

THE MAGISTRATES' ASSOCIATION
SENTENCING POLICY AND PRACTICE COMMITTEE

Use of short term custody – policy paper

There is a continuing debate about the use of short-term custody which has been highlighted in the context of the *rehabilitation reform*. On the one side is the argument that nothing can be done to address offending for prisoners serving short periods of custody — whilst on the other is a total lack of alternatives available to sentencers when dealing with persistent offenders whose individual offences are not serious enough for a longer prison sentence, but have been assessed as unsuitable for a community penalty. Magistrates are often criticised for using custody when other sentences are apparently available; and for referring cases to the Crown Court when their own powers ought to have been sufficient. This short paper seeks to set out the sentencing dilemma and make some recommendations for review.

Definition

When we use the term short prison sentences we are referring to custodial sentences of six months or less, basically any sentence that a magistrates' court might impose under current powers. We are aware, of course, that the actual time served is usually a matter of weeks.

Examples of where short term custody is found necessary include:

- First time offenders pleading guilty to offences which are serious enough for a nine months custody but which, with a three month reduction for an early guilty plea, come out at six months custody;
- Persistent petty offenders, for example shoplifters, who have in the past been fined for similar offences, then have had community orders imposed, but have continued to offend;
- Offenders who breach ASBOs, even though the offence itself may not be imprisonable. For example being drunk and disorderly is not imprisonable, but breaching an ASBO which requires the offender not to be drunk and disorderly in the local town centre *is* imprisonable;
- Offenders who breach bail;
- Offenders who breach community sentences, including where the probation service has reported that they can no longer work with the offender;
- Offenders where probation can only offer custody as a disposal — which can include people with no fixed abode.

Without short term custody there will be an unacceptable gap between community penalties and longer periods of custody.

Purposes of sentencing

Custody may serve any one or more of the statutory purposes of sentencing as set out in s142 of the Criminal Justice Act 2003, most obviously punishment and protection of the public. The latter remains a vital effect of custody even in respect of non-violent offenders, since victims and communities get a respite from their activities.

There is however a considerable debate about the rehabilitative effect of short custodial terms. We know that it is said that short term custody achieves no positive purpose — and, in fact, can make people worse. Statistics appear to show that community penalties may have a better record in terms of preventing re-offending but it has to be borne in mind that many of those people sentenced to short periods of custody have already demonstrated that they are unwilling or unable to respond to community sentences. What is the answer for those who are not prepared to engage with programmes? Is there then a place for short term custody — despite its high transactional and logistic cost to the prison service — simply to take offenders out of circulation? We would say that there is — there is a cost to society in letting this group continue to offend and if the threat of a custodial sentence is removed, there is no incentive to stop offending.

Rehabilitative work

The better response, of course, is to couple short term custody with rehabilitative work so that time in custody can be more than simple deprivation of liberty. But is this possible? We are aware of differing views on how much if any rehabilitative work can be done with prisoners who will spend at most three months in custody.

On the one hand, it is said that it is not really possible for the prison service to do any rehabilitative work with offenders serving short term custody. Prisons are overcrowded and the first priority of the staff is keeping control, processing prisoners in and out, doing risk assessments, keeping prisoners safe, finding a bed for everyone, shunting prisoners around the system so that there is space for new arrivals from court, etc. Rehabilitative work is a non-essential activity which does not happen until longer sentenced prisoners (serving over 12 months) arrive in an establishment where they will remain for a few months at least. In any event, rehabilitation does not happen overnight. Behaviour changes are gradual. Although we have heard of a few establishments where the voluntary sector is invited in to work with short-sentenced prisoners — even in well-resourced prisons with no overcrowding — not much has been achieved in a short period and the need for post release work is essential.

On the other hand, it is argued that *any* time in custody can be usefully employed for rehabilitative work if the will and resources are present. Some prisons *can and do* provide programmes for short term prisoners — for example short duration drug intervention; qualification based training, for example catering; and other programmes, for example harm reduction and domestic violence. However, it must be recognised that such work can only happen with the cooperation of the individual and it might be worth considering whether early release should be conditional on engagement with rehabilitative programmes both pre and post release. Such conditions could — and should — be monitored by the courts.

There is a way that the practical difficulties could be overcome — and that is to create a separate custodial estate which is specifically designed for short term detainees. This would enable programmes to be delivered without any disruption caused by the constant movement

currently required. This might also enable short term custody to be used as deterrent for less serious offenders who have not yet got into a pattern of offending and re-offending.

Are short periods of custody ever necessary?

The use of custody is always a last resort, but sentencers are clear that short term custody *is* necessary for those offenders who will not respond to community penalties but for whom a longer period of custody is not appropriate. It is often the only disposal left to punish the offender and to protect the public. However, sentencers believe that the shortest period of custody possible should be imposed to achieve these objectives — but with a minimum of 14 days served so that sufficient time is available to make positive arrangements for release. Of course, this can only work if the time sentenced is the time served.

What should happen on release?

We are told that the most important issues for prisoners to prevent re-offending are:

- provision of useful skills;
- maintenance of family ties;
- immediate eligibility for benefit on release — the small grant provided on release can be used to purchase drugs or alcohol and the current rule, that no benefit can be claimed for two weeks, exacerbates the problems. To avoid this it is imperative that offenders' benefits are in place upon their release.
- through the door work, eg. Nottingham community prison; Lincoln community prison.

We suggest that extra effort needs to be invested in these areas so that good practice evident in some areas becomes the norm. At the very least, the prison should identify the needs of the individual on the day of release and refer them to a suitable community based advisory centre.

Review of guidelines for offences for which short term custody is sometimes appropriate

Sentencing Committee members have considered whether there were any offences where custody is given as an option in the Magistrates Court Sentencing Guidelines (MCSG) but which could be reviewed. Initially the offences of excess alcohol; theft from a shop; and possession of class B and C drugs were considered. We felt that there was merit in reviewing sentencing options with the aim of preventing further offending firmly in mind. However, we have reservations about proposing that these offences became non-imprisonable, especially as under present legislation a non-imprisonable offence would preclude a community sentence being imposed.

Sentencing framework

It is sometimes suggested that the current sentencing framework is too rigid in relation to the custody threshold. However the MCSG guidelines guidance (pp 163 and 164) does allow for a review to take place once the threshold has been reached. We are of the opinion that more should be done to promote this guidance as there is a misconception that community sentences cannot or should not be imposed if the guidelines take the bench beyond the borderline and well into the custody bracket.

Crown Court cases

The fact that some cases are referred to the Crown Court by magistrates, which are subsequently dealt with by the Crown Court within magistrates' powers, is often held to indicate that magistrates are more punitive than they are. The Association has produced a detailed paper which explains the reasons for this (paper 10/55). We recommend that guidance and/or legislation should be changed to allow magistrates more discretion on which matters are referred to the Crown Court.

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