JUSTICE 1 COMMITTEE

AGENDA

38th Meeting, 2002 (Session 1)

Tuesday 12 November 2002

The Committee will meet at 1.30pm in Committee Room 1.

1. **Items in private:** The Committee will consider whether to discuss agenda items 4 and 5 in private. The Committee will also consider whether to discuss questions for witnesses for the Council of the Law Society of Scotland Bill in private at its next meeting.

2. **Mental Health (Scotland) Bill (in private):** The Committee will consider its draft report to the Health and Community Care Committee at Stage 1.

3. **Title Conditions (Scotland) Bill (in private):** The Committee will consider its draft report on the general principles of the Bill at Stage 1.

4. **Inquiry into alternatives to custody:** The Committee will discuss lines of questioning for the witnesses.

5. **Prostitution Tolerance Zones (Scotland) Bill:** The Committee will consider its approach to the Bill.

6. **Convener’s report:** The Committee will consider the Convener’s report.

7. **Petition:** The Committee will consider the following petition—

   Petition PE14 by Carbeth Hutters’ Association on hutters in Scotland.
8. Inquiry into alternatives to custody: The Committee will take evidence from—

Jackie Tombs, Director, Scottish Consortium on Crime and Criminal Justice,
Dr Bruce Ritson, President, Howard League for Penal Reform in Scotland,
Sue Matheson, Chief Executive, Safeguarding Communities and Reducing
Offending in Scotland (SACRO) and Maggie Mellon, Head of Policy, NCH
Scotland, Scottish Consortium on Crime and Criminal Justice and
Robert MacKay, Representative of the Executive Board, Restorative Justice
Consortium.

Alison Taylor
Clerk to the Committee, Tel 85195

The following papers are attached for this meeting:

Agenda item 2
Note by the Clerk (private paper) (TO FOLLOW) J1/02/38/1

Agenda item 3
Note by the Clerk (private paper) J1/02/38/2
Further submission from Raeburn Smith for Petition PE532 J1/02/38/3
on the Title Conditions (Scotland) Bill

Agenda items 4 and 8
Note by the Clerk (private paper) J1/02/38/4
Submissions for the alternatives to custody inquiry from:
Scottish Consortium on Crime and Criminal Justice J1/02/38/5
Restorative Justice Consortium J1/02/38/6
Supplementary submission from Scottish Consortium on
Crime and Criminal Justice J1/02/38/7

Agenda item 5
Note by the Clerk (private paper) J1/02/38/8

Agenda item 7
Note by the Clerk (petition attached) (TO FOLLOW) J1/02/38/9

Papers not circulated:

Agenda item 2
The Mental Health (Scotland) Bill (and Explanatory Notes and Policy Memorandum
for the Bill) are available from Document Supply or on the Scottish Parliament
website at: http://www.scottish.parliament.uk/parl_bus/legis.html
Agenda item 3
The Title Conditions (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html

Agenda item 5
The Prostitution Tolerance Zones (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html

Agenda item 7
The Justice and Home Affairs Committee report on Petition PE14 from the Carbeth Hutters’ Association is available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/official_report/cttee/just-00/jur00-03-01.htm

Paper for information circulated for the 38th meeting, 2002

Submission from RCN for Protection of Children (Scotland) Bill J1/02/38/10
Background

Public Petition PE14
1. The Carbeth Hutters’ Association submitted a petition to the Parliament (Petition PE14) in September 1999. The Petition calls for the Scottish Parliament to bring in "legislation which will ensure that people who have owned property on rented land for at least four years, where that property cannot be removed without being destroyed, have secure tenancies and access to rent control, to ensure that rents cannot be arbitrarily increased above inflation without reason, and that such owners cannot be deprived of their property without fair cause."

Report by the Justice and Home Affairs Committee
2. The petition was referred by the Public Petitions Committee to the Justice and Home Affairs Committee to consider the issues it raised. The Justice and Home Affairs Committee took evidence on:

- whether a statutory system of rent control and arbitration for huts was required; and

- whether legislation to give hutters increased security of tenure should be introduced.

3. On 2 May 2000, the Justice and Home Affairs Committee published its ‘Report on Petition PE14 from the Carbeth Hutters’ Association’. The report invited the Executive to consider ways of providing legislative protection for hutters, specifically:

- a system of rent control and arbitration; and

- increased security of tenure which balances the huts' status as holiday homes with recognition of hutters' ownership of an immovable structure.

4. An opinion was also sought from the Executive on whether the then forthcoming Land Reform Bill offered a suitable opportunity to address this issue.

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The Executive’s Consultation Paper

5. In response to the Report, the Executive commissioned research into ‘Huts and Hutting in Scotland’. The research identified the majority of sites across Scotland and examined their origins, growth and in some cases decline. It also looked at the characteristics of sites and huts, their use and ownership. The Executive considered it a useful piece of work, which placed the Carbeth issue in the wider context of hut use and ownership throughout Scotland.²

6. On 15 December 2000 the Executive issued a Consultation Paper on possible legislation to provide greater protection for hutters in Scotland³. The consultation paper explained the background to the situation and set out the detailed provisions that might be required to provide legislative protection for hutters. In particular they were keen to hear views on:

- whether or not, in principle, the Executive should seek to promote legislation to give greater protection for hutters;
- the detailed legislative provisions that would be required if legislation along these lines were to be introduced into the Scottish Parliament.

7. The closing date for the consultation was 9 March 2001. A decision on whether to proceed with legislation would be taken after responses to the consultation had been analysed.

Correspondence

8. Dorothy-Grace Elder wrote to the Convener of the Public Petitions Committee (letter attached) enclosing a letter from Mr J T L Ramsay, the Secretary of the Lochgoilhead Chalet Owners Association, asking that the Petitions Committee to look into the current situation regarding hutting in Scotland. The correspondence refers to an ongoing dispute between Drimsynie chalet owners and the Drimsynie Estate landowners, but also questions why the Executive had taken no action since the consultation period ended in March 2001. As such, the correspondence has been passed to the Justice 1 Committee, as successor to the Justice and Home Affairs Committee, to consider.

9. Members should also note that Robin Harper MSP has lodged a Parliamentary Question on 10 October asking when the Executive publish its proposals in the light of the responses to its Consultation Paper.

Options

10. The Committee is asked to consider whether it wishes to follow-up the general issue raised in Mr Ramsay’s letter.

11. If so, the Committee may wish to write to the Minister of Justice asking:

- how many responses were received and whether an analysis of responses was carried out;
- what issues were raised in the responses, and whether there was support for legislation to protect hutters in Scotland; and
- what action has been taken since the consultation period ended.
Supplementary Submission

The following points were touched on briefly at the meeting with MSPs chaired by Sylvia Jackson on 3 October and it is appropriate to further expand on these in connection with PE532.

A considerable number of sheltered housing complexes – at least nine to my knowledge – are managed by superior/manager who, despite repeated requests to say how the residents money – demanded as a service charge – is being used, refuses to give any accountability whatsoever. his justification for this practice rests in his company, being a small private company (as defined by the Companies Act), is exempt under Scottish Law from publishing financial information (apparently this is not the case under English Law).

Clearly this is at loggerheads with the spirit and ethos of the Title Conditions Bill. Yet there is a real possibility that such a company could well continue to be managers of Sheltered Housing complexes, and for the reasons given in the petition, residents may not be able to dismiss such a company. The ability and the determination of such a company to persuade the elderly and vulnerable that it operates in their best interest should not be underestimated.

Quite apart from those complexes covered in Part 2, a Development Company as covered by Part 5 (Section 58, Manager Burdens) could similarly be such a company, and so could operate in like manner for up to 10 years, or even longer if the company were to be successful in conning a majority of its elderly residents.

Undoubtedly there are complexes the management of which is operating in a fair and just manner. However, unfortunately there are also a substantial number of complexes within which the more able minority of pensioners have to struggle for justice without the support of an adequate framework of law.

The Title Conditions Bill is an opportunity that should not be missed, for the Justice Committee to recognise and address the problem in advance. A possible solution would be to include a requirement for managers, regardless of how they are appointed, to give detailed financial information concerning their management of a complex periodically to residents for perusal and approval.

Ronald Raeburn Smith
Principal Petitioner
5 November 2002
Justice 1 Committee

Protection of Children (Scotland) Bill

Submission from Royal College of Nursing (RCN)

RE: PROTECTION OF CHILDREN (SCOTLAND) BILL

The Royal College of Nursing (RCN) is the UK's largest professional association and union for nurses, with over 325,000 members. (33,500 in Scotland). Most RCN members work in the NHS, with around a quarter working in the independent sector. The RCN works locally, nationally, and internationally to promote standards of care and the interests of patients and nurses, and of nursing as a profession. The RCN is a major contributor to the development of nursing practice, standards of care and health policy. RCN Scotland has distributed details of this consultation database. This is directly mailed to hundreds of nurses.

RCN Scotland is pleased to submit this written evidence during the passage of the above Bill. Although RCN Scotland was not asked to give oral evidence, we alerted to the issues for health professionals by other organisations whose members are regulated.

The issue of linkage between the nurses and midwives regulator the NMC and the powers in this Bill are important for committees to consider. It would be unacceptable if nurses were to be ‘listed’ as outlined in the Bill without referral to the NMC. Similarly, it would create anomalies if any nurses were on the ‘list’ but were still able to practice.

We trust these views are helpful to the committees and do suggest that the position of health professionals on other registers should be reviewed in light of this proposed legislation.

Yours sincerely

Pat Dawson
Head of Policy
Royal College of Nursing (RCN)
4 November 2002
Briefing on Protection of Children (Scotland) Bill

**Background**
The NSPCC commissioned a major piece of work ‘Commission for the Prevention of Child Abuse’. A key finding from this was that there was no formal system in place to check adults who work with children, in the paid or voluntary sectors, and adults who are dismissed or mysteriously resign from jobs can move from job to job and from job to volunteer. The most widely known examples being the children's homes sector and the scouts. Informal systems are very much in place in the sense that Local Authorities and so on do check with each other before employing individuals. However, this system has 2 major flaws; first it is secret in the sense that it does not officially exist so individuals have no right of appeal/do not know it exists; secondly, it does not cover independent sector or voluntary type work.

Following the publication report, the NSPCC with all the major children's charities (Barnados, etc.) lobbied for a change in the law to so that a formal and centralised system covering all work sectors, paid and unpaid, could be put in place. Debra Shipley MP introduced a private member's Bill that became the Protection of Children Act 1998.

The Government then decided to include adults who were vulnerable as well and this was passed in the Care Standards Act 2000.

**RCN concerns**

1. **Definitions**

Definition of an individual who is or has been working in a child care position applies to organisations that provide accommodation, social services or health services to children. It is unclear whether the individual includes those who have regular contact with children in a care home or hospital but who are not employed in caring capacity, i.e. catering/cleaning staff?

Definition of children is for those who are under 18 years of age. It is unclear why these provisions are aimed solely at this group, when there are other vulnerable adults who may also be subject to similar types of abuse.

Harmed or placed at risk of harm includes harm that is not physical. The ability for any organisation to assess whether an individual placed a child at risk of harm is hard: proving this at Scottish Ministers level is unclear. This is very broad and liable to differing interpretations. Placing a child at risk of harm could include situations such as a nurse accidentally giving the wrong drug or wrong dosage to a patient, or failing to ensure that a child had been fed or had their soiled sheets changed. Whilst all of these situations indicate a quality of service falling far below acceptable care standards, the RCN questions whether a statutory referral to the Scottish Ministers’s list would always the most appropriate course of action in such circumstances.
2. Harm or risk of harm: incompetence and errors of judgement

There are some situations in which the harm or risk of harm could arise from mistakes or incompetence, rather than deliberate actions. The statutory regulatory authority for nursing - the Nursing and Midwifery Council (NMC) - has issued guidance which says that where a nurse’s competence is in question, the employer should, in the first instance, aim to provide further training and professional support, rather than disciplining them. However, where the employer transfers the individual while this retraining takes place the Bill would require that a referral is also made to the Scottish Ministers. This is counter productive to proper employment processes.

The RCN asks whether it is the Parliament's intention that individuals should be referred to the Scottish Ministers’s list in situations where the harm or risk of harm was the result of an isolated incident or genuine mistake. The Bill does not distinguish that workers in such circumstances should not be treated in the same way as those where there are systematic or repeated failings in care standards.

3. Management responsibility

Situations can arise as a result of management failings such as poor procedures, or because of the huge pressures on nurses and other staff caused by staffing shortages. The RCN is concerned that individuals may find themselves scapegoated and referred to the Scottish Ministers, when the responsibility and accountability for failings in care should actually be shared, and addressed at a more systematic level.

Possibility of malicious referrals – the RCN is seeking further information on the appropriate guidance pledged to ensure that employers understand their responsibilities when the scheme begins. The RCN recommends the following action is needed

All providers of care for children should be required to have written disciplinary policies and procedures, and there should be a requirement that the dismissal of the worker must have been carried out following those policies and procedures. The provider should be obliged to keep a written record of any investigation, action and conclusions taken as part of those disciplinary proceedings, and to submit these to the Scottish Ministers as part of the referral.

In situations where the provider would have dismissed the worker, or would have considered dismissing him, had he not resigned or retired, the provider should be obliged to keep a written record of any investigation, action or conclusions taken as part of any disciplinary proceedings in relation to the misconduct, and also of any incidents and events which would have caused him to dismiss or consider dismissing the worker if he had not resigned or retired, and to submit these to the Scottish Ministers as part of the referral.
People should have a right to know that they have been referred to the list. There should be a requirement on providers to make all reasonable attempts to inform the care worker in writing that they have been referred to the list.

Once a referral has been received, the Scottish Ministers should have an obligation to inform the care worker in writing of their rights in relation to the list – including the appeals process - and of the procedures to be followed as their case is investigated and the Scottish Ministers decides whether they should be included on the list.

4. Overlap of regulatory controls with existing professional regulatory bodies

The RCN would like to clarify how this system will mesh with that already operating by the NMC or GMC? This includes matter of burden of proof and joint referral to the professional regulator at the same time as the Scottish Ministers.

Misconduct for nurses has a statutory definition in clause 1 (2) (k) Nursing Midwifery and Health Visiting (Professional Conduct) Rules 1993 SI 893. "Misconduct means conduct unworthy of a nurse, midwife or health visitor as the case may be, and includes obtaining registration by fraud". Using the phrase "harm or placed at risk of harm" in the Bill means that employers can make decisions about harm which has the potential to conflict with the statutory definition used by the NMC.

The RCN does not believe it would be appropriate to refer a registered nurse to the Scottish Ministers’s list in situations which did not also merit referral to the NMC.

The NMC or other regulatory should be made aware of any misconduct resulting in a referral to the list, so that it can carry out its own investigations and determine whether the worker should be removed from the NMC register. The RCN would wish to see a requirement that in any case where the care worker to be referred to the Scottish Ministers is on the register of nurses, there is also a statutory duty of the provider making the referral to refer the care worker to the registration authority (i.e. the NMC).

This should mean that any misconduct leading to a referral to the Scottish Ministers’s list is also brought to the attention of the NMC. If a nurse was subsequently cleared by the registration authority, or was found guilty but allowed to remain on the statutory nursing register, the RCN believes that the Scottish Ministers should have a duty to reconsider that person’s position on the list in the light of the registration authority’s finding, and to publish his decision and the reason for that decision in relation to the nursing registration authority’s finding. This would not be possible under the Bill as currently drafted which would not allow a referral to the Tribunal to take place before 10 years had elapsed, whatever the change in circumstances was for the individual.
In addition, the proposed system of referral to the list does not take the regulatory functions of any body into account. The RCN has particular concerns about:

- The role of the regulatory body in its own duty to investigate whether an individual is safe to practice as a nurse (in any setting) by reason of ill health or misconduct. It is unclear what role would remain for the regulatory body in this regard.
- Where the cost of duplicate investigations would fall. Practitioners fund regulatory bodies. This scheme would be funded by the public purse. It is unclear why the State should fund an equivalent investigation being carried out by the regulatory body.
- Regulatory bodies have the power to suspend (the NMC can suspend a nurse on 14 days notice of an incident following a hearing) pending a public hearing (based on criminal rules of evidence) into the allegations of misconduct. The proposed scheme does not allow for a suspension hearing. As a result, the nurse would be placed on the list with a presumption of guilt pending clearance by the Scottish Ministers. Suspension by the NMC makes no such presumption and is taken either for the protection of the public or for the protection of the individual nurse.

5. Penalty for inclusion in the list by Scottish Ministers

Where the proposed List is different from any other form of appeal hearing, is that the penalty for inclusion is 10 years for an adult individual or 5 years for an individual aged under 18 at the time of the inclusion before an application to be removed can be made. This is inappropriate for the following reasons:

- It gives no incentive for the individual to rehabilitate themselves. For example, a 20 year old care worker shouts aggressively at a number of children in a care home and is placed on the List. It is because she has post natal depression. She has no incentive to sort this problem out for the period of 10 years. Removing the time limits would mean that she could seek appropriate medical help and then apply to the Tribunal to come off the List when she felt ready to return to work in a care setting as a prospective candidate for entry to a nursing course. The Tribunal would need evidence of this (probably medical) but there would be no disincentive for her to rehabilitate herself and continue to strive for a career in the care sector.

- Where someone has no incentive to rehabilitate themselves, there may be little incentive to look for other work. This in turn would put a strain on the benefit system.

- The period of 5 or 10 years acts as a sentence which has no flexibility to relate to the severity of the offence.

- The penalty of being unable to work in the sector would be a disincentive for those (particularly young people) who are considering a career in caring but who would be put off by the prospect that if they did something
wrong, they would be prevented from working in any caring sector for 10 years. They may well feel that it would be easier to look for work in the non caring sector, something that would automatically reduce the number of potential nurses in Scotland.

- No regulatory body has been able to impose minimum sentences for professions to be removed from the register. Both the GMC and the NMC have considered the possibility of removing persons from the register for a life ban. Both have been told that this is unlawful as it prevents any form of rehabilitation at all. Neither regulatory body removes people for fixed periods either, the next level down. The most the NMC does is to recommend that a certain period of time elapses before the nurse makes an application for restoration. This is useful as it gives the nurse some idea about how long to wait (and the panel can also make recommendations about rehab to be followed).

- Criminal law allows a person convicted of an offence to appeal against the length of the sentence. This provision would take the work of the Tribunal outside any realm of criminal law, and may on that ground, be incompatible with the Human Rights Act 1998.

6. Burden of proof

The burden of proof required by an employer to dismiss someone is ‘on the balance of probabilities’, whereas the burden of proof required by the NMC to make a finding of misconduct is the same as used in the criminal court i.e. ‘beyond reasonable doubt’. Once the misconduct has been proved, the decision whether or not to remove the nurse from the register is made by the NMC using its judgement. There is no burden of proof at that stage, and indeed the High Court has been commended the use of “peer group” committees to make the decision as to whether a nurse can be considered safe to practice.

Due to the different standards of proof required to be placed on the list, and to be struck off the NMC register, a situation could arise where a registered nurse is placed on the list, but there is insufficient evidence for them to be struck off the NMC register. However, the RCN believes that being placed on the list would effectively end a person’s career as a registered nurse. The RCN asks:

- Does the government envisage any circumstances in which such a person could be employed as a registered nurse?
- If the answer is ‘no’, then does the government agree that this new list effectively circumvents the NMC register in relation to cases of misconduct which harmed or placed at risk of harm a vulnerable adult, but with a much lower standard of proof?
- If the answer is ‘yes’, then will the Minister describe those circumstances?

Helen Caulfield
28 October 2002
INTRODUCTION

1. The Scottish Consortium on Crime & Criminal Justice (SCC&CJ) aims to reduce the incidence and alleviate the impact of crime in society by whatever morally acceptable means can be shown to be most effective. Consortium members include the leading voluntary organisations concerned with crime and criminal justice – the Howard League for Penal reform in Scotland, APEX, NCH, SACRO and the Scottish Human Rights Centre. Associate members include a wide range of other organisations and academics.

2. Justice 1 Committee’s ‘Alternatives To Custody Inquiry’ is investigating the use and effectiveness of community sentencing as an ‘alternative’ to imprisonment. In particular the Committee wishes to address specific questions under four headings:
   - what currently exists,
   - levels of service provision,
   - effectiveness, and
   - allocation of community penalties.

   The Consortium welcomes the inquiry and our member organisations are responding to the specific questions raised. This response concentrates on broader questions at the heart of the debate on ‘alternatives to custody’.

3. In Rethinking Criminal Justice in Scotland, (see www.scccj.org ), the Consortium highlighted the evidence showing that community sentences work best in reducing re-offending and promoting social inclusion. On grounds of effectiveness and morality, we therefore recommended that imprisonment, the most extreme form of social exclusion, should be avoided wherever possible and used only in those circumstances where it is necessary to protect the public. We further recommended that, in order to make an impact on reducing re-offending and increasing social inclusion, the Parliament and Executive should promote a redirection of thinking, resources and sentencing policies. These three areas are the focus of this response.

RETHINKING PENAL SANCTIONS

4. The central theme in Rethinking Criminal Justice in Scotland is that ‘rethinking’ requires a direct focus on the appropriateness and effectiveness of all penal sanctions in terms of achieving the aims of reducing crime and its impact on offenders, their victims and the community. The necessary shift in thinking is from references to ‘alternatives to custody’ to ‘appropriate and effective responses’ to crime. This is not a question of semantics; thinking fundamentally affects the actions decision-makers can – and do – take at all stages in the criminal justice process. In the case of imprisonment, decision-makers have to justify – to
themselves at the very least – choosing an ‘alternative to custody’. It should be the other way round.

5. At present there is a statutory protection to prevent the use of detention for young offenders or imprisonment for those who have not previously been imprisoned (sections 207 & 204 of the Criminal Procedure (Scotland) Act 1995 respectively). In those cases custody can only be imposed if the court considers that no other disposal is appropriate. Such protection is not otherwise available. We **recommend** that consideration should be given to a test for imposing any custodial sentence; that no other disposal is appropriate for the protection of the public.

6. We further **recommend** that the inquiry concern itself with how the current sentencing tariff operates. The inquiry’s focus is presumably on community sentences that are acceptable to sentencers at times when the seriousness of the offence would, in the absence of an alternative, have resulted in a prison or youth custody sentence. Existing ‘alternatives’ are, however, under used (though it must also be noted that national availability of some community sentences is patchy). The vast majority of our prisoners are currently serving short sentences for less serious offences and do not require to be held in prison on public protection grounds.

7. Under use relates, at least in part, to the concept of an ‘alternative to custody’ itself, which means different things to the range of practitioners involved in criminal justice. Some think of an alternative to custody as an, alternative to punishment. The aim here is prevention and/or rehabilitation and/or restitution, the community sentence is typically conceived of in terms of treatment/correction and as likely to be more effective in reducing re-offending; others think of an alternative to custody as an, alternative method of punishment. The aim here is punishment, the community sentence is typically conceived of as ‘just as tough’ as prison – ‘punishment in the community’ – but less costly and likely to be more effective in meeting other sentencing objectives, including reducing re-offending. The evidence shows that offenders frequently experience community sentences as at least as difficult, often more so, than imprisonment.

8. These differences in meaning are not academic – they have serious implications for sentencing practices and for work with offenders. We therefore **recommend** that the use of the concept of ‘alternatives to custody’ should be abandoned. It is not at all clear what sense it makes to lump together fines, supervised attendance orders, community service orders, standard probation, intensive probation, deferred sentences with psychological or social work support, drug treatment and testing orders, restriction of liberty orders, under the name ‘alternatives to custody’. These are all penal sanctions in their own right. The issue to be addressed is not about ‘alternatives to custody’ but rather about the appropriate and effective use of the full range of penal sanctions, including imprisonment.

**REDIRECTING RESOURCES**

9. In *Rethinking Criminal Justice in Scotland* we reviewed the evidence on justice interventions found to be most effective in reducing crime and its impact on victims and the community. We recommended “a rapid increase in the use of penal sanctions which offer the possibility of restitution for victims, offenders and communities.” (SCC&CJ, 2000, paragraph 23). Not only are community sentences more effective in rehabilitating offenders; they are also much cheaper. For example, a six-month prison sentence costs around £14,000 whereas a
community sentence such as Probation or Community Service costs around £2000 and a Drug Treatment and Testing Order costs around £7000.

10. At present, the availability of community sentences is patchy and some are only in the process of being piloted or rolled out following feasibility studies. Many sentencers have to make decisions in the light of what is available rather than what is the most appropriate, effective or desirable. Any significant redirection in sentencing policies and practices will, therefore, depend on a prior redirection of resources away from prisons so that the full range of penal sanctions is nationally available. We recommend that the inquiry consider how a redirection in resources across the criminal justice system might be achieved.

11. The criminal justice system is not, however, a ‘system’ in the sense of a set of co-ordinated decision-makers but rather groups of decision-makers who enjoy considerable discretion and are relatively autonomous. The ‘system’ operates like a collection of powers, each with its own substantial revenues, populations, buildings, structures, customs, cultures and symbolic organisation. Expenditure is considered in terms of each of these ‘powers’ and discrete stages in the criminal justice process rather than in terms of priorities for the whole system. Thus police, prosecutors, courts, legal aid, criminal justice social work services and prisons all have their own budgets. Given that resources are limited, a shift towards increased use of community sentences would require a redistribution of the total budget in a way that prioritises rehabilitation and restitution. Just as a point of comparison, in 2000 the Scottish Prison Service cost £215.5m compared with £48.7m for Criminal Justice Social Work (Scottish Executive, 2002, 6).

12. It is, nevertheless, important to distinguish the aims of the criminal justice system from the aims of sentencing – sentencing aims relate to only one aspect of the ‘system’. The criminal justice system – as a whole – encompasses a series of stages and decisions, including the initial investigation of crime, the various pre-trial processes, the provisions of the criminal law, the trial, the forms of sanctioning and then the post sentence decisions concerned with supervision, release from custody, breach procedures and so on. While all of these stages rightly have their own aims, it is critical that the various decision-makers do not pull in opposite directions as far as the aim of crime reduction is concerned. Crime reduction is surely one of the key objectives of the criminal justice system as a whole. If so, then it is vital that criminal justice decisions are made with that objective at the forefront.

RETHINKING SENTENCING

13. A redirection of resources towards community sentences is, however, only one side of the equation. The other requires the judiciary to abandon old thinking about sentencing in order to focus on an evidence-based decision about what works. Traditionally, sentencing aims have been about retribution, incapacitation, deterrence and rehabilitation. More recently, restitution and ideas of restorative justice have become more prominent. The response to the inquiry from the Howard League for Penal Reform in Scotland provides a fuller discussion of sentencing objectives and the evidence on how well these have been realised in practice. We wish to concentrate on changing thinking about sentencing, not least because there is little evidence to suggest that traditional sentencing objectives reflect the public’s priorities.

14. Most of all, the public wants to be protected from crime and its consequences. They want offenders to be given sentences that will reduce their re-offending in the future. All the
evidence shows that, for the majority of offenders currently imprisoned, this goal – reducing reoffending – can be achieved best through community sentences. Over the last ten years, the research also shows that public support for imprisonment has reduced and support for community sentences with rehabilitative and restorative elements has increased (MORI, 2002). Moreover, international comparisons on the effectiveness of various penal sanctions (Moxon, 1998) show that restorative sanctions and measures that confront offenders with the consequences of their offending are the most effective in preventing further crime.

15. These findings have important implications for sentencing policy and practices. The courts can and should be presented with information about the availability and effectiveness of all penal sanctions. But evidence itself carries no particular moral imperative. Penal policy must explicitly recognise and engage with the moral questions that provide the indisputable context of punishment. A policy of decarceration through increasing the availability and use of community sentences will remain unrealised unless action is taken to reduce the number of prison places, impose limits on sentencers in relation to its use and so on. But it is not possible for that action to take place in a moral vacuum. The morality, quite separately from the effectiveness, of punishing people by incarceration for minor property offences and problematic drug use, requires to be explicitly addressed in order to effect positive sentencing reform.

CONCLUSION

19. In conclusion, we believe that the inquiry into ‘alternatives to custody’ must consider the broader questions about sentencing reform raised in this response. The choice of penal sanction should not be about prison versus an alternative but about the most effective, appropriate and moral sanction. This, of course, means that sentencers must be provided with the full range of sanctions to choose from together with information about their effectiveness. It also means that the objectives of sentencing and their moral bases must be clarified.

REFERENCES


Jackie Tombs
Director
Scottish Consortium on Crime and Criminal Justice
16 September 2002
The Scottish Consortium on Crime & Criminal Justice (SCC&CJ) aims to reduce the incidence and alleviate the impact of crime in society by whatever morally acceptable means can be shown to be most effective. Consortium members include the Howard League for Penal reform in Scotland, APEX, NCH, SACRO and the Scottish Human Rights Centre. Associate members include a wide range of other organisations and academics.

The Consortium and its Member Organisations have submitted written evidence responding to the specific and general questions raised in Justice 1 Committee’s ‘Alternatives to Custody Inquiry’. While giving oral evidence to the Committee on 12 November 2002, we wish to focus on the following five main points.

1. The unhelpfulness of thinking about ‘alternatives to custody’, rather than about ‘appropriate and effective responses to crime’. We would like to see Justice 1 Committee promote this kind of shift in thinking; a shift that would include promoting restorative justice practices where appropriate and effective.

2. The need for a presumption against imprisonment, given its evident lack of benefits, its exclusionary and morally oppressive nature, and its costs. Imprisonment can be justified only in terms of the great seriousness of the crime, as justifying exclusion, and its necessity for public protection. On the most pessimistic interpretation of the evidence, community sentences are at least as effective and frequently significantly better than custody in reducing re-offending.

3. The need for properly evidence-based policy making, and thus for attention to the large amount of available knowledge about the efficacy of a range of community-based responses. This means that those involved in the administration of justice, notably sentencers, require information and feedback about the effectiveness of their decisions, for example, as currently happens in drug courts.

4. In the longer term, the need for a significant re-allocation of resources from the Prison Service to services covering community responses; and, in the shorter term, increased expenditure so as to fund the latter adequately. Expenditure at present is as follows – 63% on Police, 18% on Prison, 9% on Criminal Legal Aid, 7% on Courts, and 3% on Community Sentences. A major obstacle to increased use of community sentences is inadequate investment. For example, Sheriffs are increasingly frustrated by the inability to implement community sentences effectively due to a lack of resources.
5. The need to encourage a shift in public and judicial perceptions away from the presumption that only imprisonment ‘really’ counts as punishment. This relates to the shift in thinking noted at 1. above and would require dialogue with sentencers to develop an effective policy on the reduction of use of prison. Such a policy would, at a minimum, require statutory limitations on the use prison sentences.

Jackie Tombs
Director
Scottish Consortium on Crime and Criminal Justice
7 November 2002
Justice 1 Committee

Mental Health (Scotland) Bill

Statement from Professor John Blackie, Law School, University of Strathclyde and Clare Connelly, School of Law, University of Glasgow on the Mental Health (Scotland) Bill

MAIN ISSUES FOR JUSTICE 1 COMMITTEE

Assessment and Treatment Orders

1. The current provisions do not empower either the accused/offender or their legal representative to apply for either of these orders. We agree that defence agents should have some power or role to apply, on behalf of their client, for either of these orders. This will not only provide an opportunity for an accused/offender to apply for such an order but also reflects the fact that the defence agent will have the greatest contact with the accused/offender and may be more aware of any difficulties they are experiencing. This would also better reflect the provisions relating to accused who are suspected of being unfit to stand trial.

Interim Compulsion Orders

2. The provisions relating to interim compulsion orders are generally welcomed, however, they are only available for offenders convicted on indictment (S.53(11)). It is not clear what provisions are made for offenders who commit less serious offences as a result of their mental illness and trial proceeds by way of a complaint (i.e. summary cases). This departs from the provisions in the Criminal Procedure (Scotland) Act 1995 which empowered the court to make an interim hospital order in summary cases in the District Court (if remitted to the Sheriff Court for sentencing) and in the Sheriff Court (s. 53 (11) (b) & (c)). The provisions in s.95 do not restrict the availability of compulsion orders to offenders convicted on indictment and this appears to be inconsistent.

It is now unclear how offenders convicted on complaint will be dealt with. Research by Clare Connelly revealed that interim hospital orders (the predecessor of interim compulsion orders) were used in summary cases. Is psychiatric diversion envisaged here?

One of us, John Blackie, considers that where in the case of a less serious crime or offence, where a custodial sentence would not be imposed, (as opposed to where it would be), that psychiatric diversion should be encouraged before the case is proceeded with, and, if that has not occurred, the civil provisions should be used for that group of those convicted of less serious crimes or offences.
Compulsion Orders

3. The criteria and range of measures that can be authorised are appropriate. The provisions for monitoring, varying, renewal and revoking an order are welcomed.

4. Section 57(A) on p.75 contains an error re the definition of restriction order.

Community Based Compulsion Orders

5. We agree with the Millan Committee that the Mental Health Tribunal should be consulted when such an order is being made. This ensures that their expertise is employed in making this important decision and also ensures that a situation could not arise where limited hospital resources affect the decision of where treatment is delivered. We are of the view that there should be a mechanism, in the case of mentally disordered offenders (as defined in clause 227 of the Bill), for the mentally disordered person to have this Order reviewed, to take account of the fact that his or her mental disorder may have improved, altered or ceased. An application for such a review would most appropriately be made to the Mental Health Tribunal. Since the issue will be the nature and consequences of his or her disorder, this Tribunal will have and further develop the expertise to assess such evidence. Provision would require to be made so that such applications for review could not be made inappropriately frequently after one had been rejected.

Public Safety Test

6. This test should be abolished. It is prejudicial to mentally disordered offenders as it introduces indeterminate sentencing by the back door. It is not available for other offenders. In addition, a lot of research suggests that the best time to carry out a risk assessment is at the time of offending rather than at the time of release from detention. We agree with the Millan Committee that an amended and appropriate form of the Order for Lifelong Restriction proposed by the Maclean Committee should be used in place of the Public Safety Test.

Authorising Discharge of Patients

7. We agree that the Mental Health Tribunal rather than Ministers should make this decision. This responsibility will require that the Tribunal is properly resourced.

Risk Management Authority

8. Decision on temporary release and transfer of patients should be made by the Risk Management Authority and not by Ministers.
Hospital Directions

9. The empirical study one of us, Clare Connelly, conducted revealed that Hospital Directions were not used for two reasons:

- Sentencers and lawyers lacked familiarity with the disposal
- Psychiatrists felt that they were unable to recommend the disposal because of (i) the guidance given to them by the Executive on their powers of recommending the new disposal and (ii) the ethical problems which arose if they recommended a disposal which involved an element of imprisonment rather than a purely therapeutic disposal.

10. The proposed amendment to the criteria for making hospital directions will not result in an increase in use as they do not address the problems outlined above. The reasoning behind the second of the proposed criteria is not clear. One of us, John Blackie, is also doubtful as to the reasoning behind the second of the proposed criteria. As the criminal justice goals are met by the sentence, the hospital direction only has treatment goals, and accordingly it is not clear what the relevance is of the relative strength of the connection or lack of connection between the mental disorder and the crime. It may also in practice be difficult to consider that at this stage of the proceedings. Clare Connelly agrees with this point.

Transfer for Treatment Direction

11. We do not agree with the omission of a right of appeal against such a direction. This could only be tolerated where any treatment, deemed necessary, would be unduly delayed by such an appeal taking place.

Criteria For Admission to the State Hospital

12. We Agree with Millan that until there are alternative provisions for those who may self-harm that admission to the State Hospital should be available.

Appeals on Levels of Security

13. This right of appeal should not have been omitted. It is important in terms of patients rights and also to assist in the process of rehabilitation into lower levels of security and eventually the community.

Special Offences

14. The introduction of special offences is welcomed. The existing statutory offences are in certain respects unclear, and do not deal with all the cases. The existing common law crimes do not deal with the problem adequately. The penalty for ill-treatment or obstruction when convicted on indictment (max. 2 years) appears to be rather light.