (Scotland) Act 1993*. This Act distinguishes between conditional release and parole (Gibb and Duff, 2002).

Short term prisoners (sentenced to less than 4 years imprisonment) are eligible for release after serving one half of their total sentence (although any additional days added to their sentence due to breach of prison discipline is also taken into account). Only one condition is usually imposed on release from prison for short term prisoners, and that is, if the individual is convicted of a further offence that in turn would normally be punishable by imprisonment, he or she will serve the whole or part of the original sentence (Gibb and Duff, 2002).

A person imprisoned for between one and four years may also, if appropriate, be subject to a supervised release order. A supervised release order requires that the offender may be placed under the supervision of a local authority for a period of not more than 12 months, or the remainder of the prison sentence at point of release. The individual must comply with the conditions set out at the disposal of the order. If the conditions of the order are breached, the individual will be returned to prison for the whole or part of the period during which the order would apply (Gibb and Duff, 2002).

Long term prisoners (sentenced to more than 4 years imprisonment) are eligible for consideration for parole after one half of the total sentence (again, additional days added to their sentence due to breach of prison discipline is also taken into account). If a prisoner is to be considered for parole he or she must be notified in writing. A file containing materials relevant to the case will be sent both to the prisoner and the parole board. Written information relevant to the case may also be submitted to the board by the prisoner him or herself. The following factors should be taken into account by the board when considering a prisoner for parole: the nature and circumstances of the original, or any other, offence; the prisoner's conduct in prison; the likelihood of re-offending or of the prisoner causing harm upon release; and any relevant information provided by the prisoner or any other party (Gibb and Duff, 2002).

Prisoners sentenced to more than four years qualify for release 'on license' after two-thirds of their sentence has been served (again, additional days added to their sentence due to breach of prison discipline is also taken into account). The license conditions are set by the parole board and supervision is carried out by the social services. If the conditions of the license are breached, or if the individual is convicted of a further offence whilst on license, he or she may be returned to prison by the court (Gibb and Duff, 2002).

## **2.7 Alternatives to custody and rates of imprisonment in the UK**

Bottoms (1987) suggests of the experience in England and Wales in developing alternatives to custody over the period of twenty years from 1965-1985:

*'Unfortunately, as will be seen, the experience of this period suggests: first that the concept 'alternatives to custody' has many limitations, and the success of so-called 'alternatives to custody' measures in reducing the prison population has not been very great: second, that attempts to limit the length of custodial measures by various means have led to several anomalies' (p177).*

The international evidence indicates that often when penalties designed as substitutes for custodial sentences were adopted as policy, in practice they rapidly became alternatives for other non-custodial penalties. In this way it is important to be cognizant when investigating new means to reduce rates of imprisonment, that both reductions and expansions in prison populations may be the result of inadvertent penal practices, such as greater flexibility within the judiciary, rather than by the conscious adoption of a greater number of new 'alternatives' (Muncie and Sparks, 1991). Cohen (1985) first outlined the relationship between *net-widening* and community alternatives. The problem of net-widening arises when penalties and sanctions, designed as substitutes for custodial sentences become alternatives for other non-custodial sanctions. The consequence of this is that the criminal justice system expands and becomes more intrusive, subjecting more and newer groups of offenders to more intense supervision, without in turn reducing the prison population. It is therefore within a relatively complex and paradoxical situation that the debate about alternatives to imprisonment takes place.

## **2.8 Towards a comparative study of Scotland, Finland, Sweden and Western Australia**

Sections 3 to 5 of this report present a detailed analysis of relevant published material combined with additional information that will offer a critical examination of the approaches to managing prison populations in the jurisdictions of Finland, Sweden and Western Australia to be better understood.

Across many jurisdictions there exists a broad range of penalties and sanctions used either as a substitute for, or in conjunction with, imprisonment or fines. All countries vary in how widely, and in what way, these sanctions

are used. This diversity of use, but similarity in name, only serves to highlight the ambiguity of terms such as 'alternative to custody' or 'alternative sanctions'. Ruggiero (1995) warns that there is no single definition of what 'alternatives to custody' are, and that anything that involves crime prevention and punishment outside custodial establishments can legitimately be defined as 'alternative'. He quotes a definition by Vass (1990) which seems to apply to most jurisdictions: *'Alternatives to custody are those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments'* (quoted in Ruggiero 1995:53). This definition is useful as it includes parole and other forms of conditional release and it is the definition that will be used throughout this report. Other measures that do not come under this definition will simply be referred to as 'penalty'.

Given these considerations, in section 6 of this report, the applicability of their policy measures, approaches and experience to the situation in Scotland will be considered.

## **SECTION 3: POLICIES, PRACTICES AND LEGISLATIVE CHANGE TO REDUCE IMPRISONMENT RATES IN FINLAND**

### **3.1 Introduction**

Finland's long-term experiences of reducing the prison population are of interest to other jurisdictions. From a prisoner rate that was four times higher than in the other Nordic countries at the beginning of the 1950s to reaching the Nordic level in the early 1990s, the prisoner rate has now began to rise. The following sections will investigate the law reforms and sentencing policies of Finland from 1950s to the present day, examine the implications for specific prisoner groups and consider the sociological, technological, economic, environmental and political factors influencing criminal justice policy. Finally some arguments for the recent rise in the Finnish prison population will be examined.

### **3.2 Brief history of imprisonment and reform**

In the 1950s, Finland had a prison rate which was four times higher than in other Scandinavian countries (approximately 200 prisoners per 100,000 inhabitants compared to around 50 per 100,000 in Sweden, Denmark and Norway). This continued through the 1970s, with Finland having a prisoner rate amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland's prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000). Recently, there has been a rise in the number of prison sentences and the number of prisoners. Between 1999 and 2002 there was a 25% increase in the number of prisoners which has now stabilised. Some explanations for this recent rise will be examined in a later section. The process of reducing the prison population in Finland over the past fifty years will be considered first.

The decrease in Finnish prison population has been the result of a long term pragmatic-rational criminal policy<sup>1</sup>. In a similar approach to Western Australia from 2000, Finland has conducted prison policy and sentencing reforms as part of a 'bigger picture' of change since the 1950s. The social complexity of this long term change is apparent with legal reforms, changing practices of sentencing, prison enforcement as well as macro-level structural factors and ideological changes in penal theory contributing at different stages and to different degrees.

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<sup>1</sup> Other structural and demographic factors such as the ageing of the large birth cohorts after the war (Aho 1997) have contributed to the reduction of the prison population.

Table 3.1 offers a summary timeline of major law reforms from 1950-1995 that have contributed to the significant reduction in prison populations.

Table 3.1: Major law reforms in Finland 1950-1995

Year	
1950s	Court-based mitigation
1967	Amnesty
1969	Day-fine reform
1972	Theft reform
1977	Drink driving reform
1989	Parole reform
1993-1995	Community service order reform

In the 1960s, coercive treatment (rehabilitation) was viewed as limited in its ability to reduce crime in any significant way and reforms were introduced to limit the use of coercive treatment and restrictions of liberty on rehabilitative grounds. Consideration of cost-benefit analysis resulted in the authorities looking beyond the traditional penal system in attempts to reduce crime and expenditure on criminal justice. This led to consideration of the possibilities of using environmental planning and situational crime prevention as a mechanism for controlling crime. Punishment was re-evaluated and regarded as one option among other forms of intervention, with general prevention (based on legitimacy and acceptance: principles of justice, proportionality and fairness) increasingly seen as more important than sentence severity.

Social debate on involuntary treatment in institutions merged with criticism of the Criminal Code and the excessive use of custodial sentences in Finland. 'Humane neo-classicism' stressing both legal safeguards against coercive care and less repressive measures in general emerged. This offered the starting point for a series of reforms of Finnish criminal legislation. Criminal law in this framework has a less prominent role as a means of crime policy than before.

From early 1970s, the reform ideology was emblematic of a pragmatic, non-moralistic approach to crime problems allied with a strong social policy steer. There was a purposeful shift towards a reduction in the use of custodial sentences and a more lenient system of sanctions. As Lappi-Seppälä has stated 'It entailed, *inter alia*, that measures against social marginalisation and equality work also as measures against crime, and that crime control and criminal policy are part of social justice and not so much an issue of controlling dangerous individuals' (Lappi-Seppälä 2004: 1). This framework was supported by the Nordic welfare state ideal and had supporters in the Ministry of Justice, the prison administration and by penological experts. The independent role of the judiciary has also contributed to sentencing changes

as some courts have moved towards more lenient sentencing level in anticipation of legislation.

### **3.3 Trends in sentencing**

The Finnish judge has four basic sentencing options:

- Unconditional imprisonment
- Conditional imprisonment
- Fine
- Community service

The general criminal punishment of the sentence of imprisonment can be imposed either for life or for a determinate period of at least fourteen days and at most twelve years. Sentences of imprisonment of at most two years can be imposed conditionally with the sentencing principle that “the maintenance of general obedience to the law does not demand an unconditional sentence”.

Between 1950 and 1990, there were two consecutive changes to sentencing patterns:

1. Between 1950 and 1965 the average length of unconditional imprisonment fell from thirteen to seven months
2. From the late 1960s onwards the proportion of unconditional sentences fell from 70% (1966) to 42% (1980).

Also, in 1967, the number of prisoners in Finland was reduced by an amnesty which shortened prison sentences by one-sixth.

Sentencing for two distinct crime categories – drunken driving and theft – primarily explain the changes to sentencing patterns.

Drink driving remains a key issue in Finnish criminal policy due to an intolerant and restrictive attitude towards drinking-and-driving and hard drinking habits in society. The 1970s witnessed an attempt to move away from the fairly long unconditional prison sentences imposed for drink driving towards non-custodial alternatives. In 1977 there a modernization of the law and the definition of drink driving which gave legitimacy to a movement started by the courts themselves to punish drunken driving with conditional sentences and fines. Comparing 1981 to 1971, the reform had a significant effect with 70% of drink drivers receiving an unconditional sentence in 1971 which dropped to 12% in 1981. Today the common punishment for aggravated drink driving is conditional imprisonment together with an unconditional supplementary fine while drink driving cases where blood alcohol is under 0.12% are punished with fines.

In the 1950s courts began to mitigate the sentences for theft offences. The high minimum penalties with the rigid offence definitions for aggravated forms curtailed these efforts and long custodial sentences for property crimes sustained the prison population at a high level in the 1950s. Two changes made a clear change in sentencing practice.

1. In 1972 new definitions and new punishment for larceny were introduced and
2. In 1991 the latitudes for the basic form of theft was reduced.

Comparing 1991 to 1971, the legislative changes had a significant effect with 38% of offenders sentenced for larceny receiving a custodial sentence in 1971 which dropped to 11% in 1991. While it must be recognized that the typical forms of theft have changed over the forty year period from 1950 to 1990, with the frequency of petty shoplifting replacing crimes against individual victims and households in the 1980s and 1990s, the legislative changes did contribute to a steep decrease in sentence length (and so contributing to reducing Finnish prison populations as shown in Table 3.2).

Table 3.2: Average length of all sentences imposed for theft, Finland 1950, 1971, 1991

<b>Year</b>	<b>Average length (in months)</b>
1950	12.0
1971	7.4
1991	2.6

### **3.4 Alternatives to custody in Finland**

Finland has relatively few alternatives to imprisonment:

- The fine has been the principal punishment and its use for more serious crimes was extended during the late 1970s (by raising the amount of day-fines).
- The conditional sentence, where sentences of up to two years can be imposed conditionally. This places the offender on probation for a period of one-three years but does not necessarily involve supervision for adult offenders.
- Conditional prison sentences can be combined with unconditional fines.
- Community Service was introduced in 1991 in four jurisdictions and extended to cover the country in 1994 (duration between 20-200 hours). It can replace custodial sentences of up to 8 months and is intended to replace an unconditional prison sentence (similar to Scotland).
- Victim-offender reconciliation programmes were initiated in 1983 and have expanded throughout the country.

- The amount of time actually spent in prison is controlled by the parole system and applies to all prisoners, except those serving their sentence in preventive detention or a life sentence.

### 3.4.1 *New sentencing alternatives*

The sentencing reforms of the 1970s in Finland ‘constituted a coherent and consistent unity with clear aims and systematic strategy (Lappi-Seppälä 2004: 6). The ‘bigger picture’ approach of passing a series of legislative changes supported by the judiciary and a debate on sentencing levels and punishment leads to the criminal policy success of Finland’s sentencing reforms. Table 3.3 charts the use of difference sentencing alternatives in Finland from 1970 to 2000. In 2002, the majority of penalties imposed by Finnish courts were fines (57%), followed by conditional imprisonment (23%), unconditional prison sentence(13%), community service (5%) waiver (2%).

In 1977 three other bills were passed alongside the modernization of the definition of drink drinking that promoted the increased use of conditional sentences and fines in general.

- The reform of the conditional sentence act allowed the combination of a fine with a conditional sentence.
- The reform of the day-fine system raised the amount of day-fines and encouraged courts to use day-fines in more serious cases.
- The enactment of general sentencing rules provided in chapter 6 of the Criminal Code gave the courts general guidance in punishment for all offences (and opened the debate on proper sentencing level<sup>1</sup>).

The conditional sentence has been the most effective alternative to imprisonment. From 1950 to 1990 the number of conditional sentences increased from some 3000 to 18000 sentences per year. Growth was very rapid between 1970 and 1980. The shift from custodial sentences to conditional imprisonment and fines for drunken-driving has had an impact on reducing prison populations. The introduction of community service has also affected sentencing for drink-driving.

Community service was introduced on a pilot basis in 1991 and was rolled out in 1994 to cover all Finland. Community service is now an established part of the sentencing options in Finnish courts. Community service of between 20 and 200 hours can be imposed in lieu of unconditional imprisonment for up to 8 months. To address potential ‘netwidening’, the Finnish courts operate a two step directive approach.

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<sup>1</sup> Judges led the discussions with organisational help from the Ministry of Justice.

- 1 – the court makes its sentencing decision in accordance with the principles and criteria of sentencing
- 2 – if the result of this first step is unconditional imprisonment, then the court can commute the sentence into community service if
  - a) the offender consents to the sanction
  - b) the offender can carry out the working obligations of the community service order
  - c) recidivism and criminal record does not prevent the use of the community service order

An unconditional imprisonment sentence is commuted to a community service order based on the following translation: one day in prison equals one hour of community service. A community service order in Finland focuses on the offender's working obligations and does not include extra supervision aimed at offending behaviour. If a community service order is violated, a new unconditional prison sentence would be usually imposed.

*Table 3.3: The use of different sentencing alternatives in Finland 1970 to 2000*

	1970	1980	1990	1995	2000
	n	n	n	n	n
<b>Offences leading to a sentence*</b>	208,441	321,476	462,807	390,747	365,179
<i>Penalties imposed by courts</i>	(57,675)	(72,282)	(81,627)	(61,208)	(64,403)
-unconditional imprisonment	10,212	10,326	11,657	6,754	8,147
-community service	-	-	-	2,803	3,413
-conditional imprisonment	5,215	14,556	17,428	13,624	13,973
-fine by court	42,248	47,401	52,542	38,027	37,503
<i>Summary proceedings</i>					
- fine by a penalty order	150,542	249,006	311,889	277,530	196,156
- of these, traffic violations	129,140	189,752	252,239	234,977	
- petty fine (traffic violations)	-	-	69,291	52,009	103,499
<i>Waiving of penal measures**</i>					
Non prosecution	-	2,003	3,417	6,361	7,483
Waiver of the sentence*	-	1,765	1,648	1,351	1,069
- of these young offenders	109	1,236	1,049	415	215

Source: Statistics Finland (2003)

\* If the offender has been convicted of several offences the statistics are based on the main offence

\*\* Excluding traffic offences

*Table 3.4: Imprisonment and community service in the Finnish court practice 1992-2002*

<b>Year</b>	<b>Imprisonment</b>	<b>Community Service</b>
1992	11,538	0
1993	9,563	563
1994	7,699	1,487
1995	6,754	2,803
1996	6,101	3,277
1997	5,967	3,534
1998	6,642	3,957
1999	7,666	3,658
2000	8,147	3,413
2001	8,352	3,388
2002	8,439	3,313

Source: Statistics Finland (2003)

As a 'true' alternative to custody, there is evidence to support that community service has worked well. Table 3.4 details Finnish court practice 1992-2002 in imprisonment and community service. From 1992-2002, as the number of community service orders have increased so the number of unconditional prison sentences has decreased. The use of community service reached a peak in 1998-1999 where the average daily number of offenders serving a community service order was about 1200 and the corresponding prison rate was 2800. From 1998-2002 the amount of community service sentences have decreased and remain stable in 2005.

In Finland, mediation cooperates with the criminal justice system as far as the referral of cases and their further processing is concerned and is not part of the criminal justice system. Mediation is based on volunteer work and mediators are not considered public officials. In 1996, victim-offender reconciliation programmes received a recognised legal status in the criminal code. They can influence the decision of the prosecutor to waive further measures, or the decision of the court to waive punishment. In 2003, all towns in Finland with a population over 25,000 and most over 10,000 offer mediation services giving an estimated coverage of 80% of all Finns living in a municipality. Around 5,000 cases are referred to mediation. Participation in mediation is voluntary and can be initiated by any one of the possible parties and can start between the commission of an offence and the execution of a sentence. The police and the prosecutor account for approximately 75% of all referrals annually. Typical offences are assault, theft and damage to property.

Controlling prisoner rates in Finland has also been influenced by the parole (early release) system. All prisoners, with the exception of those serving a life sentence or in preventive detention, will be released on parole. The minimum

time to be served before eligibility for parole has been subject to a series of reform. These are summarised in Table 3.5. Changes to parole eligibility have had visible effects on decreasing prison figures. In 2000, the number of parolees under supervision was 2207.

Table 3.5: Minimum time served before eligible for parole, Finland

<b>Year</b>	<b>Minimum time served</b>
Pre-1960s	6 months
Mid 1960s	4 months
Mid 1970s	3 months
1989	14 days

### *3.4.2 Specific prisoner groups*

Embedded within the law reforms and trends in sentencing practices different prisoner groups have received different attention. The focus in the 1960s and the 1970s was on fine defaulters and recidivists in preventive detention. In the 1970s and 1980s, restrictions to the use of imprisonment for young offenders were made. Less attention has been given to female offenders and drug involved offenders who are significant prisoner groups.

#### Fine Defaulters

Two consecutive law reforms in the late 1960s significantly reduced the number of fine default prisoners from the one time high of 25% of the total Finnish prison population in the 1950s and 1960s. The two law reforms were:

1. Decriminalising the major offence leading to a default fine - public drunkenness and
2. Reducing the number of day-fines and raising the amount of day-fines.

The decriminalisation of public drunkenness in 1969 reduced the number of prisoners serving a sentence for unpaid fines from a daily average of 800 to less than 100 (Lappi-Seppälä 2004). The decreasing number of day-fines and raising of the amount of day-fines led to shorter default sentences. Currently, there are proposals in Finland regarding fine default aimed at reducing prison populations.

#### Recidivists in preventive detention

A number of other reforms have subsequently been introduced, notably restriction of the use of preventive detention. In 1971 this was restricted to dangerous violent recidivist offenders resulting in a significant decrease in the number of prisoners held in detention as recidivists. This now means that

prisoners are not held in custody for longer than their original sentence and only a very small minority do not qualify for early release on parole. The impact of this reform was apparent within a year of its introduction as the number of persons held in preventive detention fell by 90% from 206 to 24. The annual average since the 1970s has been steady at between 10-20 prisoners.

### Young offenders

The age of criminal responsibility in Finland is 15 years. Historically in the 1970s and 1980s, Finnish courts were reluctant to impose custodial sentences on young offenders. In 2002, under 18s accounted for 0.5% of the Finnish prison population (International Centre for Prison Statistics 2004a). Punishments of young offenders relies heavily on traditional alternatives to custody. Offences committed by under-15s are turned over to the municipal social welfare or child welfare board for consideration. There are no juvenile courts and use of specific penalties is limited. The Conditional Sentence Act was amended in 1989 to restrict the use of unconditional sentence to situations where extraordinary reasons call for this. In 1996, a new sanction (a 'juvenile penalty') was used on an experimental basis for 15, 16 and 17 year olds. This involves a short period of unpaid work or 'similar activity'. There are two alternatives to court proceedings:

- transfer to the municipal social welfare board (limited to cases that involve offenders aged 15-20) but is not used often.
- Mediation.

There is a growing recognition in Finland of the need for cooperation between the Probation Association and other agencies. In 2000, 2720 conditionally sentenced young offenders were put under supervision.

### Female offenders

The female prison population is similar to many other European countries. In 2002 women constituted 5.6% of the prison population (195 individuals), an increase from 167 in 2001 (but representing a similar percentage of the total prison population) (Finnish Prison Service 2003). Foreign prisoners accounted for 8.5% of the prison population in 2002.

### Drug involved offenders

On 1 May 2003, 496 persons out of an overall total of 2974 (excluding remand and fine defaulters) in Finnish prisons were convicted of drugs offences. This was a significant rise compared to the 360 persons out of an overall total of

2361 on 1 May 1999. Greater quantities of drugs recovered on arrest and the rise in drug smuggling to Finland has raised the profile of drug offending to the Finnish general public and its material costs to the public purse. Lappi-Seppälä states that 'plans have been prepared to extend the scope of non-custodial sanctions to a new type of treatment order reserved for those who – due to their alcohol or drug abuse – do not fulfil the conditions of community service' (Lappi-Seppälä 2004: 15).

### **3.5 Understanding the conditions for law reforms in the jurisdictions**

The systematic criminal policy of Finland started in the 1950s with courts reducing their sentences and has included a series of legislative changes from the 1960s to present day. Lappi-Seppälä argues that to put the Finland changes into perspective, it requires the acceptance of the changes as a 'normalisation' of prison rates 'a move from a level that was totally absurd to a level that can be considered to be a fair Nordic level – albeit ten times lower than the present US level' (Lappi-Seppälä 2004: 12). In the following sections, the sociological, technological, economic, environmental and political factors that contributed to the adoption and acceptance of the law reforms will be considered.

#### *3.5.1 Sociological and economic factors*

During the 1960s in particular, Finland experienced social and structural changes as it developed from a rural agricultural country into an industrial urban welfare state. This social restructuring was related to a steep rise in crime rates during the late 1960s. It is well established in criminological thought that the number of crimes committed or reported are unrelated to the use of imprisonment. Interestingly, policies of penal reform and reduction were introduced at a time when there was the rapid increase in recorded crime<sup>1</sup>.

The level of crime does not appear directly related to the severity of sentences, but may be attributed more to structural, social and situational factors. The Finnish reduction in the use of custody may be more indicative of a shift from an excessive use of imprisonment to a more 'normalised' situation rather than a major move towards decarceration.

In 2003, Finland had a population of 5.2 million. Over 60% of the population live in urban municipalities, with the Helsinki metropolitan area accounting for

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<sup>1</sup> Examinations of the particular areas that were targeted for reduction indicate that significant reductions in the use of imprisonment (eg for drunk driving) did not lead to an increase in the recorded figures for this offence.

almost one-fifth of the total Finnish population. Finland has a largely service-oriented industrial structure with trade, transport and communications, financing, community and other services accounting for around two-thirds of the economically active population. Compared to Scotland, Finnish society has demographic homogeneity with less racial and class distinctions. Social inclusion is not a significant agenda for Finland and the public perceptions of social equality may have protective value against demands for control and exclusion of offenders leading to higher rates of imprisonment. The higher number and diversity of foreigners in Finland, from Sweden, Estonia, Russia, Somalia and Turkey and their representation in the crime statistics may influence public opinion. In 2003, about 16,600 foreigners who had residence in Finland (2.8% of all persons suspected of offences known to police) and about 15,000 foreigners who did not have residence in Finland were suspected of some offence. About 8-9 per cent of the Finnish prison population in 2003 was foreigners. Studies of foreigners as victims of crime highlight that they frequently experience discrimination in Finnish society including attacks of racist violence.

Historically there has been little evidence in Finland of a low level populism surrounding criminal policy. Over the past decade, there have been increasing reports of crime on Finnish TV partly due to the increasing number of channels and by the expansion of news print media. The major political election campaigns have not made use of 'truth in sentencing', 'three strikes' or 'war on drugs' policies that have been apparent in other jurisdictions (Roberts et al 2003).

The International Crime Victims Survey in 1989, 1992, 1996 and 2000 has established Finland as having a relatively low overall victimization rate for 11 different offences ranging from car crimes to property crimes and contact crimes with the exception of assault and sexual violence. Finland's rate of assault and sexual violence is higher than average for Western European countries. Large-scale national population surveys in Finland measuring victimization and fear of crime indicate that in 2003 there is less concern/fear of street crimes compared to the 1990s. The economic recession in the early 1990s has influenced crime trends in Finland, particularly thefts. The public fear of being burgled was heightened between 1988-1993 and has continued to decrease with burglary protection measures maintaining their popularity. Economic upturns in Finnish society have been followed by an above-average increase in recorded theft, with higher rates found in urban regions. Crime preventative measures such as self-defence education against violence have continued to increase over the past 15 years. The Eurobarometer of public safety and the international victimization survey found that fear of being on the streets at night was one of the lowest in Finland.

The past five years has seen ‘humane and rational criminal policy’ disappear from official policy documents. Political rhetoric has focused on ‘transnational organized crime’ and raised concerns about violent and sexual offences, offending by foreigners and the rise in drug smuggling. Policy initiatives extending the investigative powers of the police form part of a new tougher Finnish criminal policy. This has contributed to a rise in prison populations in the past five years. Public attention has begun to focus on the cost and conditions of increasing numbers of prisoners on longer sentences.

### 3.5.2 Technological factors

In the mid-1990s, an automated police information system was introduced to replace the previous manual system in Finland. This has been identified as contributing to the significant decrease in clearance rates (a measure of crimes solved by the police) for offences in Finland. Up to the 1990s, around 90% of all reported violent offences and over one-half of all reported property offences were cleared, a relatively high rate in by comparison to other jurisdictions. Table 3.6 reports the clearance rate of selected offences in Finland in 1990, 2000 and 2002.

Table 3.6: Clearance rates of selected offences in Finland, 1990, 2000 and 2002.

Offence	1990	2000	2002
Frauds	89	77	81
Embezzlements	83	67	59
Assaults	81	76	76
Rapes	67	56	62
Robberies	48	43	44
Thefts (excl. thefts of motor vehicle)	37	30	30
Damage to property	27	25	26

Source: Statistics Finland (2003)

### 3.5.3 Environmental factors

Historically, Finland has had a low level of recorded crime. While sharp increases in recorded crime occurred from the mid-1960s to mid 1970s and across the 1980s, the current crime rate remains low compared to other jurisdictions. The low crime rate may have made a small contribution to the adoption and acceptance of the law reforms in some way. Generally, prisoner rates and crime rates in Finland have changed in isolation.

Compared to other jurisdictions, Finnish criminal policy is highly expert-oriented. A small group of broadly similar thinking penal experts with close ties to the academic research community and to senior politicians were leaders in the reforms to reduce prisoner rates in Finland.

The proposed law reforms were enabled through collaboration between the experts and the judiciary. The judiciary have been described as having an 'attitudinal readiness' (Lappi-Seppälä 2004: 11) before the reforms. Lawyers in Finland have covered criminology and criminal policy as part of their university courses and subsequent continuing professional development training have contributed to the adoption and acceptance of a liberal criminal policy in Finland.

Crime prevention strategies in the community remain the main armoury against crime in Finland, not the criminal justice system. The profession views of penal experts continues to have a significant impact on the development of evidence-based criminal policy in Finland. The public participation agenda, of hearing the 'voice' of the general public and of 'front line' workers such as police officers has started to contribute to the policy making process.

#### *3.5.4 Political factors*

Törnudd has emphasized that political consensus that prisoner rates was a problem which needed to be addressed was crucial in the adoption and acceptance of the law reforms in Finland:

“Those experts who were in charge of planning the reforms and the research shared an unanimous conviction that Finland’s internationally high prisoner rate was a disgrace and that it would be possible to significantly reduce the amount and length of prison sentences without serious repercussions on the crime situation” (Törnudd 1993: 12).

Civil servants, the judiciary, the prison authorities were part of this consensus which was endorsed by the politicians. Finland is exceptional in that crime control has never historically been a central political issue in election campaigns (Lappi-Seppälä 2004).

In Finland, the pragmatic-rational approach to crime problems had a strong social policy orientation: 'good social policy is the best criminal policy' (Lappi-Seppälä 2004: 1). Joutsen et al (2001, p.38) note that “The criminal justice system is not the only, or even the most important system for controlling

behaviour. Better results can be achieved by changing social structures and conditions conducive to crime, developing educational measures, and reducing the opportunity for crime". Echoing the values of the Nordic welfare state ideal, measures against social marginalisation and equality work were also held as also measures against crime. Instead of ensuring community safety from dangerous individuals, the Finnish approach was that crime control and criminal justice are part of social justice. The pragmatic-rational approach was supported by leading officials in the Ministry of Justice and the prison administration and by penological experts.

Political moves to harmonise criminal law and penal policy at the EU level has been met with some skepticism by Nordic scholars in criminal law as the current Finnish debate on criminal policy has notably become more politicised. While sentencing has been noted to have become more punitive recently, the political culture remains reluctant to use tough criminal policy as a political strategy.

A number of moves suggest that the criminal justice system in Finland has been modernised in similar ways to other jurisdictions. For example, in 2001, the administration of prison, probation and parole services was reorganised into the Department for Punishment Enforcement which is divided into Prison Administration and Probation and After-Care Administration.

### **3.6 Understanding the prison population rise in Finland (1999-2004)**

Although there were significant decreases in the prison population between 1992 and 1998, since 1998, the overall trend in imprisonment has increased. The figures for 2000 to 2004, show a steady rise from below 3000 (2663 on 1/1/00 and 2887 on 1/1/01) to recent figures of over 3000 (3110 on 1/1/02, 3469 on 1/1/03 and 3463 on 1/1/04)<sup>1</sup>. As well as the number of prisoners, the number of prison sentences has started to increase. Explanations of this significant increase in Finland's prison population have focused on foreign prisoners. The number of foreign prisoners, particularly from the Russian Federation and Estonia, has more than doubled between 1999-2002 (+112%). Fine defaulters and remand prisoners also contribute to the increasing prison population (+86% and +35% respectively (Table 3.7). Currently, proposals to reduce the use of remand and default imprisonment are being considered. A 20% increase is explained by increased number of persons being convicted and sentencing practices.

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<sup>1</sup> Figures supplied by Ministry of Justice, Finland.

Table 3.7: Prisoners in 1999, 2002, 2003 and 2004 by prisoner groups

	1999 <sup>1</sup>	2002 <sup>1</sup>	2003 <sup>2</sup>	2004 <sup>2</sup>
All	2743	3433	3469	3463
- serving a sentence	2215	2673	2819	2845
- remand prisoners	354	478	475	450
- fine defaulters	102	190	175	168
Foreigners	138	293	285	306

<sup>1</sup> annual average

<sup>2</sup> on 1 January

Source: Lappi-Seppälä (2004)

Excluding remand and fine defaulters, there have been significant increases in the prison population by type of offence. There are three main factors contributing to this (Lappi-Seppälä 2004).

1. Drug offences show the most rapid increase (38%) from 1999-2003. Sentences have become longer by one third and the number of prison sentences for aggravated drug offences has doubled in response to changes in the nature of drug offending e.g. the rapid growth of organised drug-smuggling from the Russian Federation and the Baltic countries and the increased quantity of drugs.
2. The largest prisoner group of violent offenders has increased by 28% from 1999-2003 and continues to rise. Purposeful tightening of the reporting, apprehension and sentencing level of violent offences has significantly contributed to this. Policy initiatives extending the investigative powers of the police form part of a Finnish criminal policy to tackle violent and sexual offences that is moving away from the 'humane and rational criminal policy' of previous decades.
3. The drop in the use of community service between 1997-2000 partially explains some of the change in prison population. This decline in use could be considered a logical response to the rapid increase in the use of this sanction.

It is difficult to offer a robust conclusion about the rise in the prison population in Finland over the past five years. Lappi-Seppälä suggests that 'this short-term rise in Finland's prison population is only a "natural step backwards" after a long-term decrease, an adaptation to "new circumstances" and changes in the nature of crime, or a sign of new punitive policies finally entering Finland and argues that 'the safest guess is that all these three elements have been involved' (Lappi-Seppälä 2004: 15).

While it is noted that there appears to have been a recent shift in Finland towards a more politicised punitive approach to sentencing practices, many of the social, political, economic and cultural factors that explain the sharp rises

in imprisonment in the United States and the United Kingdom are not present in Finland. While it is clear that Finland in the past five years has experienced a significant rise in its prison population, in comparison to Scotland, Finland's prison populations are low, crime rates are low and the level of resources to the prison administration and the police forces modest for a similar population size of around 5.2 million.

## SECTION 4: POLICIES, PRACTICES AND LEGISLATIVE CHANGE TO REDUCE IMPRISONMENT RATES IN SWEDEN

### 4.1 Introduction

Up until the 1960s, the prison populations of Sweden and the UK were very similar but the Swedish prison population decreased after the 1960s, and the rate of imprisonment has not returned to the level of imprisonment evident in the late 1960s. This relative stabilisation is in contrast to the UK prison population which has continually increased during this period.

After a decrease in the prison population of Sweden between 1995-1998, it began to increase again between 1998 and 2001. This trend has continued upwards (Table 4.1). In terms of the prison population rate (per 100,000) of the national population Sweden has a rate of 72 (International Centre for Prison Studies, 2004). In 2001, fines constituted the most common form of sanction in Sweden with around 53% of convicted persons receiving a fine, compared to 11% who were sentenced to imprisonment. The most common length of sentence is between 2 and 6 months, and accounts for 28% of those sentenced to prison.

Table 4.1: Prison population total and rate of imprisonment, Sweden, 1992-2003

Year	Prison population total	Prison population rate
1992	5431	63
1995	5767	65
1998	5290	60
2001	6089	68
2003	6473	72

Source: International Centre for Prison Studies (2004b)

Although the prison population rose during the 1960s and a programme of prison expansion (building new prisons) was implemented, the anticipated rise in the number of prisoners did not materialise. This could be attributed to the increasing view of prison as an expensive and largely ineffective form of punishment, which should be limited in use as far as possible. While such a view was most forcefully represented among abolitionists and grass-roots movements, it also gained favour within the political establishment and justice system (Mathieson, 1974). Accordingly, when the prison population has tended to rise, various legislative changes have been implemented in order to control such increases.

## 4.2 Recent social and economic changes

Sweden has a strong welfare state and although unemployment rose between the 1970s and 1990s it was at a much lower rate than that of other European countries, the result of a pronounced policy to keep the level of unemployment down. Sweden has, however been affected by the international economic downturn which has had adverse consequences for the labour market, with rises in the level of unemployment. Nevertheless in February 2003, the rate of unemployment was 4.5% (Government Offices of Sweden, 2003:7).

Sweden has experienced a number of structural changes reflected in many other West European countries. Improvements in the standard of living and the development of consumerist culture have been linked to the increase in the number of criminal offences. Changes in social organisation, particularly urbanisation, have resulted in shifts in the mechanisms of formal and informal social control. Increasing concerns can be identified in relation to crime, drug misuse<sup>1</sup> and social exclusion.

Since the 1950s there has been a marked increase in the crime rate, which reflects developments in crime recording systems but also illustrates rising levels of crime. This remained relatively constant during the 1990s. In Sweden, the most commonly used statistics to measure crime are the number of offences reported to the police. There are some noticeable features of statistical data on crime in Sweden:

- A crime is registered at the point at which it is reported
- Reported acts that later prove to be non-offences are not removed from the statistics
- All offences listed on the same police report or committed on the same occasion appear as separate offences in the Swedish statistics.

The number of reported offences was 1,189,400 in 2001, an increase of 57% since 1975 (Pettersson, 2001: 1). While the number of offences reported to the police has generally increased, there has been evidence of stabilisation and a slight reduction up to 2000. The clear-up rate has decreased and currently stands at about 26%.

The level of crime in Sweden remains low in comparison with most other West European countries and this is attributed largely to Swedish welfare policy

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<sup>1</sup> Since the 1970s, Swedish drug policy has been prohibitionist and the following decades have been characterised by increased police attention on drug use and drug users, something which has impacted on the prison population and criminal justice system in general.

which has limited the potential effects of social marginalisation. There is significant emphasis placed on the location of crime policy within a framework of general welfare policy (National Council for Crime Prevention 1997). However, crime is viewed as a significant problem and one which requires increasing measures to reduce and prevent it, particularly given concerns about reductions in the total clearance rate. Increasing concerns about particular types of crime can be identified; drug related crime, economic and technology-based crime, violent crime and racially motivated crime. However, motoring offences account for the highest proportion of convictions (40%) followed by theft offences which account for 21% of all convictions (Petersson, 2001: 21).

While the focus of measures to reduce crime has been centred on the criminal justice system (number of police officers, length of prison sentences), growing concerns about the increasing effects of crime rates on local communities have led to the establishment of a broadly based collaboration in relation to crime prevention. In the spring of 1996, the Swedish government adopted a national crime prevention programme which was aimed at intensifying crime prevention work in all areas of society in order to prevent and reduce crime. The underlying basis for this collaboration was a recognition that the social problems caused by crime needed to be tackled at the local level, where the problems existed. It was noted that previous shifts to formalised, official control had increased the distance between problems experienced locally and the measures needed to combat these problems (Ministry of Justice, 2000a).

The national crime prevention programme was based on three central elements: that the government and government authorities would give increased attention to the way in which general social developments, and political decisions on matters other than crime policy, could exert an influence on levels of crime; that legislation and crime policy should be developed and made more effective; that measures would be taken to support and promote citizen involvement and collaboration (between authorities, companies, organisations and individuals) in local crime prevention work.

Each municipality is expected to create a local crime prevention council as a contact point for individuals and organisations to take a role in crime prevention. The strategy places significant emphasis on reducing opportunities to commit crime; reducing involvement in crime, particularly amongst young people; reducing crime committed by persistent offenders. While a range of social and welfare factors are stressed as important, so too is the role of the Prison and Probation Service. The development and strengthening of local collaboration is seen as crucial and strong links with social services and the local police are viewed as important. However the

emphasis on these 'soft' measures of general or social crime prevention through situational prevention has led to some criticism of the potential this poses for increasing social segregation within communities and increasing privatisation of the legal system (Raimo, 2000). There are no private prisons in Sweden, however in 1998, the Swedish parliament authorized the use of private security firms to carry out functions such as transporting prisoners or guarding prisoners in hospital, where appropriate.

### **4.3 Legislative developments**

A number of legislative measures have been introduced in an attempt to stabilise and/or reduce the use of custody.

- The 1965 Criminal Code stated that alternatives should always be considered before an individual was sentenced to imprisonment.
- In 1974, the introduction of rules which reduced time served on remand from prison sentences served to reduce the prison population. This meant that time spent on remand prior to a court hearing was automatically deducted from the prison term to which the individual was sentenced.
- The decriminalisation of drunkenness in 1977 significantly reduced the number of convictions.
- In 1983 legislation was introduced to release prisoners who had been sentenced to between four months and two years on parole after they had served half their sentence.
- The use of imprisonment for drink-driving offences was restricted in 1990.

There has been a tendency for more severe sanctions to be used with the proportion of sanctions taking the severest forms of intervention (prison, probation and conditional sentence) doubling since 1975. In 1978, 12% of those convicted of offences received one of these forms of sanctions compared to 23% in 2000 (Ministry of Justice, 2001: 12). This may reflect an increasing prioritisation of serious offences.

The proportion of convictions leading to a prison term increased from 6% in 1978 to 10% in 2000 (Ministry of Justice, 2001: 12) however, the number of persons imprisoned in 2000 was approximately the same as the number imprisoned in the mid-1970s. While the rate of imprisonment increased

during the late 1970s and early 1980s, it decreased during the 1990s largely due to the development of alternative sanctions.

With the introduction of a centre-right government between 1991-1994, changes were introduced which resulted in the further increase of the prison population. For example, parole was made available after two-thirds of the sentence had been served. Following this, prisoner numbers were once again regulated by the introduction of supervision by means of electronic monitoring in 1994 and the extended use of community service in 1999.

Overall, there have been a number of measures put in place to regulate and limit the use of imprisonment in Sweden. Future developments would appear to indicate however, that although there has been relative stability in the prison population it is set to rise. In 2002, plans to expand the capacity of the prison system by around 1000 places were announced. This was intended to offset prison overcrowding and represented an administrative rather than political decision (von Hofer, 2003). Nevertheless this does indicate an acceptance of the role of imprisonment within criminal policies. Indeed, current debates centre around the demand for more and longer prison sentences.

Recent reforms have been introduced in an attempt to boost the efficiency of the judiciary and broaden the recruitment system for judges, and to respond more appropriately to heightened concerns about security.

#### **4.4 Administration**

With the development of the welfare state in Sweden in the 1930s, criminal policy became part of social policy underpinned by a belief in the ability of the state to reform the individual. The Probation Service was established in 1942 and was an autonomous authority within the criminal justice system at that time. By 1990 probation officers and lay supervisors were expected to place greater emphasis on the control of the individual, with probation increasingly viewed as a form of punishment rather than 'treatment'. This was consolidated in 1998 when the Probation Service was integrated into the same structure as the prison service at both local and national levels. The main tasks of the Prison and Probation Service are the organisation of prison and probation, the supervision of conditionally-released individuals and community service and to carry out pre-sentence investigations in criminal cases. The probation authority is organised into 43 probation units which provide courts with pre-sentence reports, supervise probationers and parolees in the community and implement prison sentences through intensive

supervision with electronic monitoring. They will also work with prisons to plan and prepare for a prisoner's conditional release.

The National Prison and Probation Administration, which is accountable to the Ministry of Justice, is the central administrative agency for the prison and probation service. It consists of a central administration and local prison and probation administrations and the Transport Service. The Transport Service manages transport within the Swedish justice system as well as arranging for the transportation of individuals who have been detained, refused entry into Sweden or who are to be deported.

#### **4.5 Imprisonment**

Each year about 14,000 people in Sweden are sentenced to imprisonment. However the number of people entering prison has dropped in the last few years to around 9,500 largely due to the use of intensive supervision with electronic monitoring as an alternative way of serving prison sentences of up to three months. A person may be sentenced to imprisonment for 14 days up to life<sup>1</sup> (imprisonment for a determinate period may not exceed ten years). Of those admitted to prison in 2001, the largest proportion were sentenced for offences of theft, accounting for 27% (Petersson, 2001: 21). The official capacity of the prison system in 2001 was 6,051 with an occupancy level in 2002 of 107.5% (International Centre for Prison Studies, 2004b).

There are currently 55 prisons in operation in Sweden, six of which are designated for women prisoners. Most prisons are relatively small (average capacity of 45 beds) with a few larger prisons (average capacity 100-200 beds) and can be closed (categories i-iii) or open (category iv). The larger prisons hold individuals convicted of serious crimes and sentenced to long-term imprisonment (over two years). Reception centres for both male (at Kumla prison) and female prisoners (at Hinseberg prison) receive prisoners sentenced to four years or more (or over two years for women sentenced to a serious drug offence). At these centres, prisoners are assessed and given a security classification and prisoners will be allocated to an appropriate prison or wing. Prisons are either national or local, with national prisons taking individuals with sentences of at least one year, or who merit extra security. Prisoners may be transferred to local prisons when nearing the end of their sentence.

In addition to local and national prisons, in 2002 there were 28 remand prisons with accommodation for 1681 people (Prison and Probation Service,

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<sup>1</sup> The death penalty was abolished in 1921 for offences committed in peacetime and in 1973 for offences committed in times of war.

2003). Remand prisons hold individuals arrested, held or detained on remand and also those held under specific Acts such as the Aliens' Act, the Care of Young Persons (Special Provisions) Act, the Care of Alcoholics and Drug Abusers Act and the Forensic Psychiatric Care Act. Individuals detained on remand are usually held for between one and two months.

Around 50% of those sentenced to over two months imprisonment have drug/alcohol problems and accordingly programmes are available to address these issues. Increased emphasis has been given to reducing the flow of drugs into prisons and financial support for programmes for drug misusers<sup>1</sup>. Special units exist for different categories of prisoners such as young prisoners, those convicted of sexual crimes, those convicted of driving under the influence of alcohol. Different units/wings offer programmes that address the problems specific to each category of prisoner.

Prisoners can be granted short-term leave, and may work or attend education/training outwith the prison during working hours. A prisoner may also be granted leave to receive treatment away from the prison although this is usually only granted at a later stage of a prison sentence (but may be prior to conditional release). Local supervisory boards will handle such applications for prisoners serving sentences of up to two years, while the National Parole Board will handle applications from prisoners serving sentences of more than two years.

Individuals serving a prison sentence of a fixed period are unconditionally released after serving two-thirds of their prison sentence but only after serving at least one month of the total sentence. A prisoner will not be released on parole if serving a sentence of probation and imprisonment, or if imprisonment has been imposed for non-payment of a fine. Individuals sentenced to life imprisonment will only be released if a government pardon is given to convert the sentence to imprisonment for a fixed period.

In the 1998 Budget Bill, the government required the prison and probation services and other relevant administrations to present proposals on improving the situation of prisoners on release, with the intention of reducing the risk of re-offending. After-care is seen as important and to manage the transition between prison and the community, the final part of prison sentences can be served at home with intensive supervision using electronic tagging. However, in line with other European countries, rates of recidivism are not unproblematic. Statistics from the Swedish Prison and Probation Service indicate that while 32% of individuals released from prison in 1997 had

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<sup>1</sup> Under the Government National Action Plan to combat drugs, the Prison and Probation Service has been allocated special funds to provide treatment programmes.

reoffended and been sentenced to a new prison or probation order within one year, that figure had risen to 45% after a two year follow-up (R. Nilsson, 2003). A study conducted by A. Nilsson (2003) provides similar findings with 43% of the individuals in Nilsson's study reoffending and sentenced to a new sanction within the prison and probation system, 36% of those being sentenced to a new prison term during the follow-up period (between 1997-2000)<sup>1</sup>. Repeated re-offending was primarily associated with theft and drug offences and was markedly worse among individuals with drug, housing and employment problems.

While contact between the probation service and clients' is considered important prior to the individuals' release, an evaluation of how the prison service works to prepare prisoners for release on parole (National Council for Crime Prevention, 2001a) illustrated that approximately half of prisoners had been visited by their probation officers prior to release. In only one fifth of cases, had there been co-operation between the prison and the probation service in relation to planned after-care and in some cases there were no plans in place for parole supervision<sup>2</sup>.

In recent years there have been increasing shifts to tighten up security in prisons, for example, the introduction of technology which can jam mobile phone signals to and from prisons and the introduction of comprehensive entry checks including body searches.

Following a number of prison escapes over a period of weeks (Larson, 2004) calls were made for the resignation of the Justice Minister (Thomas Bodstroem) and the media highlighted criticisms of the 'soft' penal system. In response, Minister Bodstroem announced the introduction of tightened security measures such as increased police presence near prisons and the building of a maximum-security prison for Sweden's 'most dangerous criminals'<sup>3</sup>.

In September 2004, the Government announced an increased investment in the legal system intended to strengthen the police, prosecutors, courts and prison system, as well as tackling broader concerns around terrorism through the Swedish Security Service. The announcement indicated that 4000 new police officers would be trained, additional resources would be allocated to the

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<sup>1</sup> For women, 34% had reoffended within the follow-up period with 23% receiving a new prison sentence.

<sup>2</sup> In some cases this resulted requests for supervision at a late stage in the process.

<sup>3</sup> However as Henrik Tham (of Stockholm University) pointed out (in Larson, 2004) while the number of prisoners in Sweden had increased by 50% since the 1980s, the number of prison guards had remained much the same.

Prison and Probation Service to create more prison places, tighten security in prisons and develop measures to tackle the drug problem (Ministry of Justice, 2004a).

## **4.6 Profile of prisoners**

In 2001, 6% of those admitted to prison were 18-21, with women constituting about 5-6% of the prison population, a figure which has remained relatively constant over the last decade.

### *4.6.1 Young Offenders*

The age of criminal responsibility in Sweden is 15. However, special rules apply up to the age of 21. An offender below the age of 18 can only be sentenced to imprisonment on special grounds and there have to be specific factors for imprisoning an offender between the ages of 18-21. In 2001, young people aged between 15-20 years constituted approximately 25% of all those suspected of offences<sup>1</sup> (Petersson, 2001:21).

In 1999 a new sanction of secure youth care was introduced for youth people aged between 15-17 years replacing prison sentences for this group. Under this new system, young people aged 15-17 who have committed serious crimes can be sentenced to closed youth detention in a special youth detention centre instead of prison. In 2001, 102 young people were sentenced to secure youth care. Unpaid work was also added to social service care in 1999 and 18% of those admitted into the care of the social services were also sentenced to youth service in 2001. In 2002 there were no young people under the age of 18 held in prison in Sweden (International Centre for Prison Studies, 2004b).

While there have been growing concerns about dramatic increases in the level of violent crime among young people, it would appear that much of this is due to depictions presented in the media and political arena, rather than directly supported by empirical evidence (von Hofer, 2000).

### *4.6.2 Women*

Women account for around 18% of persons suspected of committing an offence and in 2002, accounted for 5.3% of the prison population. While this is a relatively small proportion, the number of women being drawn into the penal system is increasing. The most common crime for which women receive prison sentences is theft, followed by narcotics offences, fraud,

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<sup>1</sup> This group makes up around 8% of the total population.

embezzlement and drunken driving. Most women are aged between 35-44 years of age and the majority receive short sentences of less than one year. The introduction of intensive supervision and electronic monitoring from 1999 is claimed to have reduced the number of women prisoners in Sweden by around 250-300 per year (Ministry of Justice, 2000a).

Women entering prison are more often marginalized than men in relation to factors such as drug misuse, employment opportunities, housing and relationships. The importance of gender equality and the need for a gender perspective resulted in the publication of a report by the Ministry of Justice (2000b) *Principles for the Treatment of Women Sentenced to Imprisonment: A National Report from Sweden*. This report outlined the importance of certain principles in the treatment of women in the criminal justice system:

- Women sentenced to imprisonment shall be placed in prisons intended only for women or in wings that are separated from those housing male prisoners.
- Women's needs and issues should be addressed in a woman-focused environment that is safe, trusting and supportive.
- Hospital and psychiatric facilities suitable for women shall be provided.
- Women whose sentences include expulsion orders shall be dealt with taking their special circumstances into account.
- Visiting apartments shall be provided.
- Visiting rooms adapted to the needs of children of different ages shall be provided at all prisons housing women.
- Programme activities and premises shall be designed taking into account the special needs of women prisoners.
- Staff shall be trained to deal with crime from a gender perspective. (Ministry of Justice, 2000b:6).

#### 4.6.3 Foreign prisoners

The level of immigration in Scandinavian countries is highest in Sweden and this is reflected among the prison population where in 2002, foreign prisoners accounted for 27.2% of sentenced prisoners.

## 4.7 Alternatives to custody

Since 1975 the number of people convicted of offences has been reduced by more than half. The decriminalisation of drunkenness at the end of the 1970s accounted for a significant decrease in convictions. During this period, certain offences have come to be dealt with by summary fines issued by the police. Motoring offences constitute the most common crime type resulting in conviction (accounting for approximately 40% of convictions) followed by thefts (accounting for 21% of convictions in 2001). Conditional sentences and probation constitute alternatives to prison (fines do not).

Swedish penal law has aimed to reduce the use of shorter prison sentences with much attention given to alternatives that do not entail deprivation of a person's liberty. In 2002, approximately 12000 clients were under supervision. Of these 12% were women (Prison and Probation Service, 2003:16). A number of sanctions are available to the courts: (fines, probation, committal to special care and community service, conditional sentence and imprisonment). Victim-offender mediation is an area of development but has tended to operate at a stage prior to prosecution and does not appear to provide a direct alternative to other forms of sanction (National Council for Crime Prevention, 2000).

The prosecutor may decide not to prosecute those under the age of 18, individuals in need of psychiatric care and sometimes 'drug abusers' if they agree to treatment instead. This constitutes a commitment for special care. In order to be eligible for a treatment order the offender must sign a contract binding him/her to a specific treatment programme at a specific treatment centre over a stated period of time. An alternative prison sentence will be specified in the court order and in the event of non-compliance with the order, the alternative prison sentence can be invoked.

### 4.7.1 Fines

Monetary fines are used primarily for less serious offences such as traffic violations. Day-fines can be administered, calculated on how serious the crime is and the offenders' financial situation. On the spot fines can be imposed by the police. Fines constitute the most common form of sanction (and can be issued by the prosecutor or by the courts), or as summary police fines.

#### *4.7.2 Probation*

Probation may be given for crimes that require a more severe sanction than a fine and may be combined with special regulations such as contract care or community service which can be imposed for a minimum of 40 and maximum of 240 hours. Courts have been able to administer probation and community service (combined) as an alternative to custody since 1990. However this disposal was used to a limited extent. The role of community service was expanded significantly when, in 1999, the combined disposal of a suspended sentence with community service was introduced.

While probation is made for three years, the period of supervision will be discontinued after the first year. Each client is assigned a personal probation officer and around 45% also have a lay supervisor (members of the public who volunteer to serve as supervisors in their spare time). Apart from this aspect, the system seems to operate very similarly to the role of criminal justice social workers in Scotland. Special forms of probation include “contract treatment” where treatment for drug or alcohol misuse is decided by the court as an alternative to prison. A person may be sentenced to treatment under the Care of Alcoholics and Drug Abusers Act – if the crime would not lead to more severe punishment than one year’s imprisonment.

Courts can combine probation with up to 200 day-fines which are calculated on the basis of the offence and the financial situation of the offender. Probation can also be combined with a short term of imprisonment which can last for a minimum of 14 days or a maximum of three months.

#### *4.7.3 Community Service*

While community service is intended to provide a direct alternative to a prison sentence of up to 12 months, in practice it tends to be used for those who are unlikely to have received a prison sentence of over two months. An evaluation conducted by Andersson and Wahlin (2003) indicated that in two-thirds of cases where community service and a suspended sentence were combined as a disposal, the alternative prison sentence was, at most, one month (Andersson and Wahlin, 2003: 62). Similarly, Baldursson (2000) indicates that up to half of all community service sentences replace sanctions other than unconditional imprisonment.

Despite the increasing use of community service alongside a suspended sentence, the number of individuals admitted to prison has not decreased in a similar way. It would appear that those sentenced to a suspended sentence with community service are generally those individuals who would previously

have been sentenced to supervision at home with electronic monitoring (Andersson and Wahlin 2003: 62) which has actually decreased since the introduction of a suspended sentence with community service.

#### *4.7.4 Electronic monitoring*

In 1994 the using of intensive/close supervision with electronic monitoring was piloted in five probation districts. This was extended to the whole country in 1997 and could be used as an alternative to prison for individuals sentenced to three months at the most. In January 1999 this was made a permanent alternative to short terms of imprisonment. Anyone sentenced to, at most, three months imprisonment can apply for intensive supervision, thus ensuring it operates as a direct alternative to custody. Between 1997-1999, between 3-4000 offenders per year with a sentence of a maximum of three months imprisonment applied to serve their sentence in the community under intensive supervision. Almost 90% of these applications were granted, and included applications from between 2-300 women per year (Ministry of Justice, 2000b). Decisions on the outcome of applications are made by the local probation authority. Offenders are expected to work between 20-40 hours per week and if they do not, community service can be carried out instead. If the offender has an income, they will be expected to pay a charge of 50 SEK per day which goes into a fund for victims of crime.

#### *4.7.5 Conditional/suspended sentences*

Conditional sentences may be prescribed for crimes for which the sanction must be more severe than a fine, but where there is no reason to assume that the individual will commit further offences in the future. The offender will not be sanctioned on condition that they refrain from committing further crimes of a probationary period of two years. During this period they will not be placed under supervision. Generally, this sanction will be combined with a fine, community service, payment for damages or other forms of restitution. Similarly, an under 21 year old may be placed in the care of the social services and fined.

Prison terms of up to three months can be served in partial house arrest (intensive supervision through electronic monitoring). This is used mainly for individuals convicted of drunk driving or less serious assaults. Conditional release usually takes place after two-thirds of the sentence have been served<sup>1</sup>.

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<sup>1</sup> If a prisoner commits a disciplinary offence the date for his/her conditional release may be postponed for a maximum of 15 days on each occasion of postponement.

#### *4.7.6 Early release*

In 2001, a pilot was initiated using electronic monitoring for those sentenced to a prison term of at least two years. This gives individuals the opportunity to serve the final part of their sentence, up to a maximum of four months, in the community with electronic monitoring. In order for this to be granted, prisoners must have accommodation, a telephone, electricity and a regular occupation. Applications for this form of early release will not be granted if there is a risk of absconding, reoffending or drug/alcohol abuse during the period of electronic monitoring. Applications are assessed by the Prison and Probation Administration. In 2002, 315 individuals (approximately 40% of those serving a prison sentence of over two years) applied for this release. Of these 48% were granted, impacting upon around 20% of the long-term prison population (Olkiewicz, 2003: 51). Most of those granted release under this were people who had no previous convictions, and had not abused alcohol or drugs during the six months prior to their application.

Prisoners may be conditionally released when two thirds of the sentence (but at least one month) has been served. A prisoner who is serving a life sentence may be granted a pardon by the government and instead given a determinate sentence of imprisonment.

In 2002 the Swedish Government appointed a Governmental Commission on the Prison and Probation Service to draft a proposal for a new act on correctional treatment in institutions. It was expected to examine the way in which the length of prison sentences could be adapted to prevent prisoners from relapsing into crime.

#### **4.8 Measures of effectiveness**

There is a clear commitment to research and development, both centrally and locally to establish 'what works' in terms of crime policy and crime prevention. The Penal System Committee, a parliamentary committee, currently reviewed the sanction system and recommended significant changes to the sanction system. Increased emphasis was given to the development of alternatives to custody given the failure of imprisonment to act as a deterrent or to reduce recidivism.

The National Council for Crime Prevention had been commissioned by the Swedish Government to conduct a wide range of evaluations into various aspects of the criminal justice system in order to identify good practice and which initiatives appear to produce effective results.

## **4.9 Final Points**

Throughout much of Europe, increases in the prison population have been the result of rises in rates of incarceration and the in the average sentence length. Most of such increases have not been due to considered shifts in policy originating from the government, but due to changes in the behaviour of judges within a political climate dominated by perceived increases in crime and demands for tougher criminal justice responses. Sweden has attempted to resist this trend and the development of initiatives aimed at provided alternatives to custody have been effective in reducing the prison population at particular moments in time. While some of the measures in place in Sweden are already operational in the Scottish criminal justice system there is potential to learn from the ways that such initiatives are enacted.

## **SECTION 5: POLICIES, PRACTICES AND LEGISLATIVE CHANGE TO REDUCE IMPRISONMENT RATES IN WESTERN AUSTRALIA**

### **5.1 Introduction and Background**

Australia has a federal structure of government with the six states and two territories having responsibility for the majority of criminal justice policy and legislation. This being the case, there is considerable variation in the administration of criminal justice across the country and there are wide variations between jurisdictions in sentencing patterns and trends. The latter reflect to some extent differences in the characteristics of the populations served (for example, imprisonment rates tend to be higher in those jurisdictions with a high indigenous population) but they are also a manifestation of legislative and policy responses to crime. Western Australia, for example, has tended to place a greater emphasis upon the use of imprisonment and lesser relative emphasis upon the use of community-based alternatives than other states, a situation that, as we shall see, it is currently making concerted efforts to address.

Recent policy developments are broadly predicated upon the potentially greater effectiveness of community-based disposals, especially those that are based on 'what works' principles. However government responses have also, in the main, tended towards conservatism, for fear of being considered soft on crime. An increasing tendency is for particular attention to be paid to the development of policies to take account of the specific circumstances of the indigenous population and women who offend.

Between 1993 and 2003 the prison population across Australia increased by nearly 50%, greatly exceeding the 15% growth in the Australian adult population over the same period. The result has been an increase in the adult imprisonment rate from 119 to 153 prisoners per 100,000 adult population between 1993 and 2003 (Australian Bureau of Statistics, 2004a). Taken over a longer timescale, there has been an average annual growth in the prison population of 5% per annum since 1984.

These national figures mask underlying variations by state. As Table 5.1 indicates, the highest rates of imprisonment at June 2003 were in the Northern Territory and Western Australia while the lowest were in Victoria and Australian Capital Territory (ACT). Western Australia and NSW had the highest imprisonment rates for indigenous people while the rate of imprisonment of female offenders was highest in the Northern Territory and Western Australia and lowest in Tasmania and ACT.

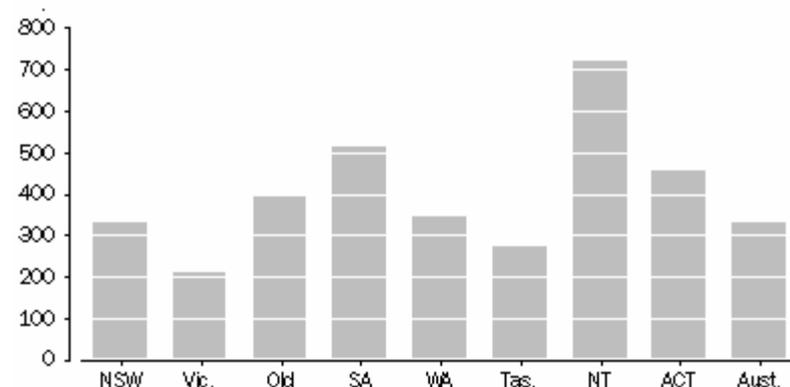
**Table 5.1: Imprisonment Rates (Per 100,000 Adult Population) by States and Territories, Australia**

	NSW	Vic.	Qld.	SA	WA	Tas.	NT	ACT	Aust.
<b>Males</b>	321.2	186.6	341.4	230.1	360.6	240.6	942.9	193.6	290.8
<b>Females</b>	22.3	14.3	23.7	16.8	28.9	12.8	32.9	9.4	20.4
<b>Indigenous</b>	2,181.2	1,183.0	1,697.6	1,672.3	2,743.9	527.3	1,626.0	697.8	1,888.3
<b>Non-Indigenous</b>	135.2	93.8	139.0	87.5	125.7	109.3	111.3	93.2	119.4
<b>All prisoners</b>	169.4	98.3	180.7	121.3	193.7	123.8	513.6	99.6	153.4

Source: Australian Bureau of Statistics (2004a) Prisoners in Australia, 30 June 2003.

Community corrections in Australia can be categorised as: restricted movement orders (home detention); reparation orders (e.g. monetary penalties, community service); and supervision (compliance) orders (parole, bail, sentenced probation). Supervision orders are most common. As Figure 5.1 indicates, the community-based corrections rate varies by state, being highest in the Northern Territory and lowest in Victoria. There is a tendency, therefore, for states with lower use of imprisonment also to have a lower use of community corrections and for those with a high use of imprisonment also to have a high use of community corrections.

**Figure 5.1: Community-Based Corrections Rate (per 100,000 adult population) Australia**



(a) Rate per 100,000 adult population.

Source: Australian Bureau of Statistics (2004b) Corrective Services, Australia

In general terms, broad policy and legislative developments in Australia have mirrored those in other western jurisdictions. Thus in the 1970s and 1980s, the emphasis was upon expanding the range of community-based disposals as alternatives to imprisonment. In the 1990s came calls for tougher penalties, incapacitative sentencing and vindication of the rights of victims (Freiberg, 1987). Public and political concern about crime resulted in increasingly punitive responses, particularly in respect of those offenders deemed to

present the greatest risk of public harm. During the 1990s several states enacted 'truth in sentencing' legislation that abolished remission on prison sentences. The impact of these policies upon prison numbers appears to have been somewhat varied, depending upon the additional safeguards put into place.

A comparison of sentencing trends and policy developments across Australia identified Western Australia as a jurisdiction worthy of closer scrutiny<sup>1</sup>. More specifically, the Western Australia government has, in the last few years, embarked upon a series of legislative and administrative changes, the expansion of diversionary measures and court reforms aimed at reducing the use of imprisonment in the state. Before describing these reforms and considering their impact upon prison numbers, the impetus for these changes and the wider penal context in which they were introduced is considered.

## **5.2 The Policy/Penal Context**

Western Australia has traditionally had a conservative approach to crime and punishment, reflected in its high use of imprisonment and relatively low use of community-based disposals in comparison with most other Australian states. In particular, conservative law and order policies were driving the use of imprisonment up, especially in remote regions, and these policies impacted disproportionately upon the indigenous population. For example, between 1991 and 2001 the average number of people imprisoned in Western Australia increased by 43% while over the same period a 16% growth in offences reported to the police paralleled an increase in the state's population (WA Department of Justice, 2002a).

In 1999 the prison estate in Western Australia was characterised by overcrowding and plans were being made for the building of a new 750-bed facility to ease this situation. With a change in government (from a liberal-national to a labour-led coalition) in 2000, attention turned to the economic and social costs of imprisonment. While cost was a key factor driving subsequent reforms, the new administration was also prompted to take action by national comparative data which indicated that Western Australia had a higher recidivism rate and higher per capita imprisonment cost than other jurisdictions and the highest rate of indigenous imprisonment in the country.

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<sup>1</sup> Western Australia has a population of around 1.9 million, 1.3 million of whom are resident in the Perth metropolitan area. The remainder of the population is distributed around the remainder of a state that is one-third of the size of Australia. As in Scotland, particular challenges are presented in the delivery of justice and other services in remote regions. However, in Western Australia ensuring access to justice for the indigenous population presents an additional significant challenge.

Although Western Australia does not share Scotland's experience of an ageing prison estate with commensurately dated facilities that will be costly to update or replace, concern about prison conditions was, arguably, heightened following the establishment of an independent prisons inspectorate in 2000. The creation of the inspectorate, which reports directly to parliament rather than to the Justice Minister, coincided with the opening in 2001 of the state's first private prison (Acacia). The existence of a mechanism for accountability and scrutiny was a necessary precursor to the securing of political support for this private initiative (Office of the Inspector of Custodial Services, 2003a). Subsequent inspections have, among other things, highlighted the 'disarray' at Bandyup women's prison to the extent that 'fundamental and integrated changes are needed to make Bandyup a well-functioning, humane prison, such that staff, especially women, want to work there and prisoners are better able to be equipped for law-abiding lives and lifestyles' (Office of the Inspector of Custodial Services, 2003b, pp.20-21)<sup>1</sup>. Across the estate more generally, insufficient organisational commitment was identified as potentially undermining the effective operation of prison-based cognitive skills programmes (Office of the Inspector of Custodial Services, 2004a). A review of deaths at Hakea men's prison following the suicide of two young aboriginal men in the space of a few weeks concluded that the regime at the prison was unnecessarily harsh and security-focused and that uniformed staff felt alienated from management, cynical and disempowered. Communication between the various professional groups in the prison was found to be poor and from the perspective of the prisoners themselves 'the regimes were largely purposeless, with inadequate work opportunities and virtually no programs. There was also a fear of intimidation in some parts of the prison. The overall culture was antagonistic and destructive' (Office of the Inspector of Custodial Services, 2004b, p.94).

Various initiatives have been taken forward to improve the quality of prison regimes and to facilitate the re-integration of prisoners on release. These include developments in women's prisons that are underpinned by a

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<sup>1</sup> The report of an inspection conducted in June 2002 concluded that 'the prison was still functioning poorly...when all the details of poor service are stripped away, this is because imprisonment in Western Australia is still defined in male terms; Bandyup is in a sense a male prison occupied by females...the concept of women's imprisonment was not recognised in its own right and for its own imperatives' (Office of the Inspector of Custodial Services, 2003b, p.6). Work opportunities were limited, there was inadequate provision of mother-and-baby accommodation and potentially exploitative sexual relationships were tolerated: 'lesbian relationships were condoned to the point of encouragement, seen by management as a tool for keeping prisoners quiescent. The recognition of the importance of relationships to women was completely distorted in that it seemed to ignore the distinct possibility that many of these relationships would not be fully consensual. The culture has left its mark on the prison' (Office of the Inspector of Custodial Services, 2003b, p.6).

philosophy that emphasises women's needs<sup>1</sup> (Western Australia Department of Justice, 2003a); the development of an integrated prison regime based on unit management, assessment, case management, cognitive skills training for prisoners and interpersonal skills training for staff, enhanced day-time activities and an upgraded system of incentives and earned privileges (Western Australia Ministry of Justice, 2001); and a community re-entry program for prisoners which includes a Community Re-Entry Support Service to support prisoners before and after their release (Western Australia Department of Justice, 2002b). However, there was also recognition by the Department of Justice that non-custodial options were more likely than prison sentences to promote offender rehabilitation and enhance community safety (Western Australia Department of Justice, 2003b).

Further analysis by the Justice Department of sentencing patterns in Western Australia revealed that the high imprisonment rate was as a result of the high use of short custodial sentences. Western Australia used sentences of 6-12 months three times more than the national average, with the extensive use of short sentences being even more apparent among the indigenous population<sup>2</sup>. The use of community service orders, by contrast, was relatively low. To address this situation, in 2001 the Government of Western Australia announced the introduction of a programme of major reforms in the adult justice system that included:

“...more effective measures for the management of adult offenders which encourage them to take responsibility for their actions and make reparation to victims and the community. Seeking to divert offenders from the criminal justice system at the earliest opportunity while protecting public safety is another important aspect of the reform”

Western Australia Department of Justice (2002a, p.7)

This report focuses upon those measures that have been introduced under the Reducing Imprisonment Program, although other relevant reforms – especially those that directly relate to or that are likely to impact upon the policy objective of reducing prison numbers are also discussed.

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<sup>1</sup> Including a new, purpose-built 70-bed Metropolitan Low Security prison for women that was opened in 2004.

<sup>2</sup> For example, in February 2002, 57% of prisoners serving sentences of 6 months or less were indigenous, 48% of whom were serving sentences for traffic, justice or public order offences (Western Australia Department of Justice, 2002a).

### 5.3 The Reducing Imprisonment Program

The package of reforms that comes under the rubric of the Reducing Imprisonment Programme includes legislative changes, administrative reforms, the expansion of diversionary options and court reforms. Some of the reforms were first proposed in a cabinet submission in 2001 with others included in the 2002 strategy document '*Reform of Adult Justice in Western Australia*' (Western Australia Department of Justice, 2002a). They have been introduced in a phased manner to enable the impact of each reform on the prison population to be assessed. The initiative that is anticipated to have the most dramatic impact on prison numbers – the abolition of short sentences (up to 6 months) – was the last to be introduced.

### 5.4 Legislative reforms

A number of legislative changes have been effected through amendments to the Sentencing Act 1995 and the Road Traffic Act 1994.

#### 5.4.1 Adjournment of sentencing

Under existing provisions in the Sentencing Act 1995 courts had the option of adjourning (deferring) sentencing for up to six months. The new provisions allow for the extension of adjournment of sentence up to 24 months<sup>1</sup>. Courts must contemplate adjournment when considering imposing a prison sentence and must provide reasons if an adjournment is not used. When adjourning a case the court can impose a Pre-Sentence Order (PSO) which specifies the date and time of the next court appearance and which must include one or more of the following:

- programme requirement to undergo treatment/counselling/substance abuse treatment/education or personal development
- community work or supervision requirement;
- curfew requirement designed to restrict the movements of the offender and which may involve the use of electronic monitoring for enforcement.

At sentencing, the court must take into account the extent to which the PSO has been complied with and how long the offender has been subject to it (Western Australia Department of Justice, 2003c). This provision has

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<sup>1</sup> For example, the Perth Drug Court previously operated under bail provisions (for up to six months) but is now able to impose PSOs for up to two years. This is thought to provide a more realistic timescale for treatment and other intervention with the group of offenders for whom the Drug Court is considered appropriate.

similarities to the option available to Scottish courts to defer sentence on the undertaking that the offender be of good behaviour and the more recent formalisation of structured deferred sentences through the introduction of pilot schemes. Where it differs is in the requirement that the courts provide a reason if they do not adjourn sentencing prior to imposing a custodial sentence.

#### *5.4.2 Traffic offences*

Under the existing legislation the sanctions for many road traffic offences were expressed in terms of penalty units and/or imprisonment. Although the Sentencing Act 1995 allowed for other sentencing options to be considered for offences deemed imprisonable under the Road Traffic Act 1974, much confusion was found to exist with the result that offenders were often imprisoned without consideration being given alternative disposals. For example, in the 12 month period to 30.6.03, 887 receptions into custody were for traffic offences including driving under the influence of alcohol/drugs (400) or for driving licence offences (450), with aboriginal males accounting for 61% of these sentences of imprisonment (Western Australia Department of Justice, 2003d). Road traffic offences accounted for around one quarter of all sentenced receptions during that period. Amendments have been made to the Road Traffic Act 1994 to ensure that the full range of community-based sentencing options is available for all driving offences and to reduce the incidence of imprisonment for fine default in relation to driving offences<sup>1</sup>.

#### *5.4.3 CEO Parole*

Under existing legislation the Director General of the Department of Justice (CEO) can release prisoners serving sentences of less than 12 months on home detention orders once the prisoner has served one third of their sentence. Home Detention Orders have been replaced by CEO Parole<sup>2</sup>, with or without conditions<sup>3</sup>, with prisoners eligible for CEO parole after serving 50% of their sentence. CEO parole will be mandatory for all prisoners serving less than 12 months except for those sentenced for a violent or sexual offence; those who have served a sentence of imprisonment for a serious offence in the preceding five years; and those who have had an early release order cancelled in the preceding two years. Individuals released on CEO parole

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<sup>1</sup> In Western Australia the non-payment of a fine can result in the suspension of a driving licence which can, in turn, result in imprisonment if the individual continues to drive without a licence.

<sup>2</sup> Home detention is now regarded as an excessively intrusive and onerous option for those short-term prisoners who would hitherto have been granted access to it (Western Australia Department of Justice, 2002a).

<sup>3</sup> These can include programme, supervision or curfew requirements.

remain subject to the prison sentence to which the order relates until its expiry.

#### *5.4.4 Abolition of short prison sentences<sup>1</sup>*

Perhaps the most radical reform – and the one that was expected to have the greatest impact on prison numbers – is the abolition of prison sentences of less than six months for minor crimes. Western Australia had already taken the step in the Sentencing Act 1995 of proscribing sentences of imprisonment of three months and less. Cabinet approved an extension of this legislative provision with the effect that courts are now prohibited from imposing prison sentences of six months and less. Perhaps because the abolition of short sentences was taken forward in an incremental fashion, there was reported to have been little opposition from the public or from the judiciary. Indeed, the latter were said to have amended their sentencing practice in advance of the legislative changes being effected (see Recent Trends in Sentencing below).

The abolition of short prison sentences has four stated aims (Western Australia Department of Justice, 2003e):

- A reduction in the number of offenders sentenced to short periods in prison and an increase in the number made subject to community orders;
- A reduction in the costs associated with large numbers of short-term prison sentences;
- A reduction in overall prison numbers, especially in respect of aboriginal offenders imprisoned for fine default or driving offences;
- The use of imprisonment as a last resort and only in respect of those convicted of serious offences.

The initiative involves the removal of imprisonment as a penalty for certain offences and an increase in the minimum sentence of imprisonment that can be imposed (to nine months or more) for offences for which imprisonment remains an option. For many minor offences the statutory option of imprisonment has been replaced by a fine, with the courts having the option to replace the fine by a community-based order with conditions (such as community service or an education programme).

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<sup>1</sup> This is sometimes misinterpreted as the release of those already serving custodial sentences. It should be emphasised that this legislation is not retrospective and applies only to offenders sentenced from the date of its enactment.

Western Australia's commitment towards the abolition of short sentences is being looked at with interest by other states. For example the Select Committee on the Increase in Prisoner Population (2001) recommended to the NSW Government that it adopt a similar policy and abolish short term prison sentences. Research in New South Wales estimated that the effect of abolishing sentences of 6 months or less would be a reduction in prison receptions from 150 to 90 prisoners per week; an overall reduction in the state prison population by about 10%; and cost savings of between \$33m and \$47m per year (Lind and Eyland, 2002). However, as we shall see, the reform has not been without its critics who have argued that its net effect may at best be neutral and at worst may result in an overall increase in the sentenced prison population.

## **5.5 Administrative reforms**

In addition to these legislative changes, the Western Australia Justice Department has embarked upon a range of administrative reforms aimed at improving efficiency within the new legislative framework. This includes a package of court reforms and other reforms included more specifically under the umbrella of the Reducing Imprisonment Program.

### *5.5.1 Processes for breaches of community supervision*

In the late 1990s the proportion of offenders imprisoned as a result of breaching parole or Early Release Orders more than doubled, with the increase being attributed to offenders failing to comply with conditions of their orders rather than being a result of the commission of further offences. By 2001, approximately 10% of prisoners were in custody as a result of the suspension of work release, parole or home detention (Western Australia Department of Justice, 2002b).

Through the Reducing Imprisonment Program new breaching and drug testing policies have been developed to give community corrections managers more confidence in decision-making in relation to enforcement and breach (A 'structured approach to breaching of community orders'). Furthermore, in the event of an offender failing to comply with a condition of their order a range of sanctions other than imprisonment is now available. The intention is that offenders will only be returned to prison when the nature of the breach justifies imprisonment and not when a relatively minor transgression – such as

failing to meet a regular reporting obligation – is involved. Return to prison remains an option where public safety is a concern<sup>1</sup>.

### *5.5.2 Expanded work and program options for offenders*

Community service has been available as a sentencing option in Western Australia since 1977 (the same year in which it was introduced on a pilot basis in Scotland). Under existing legislation it can form part of an early release scheme for prisoners (via Work Release Orders and Home Detention) or can be used as an option for fine defaulters. In comparison with other states, however, Western Australia had a lower ratio of people on community service orders to people in prison (1.5 compared with 6.2 in ACT and 5.0 in South Australia in 2000-01) (Western Australia Department of Justice 2002a).

Under the existing legislative reforms there will be greater scope for offenders who default on payment of their fines to convert their fines into work and development orders and avoid imprisonment as a result<sup>2</sup>. More generally, efforts are being made to identify large-scale community work projects to increase the numbers of offenders engaged in work that benefits organisations and communities. The aim is to increase opportunities for skills acquisition by offenders that may enhance their employment prospects and to ensure that offenders with special needs can be accommodated where possible. At the same time, greater attention is being paid to the recruitment and selection procedures and to the support provided for agencies that provide community work tasks.

The document 'Reform of Adult Justice in Western Australia' observed that the expansion of offender programmes in the state had been restricted due to lack of funding (Western Australia Department of Justice, 2002a) despite evidence that appropriately targeted interventions can reduce recidivism and that programmes delivered in the community are more effective than those delivered in prison<sup>3</sup>. Under the Reducing Imprisonment Program it is seeking to expand upon existing programmes – sex offences, anger management, substance misuse and cognitive skills – and to ensure that they better reflect offenders' needs. The Department of Justice is auditing existing provision and working with other agencies and community groups to provide community-

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<sup>1</sup> At the time of writing the Justice Minister was under attack by the media and by the opposition as a result of the alleged rape of an elderly woman by two young men released on parole following a prison sentence for rape. At the time of the alleged rape one of the young men was, contrary to parole conditions, living with his father who was himself a convicted rapist. It is likely that this case will result in a further tightening of parole procedures prior to and following release.

<sup>2</sup> Clearly there are similarities here to Supervised Attendance Orders in Scotland.

<sup>3</sup> 45.1% of prisoners were returned to prison in Western Australia in 2000-01 compared with a national average of 35.5% (Western Australia Department of Justice, 2002a).

based programmes for offenders, such as domestic violence perpetrator programmes in remote areas of the state (Western Australia Department of Justice, 2002a).

Expanding the use of community-based disposals is not without its resource implications. In particular, there was an investment in 22 additional community corrections officer posts in 2001-02 and a further 24 in 2002-03. However this has to be offset against the estimated average daily cost of imprisonment of \$241 (approximately £100) compared with a daily cost of \$13 per day for community-based sanctions (Western Australia Department of Justice, 2002 a).

### *5.5.3 Bail and remand reforms*

A number of strategies have been put into place to improve access to bail and to reduce the number of people remanded to custody or detained in prison when bail has been set. Failure to meet bail once it has been set is recognised as often being a temporary problem that can be resolved within a few days but its effect is a high number of short-term receptions. A key strategy that has been adopted to reduce unnecessary remands is the appointment of bail co-ordinators at key remand centres.

### *5.5.4 Release of prisoners at their earliest release date*

As a result of cumbersome administrative procedures, the earliest release date of prisoners could not readily be identified which resulted in some prisoners not being considered for parole at the earliest possible date. These procedures have now been revised and steps are being taken to ensure that prisoners are able to complete any program requirements early enough to have their parole application considered at the earliest possible date.

## **5.6 Expansion of diversionary options**

The final group of measures contained in the Reducing Imprisonment Program are predicated upon the diversion of low-risk, minor offenders either before or after being charged with an offence. Expansion of the range of diversionary programs is intended to benefit, in particular, those with mental health problems and learning disabilities, drug users in country areas and indigenous people.

The expansion of diversionary measures includes:

- Wider use of informal and formal police cautioning

- Pre-court diversionary conferencing for adults in which no conviction will be recorded if a mutually acceptable resolution is achieved
- Aboriginal dispute resolution services for restraining order applicants and respondents
- Diversion from court of persons with mental health problems or learning disabilities with referral to relevant agencies for treatment and/or support<sup>1</sup>.

Before considering what impact, if any, these reforms have had, it is worth briefly considering two other key areas of policy development that have some relevance to the Reducing Imprisonment Program and its potential to reduce prison numbers in Western Australia.

## **5.7 Other relevant policy developments**

### *5.7.1 Community Re-entry Program for Prisoners*

The Community Re-entry Program for Prisoners is a package of reforms linked to the Reducing Imprisonment Program. It is aimed at diverting minor offenders from sentences of imprisonment, improving the management of prisoners and enhancing the rehabilitation of offenders. It is not intended to serve as a stand alone program. Instead it aims to extend the services that currently exist in the prison, court and community justice systems. The key components of the program are:

- A Community Re-entry Support Service to support prisoners before and after their release
- Linking prisoners to education and employment options
- Providing transitional accommodation and support services
- Increasing drug treatment options in prison and in the community
- Encouraging family relationships through enhanced prison visits and leave-of-absence

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<sup>1</sup> An evaluation of the Intellectual Disability Diversion Pilot, jointly administered by the Disability Services Commission and the Departments of Justice and Health has recently been completed (TNS Social Research, 2004). It found that there was disagreement about the point in the criminal justice process at which it should operate (through the police or through the courts) and that because it was operating as a diversionary measure it was excluding those with the highest needs. The authors highlighted the importance of a 'whole of government' approach to ensure that all those requiring special support are able to access relevant services.

- Developing strategies for managing offenders with mental health problems
- Developing and implementing a justice mediation model for adult offenders.

These elements of the program are to be underpinned by improved understanding of the offender population and factors associated with re-offending; the development of effective partnerships with other government and non-government agencies; the alignment of existing services to a common purpose; improved statistical information and performance measures; and the provision of information to enable effective monitoring and evaluation of re-entry strategies (Western Australia Department of Justice, 2002b).

A total of \$5.28million (approximately £2.1million) has been allocated to the prisoner re-entry program. This includes resources to develop community-based programmes of intervention, the development of a Re-entry Co-ordination Service, the expansion of mediation services to adults, two additional community justice posts to assist prisoners to find work on release and funding for initiatives to help prisoners to sustain family links.

### *5.7.2 Dealing with Drug-related Crime*

From 1985 onwards, drug policies in Australia have been underpinned by a philosophy of harm minimisation. In the late 1990s, to combat the growing drug problem the Federal Government provided funding for the development of programmes aimed at diversion to education or treatment (National Drug Strategy, 2001).

The shift in policy focus to diversion resulted in the introduction of legislated and non-legislated diversionary measures, pre-court, pre-trial and following conviction. Drug diversion strategies are targeted upon drug offences and drug-related offences (such as offences committed under the influence or to fund drug use). Offenders diverted under these schemes have access to drug education and/or treatment (Vaughan, 2002). In Western Australia relevant initiatives include

- the issuing of a police caution for simple use/possession offences.

- pre-arrest diversion involving informal warnings and formal cautions by the police.
- pre-trial diversion requiring an admission of guilt.
- the establishment of a three-tier drug court programme for those convicted of drug-related offending.

Recent developments in Western Australia have also focused upon reducing drug-related harm in prisons (such as the transmission of blood-borne diseases), including the introduction of pharmacotherapies such as methadone and naltrexone.

## **5.8 Recent trends in sentencing**

### *5.8.1 Sentencing outcomes following the prison reduction programme*

Following the introduction of the Reducing Imprisonment Program, the rate of imprisonment in Western Australia was found to have decreased by just under 13% over a period of 12 months (Western Australia Department of Justice, 2003e), enabling sections of prisons to be closed. However, as the following discussion will show, this reduction has not been sustained and the policy appears overall to have had little if any impact on the imprisonment of the indigenous population.

Between January 2001 and December 2003 the imprisonment rate in Western Australia decreased by 8.6% compared with a national increase over the same period of 4.7%. The aboriginal imprisonment rate only in Western Australia only decreased by 1.3% (though this has to be offset against a national increase of 16.8% over the same two years). The decrease in imprisonment in Western Australia was not as large as had been envisaged when the Reducing Imprisonment strategy was initially endorsed by Cabinet. Moreover, since February 2004 it has shown a steady increase and is predicted to continue rising over the next 18 months.

An increased rate of imprisonment has been sustained despite the enactment in May 2004 of the legislation abolishing six month prison sentences: this provision was anticipated as being likely to have the greatest impact on prison numbers of all the provisions in the Reducing Imprisonment Program, but the reduction in the rate of imprisonment occurred before it was in place. It appears that magistrates in Western Australia began to amend their sentencing in anticipation of the new provision, which impacted upon prison

numbers. However, laterally there appears to have been an increase in the remand population and in the numbers imprisoned for fine default (in respect of fines imposed in lieu of short prison sentences and particularly among indigenous offenders). It also appears that the abolition of short sentences may have resulted in longer sentences being imposed than was hitherto the case: for example, magistrates were known in some cases to have passed prison sentences of just over 6 months to circumvent the new provisions. At the same time there has been a decrease in 2004 in the number of prisoners release under parole supervision following the publication of a report into a fatal shooting by a parolee (The Skinner Report). The increase in the prison population appears, therefore, to be a consequence of a higher number of receptions and longer periods served in custody.

A number of factors appear to have limited the anticipated impact of the Reducing Imprisonment programme. First, at a policy level, it could be argued that the range of measures introduced over time was overly ambitious and it has been suggested that with the locus of responsibility for these measures being spread over three policy division (courts, community justice and custodial services) there has been an overall lack of ownership of the program. Second, although the introduction of CEO parole and the Community Re-entry Program is expected to impact on prison numbers, the more recent focus of policy attention on the latter may have resulted in the Reducing Imprisonment Program receiving less close attention than is required. Third, the Reducing Imprisonment Program has not actively involved the police division and this has resulted in the introduction of policing initiatives the likely effect of which is to bring about an increase in the numbers of arrests and hence, indirectly, in the numbers imprisoned. These include initiatives focused upon domestic violence, the Crime Link Unit Police Initiative targeting repeat offenders, the increased policing of aboriginal communities following the publication of the Gordon Enquiry into child sexual abuse in these communities and the DNA testing of arrestees.

The policy has, in particular, failed to impact on the imprisonment of indigenous people who are imprisoned at a rate of around 3,400 per 100,000 population: in other words, at any one time one in thirty aboriginal adult males is in custody in Western Australia. The high rate of arrest and imprisonment of this group partly reflects social and cultural factors: their dislocation from their traditional culture, poverty and associated high levels of alcohol misuse and associated crime. Although the policy was intended to address the high level of imprisonment of indigenous people, existing non-custodial alternatives do not appear to be appropriate. Distances to attend appointments are often great and the concept of appointments and time-keeping is somewhat at odds with the aboriginal culture. Breach rates and consequent imprisonment among

aboriginal offenders are particularly high. Nor do existing initiatives necessarily focus upon issues that are relevant to offending by aboriginal people: for example, the drug court does not deal with alcohol misuse (and even if it did it is arguable that aboriginal offenders would have great difficulty complying with the demands of the drug court regime).

Other legislative changes may also work against the Reducing Imprisonment Program in bringing down prison numbers. For example, Western Australia has recently enacted 'Truth in Sentencing' legislation, abolishing remission and setting initial eligibility for parole at 50% of the sentenced imposed (Western Australia Department of Justice, 2003f). During the 1990s several states enacted 'truth in sentencing' legislation that abolished remission on prison sentences. The impact of these policies upon prison numbers appears to have been somewhat varied, depending upon the additional safeguards put into place. For example, the introduction of truth in sentencing in New South Wales appears to have resulted in a significant rise in the prison population (through an increase in the length of sentence served). As Gorta (1997) indicates, the average time spent in custody increased by 20% resulting in prison overcrowding. At the same time the duration of supervision following release was reduced to a quarter of what it had previously been. As Freiberg (1997a, p.158) has observed:

"Truth in Sentencing in New South Wales came to mean longer sentences, rather than a sentencing system in which the time served by offenders more closely reflected the sentence imposed by the courts."

In Victoria, on the other hand, courts were directed (through the Sentencing Act 1991) to decrease their custodial sentences commensurately following the implementation of the policy and this appeared not to have resulted in increased time spent in prison (Freiberg, 1997b). In Western Australia sentencers have also been directed to adjust their sentences to ensure that a prisoner becomes eligible for parole at the same time as they would under the previous early release provisions. It is too early for the impact of the introduction of Truth in Sentencing in Western Australia to be assessed.

## **5.9 Conclusions**

Following an initial marked decrease in prison numbers, the Reducing Imprisonment Program in Western Australia appears not to have made a sustained impact in this respect. The program was ambitious in scope and in intent, introduced within a complex wider policy context. It is perhaps not surprising, therefore, that it has been less successful than anticipated in

reducing prison numbers, resulting in the suggestion by some that the reforms have been well-intentioned but that the rhetorical has not been translated into reality. Indeed some have argued that many of the initiatives included in the program could have been anticipated to have the contradictory effect of increasing prison numbers, with the indigenous population being disproportionately affected in this way (e.g. Morgan, 2004).

That does not mean that Scotland has nothing to learn from the recent experience in Western Australia. On the contrary, it demonstrates the need for a clear policy focus, for ownership of initiatives by all relevant policy interests and for the wider policy context (and its potential effects) to be clearly understood. This implies a holistic approach but also one which is less complex and ambitious. Identifying a small number of initiatives that might be expected to have the desired impact, implementing them carefully and evaluating their operation and effects would appear more promising, especially in a jurisdiction like Scotland in which the culture of imprisonment appears firmly embedded. In such a context the fragility of progressive policy aims must also be recognised: state elections are looming in Western Australia and against this backdrop none of the political parties wishes to be seen as being 'soft on crime'.

From our analysis of reforms in Western Australia the policy initiative that may be both workable and effective in the Scottish context – where the vast majority of prisoners are sentenced to imprisonment for short periods - is the abolition of short prison sentences. The range of alternative non-custodial sanctions is wider than in Western Australia where the legislative changes appear not to have met with significant judicial or public approbation. However, for such an initiative to have a maximum impact it is important that it is substantive rather than somewhat cosmetic in effect. For example, Morgan (2004) has argued that most of the offences for which prison sentences in Western Australia have been abolished are 'unenforced, irrelevant and never attract a prison sentence...Most of them could have been decriminalised without anyone noticing' (p.15). By contrast, he cautions that many offences will, as a result of the enhanced maxima, attract longer sentences than was previously the case and that remands in custody may be used 'in a manner that amounts to a short prison sentence' (p.17) thereby reversing any trend towards the lower prison numbers that legislative changes are intended to effect.

## **SECTION 6: COMPARATIVE EVIDENCE**

### **6.1 Introduction**

The prison population in Scotland is projected to nearly double by 2012-2013 assuming the current trends in sentencing behaviour continue. In 1990 the average daily prison population was 4724. This has similarities to the United States of America where currently over two million persons are imprisoned, a two-fold rise since the 1980s (a twenty-year period) supported by an expansion in the prison estate. In Scotland, the prison population has been increasing in parallel to increases in the use of alternatives to custody<sup>1</sup>. The Justice 1 Committee Alternatives to Custody Inquiry recommended that information on the effectiveness of community disposals in comparative jurisdictions be reported to the successor Justice Committee. This report provides such international evidence to contribute to any subsequent proposed action to reduce the use of imprisonment in Scotland and promote the appropriate use of the range of alternatives to custody available to sentencers in Scotland.

### **6.2 Understanding the rising use of imprisonment in Scotland**

In Scotland, the rise in rates of imprisonment has occurred despite a greater proportionate use of high tariff non-custodial disposals such as community service orders (Scottish Executive 2002a, McIvor 1999). Addressing the rising use of imprisonment in Scotland is a complex matter. There is a commonly held assumption that rising rates of imprisonment are linked to rising rates of crime. International evidence does not support this view. A study of 36 countries conducted by the Council of Europe (1999) compared statistical information on crime and criminal justice. From this, the findings suggested that there was no relationship between the size of the prison population in a country and the level of recorded crime. This finding is confirmed by information from the International Crime Victims Survey (ICVS) which suggests that levels of crime in many countries have fallen from between 1995 and 1999. Furthermore, in Canada, England and Wales, Finland, France, Netherlands, Northern Ireland, Poland, Scotland, Sweden, Switzerland and the United States, the decrease in crime trends recorded in the victim surveys is consistent with levels of crime reported by the police (Barclay and Tavares, 2002).

Three alternative explanations of increasing use of imprisonment can be found in the academic literature:

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<sup>1</sup> Scottish Executive, written evidence Annex B Justice 1 Committee Inquiry into Alternatives to Custody

1. That a change in the patterns of *criminalisation* whereby new forms of behaviour perceived as challenging community safety have been criminalised and become part of criminal policy (Mathiesen, 2000). The siting of anti-social behaviour as a criminal justice issue in Scotland could support this explanation.
2. That new legislation and changing patterns of sentencing have contributed to an increase in punishment across several offence types. This explanation relates to Bottoms' notion of '*populist punitivism*' (Bottoms 1977). Tonry (2004) argues that a succession of recent highly dramatised incidents has produced a series of 'moral panics' that, in turn has amplified anxieties in the public and contributes to overreactions in policy debates and policies. Incidents of 'incivility' in Scotland have been found to contribute to a feeling of generalised insecurity in the public particularly among older people and to a popular discourse of social breakdown (Anderson *et al* 2002).
3. That modern crime control and penal policies are primarily focused on the identification, quantification and reduction of risk or the perception of risk (Garland 2001, Feely and Simon 2003), a reflection of a society preoccupied with uncertainty, danger and risk. These conditions support the principle of '*incapacitation*' as the law is no longer seen as a moral code and offenders are targeted as an aggregate. The lack of specificity thereby contributes to rising rates of imprisonment (Garland 2001, Feely and Simon 2003). The former approach in Scotland to punish drug-involved offenders with severe sentences of incarceration could support this theory although with the introduction of the Drug Treatment and Testing Orders and Drug Courts in Scotland, this position is slowly shifting away from incapacitation towards treatment and rehabilitation.

The following sections will consider international evidence relating to the use of imprisonment and alternatives to custody in Scotland and will draw upon the legislation, policy and practices in Finland, Sweden and Western Australia to critically examine proposed actions.

### **6.3. Comparative perspective**

From a comparative perspective, Finland, Sweden and Western Australia were considered worthy of in-depth scrutiny. Finland and Scotland are smaller northern European countries which are broadly similar in terms of population size (5.2 and 5.08 millions respectively) concentrated in urban areas and located in large sparsely populated areas. Both countries share a tradition of

strong welfare institutions with equality as a key principle in their societies yet Finland's rate of imprisonment is half that of Scotland. Finland has previously been used as a model for good practice in other jurisdictions. In the 1970s the prisoner rate in Finland was amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland's prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000). In 2000, the expenditure on prison administration in Finland was approximately £81,000. Compared to the average costs of £30,000 per year for a custodial sentence in Scotland, in Finland, the per year costs per prisoner are about £25,610 or £70 as the price of one prisoners' day in prison.

Sweden provides an interesting jurisdiction to study as its rate of imprisonment is significantly lower than in Scotland and has remained more or less stable over the past 20 years. A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible. The significant difference between the rate of imprisonment in Scotland and the rates in Finland and Sweden could be explained as a product of the social context of crime and sentencing in Scotland. The Nordic countries have placed considerable emphasis on social crime prevention as a strategy for dealing with crime, and this has been given high priority in many areas of social life (e.g. social work and education). There has been considerable co-operation between the Nordic countries and their crime-prevention agencies: The Crime Prevention Council in Denmark, The National Council for Crime Prevention in Finland, The Ministry of Justice and Ecclesiastical Affairs in Iceland, The Norwegian National Crime Prevention Council in Norway and The National Council for Crime Prevention in Sweden (The National Council for Crime Prevention 2001a).

The Nordic countries tend to have large public sectors and well developed welfare systems with public expenditure on social welfare comparatively high. Crime prevention in the Nordic countries is strongly affiliated to areas outside the justice system and considerable emphasis is given to social and situational crime prevention. The criminal justice system is considered to have a marginal effect on the prevention of crime, with social policy viewed as an end in itself, not explicitly as a means of crime prevention. Informal social control, is seen as important, involving citizens themselves in crime prevention work and penal reforms in recent years have generally been informed by human rights considerations rather than a 'popular punitivism' (Bottoms 1977) observed elsewhere in Europe.

Finally, in Western Australia, the broad policy and legislative developments have mirrored those in Scotland. Thus in the 1970s and 1980s, the emphasis

was upon expanding the range of community-based disposals as alternatives to imprisonment. In the 1990s came calls for tougher penalties, incapacitative sentencing and vindication of the rights of victims (Freiberg, 1987). Public and political concern about crime resulted in increasingly punitive responses, particularly in respect of those offenders deemed to present the greatest risk of public harm. Recently, Western Australia has introduced a package of reforms including legislative changes, administrative reforms, the expansion of diversionary options and court reforms. The Reducing Imprisonment Program has been introduced in a phased manner to enable the impact of each reform on the prison population to be assessed.

The international evidence from Finland, Sweden and Australia relating to the use of imprisonment and direct alternatives to custody will form the basis for a critical examination of proposed actions in Scotland to reduce its prison populations in the following sections.

#### **6.4 Effectiveness of short-term sentences**

Recent figures from the Scottish Executive (2004) show that 2165 total direct sentenced receptions<sup>1</sup> into Scottish prisons are for less than 2 months and 4561 are between 2 and 6 months in duration in 2003. From a total of 12114 direct sentenced receptions in 2003, this is 18% and 38% respectively. The Justice 1 Committee Alternatives to Custody Inquiry reported that 'many witnesses questioned the effectiveness of such short term prison sentences'<sup>2</sup>. It was widely argued in evidence that short sentences do not allow for the Scottish Prison Service (SPS) to offer prisoners programmes to address offending behaviour and rehabilitation' (p.12). The written evidence supported the view that a short term prison sentence offers little or no opportunity for rehabilitation (Scottish Executive; Bill Whyte written evidence, Annex B).

The earlier prison estates review found that this lack of opportunity is linked to the shortcomings in rehabilitation programmes and throughcare currently offered by the SPS. Transitional care to support short-term prisoners (that is, those serving less than four years) and remand prisoners with an identified substance misuse problem was introduced by the Scottish Prison Service in 2001. The main aim of Transitional Care is to facilitate access to pre-existing community services based on an individual's assessed needs. This is done through the provision of support during a 12-week period immediately following a prisoner's return to the community. The Transitional Care

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<sup>1</sup> 'Receptions' are not equivalent to 'persons received'. Where an offender has several sentences disposed on him by one court in one day this is counted as one reception. When several sentences have been disposed on the same offender by two or more courts in one day, two or more receptions are counted.

<sup>2</sup> Short sentences were considered as less than 6 months in prison.

arrangements are provided by Cranstoun Drug Services under contract to SPS. The operation and the effectiveness of the Transitional Care Initiative is being evaluated by a research team from the University of Stirling, TNS Social Research and the University of Kent. In an interim report on four month client interviews, Murray and Malloch (2004) found that "Transitional Care is reasonably effective in linking clients with services, and that those who participate in the service find it beneficial in a number of ways. However, these reports are based on a very small sample of individuals and may not be fully representative of all those who signed up for Transitional Care. It is likely that those able to provide better contact details, and so who were able to be followed up by the researchers, were in a more stable situation and were possibly less 'difficult' cases".

Evidence presented to the Justice 1 Committee Alternatives to Custody Inquiry argued that community sentences are more beneficial to both the public and the offenders than short term prison sentences (Fergus McNeill; Scottish Executive written evidence Annex B; Fergus McNeill, oral evidence, col 4445) leading the Inquiry to state that 'evidence suggests that Scotland should be seeking means to reduce the use of short term prison sentences and replace these with community sanctions'. (p.13).

## **6.5 Alternatives to short-term prison sentences**

Scotland could reduce the use of short term prison sentences by adopting measures used in Western Australia, Finland and Sweden including the abolition of sentences of imprisonment of three months or less, the abolition of all prison sentences of less than six months, the translation of prison sentences less than eight months into a community sentence, the increased use of fines and intensive supervision with electronic monitoring as an alternative to prison sentences of up to three months.

In Western Australia, the Sentencing Act 1995 prohibited the sentences of imprisonment of three months or less. In May 2004 this legislative provision was extended with the result that courts in Western Australia are prohibited from imposing short sentences of less than 6 months. This is a final (and radical) initiative within the broader Reducing Imprisonment Program. The international evidence shows that the judiciary changed their sentencing practices ahead of the legislative change and that the incremental approach to abolition of short sentences contributed to limited public opposition. The abolition of short prison sentences initiative in Western Australia involves the removal of imprisonment as a penalty for certain offences and an increase in the minimum sentence of imprisonment that can be imposed (to nine months or more) for offences for which imprisonment remains an option. For many

minor offences the statutory option of imprisonment has been replaced by a fine, with the courts having the option to replace the fine by a community-based order with conditions.

Evidence of the effectiveness of the abolition of short sentences in Western Australia to meet its four stated aims of 1) a reduction in the number of offenders sentenced to short periods in prison and an increase in the number made subject to community orders; 2) a reduction in the costs associated with large numbers of short-term prison sentences; 3) a reduction in overall prison numbers, especially in respect of aboriginal offenders imprisoned for fine default or driving offences; and 4) the use of imprisonment as a last resort and only in respect of those convicted of serious offences is awaited. Preliminary evidence suggests that since the enactment of the legislation abolishing six month prison sentences in May 2004, there has been an increased rate of imprisonment in Western Australia. There appears to have been an increase in the remand population and in the numbers imprisoned for fine default (in respect of fines imposed in lieu of short prison sentences). It also appears that the abolition of short sentences may have resulted in longer sentences being imposed than before the enactment to circumvent its provisions. The evidence suggests that the increase in Western Australia's prison population following the abolition of short sentences is a consequence of a higher number of receptions and longer periods served in custody.

The case study of criminal justice in Finland is a stimulating challenge to the ways of working in Scotland. Both countries share a tradition of strong welfare institutions and yet Finland's rate of imprisonment is half that of Scotland. In 2003, Finland had a rate of 66 per 100,000 in prison while Scotland had a rate of 129 per 100,000 in prison. From the 1950s, Finland acted upon the need to 'do something' about their then high rates of imprisonment (187 per 100,000) by a series of law reforms supported by the judiciary, key politicians, government officials, academics and the Finnish public. While the bespoke reforms of Finland can not be transferred wholesale to Scotland, evidence of the Finnish approach to legitimatising the use of non-custodial sentences is worthy of consideration in the Scottish context.

As in Scotland, a sentence of imprisonment in Finland gives an important message to the convicted person and the public. There are fewer sentencing options in Finland compared to Scotland and the process of sentencing alternatives to custody offers a transparency that contributes to the legitimacy of the sanctions for the convicted person and the public. There are two basic sentencing options in Finland: the fine and imprisonment. The fine is the principal form of punishment in Finland (57% of sanctions were fines in 2002). A prison sentence can be imposed by courts if a fine is decided as insufficient

punishment. This requires the judge to have clarity in reaching this sentencing decision. In Finland, alternatives to imprisonment are available as a sentencing option after this initial decision of fine or imprisonment has been made. For example, a sentence of imprisonment of up to eight months will be translated into community service based on the following formula: 1 day in prison equals one hours of community service. This mechanistic approach negates judicial discretion regarding the number of hours of community service. It offers transparency to the Finnish public about the severity of the alternative to custody. As a direct alternative to custody, there is statistical evidence to support that community service has worked well as the number of community service orders have increased so the number of unconditional prison sentences has decreased (see Table 3.4 earlier in the report).

Swedish penal law has aimed to reduce the use of shorter prison sentences with much attention given to alternatives that do not entail deprivation of a person's liberty. In Sweden, the number of people entering prison has significantly dropped in the last few years largely due to the use of intensive supervision with electronic monitoring as an alternative way of serving prison sentences of up to three months. This measure was made a permanent alternative to short terms of imprisonment in January 1999 following pilots in five probation districts in 1994 and roll-out across Sweden in 1997. Anyone sentenced to, at most, three months imprisonment can apply for intensive supervision after their custodial sentence has been made. This ensures that this disposal operates as a direct alternative to custody. Offenders are expected to work between 20-40 hours per week. If the offender has an income, they will be expected to pay a charge of 50SEK per day (approximately £4) which goes into a fund for victims of crime. The National Council for Crime Prevention had been commissioned by the Swedish Government to conduct a wide range of evaluations into various aspects of the criminal justice system in order to identify good practice and which initiatives appear to produce effective results.

## **6.6 Fine default**

The number of people being sent to prison in Scotland for fine default was a concern expressed to the Justice 1 Committee Alternatives to Custody Inquiry. Written evidence stated that 'around 38% of custodies in 2001 (average length 10 days) were for fine default for an average outstanding fine of £259' (Bill Whyte Annex B). The Inquiry concluded that 'This Committee would support concrete measures and targets to reduce the number of fine defaulters being sent to prison in Scotland'. Scotland could learn lessons from Finland, a jurisdiction which once had a high proportion of its prison receptions being fine default prisoners.

In the 1950s, Finland had a high of 25% of the total Finnish prison population being imprisoned for fine default. In the late 1960s the number of fine default prisoners was significantly reduced by two consecutive law reforms that were 1) in 1969 decriminalising the major offence, public drunkenness, leading to a default fine and 2) reducing the number of day-fines and raising the amount of day-fines. The decriminalisation of public drunkenness reduced the daily average number of prisoners serving a custodial sentence for unpaid fines from 800 to less than 100. Evidence suggest that the impact of the reducing the number of day fines and raising the amount of day fines has led to shorter default sentences and therefore contributing to reducing the average number of daily prisoners in Finnish prisons. Practice relating to fine default can be a significant lever in reducing imprisonment.

## **6.7 Remand**

In Scotland, from 1992 to 2003, the proportion of persons held in custody on remand ranged from between 38% to 49%. In the Third Report of the Inquiry into Alternatives to Custody, the Justice 1 Committee stated their belief ‘that people should not be remanded in custody unless they represent a danger to the public or there are concerns that they will breach conditions of bail. It is not acceptable that people are remanded in custody simply because their chaotic lifestyles cast doubt on whether they will appear in court when required. Other facilities, such as residential bail support schemes, should be available for such people. In 1999, bail schemes were made permanent in Scotland following the evaluation of two pilot bail schemes piloted in Glasgow and Edinburgh Sheriff Court (McCaig and Hardin 1999). The evaluation found that the two pilot schemes successfully targeted people who would otherwise have been remanded in custody and they contributed to reduced breach of bail. There is no evidence to date about the impact of bail supervision schemes across Scotland on reducing the numbers of persons remanded in custody in Scottish prisons. The level of bail supervision provision in the 11 local authorities areas plus the islands and access to bail in Scotland can not be presently assessed<sup>1</sup>.

In Western Australia, as part of the Reducing Imprisonment Program, a number of strategies have been put into place to improve access to bail and to reduce the number of people remanded in custody or detained in prison

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<sup>1</sup> Evidence presented to the Justice 1 Committee Alternatives to Custody Inquiry suggests that provision of programmes to deliver community sanctions in Scotland is patchy and that current funding levels are not adequate. The 32 local authority criminal justice social work services have been recently restructured into 11 mainland groupings plus the islands to ensure ‘better development and greater consistency of programmes over a wider area’ (Minister for Justice, oral evidence, col 4634-5).

when bail has been set. A key strategy that has been adopted is the appointment of bail co-ordinators at key remand centres. Failure to meet bail once it has been set is recognised as often being a temporary problem that can be resolved within a few days but its effect is a high number of short-term receptions. In Scotland, more information about the practices of bail supervision schemes and the patterns of bail breaches and their outcomes could improve our understanding of their impact on the number of receptions into Scottish prisons.

## **6.8 Women offenders**

The Justice 1 Committee Alternatives to Custody Inquiry heard oral evidence (Dr Loucks, oral evidence cols 4331/2) that more than half the women who go into custody into Scotland's only women's prison, HMP Cornton Vale, in a given year are there on remand and that most of these women do not receive a custodial sentence. Also, almost half the women are in custody for fine default with an average sentence of nine days and their average outstanding fine is £214 for adults. The Report of the Ministerial Group on Women's Offending expressed concerns about the rising number of female prisoners in Scotland and the underuse of alternatives to custody for female offenders, given the nature of their offending. Measures to deal with female offenders who needed a supportive environment and not specifically imprisonment, were proposed in February 2001. The Justice 1 Committee Alternatives to Custody Inquiry concludes that 'On the basis of widespread evidence, the Committee believes that there are a substantial number of women in Scotland's prisons who do not necessarily require to be there, as they do not represent a danger to the public. The evidence suggests that these women are sent to prison due to a lack of appropriate programmes and facilities in the community'.

The Scottish Executive in partnership with other agencies invested in the establishment of the 'Time Out' centre, called the 218 project, for women in the criminal justice system which opened in Glasgow in January 2004. The 218 project is a community resource managed by criminal justice social work services, operating as a key component of a network of community services for women. The policy aim of 218 is to: 1) Reduce the number of female offenders entering custody by offering the court and criminal justice system options to meet the needs of the woman and the needs of the judiciary; 2) Assist women to avert the crises that often accompany their lives by providing a stable environment, thus enabling services to enhance the provision of prevention work; and 3) Provide a comprehensive service which will enable women to move on with their lives to the extent that they can realistically exit services confidently and re-integrate fully into society. An evaluation of the operation and effectiveness of the centre is currently underway.

Compared to the 40% rise in the average female prison population in Scotland (212 in 1999 to 297 in 2003) (Scottish Executive 2000, 2001, 2002, 2003, 2004), Sweden has a relatively low proportion of female prisoners (5.3% of the prison population). In the 1990s, there had been public and policy concerns about the number of women being drawn into the criminal justice system. Recent Swedish evidence claims that the introduction of intensive supervision and electronic monitoring from 1999 has significantly reduced the number of women prisoners in Sweden by around 250-300 per year (Ministry of Justice 2000).

### **6.9. Increasing use of alternatives to custody**

Ultimately the judiciary in Scotland decide whether to impose sentences of imprisonment or not. Written evidence to the Justice 1 Committee Alternatives to Custody Inquiry has suggested that the attitudes of sentences towards community based alternatives to imprisonment are likely to be the single most important factor influencing their use (Professor McIvor, Annex B). Courts in Scotland have many principal community sentences available including probation orders, community service orders, restriction of liberty orders, drug treatment and testing orders (DTTOs) and supervised attendance orders. There are also the pre-court measures of diversion from prosecution schemes, reparation and mediation schemes and arrest referral schemes which are available before a case goes to court. International evidence suggests that such measures are effective for early intervention to address offending behaviour<sup>1</sup>.

In Finland, only sentences of imprisonment of up to two years can be translated to sentences with conditions such as cooperation with a drug treatment programme. In Finland there has been wide concern about 'net-widening' and their policies and procedures act as restraints on net-widening tendencies:

- The fine is the principal form of punishment unless the case warrants a more severe punishment
- There are very few alternatives to imprisonment
- Alternatives to imprisonment are 'true' and 'fair' with options available only after a custodial sentence and length of sentence has been made. Short custodial sentences are commuted to community service using a universal formula. Custodial sentences of less than two years can be transformed into conditional sentences with goals of reducing re-offending.

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<sup>1</sup> For brevity of this comparative analysis, such pre-court measures have not been considered.

- If a breach to a community-based sanction occurs, this will be punished by fine or another community-based sanction. Imprisonment for breaching a community sentence is pro-actively avoided.

The Finnish approach identifies that a lesson to be learned is that the judiciary require a close involvement in the design and implementation of direct alternatives to imprisonment. If community-based sanctions are not robust in terms of giving clear messages to the convicted person and the public, then sentencers in any jurisdiction are unlikely to use them. In Finland, community sentences are direct alternatives to custody. The results of the University of Strathclyde study of the production of social enquiry reports for sentencers and how they use them will be crucial for future assessment of how to increase the appropriate use of community disposals in Scotland.

### **6.10 Improving the effectiveness of community disposals in Scotland**

The international evidence supports the view that there are an adequate number of alternatives to prison in existence. Historically, Scotland has considered a wide range of alternatives to custody. There are established networks and pathways of sharing good practice in developing alternatives to custody and in assessing their effectiveness. For example, Scotland has made a major contribution to practices in other jurisdictions in its policies and procedures relating to the Drug Treatment and Testing Order (DTTO) and the development of Drug Courts. The DTTO is one example of a direct alternative to custody that has proven effective at reducing re-offending in a key group within the Scottish prison populations. As Mclvor (2004) reports 'despite having extensive prior criminal histories, almost half of those who completed their orders (48%) had no further convictions within two years. Forty-one per cent of offenders given DTTOs were reconvicted within 12 months and 66 per cent within 24 months of the order being made. The average amount of time to elapse until the first conviction after being made subject to a DTTO was approximately 43 weeks'. The innovation of the DTTO offers rehabilitation and has efficacy in reducing re-offending in a cost-effective manner (Eley et al 2002, Mclvor 2004). Now rolling out across Scotland, the DTTO is contributing to reducing entries to Scottish prisons and reducing the rate of imprisonment in Scotland. As a direct alternative to custody for high tariff offences, the DTTO in Scotland offers other countries lessons to be learned for reducing receptions into prisons.

At least two or more of the alternatives to custody available in Scotland are imposed in similar ways in the case study jurisdictions of Finland, Sweden and Australia. It can be argued that where the community sentences are being imposed as direct alternatives to custody, then there are contributing to reducing or depressing the rate of imprisonment in Scotland. The earlier

discussion of concerns about potential 'net widening' in Finland, needs to be reconsidered here in the context of dealing with breaches of community-based sentences. The approach in Finland echoes the current practices in Scotland. In Finland where breaches of community service orders occur, a new unconditional prison sentence is imposed. The Reducing Imprisonment Program in Western Australia has made available and promoted that in the event of an offender failing to comply with a condition of their order a range of sanctions other than imprisonment. The intention is that offenders will only be returned to prison when the nature of the breach justifies imprisonment and not when a relatively minor transgression – such as failing to meet a regular reporting obligation – is involved.

During the Alternatives to Custody Inquiry, the Justice 1 Committee explored the issues of progressive use of community disposals which allows an offender to have another community disposal imposed when they are in breach of a disposal. Standard probation, probation with conditions and intensive supervision can be distinguished but these community disposals are not currently set in any tariff order. One approach outlined during the Inquiry was that tariff points be created to distinguish disposals such as standard probation from probation with conditions and intensive supervision. If an offender breaches probation, the intensity of supervision could be graduated through standard probation allowing for at least a three stage 'upgrade' in community disposal before custody is imposed (Bill Whyte, oral evidence col 4437 and written evidence). The evaluation of the new breach practices in Western Australia set within the context of their Reducing Imprisonment Program should be followed with interest.

In Scotland, the need for a more comprehensive assessment of community disposals in Scotland was highlighted by the Justice 1 Committee Alternatives to Custody Inquiry. Echoing the situation in other Western jurisdictions, there is a limited robust evidence base on the effectiveness of community sanctions in Scotland. Reduction in recidivism is a frequently used indicator of effectiveness with the acknowledged flaw that reconviction does not equate with reoffending as some offenders reoffend but are not subsequently reconvicted. The current international evidence suggests that community disposals are at least as effective in reducing offending behaviour as short term prison sentences and have a greater cost-effectiveness.

## **6.11 Concluding remarks**

Any subsequent action to reduce the rising prison populations in Scotland will require the support of the public, the judiciary and the political will. The concerted incremental approaches in Finland from the 1960-1990s that significantly reduced prison populations and the recent programme of change

in Western Australia suggest that a number of inter-related reforms could be undertaken with the aim of reducing the use of imprisonment as a sanction in Scotland, maintaining the international credibility of the political choices and the judiciary. Direct alternatives to custody that maintain comparable levels of security for the general public will ensure little opposition from the media and public confidence.

In Scotland, a wide range of alternatives to custody have been considered and many community disposals are in operation. A number of refinements could be made to the processes and procedures of existing community disposals to ensure their performance and their position in the Scottish criminal justice system as direct alternatives to custody. A greater transparency to the convicted and to the public that an alternative to custody is a direct alternative to going to prison could contribute to wider and appropriate use of community disposals. International evidence suggests that community disposals are at least as effective as short-term imprisonment and proven rigour could offer sentencers confidence in their contribution to reducing reoffending.

Concerns about 'net-widening' have been raised in Scotland as in other European jurisdictions. International evidence suggests that short term prison sentences as direct sentencing or as a result of breaching community-based sentences have limited value in terms of treatment and rehabilitation of offenders. A greater use of community-based disposals for offences that could be punished by increased day fines heightens the risk of offenders violating the conditions and being more severely punished with imprisonment in a Scottish prison.

The international evidence suggests that significantly lower rates of imprisonment than currently found in Scotland can be achieved by an approach with the following central strands:

- An emphasis that prison is not an universally effective sanction;
- A clear welfare steer;
- The need to avoid harm;
- The avoidance of net-widening.

There may be scope for 'new' community disposals in Scotland. However, it would be more effective to concentrate on the efficient and equitable use of existing sanctions. It is proposed, on the basis of the international evidence, that the procedures relating to community disposals as direct alternatives to custody could be enhanced. This underpinned by appropriate use of community disposals could contribute to lower rates of imprisonment in Scotland.

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