

# Choice versus crisis: how Scotland could transform thinking about prisons and punishment

**Sarah Armstrong and Fergus McNeill** consider a new opportunity to change how penal reform is managed and how the public is engaged.

*In late 2007, and in the face of a high imprisonment rate and unmitigated growth in the prison population over the past decade, Scotland's Cabinet Secretary for Justice launched an independent commission to consider the use of imprisonment in Scotland and to raise the public profile of this issue. The Scottish Prisons Commission, chaired by former Scottish First Minister, the Rt Hon Henry McLeish, and comprised a mixed group of criminal justice and civic leaders. The Commission reported in July 2008.*

The first radical thing about the Scottish Prisons Commission report (2008), and there are many, is its title. By calling its report *Scotland's Choice*, the Commission has taken a phenomenon that has been discussed for at least the past quarter-century as a crisis and turned it into an opportunity. This simple move opens up a space to see criminal justice, long a realm where policy making has been the art of reacting as best as one can to desperate situations, as an area where thoughtful planning is possible.

We were involved in the Commission's work in its final stages, drawn in to provide research support and advice as the Commission was concluding its collection of evidence. It is fair to say that we are

supportive and assisted development of the plan set out in the report, but at the point of our involvement with this work, the Commission had already identified a set of priorities which provided the basis for making specific findings and recommendations.

In the six months since the report was published, media coverage, most active in the few days following publication (which ensured journalists had not been able to thoroughly read the document), focused narrowly on a few specific lines in the report: the target of reducing the prison population by as many as 4,000 (or half the current population) and the greater use of community sentences. These repetitions managed to convey a report that was both more radical and less interesting than it actually is. In this piece, we suggest how such particular points in the report add up to something much bigger, with a potential to change both how penal reform is managed and how the public is engaged. The *Scotland's Choice* report is changing the way we talk about and act on punishment by:

- Making an explicit connection between penal policy, prison populations and national well-being;
- Separating questions about the

purpose of punishment from empirical questions about the capabilities of prison;

- Acknowledging the primary role of the criminal justice system itself in driving up prison populations;
- Addressing itself to a public that is able to engage in informed debates about a complicated topic; and as a result,
- Producing a plan of action that integrates a normative vision of punishment, a research-based understanding of the desistance process and a practical understanding of institutional capacities.

*Prisons are linked to national well-being.* The first objective in the Commission's remit was 'to consider how imprisonment is used in Scotland and how that use fits with the Scottish Government's wider strategic objectives' to make the nation wealthier and fairer, safer and stronger, smarter, healthier and greener (Scottish Government, 2007). This encouraged the Commission to consider prison in relation to all of these objectives, and to compare how it stacks up against other forms of civic investment as well as other forms of punishment in achieving broad social goals.

*Punishment and prison are not interchangeable, and the purposes and limits of each must be separately considered.* Policy makers and academics alike have confused and as a result inverted the purposes of punishment and of prison: the minimalist institutional function of prison to hold people securely has been back-defined as the purpose of punishment to incapacitate. The accumulating evidence that prisons fail to deter, rehabilitate or punish retributively has led to doubts about these as purposes of punishment generally. The Scottish Prisons Commission's holistic perspective in considering the place of punishment in society led it to consider first what it wanted from punishment, and then whether prison as an institutional form was well-placed to achieve this. This was an important conceptual distinction to make

and allowed for the development of an integrated package of ideas directed at improving the outcomes of punishment rather than adapting to the limitations of prison as punishment.

*Criminal justice practices drive up prison populations.* The Commission's review of crime and imprisonment data shows that no matter what crime rates have done – whether they have been rising, falling or remaining stable – the prison population has grown (Scottish Prisons Commission, 2008: 16). The report also showed that two of the main drivers of Scotland's high prison populations are system-led: rates of parole recall increased 900 per cent over less than a decade and more people entered prison in 2006-2007 to await a trial or sentence than to serve one (and there has been disproportionate growth in the part of the remand population waiting to be sentenced suggesting the impact of heavy paperwork burdens on the sentencing process).

*The public is able to participate knowledgeably and with maturity in crime and justice debates.* Around the middle point of its tenure, the Commission was asked to include review of the prison's open estate in light of a recent prisoner's absconding from an open prison and subsequent rape of a schoolgirl. This issue had the potential to derail the Commission's measured deliberations about the balance between community and prison-based sanctions.

Instead the Commission believed in a public that could understand that a tragic but rare event should not necessarily drive policy decisions about the use of prison in the long-term future, and it enshrined this belief in the report's aims to: 'take crime seriously, engage the public in rational debate and make evidence-informed policy' (ibid: 2). The

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Commission's belief was supported by evidence presented in the report that more people in the country feel drug and alcohol abuse are major problems than feel this way about crime, and few people fear being a victim of a serious violent crime (ibid: 20). These are great starting points for developing a forward-looking penal policy.

*A plan of action should integrate a normative vision, research-validated practice, and institutional capacities.* The Commission made 23 recommendations presented not as a range of options but as an interconnected package linking changes in prosecution and court processes through sentencing, community justice and prisons to resettlement of offenders. Taken together, the plan de-centres imprisonment as the main form of punishment in Scotland, where currently it is frequently used for very short sentences, and it develops an overall plan for: targeting the use of prison for serious offenders, and increasing the use and credibility of community-based sentences. We want to highlight two critical elements of this plan – the idea of *paying back* as a core principle of punishment and the recommendation of a *progress court*

to oversee community sentences. These two items take account of the need for policy to be inspired by vision and connected to evidence and also reflect striking differences with the direction policy is currently taking in England and Wales.

Louise Casey's report *Engaging Communities in Fighting Crime* (2008) has lent the concept of payback-renewed salience. For Casey, the idea of payback represents a solution to perceived problems of public confidence in criminal justice and community penalties. Recognising that public attitudes reflect emotional responses to crime, her prescription for building public confidence is yet another re-branding of community service as 'community payback'. Two features are critical to the re-branding: firstly, paying back has to hurt and, secondly, given that offenders doing payback should wear bibs identifying them as such, it has to involve the pains of public shaming.

The emphasis on payback in the Commission's report perhaps reflects a similar concern about public confidence, but the nature of the payback proposed could hardly be more different:

*payback means finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community.... Ultimately, one of the best ways for offenders to pay back is by turning their lives around* (ibid: 33)

A three-stage process of sentencing is proposed to deliver this payback. Stage 1 determines *how much payback* and is determined by the judge alone. Stage 2 determines the *form of payback* and involves judges, social workers and offenders themselves.

Stage 3 of the proposed sentencing process involves a 'progress court', the function of which is both to deal with non-compliance and to recognise progress. The emphasis is on the constructive management of community penalties rather than their rigid enforcement. But stage 3

has another function, too, of fulfilling the public's 'right to know – routinely – how much has been paid back and in what ways... [It] should mean that much greater effort goes into communication with the communities in which payback takes place' (Scottish Prisons Commission, *ibid*: 36-37).

This model of payback contrasts sharply with Casey's. It rejects the emphasis on exacting pain and shame from offenders as passive subjects of punishment. The Commission's version of payback engages with offenders both as the perpetrators of previous harms and as potential authors of reparation and reform.

Treating penal policy making as crisis management has led to ineffective reactionary tactics that have increased costs and reoffending, and decreased community safety and confidence in the criminal justice system. Scotland's re-casting of a crisis as an opportunity is a hopeful start but

carries its own pathologies. In her trenchant plenary lecture at the most recent meeting of the European Society of Criminology in Edinburgh, McAra (2008) pointed out that recent reforms in criminal justice had led to a proliferation in the number of public bodies, programmes, pilot projects and partnerships in criminal justice. McAra showed how 'demand' in criminal justice and youth justice was being driven by an increasingly complex network of these new and old suppliers rather than by anything changing in the wider world. The minority Scottish Government has so far admirably resisted the temptation to pander to the tabloids' imagined readership of the hateful and fearful, a resistance which will be sorely tested by the need to acknowledge that in some cases we must reduce and restrain as well as reform the reach of justice. The impact of the Scottish Prisons Commission is far from clear, but whatever policy outcomes it achieves, it has already made an

important contribution by offering up new ways of understanding and talking about imprisonment. ■

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