

**Scottish Parliament Justice Committee:
Call for Evidence on the Presumption Against Short Sentences**

SUBMISSION FROM COMMUNITY JUSTICE SCOTLAND

In its Programme for Government 2018-19, the Scottish Government stated that it would extend the presumption against short sentences from 3 to 12 months. In advance of the Scottish Statutory Instrument being laid in Scottish Parliament, the Justice Committee invited submissions of written evidence on the impact of the PASS since introduction, and the potential impact of the proposed extension. On 22nd May 2019, Community Justice Scotland submitted the following written evidence in response.

1) How the current presumption against short sentences of up to 3 months has worked in practice, including the impact of the presumption on offenders, victims and their families, and criminal justice stakeholders

In the period since the introduction of the presumption up to 3 months (2011), sentences of up to 3 months have reduced markedly (“Prior to 2011-12 sentences of up to 3 months were the most common custodial sentence, dropping from 41 per cent in 2008-09 to 27% in 2017-18”¹) and following their introduction, the use of Community Payback Orders gone up year on year – with the exception of the last reportable year where use of CPOs actually dropped slightly². The evidence is not available to say if the reduction in sentences under 3 months is attributable to the introduction of PASS or due to other factors, or even to say if people are now receiving a community sentence where previously they would have been sent to prison (though we would suggest this is likely the case).

Many factors are used in deciding what sentence is appropriate depending on the relevant factors of the case such as the offence and impact on the victim, the circumstances of the person to be sentenced, and the options available to the sentencer.³ The uptake in community sentences may be because of increasing sentencer confidence in their viability and potential impact on people’s lives. This is supported by the findings of Scottish Government’s evaluation of CPOs, CJSW reports and PASS in 2015, which suggested at least some Sheriffs felt they were using community penalties more since the introduction of CPOs⁴. It is unclear to what extent the existing PASS was a causal factor in the sentencing of the people who received a community sentence in this period and the independence of the judiciary makes this a challenging area to evaluate.

We would note however there continues to be widespread support among professionals and academics, particularly stakeholders in community justice, for the use of community options over short custodial sentences wherever possible and appropriate. The [Consultation in 2015](#) showed overwhelming support (84% of responses) for the extension of PASS up to 12 months. In our experience of working with local partnerships and other

¹ [Criminal proceedings in Scotland 2017-2018](#)

² Ibid.

³ [“Principles and purposes of sentencing”, Scottish Sentencing Council, 2018](#)

⁴ Scottish Government, 2015 [“Evaluation of CPOs, CJSW reports and PASS”](#)

stakeholders involved in community justice over the last two years, there is tremendous will to make community sentences as effective as possible in achieving the outcomes needed to make Scotland safer, healthier, more equal. The PASS is seen as part of this broader shift.

- 2) The proposed extension of the presumption to sentences of up to 12 months including:**
- a) the potential impact of this change on offenders, victims and their families, and criminal justice stakeholders**

Reoffending and associated harms

The case against the use of short spells of imprisonment is strong. People who receive short sentences have the highest level of reoffending⁵.

Short sentences are expensive, present limited opportunity for rehabilitative services to engage with criminogenic needs while incarcerated, can often contribute to damaging circumstances including the loss of stable housing, employment, financial stability, access to benefits, family relationships⁶ – all of which are strongly associated with failing to desist from crime. Upon release from a short sentence, many of the needs present at the time of offending and conviction remain unaddressed, or circumstances are worsened through loss of housing and income. This is likely to play a part in the high levels of reoffending present in this group. The impact of the above is felt not only by the person convicted, but also by their families. Where a parent or caregiver is sentenced to custody, children lose not only their parent, but often their homes, their sense of security and stability. Parental imprisonment is rightly named as a significant Adverse Childhood Experience, with potentially long term traumatic impact for the children of those sentenced.

In comparison, community sentences, such as the Community Payback Order, are associated with lower levels of reoffending⁷ and have a less substantial negative impact on life circumstances such as those outlined above. CPOs aren't easy to complete. People find them personally and practically challenging, but many report that engaging with elements including supervision and unpaid work is key in helping them move on from offending⁸. A shift toward greater use of community sentences has the potential to increase the number of people achieving these positive outcomes, reducing reoffending.

Costs

For every harm resulting from a short custodial sentence, there are implications for the resources of local and national public services.

For example, consider an example relating to housing where an individual in receipt of housing benefit via Universal Credit and living in a social or private housing tenancy is convicted and sentenced to a short period of custody. During that time, their benefits are

⁵ Ibid.

⁶ [Sapouna et al \(2015\) "What Works to Reduce Reoffending: A Summary of the Evidence"](#)

⁷ Scottish Government, 2015 "[Evaluation of CPOs, CJSW reports and PASS](#)",

⁸ [Community Justice Scotland \(2019\), "Community Payback Order: CJS Summary of Local Authority Annual Reports 2017-18"](#)

suspended, their rent is no longer being paid. The tenant accrues rent and council tax arrears against the local authority, housing association or private landlord. Eventually, the landlord proceeds to eviction, at a significant cost to themselves and with further charges against the individual. The landlord clears the address of the person's 'abandoned' possessions, redecorates or refurbishes as required, and makes the property available to new social tenants. The person is then released from custody having served their 6 months sentence, and must present as homeless to the same local authority, and where appropriate initiate a new claim for Universal Credit as they are unemployed. Due to the loss of their tenancy, they may also have lost key documents such as passport, driving licence or birth certificate, all of which will cost money to replace and are essential for processes such as setting up a bank account or getting a lease on a property. They have also lost irreplaceable personal possessions. The landlord has had an empty property for months while accruing considerable loss of revenue from rent and additional costs for the eviction and clearing of the property.

Research shows vast financial implications for individuals and public services in dealing with the consequences of homelessness, with estimates of the cost of one single adult homelessness case running between £15,000 and up to £83,000⁹. This does not take into account the ripple effect of harm throughout families and communities, which in turn incurs further financial and social costs. Our research has shown people on short sentences were more likely to be homeless at the point of sentencing and are more worried about their housing options than individuals completing CPOs¹⁰. The 2017 Prisoner Survey showed that 49% of prisoners lost their accommodation when they were sentenced¹¹. A short prison sentence will not address any of these issues – housing advice remains difficult to access in many prisons, and short term prisoners will likely be unable to address any issues which led to them being homeless. Research by Crisis suggests that preventing homelessness costs around £1,500¹². We would suggest that the PASS provides a key opportunity in adopting a preventative approach to this uniquely damaging issue.

The above sets out an illustration of potential costs associated with one strand of harm that arises from a short prison sentence. There are similar implications for each need associated with short terms of imprisonment, such as physical and mental health, substance use and addictions, employment, education, relationships with friends and family, and more. When these concurrent harms and associated costs are considered, along with the cost of delivering a custodial sentences, it begs the question – is a short sentence worth it? If PASS is extended and uptake is high, the potential to maximise resources and alleviate costs is significant.

Benefits

A further unintended consequence of remand and imprisonment arises when a claimant of a 'legacy benefit' (such as ESA or Income Support) has to initiate a new claim following

⁹ [Shelter Scotland \(2017\), "Evictions by social landlords in Scotland 2012-2016"](#)

¹⁰ [Community Justice Scotland \(2019\), "Sentenced to Smart Justice: A report on proposed extension of the Presumption Against Short Sentences"](#)

¹¹ [Scottish Prison Service 2017 Prisoner Survey](#)

¹² [Pleace, N. \(2015\), "At what cost? An estimation of the financial costs of single homelessness in the UK"](#)

release from a short sentence or remand. With Universal Credit, where a claimant of a 'legacy benefit' is to be migrated onto a lower level of benefit, this happens over a significant period of time to allow adaptation to new, reduced circumstances. Financial issues are a huge concern for people who are currently serving short sentences¹³. For those claiming 'legacy benefit', as an application following release from prison is treated as a new claim, claimants can experience a cliff edge of a significant and abrupt drop in income, at a time where they and their families are least equipped to cope.¹⁴

A reduction in short sentences wherever appropriate has the potential to reduce these concurrent harms to individuals, families and communities.

Disclosure

The sentence passed has a direct effect on the length of time a conviction will appear on a basic disclosure. At present a sentence of up to six months has a "rehabilitation period" (during which time an unspent conviction will appear in their basic disclosure) of seven years. For a sentence of between six and twelve months, this period is ten years. In comparison, a sentence of a Community Payback Order carries a disclosure period of five years. As the Committee is aware, these periods are currently under review in the Management of Offenders Bill. The proposals in this Bill would greatly reduce disclosure periods for these sentences – a sentence of twelve months would have a disclosure period of 3 years, 6 months would result in 2.5 years, and a community sentence would be 12 months or the length of the order, whichever is longer. Community Justice Scotland support these proposed changes, and welcome the positive and constructive response with which they have been received by the majority in the resulting discussions.

In the context of PASS, we would highlight that in both the present and proposed future arrangements around disclosure, a custodial sentence of even a relatively short term has significant repercussions in comparison to many community sentencing options. Custody and disclosure both have a substantial impact on a person's ability to gain and retain employment. Custody is immediately disruptive for present employment, and in the future may present a more challenging barrier to consideration by potential employers where someone who has been to prison may be seen as more of a risk or threat. A community sentence could allow someone to retain active employment, and may be less toxic to future employment prospects or access to further education.

Women

Scotland has the highest number of female prisoners per head of population in Northern Europe. This has been the case for several years and has been stubbornly persistent in spite of several initiatives taken by different governments over the last twenty years. Of the women sentenced to custody in 2017-18, 90% received sentences of up to 12 months, 79% receiving sentences of less than 6 months, 40% of up to 3 months. The majority of the

¹³ [Community Justice Scotland \(2019\), "Sentenced to Smart Justice: A report on proposed extension of the Presumption Against Short Sentences"](#)

¹⁴ [Child Poverty Action Group in Scotland, 2018. "Prisoners and Benefits", "Prisoners and Universal Credit"](#)

offences for which these women are sentenced are non-violent (criminal proceedings 17-18).

There will be multiple factors contributing to sentencers decision-making as regards these women. Women in prison are likely to have an even greater level of complex need and multiple vulnerabilities than those markedly present in the male prison population (insert reference PRT Transforming Lives Report 2015). In 2017, 69% of women in prison in Scotland were mothers¹⁵. Some are pregnant – 31 babies were born to women in custody between 2013 and 2017¹⁶. We do not know why sentencers are deciding that short term custody is the most appropriate response, but we do know these women are often have complex needs, many are vulnerable and traumatised, and we know that a short prison sentence or period on remand is not going to fix those problems.

The Scottish Prison Service is working with partners to build trauma-informed estates and new Community Custodial Units which will be better placed to respond to the needs of vulnerable women and support reintegration into the community. This is laudable, and will likely prove a valuable asset in working with Scotland's longer term women prisoners. Nonetheless, we would suggest that to address the issue of women serving short periods on remand and short sentences, more is needed than improved custodial facilities. For these women, we need to reduce the use of custody and improve and utilise coordinated community support. These women return to their communities after a relatively short period in custody, often to unstable and unsafe situations, factors often exacerbated by her time in custody. We would suggest that for these women, a community-based response including the range of community justice partners would be better suited in achieving positive outcomes for them, their children and their communities.

The extension of PASS could have a key role in bringing about this shift.

Increased need in CPO population

In 2018, we commissioned a piece of research to compare the self-reported needs at point of conviction of two groups: individuals currently in prison on sentences of less than 12 months and those serving community sentences. Both groups showed different degrees of need in relation to the same key issues, including mental health, housing, money, drug use, and employment. The imprisoned group showed a greater degree of need with even basic issues like struggling with everyday skills such as keeping appointments (38% in prison reported experiencing moderate or greater difficulty, compared to 29% of those completing CPOs). 70% of the imprisoned respondents reported moderate or greater need in relation to mental health, compared with 50% on CPOs. Drug use was at least a moderate issue for 55% compared to 34% completing CPOs. Overall, those in prison showed a greater degree of need in all areas¹⁷.

¹⁵ [Scottish Prison Service \(2018\) Women in custody 2017, Edinburgh: SPS](#)

¹⁶ [Scottish Prison Service \(2018\) Freedom of Information request](#)

¹⁷ [Community Justice Scotland \(2019\), "Sentenced to Smart Justice: A report on proposed extension of the Presumption Against Short Sentences"](#)

We should note that these populations are not necessarily homogenous nor directly comparable – there are likely to be significant underlying differences influencing their sentencing, including offence type and previous convictions, which we have not captured with this research. The extension of PASS however presents a welcome challenge to all to consider people not traditionally considered suitable for community sentencing *due to factors other than risk and public protection* as people who can potentially see a change under a community sentence. It seems logical that complex and multiple needs are underlying some of the reasons why people are not considered suitable for community sentences, but this in itself should not be the reason people are given custodial sentences. If however this additional complexity is a feature of people who may now be more likely to receive community sentences as a result of PASS, it follows that community resources will be required to appropriately support individuals.

Victims

Short sentences are associated with greater rates of reoffending than other sentencing options. This suggests that if we are serious about preventing the creation of new victims, something different is required. A victim of domestic abuse highlighted to us that though it was a relief when her ex-partner was convicted and given a custodial sentence, the positive impact for her was limited. Her ex-partner's behaviour continued to be abusive and threatening to her and her family following his release. She felt unsupported by the justice system as a victim of significant trauma. We can't comment on what sentence might have been required to achieve a different result, and each case is unique. We would however suggest that in relation to victims, the benefits of short custodial sentences should not be overstated, and that there are other important factors to consider such as those that are the current focus of the Scottish Government Victims Taskforce. For cases like this, the extension of PASS highlights the need for consideration of the experience of victims beyond the trial and subsequent sentence end date, and the purpose of sentencing decisions in achieving enduring positive outcomes for the individuals involved, families and communities.

For all involved, these needs would not and cannot be addressed by a short prison sentence alone. The question is perhaps, what difference needs to happen in the community and delivery of public services that makes sure those unaddressed needs can be identified and addressed as that person remains in the community? This is not a new challenge, though this is not to minimise its significance or complexity. It is precisely challenges like this that local partnerships empowered by the Community Justice (Scotland) Act 2016 are best placed to answer, and who Community Justice Scotland is committed to champion. This work needs to be actively supported by national partners and government.

b) the practical and financial impacts of this proposed extension, such as the resources or training that may be required

The impact of an extension of PASS is very hard to predict accurately. It's very difficult to predict sentencing trends in general – as stated above they are influenced by multiple factors beyond the specific options available to a sentencer. We can however hypothesise

that an extension of PASS may increase the number of people given a community-based sentence.

Justice Analytical Services have shared with us some theoretical predictions for what a reduction in short sentences combined with an increase of CPOs would look like. They suggest at the low end, in the first year of an extension of PASS if 20% of 3-12 month prison sentences were instead disposed as CPOs, it would in effect mean an additional 1,300. If the impact of PASS is greater, then the number of community disposals must logically increase.

Currently, the majority of CPOs include a requirement for supervision by Criminal Justice Social Work (CJSW), and many carry an unpaid work requirement. Each of these immediately carry a resource commitment for the local authority, funded primarily by Scottish Government, calculated and distributed by the Section 27 funding formula. If caseloads increase, so too will the amount of money distributed via Section 27, albeit retrospectively.

Realistically however, one cannot use this as a metric to reliably calculate the full financial or resource implications of an increase in community sentences, as the needs of any individual are not met solely via their involvement with CJSW and funded by S27. For example, they may be engaged with specialist third sector support (some potentially funded by S27, many by independent funding or other sources including Scottish Government and local authorities) to address their alcohol or addiction issues, employability, life skills, or any of the many other needs we know to be present in the cohort of people with convictions, that are often best addressed by non-statutory services. Many other general and specific needs may be addressed through engagement with appropriate public services including Health, Housing, DWP and more. In some cases, people need additional support (for example, mentoring) to access and continue to engage with these services.

In short, the resources involved in supporting someone on a CPO are many and varied, and the costs hard to comprehensively quantify. Theoretically, a reduction in people receiving short sentences may alleviate some local resources (for example, where a tenancy is sustained rather than allowed to accrue arrears and move to eviction as set out previously in the housing example), but as with the costs, any potential for resource maximisation is at this stage largely speculative and not necessarily directly trackable. Furthermore, even if additional CPOs alleviated pressure on the prison system, this would not result in direct savings for community partners, as the budgets are separate.

Our research suggests that the cohort currently serving sentences of up to 12 months presents increased, arguably more complex, levels of need than the population currently serving CPOs¹⁸. If this increased need translates into a greater number of people serving community sentences, then there will be a requirement to consider how best to meet that changed need. This is at this point speculative – we do not know precisely how the extension will impact the population subject to community sentences. There is a need for

¹⁸ [Community Justice Scotland \(2019\), "Sentenced to Smart Justice: A report on proposed extension of the Presumption Against Short Sentences"](#)

local and national partners to closely monitor this impact, and be prepared to react responsively, assess the issues and address with appropriate support. Any shift in the needs profile of those receiving CPOs will need careful consideration, and may involve further needs analysis and reprioritising resources currently available. Depending on the nature and degree of impact, it may also require support from the Scottish Government in the form of additional funding in-year rather than relying on retrospective S27 funding arrangements.

There is a risk that if more people with more challenging needs are given CPOs, they will not be able to comply and successfully complete. When basic issues such as keeping appointments are beyond them, they may breach more readily, not through wilfulness but because of deficits they are not in control of and cannot address on their own. We must be careful that people are not set up to fail, and also that people and local and national partners are given the opportunity to respond to the challenge presented by the extension of PASS.

It is worth noting that a reduction in short sentences will not have a significant impact on the stable prison population (or the associated resources), which is largely driven by a trend toward longer sentences for more serious offending. It will however hopefully reduce the churn of people with convictions who repeatedly serve short sentences – a life sentence in instalments. The current PASS of up to 3 months does not necessarily touch those people, who may well have been receiving sentences greater than 3 months due to the persistent and high volume offending and perhaps lengthy criminal histories being taken into account. If PASS is extended it might provide opportunity for people with chaotic lifestyles, trapped in cycles of offending, whose cost to public services and communities is already vast, an opportunity to break that cycle. [Our public campaign Second Chancers shares the personal stories of some people whose experience of Community Justice has afforded them such an opportunity](#)¹⁹.

It is difficult to speculate about the specific impact of PASS, but we would note that an increase in community sentences is not a reason to hold back from an extension. We already advocate for increased use of community options as the most effective in addressing offending behaviour, because it is the right thing to do according to the evidence available to help address the underlying causes of offending and break the cycle of reoffending.

- 3) Any other views relating to the proposal, for example:**
 - a) whether there are specific offences to which the presumption should not apply**
 - b) whether a figure other than 12 months would be more appropriate**
 - c) whether there should be an outright ban against sentences of a particular length**
 - c) the effectiveness of short prison sentences and community-based alternatives**

¹⁹ [Community Justice Scotland \(2018\) "Second Chancers - Malky's Story"](#)

Community Justice Scotland is the lead body for community justice in Scotland. We advocate for the use of high quality, evidence-based interventions for people involved in offending, delivered in partnerships involving statutory and non-statutory bodies, including the third sector and communities and involving people with lived experience, because the evidence tells us that is the best route to reducing offending and making Scotland a safer, healthier nation.

Short sentences have demonstrably poor outcomes for people, and any perceived benefits are temporary and, we would suggest, far outweighed by the enduring associated harms.

People with lived experience tell us about the hopelessness of being trapped in a cycle of short sentences and reoffending, of being unable to find a way out of the chaos and access the help required. In contrast, multiple people who received CPOs tell us of opportunities found within the hard work, ways to develop personal capacity and resilience, or to address trauma long buried. These positive outcomes are the product of collaborative working between community justice partners, support from families and communities, and the hard work of the individual.

Rehabilitation is about recovery; for people who have been convicted of an offence, for victims, for families and communities. Community sentences are challenging for all involved, and there are complex problems that need to be addressed by community justice partners at a local and national level. To achieve the environment where recovery is possible, local and national partners need to come together, recognise what is not working, strengthen what is, and innovate to respond to problems we haven't yet found a way to solve. We think the extension of PASS is an important step in this journey to achieving smart justice in Scotland.