



Presentation by Professor Fergus McNeill at 'Reimagining the Role of Prison in Irish Society – an Open Forum', which took place on Thursday June 18th, 2009, hosted by Irish Penal Reform Trust.

Scotland's Choice: Evidence, policy and policy-making?

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I must admit when [this Open Forum] was first raised, I did think, “why are the Irish listening to the English and the Scottish about how to reform their prison system or how to use prisons, given the lamentable tale that both jurisdictions have to tell about what has been going on in the last decade, or two decades?”

I think that one of the best forms of engagement across jurisdictions in relation to criminological research and scholarship, and penal policy-making, really concerns the avoidance of mistakes. I'm not so sure that it's easy to transfer what *does* work, but there are important lessons to be learned about what doesn't work, what manifestly has failed in other places. And when I thought longer about it I paused and thought that there might be just a hint of a danger of complacency - I don't know if this is true so forgive me if this is an unfair accusation - there might be a hint of complacency in Ireland. If I was sitting in a jurisdiction with about 80 per 100,000 going to jail, I might think that I was doing pretty well by European standards - and I would be right, speaking from a jurisdiction sending about 150 per 100,000 going to prison now. But then I remembered that when I first got involved with criminal justice, the figure in Scotland was 113 per 100,000. This was in 1992 / 1993.

I think what you have to examine is not your *current* rate of imprisonment but your *direction of travel*, and that is the key question and the key challenge. From almost all jurisdictions in Western Europe, including the Scandinavians, the direction of travel is worrying. So there are things to learn from what has been happening in Britain. I'll try to talk you through what has gone on in Scotland in terms of trying to arrest the problem of penal expansion.

The Report

This is the report of the independent Scottish Prisons Commission, published in July 2008. It's available to download free; if you just google 'Scotland's Choice' you'll find it. I'm going to talk you through the process and the outcome of the work of the Scottish Prisons Commission and a little bit about the aftermath, because I think that that is also salient to debates in Ireland at the moment.

Remit

[The Scottish Prisons Commission] was set up in September 2007 to examine Scotland's use of prison in the 21st century. I won't talk you through all the elements here, but what is key to grasp, I think, is that it was a misnamed commission. Calling it the Scottish Prisons Commission makes it sound as if it is about prisons, but it's not; it is about the *use* of imprisonment. In some respects it is more of a sentencing report, or a report about the principles of the justice system,

than it is about imprisonment per se. It has got almost nothing to say about prison regimes, prison conditions and prison processes. There was a remit also to foster and stimulate public debate, and some more specific local issues about the impact of certain legislation, which I will not get into tonight.

Membership

Membership of the Commission was also very interesting and something of a master-stroke by the Justice Secretary, Kenny MacAskill. He, as you will probably know, is a Scottish National Party politician, but he chose as the chairperson of the Commission a former Labour First Minister of Scotland. Obviously the Labour party is the main party of opposition in the Scottish Parliament, and having their former leader in charge of the Commission reporting to the SNP government was I think intended to take some of the political sting out of the process. Assisting the Right Honorable Henry McLeish were:

- Dr Karin Dotter-Schiller, who is Deputy Director-General of the Austrian Prison Service;
- a Sheriff, Alistair Duff, which in Scotland means a judge operating in the courts of intermediate jurisdiction where the vast bulk of the criminal business is done, and actually where the vast majority of the custodial sentences are passed, and in particular where the short custodial sentences tend to be passed;
- Geraldine Gammell, the director of the Prince's Trust, an NGO working with disadvantaged young people;
- Richard Jeffrey, the President of the Edinburgh Chamber of Commerce and a very distinguished business-person;
- Lesley Riddoch, a well-known broadcaster and journalist, renowned for the ferocity of her interviewing;
- and Chief Constable David Strang, the Chief Constable of the Lothian and Borders Police.

What was interesting about this panel was that it didn't contain the usual suspects. It had two people who worked in criminal justice in Scotland, but two only. It had no High Court judges; it had no academic representation; it had no social work representation; and no Prison Service representation. It was, I think, deliberately intended to represent a fresh group of interests looking in a new way at the problems that they were charged with considering.

Process

They deliberated for nine months; they received seventeen written submissions; they convened five oral evidence sessions and heard from eighteen contributing organisations; they undertook five public hearings; they had numerous visits, both local and international, and interestingly they came here to Dublin, as well as going to Helsinki, Liverpool and New York; and they reviewed research evidence.

The Commission was supported by a secretariat of civil servants. The Commission went about the business of gathering these submissions and debating the issues in public and private meetings. Towards the end of the deliberations, they decided that they needed some additional research support. We had a request in the Scottish Centre for Crime and Justice Research to provide this support and my colleague, Sarah Armstrong, a senior research fellow, agreed to provide research assistance to the Commission at that point. My involvement began a little later and focused on providing some assistance with the drafting of the report.

Though I think it is an evidence-based report, I think for various reasons that that's more accidental than it ought to have been, and if you were to do anything similar in Ireland, I would be encouraging a much earlier and more serious engagement with the developing criminological research capacity that exists in this jurisdiction in order to really maximise the potential for the evidence to inform the policy-making process.

The 'Choice'

It's called *Scotland's Choice*, and echoing what Andrew has been saying, what exactly is the choice? Well, the report says this:

Scotland's system of punishment is at a critical juncture: our prisons are overcrowded and expanding, reaching new highs in each successive year of the 21st century. This carries potentially devastating consequences for our communities and our nation. Prisons sometimes do good, but they always do harm. They increase the likelihood of re-offending more often than reduce it; they deepen the alienation of individuals from communities; they draw resources away from services and institutions that benefit all Scottish citizens. It is an option to be used only as a last resort. We now face a choice about how and for whom we will use them.

So they were pulling no punches about what they felt the evidence that they had heard - both academic and the oral and written submissions – what that led them to conclude about the proper use of imprisonment.

Guiding Principles

We have already heard about core values that might underpin thinking about penal systems, and the Commission came up with these:

Justice requires punishment to be visible, swift and fair.

This links to Andrew's point about proportionality, but also to the point about communication: what the process of sentencing and sanctioning communicates to the wider community and to the person involved, the offender, and of course equally to the victim.

Punishment should work to secure public safety and support victim recovery.

This again is similar to the English Commission.

Communities can and should be at the centre of a strategy for working with offenders.

This is the localism that Andrew was discussing.

We should stabilise and reduce current prison populations.

Scotland should aspire to become recognised internationally for just and effective penal practices.

So, principled and evidence-based in the approach. In fact, in the forward to the report there is some lovely aspirational stuff from Henry McLeish about imagining the Scotland of the future as a place that other jurisdictions will wish to visit so that they can see how to model justice processes and practices, comparing that with the alternative future of mass incarceration and all the social consequences that flow from it.

The report analyses the problem of the use of imprisonment in Scotland pretty swiftly, and I think quite comprehensively. We imprison more people than most other places and our prison population has risen inexorably in this century. The increases in the use of imprisonment relate more to the troubled and the troubling than the dangerous. I'm not going to go through the list of specific problems that are identified, but what is key is that it is not serious crime that is driving the increases in the use of imprisonment. There are increases in sentence length, and there are small increases in the total volume of custodial sentences, but the prison population rise is not accounted for by those two factors alone. There are problems with our use of remand, which has risen dramatically, and there are very significant problems with our use of recall to custody. We have called it the 'compliance problem' in the report: how the system handles people who slip up again and again and again. I'm not going to go through all of these factors; again, the report can provide the detail.

We looked at the social geography of imprisonment, and were able to draw on compelling evidence from Roger Houchin (a former prison governor and now an academic), that prisons draw their inmates from the least well-off communities. If you try to look at your prison rate per 100,000 in areas of deprivation - and I know that Ian O'Donnell has done this work in Ireland - you will find, as we did, very strong correlations between disadvantage, marginalisation and exclusion, and imprisonment. I think the figure in the place that I used to work as a social worker, was that 1 in 9 young men under the age of 23 will have been in prison, which puts the national figure of 150 per 100,000 (or 1 in 667) in some context.

High prison populations do not reduce crime; they are more likely to create pressures that drive re-offending. Drawing on the economic arguments that Andrew referred to, they represent staggeringly poor returns on investment. I don't want to do numbers very much tonight, but I'll give you one that infuriates me, not so much as a criminologist but as a parent. The newest prison in Scotland, Addiewell, is a 700-bed prison run by Kalyx, a private sector company. The cost of this prison, Addiewell, to the Scottish taxpayer is estimated at between £25 and £30 million per annum. The contract is for 25 years, and if you do certain clever things that academics at Strathclyde University have done to project the total cost over the course of 25 years, you're talking about a billion pounds. The reason that that infuriates me as a parent is that it is money that should be spent on my children's well-being and, in a wonderful social work phrase, their 'well-becoming', and what needs to be invested in their potential and the potential of the children that they are at school with.

An Opportunity for Action

This is where the report takes a slightly surprisingly optimistic tone. Much debate about prison populations tends to reach very bleak conclusions about a punitive population, a relentlessly populist political perspective on these issues, and seemingly intractable social problems. The Commission came to different conclusions.

Taking (serious) crime seriously

If we look at crime issues in Scotland, again - as Andrew said - for anyone who knows, crime is falling, but not uniformly. There are problems around certain kinds of crime, and certain kinds of serious crime are rising in Scotland. International comparative victimisation data shows that our population is not especially highly victimised; we're kind of average in the league table of crime victimisation. The fact that imprisonment rates do not reflect crime rates gives us a fantastic opportunity. The fact that imprisonment rates are largely a matter of political and public choice means that it's open to us to do something different; we're not at the mercy of crime problems spiralling out of control, far from it.

Engaging the public in informed debate

What, then, do we have to do to create a public climate within which we can have a more rational policy? We have to engage the public in informed debate. The Commission looked closely at public opinion research in this area, which is very complex and very interesting. To summarise the Scottish evidence: the Scottish public is sceptical about the criminal justice system and its effectiveness, and they are right to be so, but they are not especially intolerant or punitive, not when you question them closely and present them with detailed information about the kind of business that the criminal justice system is dealing with. The problems seem to be problems of invisibility and problems of misinformation. In other words, the workings of the justice system are opaque to the general public: they don't know what is going on in relation to sentencing; they don't understand what community penalties are, and they don't know what prisons are about and how they function. They know a little about their effects but they are rightly sceptical about their impacts. If we can engage with public debate then, in the context of a crime rate which is stable or falling, we have a big opportunity to use evidence to inform policy.

Using evidence to inform policy

The argument in the report is, from my point of view, perhaps slightly over-optimistic about how much we know about what does work. We could reach a more measured conclusion about that, and most critical criminologists would be more hesitant than the report is about the 'what works' evidence. But we know plenty about what doesn't work.

Re-thinking punishment

We have to re-think punishment itself. Again, this is linked to the intellectual and evidential resources available to construct a system which is rational and principled. The conclusion of the Scottish Commission is that we have to decentre prisons. Prisons should not be our principal mode of responding to crime or even of punishing offending. The default should be paying back in the community as means of decentring and marginalising the prison. I'll come on to the specific recommendation around that in a moment.

Prosecution and sentencing

There were a range of measures about maximising diversion; re-thinking the use of bail; taking sixteen and seventeen year olds out of the adult sentencing system, which is a problem in Scotland; and improving the efficiency of the processing of criminal cases.

Sentencing and managing sentencing

There were a range of recommendations about how to reform sentencing and the management of sentences. So, sentencing councils, but also a community justice council that would provide

leadership and guidance in relation to not just the operation of community sanctions but the wider context of community sanctions and local engagement, to which Andrew referred. Some new sentencing options: one simple supervision sentence that would subsume a lot of existing measures into one flexible approach. And critically, I think, very interestingly, a very new approach to compliance and how to manage compliance with sentences in the community. Again, we can pick up on that in the panel session if people are interested, or I can direct you to the report.

Community justice, prisons and re-settlement

There were proposals around community justice, the delivery of community sanctions, and the re-settlement process. One of the recommendations I like best concerns the establishment of a duty to re-integrate that would fall on all public agencies. On the principle that when a prisoner has served his or her time they have completed the proportionate penalty that the court imposed, any further punishment, I mean by that *de facto* punishment - the social consequences of having been in prison; the stigma, the labelling, the exclusion that goes on post-custody - that represents extra-judicial, illegal punishment. The duty to re-integrate is a duty on public agencies to make sure that the punishment stops when it is supposed to stop, and to do everything at the disposal of the state and civil society to bring about re-integration. The Norwegians, interestingly, in a White Paper which is being discussed over there at the moment have created something very similar which they are calling the 're-integration guarantee'. Again, this is something which you could find out more about if you are interested.

Our future

The recommendation that was seized on by the press was the proposal that we should have a target [prison] population of about 5,000 in Scotland. The current population is about 8,200. This was really trying to make the point that it was a choice, so let's make the choice and make the population 5,000 and do what we have to do to make that happen.

Key Recommendations

I'm only going to talk specifically about two recommendations because they are at the core, and then I'll jump to the end and miss out a bit of detail.

The evidence that we have reviewed leads us to the conclusion that to use imprisonment wisely is to target it where it can be most effective - in punishing serious crime and protecting the public.

- 1. To better target imprisonment and make it more effective, the Commission recommends that imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a significant threat of serious harm to the public.*
- 2. To move beyond our reliance on imprisonment as a means of punishing offenders, the Commission recommends that paying back in the community should become the default position in dealing with less serious offenders.*

I'm going to skip the mechanisms to achieve these recommendations.

The definition of 'payback' is important to contrast what is proposed here with what payback means in England and Wales, for anyone who is aware of developments in that jurisdiction around payback.

In essence, payback means finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community. This might be through financial payment, unpaid work, engaging in rehabilitative work or some combination of these and other approaches. Ultimately, one of the best ways for offenders to pay back is by turning their lives around.

It's a restorative justice informed definition of payback, even if restorative justice doesn't get much explicit coverage in the report.

What happened next?

The initial reaction to the publication of the report was very interesting. The tabloids did what tabloids do, and seeing a target of 5,000, the Daily Record the next day ran the story (I'm paraphrasing here) about *3,000 Thugs and Rapists on the Streets: the new policy of the government*. This aside, the quality of the debate which followed the publication of the report was, in my view, pretty good; arguably the tone of the debate was significantly lifted by the publication of the report. Professionals got quite excited; it was well supported by a very wide range of interest groups and stakeholders, despite the fact that they hadn't been represented on the Commission; and the government, actually to my surprise, decided to implement many of the measures in the report – not all of them but many of them – and they are now going through Parliament in a Criminal Justice and Licensing Bill, currently at the scrutiny stage, the committee stage, in the Scottish Parliament. Watching the process evolve, there is an inevitable watering down, institutionalising and de-radicalising of some aspects of what is in *Scotland's Choice*. It is a whole other discussion to think about exactly how and why that happens, and I'm not going to go into it.

Scotland's Choice put a marker down in Scottish penal debate, and even if the end product of it in the Criminal Justice and Licensing Bill is moderated to an extent that as a criminologist I'm not so happy with, nonetheless the Report has done a good service to policy-making and to the development of progressive justice in Scotland. We do have a better informed debate. It is even tangibly evident in the committee deliberations around the Bill that the politicians are better informed than they ever have been about the issues at stake, and that's a key contribution to me.

Conclusion

The global recession - which Andrew finished with and I couldn't resist either - I think is tremendously helpful in some respects and not, obviously, in others. One thing that the recession does, and this had happened in some states in America even before last year's crash, is force governments to confront the fact that they cannot afford endless expansions of imprisonment, and that, in and of itself had led them to sober up from excessive penal consumption. And that's literally the way I see it: I think that England and Wales is drunk on imprisonment, and punitiveness and populism. Scotland had been drifting in the same direction until about 2007. The recession is a slap in the face, and I hope it has the same effect everywhere in the world, to be honest. It's one of the few benefits that might accrue from the desperate economic times in which we find ourselves.

If you put that together, in this last slide there is a little diagram that comes from a book on comparing penal systems by two English academics. What they say is that our penal practices, the way that we do things in any given jurisdiction, is a product of the interaction between the material and economic conditions under which we labour, the penal ideology and culture that exists in a jurisdiction, and the wider ideology and cultural factors that are at play. Now this is a model that has been much debated and contested by comparative penologists, but I find it useful just to begin the process of thinking about what kind of a place Scotland is. Is there anything in the ideology of Scotland that makes it inevitable that we have a rising prison population, or is it a question of engaging with culture, public debate, and policy and practice ideologies in an evidence-based way to bring about a rational process of change? I am optimistic, partly because of changes in Scottish politics, and partly because of my no doubt naïve and relentlessly optimistic approach to everything, especially everything in Scotland, and my determination to hang on to the belief that we're not an especially punitive country. We have a long tradition of looking after each other, a long tradition of collectivism. There are many reasons to believe that we can have a penal policy that looks more moderate and rational than it currently does. There is some hope that we're on that track. I hope that if Ireland isn't already on that track, and you may argue that it is, then the same conditions, the same ideologies and the same cultures can be brought to bear in this jurisdiction too.

Thank you very much.

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