

THE MAGISTRATES' ASSOCIATION
SENTENCING POLICY & PRACTICE COMMITTEE

Short Custodial Sentences - Policy

There has been considerable discussion on this topic in recent years. The first question that arises is what is the definition of a short sentence? Is it a sentence which is less than 12 months when imposed or is it a sentence which is less than 12 months when served? Although some clarification would be helpful, for the purposes of this discussion paper we shall only be considering those sentences which are currently within the powers of the magistrates' courts.

Governments do not like short sentences as custody is in any case expensive; they want to reduce the number of people going to prison and they feel that it would be more acceptable to voters to reduce the number of short-term prisoners than to reduce the length of time served by more serious offenders. Prison governors do not like short-term prisoners as they are taken up the same amount of time on admission and release as longer-term prisoners but the system is unable to involve them in work or rehabilitative programmes. Organisations like the Howard League and NACRO do not like short custodial sentences as they say that they are ineffective and serve merely to disrupt the lives of already damaged and disorganised individuals.

Re-offending rates indicate that short sentences are not as effective in reforming and rehabilitating offenders as longer ones. The magistrates' courts have powers to impose other non-custodial sentences – discharges, fines and community orders – and it has been suggested that custody should be reserved exclusively for those offenders who present a danger to the public.

When are custodial sentences imposed?

When an offence is considered by the court to be so serious that only a custodial sentence would be appropriate. Magistrates can impose a maximum sentence of twelve months for two or more either-way offences.

When a community order is breached then the court must either make the order more onerous by adding an additional requirement, or by making one or other of the existing requirements more onerous e.g. by adding more hours of unpaid work. If the court decides that the breach is so serious that it would be inadequate to make the order more onerous, then it has the power to revoke and re-sentence.

If a fine has not been paid and the court makes a finding of either wilful refusal or culpable neglect then the offender can be sent to prison. The length of the sentence depends upon the amount outstanding.

The issues:

- Should custodial sentences be the prerogative of the Crown Courts?
- What can be done to reduce the number of custodial sentences imposed in breach proceedings?
- What can be done to reduce the number of custodial sentences imposed for non-payment of fines?
- What are the alternatives to short custodial sentences?
- Should more use be made of suspended sentences?

Should custodial sentences be the prerogative of the Crown Courts?

We consider that this would be unworkable. If magistrates' courts alone were to lose the power to impose short prison sentences there would be a huge increase in the workload of the Crown Courts. This would have a disastrous effect on waiting lists as (in addition to offences where magistrates found the case to be 'so serious') all cases involving breach of a community order or non-payment of a fine would have to be sent to the Crown Court for sentence.

What can be done to reduce the number of custodial sentences imposed in breach proceedings?

A problem here is that offenders, many of whom lead chaotic lives with problems such as drug use or mental health issues, and whose breaches are associated with these problems, find themselves being pushed towards the custody threshold by legislation which states that a breach must be sentenced by either making the order more onerous or by revoking and re-sentencing. It has been suggested that courts should make more use of 'creative sentencing' – namely adding an additional requirement that will have little or no impact on the offender, such as a residence requirement, or revoking and re-sentencing with a community order that is the same as, or even less onerous than, the original sentence.

While conceding that there will be occasions when a court may want to sentence creatively, taking this sort of approach as matter of course is likely to devalue community orders and ultimately reduce public confidence in the criminal justice system.

What can be done to reduce the number of custodial sentences imposed for non-payment of fines?

The question of fines in general – how they are imposed, how they are collected, and what happens when they fall into arrears – is a huge subject, far too extensive to be considered here at any length.

It is however worth bearing in mind that the total amount outstanding is over £ ½ billion, and of the £1.3 million fines imposed by the magistrates' courts annually, £300,000 results from non-payment of fixed penalty notices imposed for a range of imprisonable offences including possession of drugs, criminal damage and assault.

What are the alternatives to short custodial sentences?

1. A community order, frequently a fairly high-level one, can be imposed as a direct alternative to a custodial sentence. If the order is then breached the offender is likely to be sent to prison.
2. A band E fine (up to 500% of relevant weekly income) can be imposed as an alternative to a custodial sentence. However it remains unlikely that band E fines are ever going to be used to any great degree, and even if there is a considerable publicity campaign they are not likely to be popular with the public. Furthermore although the courts may come down from custody to community orders, to make the tremendous leap from the top to (very nearly) the bottom of their sentencing powers is quite a different matter and could give rise to the accusation that offenders who are able to pay such large fines have managed to buy their way out of custody.

An additional problem with fines (of any level) is that the longer it is from the date of imposition, the more difficult it is to enforce the fine, and although (MCSG p152, paragraph 43) makes it clear that it might be appropriate for a band E fine to be paid over a two-year period, many of the people who come before the courts regularly re-offend before previous fines have been cleared. They are so accustomed to paying a small sum weekly (generally taken as a deduction from benefits) that they seem to be almost unaware of it – almost as if it is a small but inevitable tax that everyone has to pay.

Should more use be made of suspended sentences?

There have been problems with the Suspended Sentence Order (SSO), with courts being accused of up-tariffing. There could be increased use of suspension; all sentences of less than 6 months could be automatically suspended, with mandatory supervision during the period of suspension, but this would carry the risk of returning to an unacceptably high number of SSOs being made – with a high number of offenders being sent to prison for breach and a consequent long-term rise in the prison population.

The way forward

‘No change’ is not going to be a viable option. The current system of short sentences unsupported by any supervision or aftercare is not effective (largely because changes in legislation have made it so) and the combination of statutory early release and end of custody licence have so weakened the link between crime and punishment that imprisonment generally has been fatally devalued in the eyes of the public

However there will always be some offenders who will refuse to co-operate – they will not pay their fines, they will not engage with a community order – and for them the courts will need an ultimate sanction.

We recommend that the custody licence scheme of should be ended as soon as possible.

Additionally **we recommend** statutory early release should end and that any remission should be earned by involvement in work or rehabilitative programmes.

We recommend that funding should be provided to enable prison staff and/or the probation service to make constructive use of short prison sentences – for example assessing inmates’ suitability for specific probation intervention on release.

The government did run trials of intermittent custodial sentences but this was not a great success; however more use could be made of Electronic Monitoring. This is certainly being seen as a direct alternative to custody for more serious offences.

We recommend consideration of the following options:

- Increasing the maximum from its current limit of six months
- Introduce weekend curfew e.g. up to 18hrs curfew on Saturday &/or Sunday – a maximum of 36hrs out of the period between Friday evening and Monday morning.

‘Custody Plus’ might be the best approach but unless and until a government puts serious investment into the probation service it remains an unworkable option.

We recommend that consideration should be given to funding intensive community orders for offenders at serious risk of medium term custodial sentences (6 – 18 months).

In addition we wonder whether there may a possibility of something along the lines of ‘C+ Lite’? Custodial sentences of more than 28 days could have any additional period suspended for up to 12 months with supervision being provided during the period of suspension. It would not be appropriate for this type of sentence to be made for non-payment of fines or breaches of other community orders.

When sentencing for breaches of community orders, **we recommend** that courts should once more have the power to fine the offender and allow the order to continue if the officer in charge considers that progress is being made.

In cases of non-payment of fines, **we recommend** that courts be given the options of short curfews (with electronic monitoring) and/or short, intensive unpaid work orders.

APPENDIX

Magistrates' Court Statistics

- Magistrates' Courts (MCs) dealt with over 1 million sentencing episodes last year, far more than Crown Courts.
- In 1993 MCs sent 25,000 into custody; in 2008 it was 51,000 which is down from the high (in early 2000s) of 61,000
- Custody for drug offences:
1997 – 7,745
2007 – 8,186 - this represents a very small rise
- Percentage of those convicted by MCs for drug offences who are given custody:
1997 - 2.6%
- 2007 - 3.6%
- However it should be noted that this is one of the lowest offence group percentages, compare this with 23% for burglary (DH) in 2007
- Overall MCs send 1,000 offenders a week to custody - equates to 2-3 per week per court
- At any one time around 7,500 will be serving short-term custodial sentences
- 46% of adults in all courts given custodial sentences have already had 3 previous custodial sentences - so around 25,000 of those who go from MCs each year fit this profile

Prison Receptions

Of every 10 receptions, roughly 10% are women – only 1 in 10 has never been in prison before and is likely to be sentenced for a sexual or violent offence. 2 have only previously had a community sentence. The remaining 7 have all been in prison before and two-thirds of these have also had community sentences. Of these 7, one will have been in prison between 9 and 14 times; one will have been in prison 15-20 times; the rest an average of 7 times.

Sentencing Guidelines

Some Sentencing Guidelines Council starting points for a first-time offender pleading Not Guilty and convicted after a trial:

- Possession Class A Drugs – High level Community Order for 1st offence
- Supply Class B – 6 weeks custody
- Theft (vulnerable victim) – 18 weeks custody
- Excess alcohol (4x limit) 12 weeks custody
- Possession (not use) of bladed instrument in dangerous setting – 6 weeks
- Short-term neglect of a child – 12 weeks
- Burglary DH (forced entry, good taken of low value, no aggravating features) – 12 weeks custody

Useful Statistics from NAO Report HC 431 “*Managing offenders on short custodial sentences*”

60,000 adults per year get sentences of less than 12 months

They make up about 9% of prison population on any given day

Account for 65% of all admissions and releases

Only 10% are more than 6 months

More than half are less than 3 months, so serve less than 6 weeks

On average they have 16 previous convictions, higher than any other group of offenders

60% will get another conviction within a year of release

Offences are theft and handling 21%, violence against the person 20%, breach of court order 16%, motoring 10%, everything else 33%

NAO estimates that a 6 week stay in prison costs £4,500

Estimates that a two year Community Order, including intensive supervision AND 80 hours unpaid work AND participation in accredited programmes costs £4200

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