



Scottish Sentencing Council
Sentencing young people webinar (January 20, 2022)
Summary by Sheriff David Mackie

Rehabilitative sentencing

I speak to you as a practitioner, a judicial practitioner within the criminal justice system in Scotland. I do not pretend any particular expertise, knowledge or understanding that other shrieval and judicial colleagues do not possess, quite the contrary. And especially I do not suggest that any views I express have any greater legitimacy than those of other practitioners within the criminal justice field. But in my own journey to understanding why people commit offences and come into conflict with the law I came to understand that the things that help a person desist from offending or an offending lifestyle are commonly the apparently mundane – a strong partner or relationship, a family, a settled and safe home, good employment. And so the solutions to helping a person achieve desistance seemed counter intuitive when society's instinct is to start with retribution and punishment. It wasn't difficult to reach these views. We have known for a long time that short custodial sentences do more harm than good and do nothing to help people who have come into conflict with the law especially those who have experienced trauma, adverse childhood experiences addiction and mental health problems. This was recognised in the report of the Angiolini Commission in 2012 but understood long before that and the principle has informed policy to the point that we now have a presumption against sentences of imprisonment under 12 months; in other words a presumption against custody for any crime prosecuted at summary level. I have no statistics to offer but I sense that the majority of those who have appeared in front of me over the years have been 25 years of age or under and so often one's hope was to help a young person find the right road in life and thereby become a positive contributor to the community in which they lived. I came to see my role as a Sheriff as one of helping young people in particular get out of the criminal justice system.

And so I congratulate the Scottish Sentencing Council on their publication of these excellent guidelines for the sentencing of young people, for putting unequivocally in writing that a young person is someone under 25 years of age, for recognising that the human brain does not reach maturity and nor do people until their mid twenties and for directing us to take that

into account in the sentencing of young people. I congratulate them for the focus on community based disposals, the acknowledgment of the impact of trauma and adverse childhood experiences and the exhortation to sentencing Sheriffs and judges to make use of the facility of review hearings in their engagement with people on community based orders.

The mechanism of achieving rehabilitative sentencing has been with us for a number of years and it is the Community Payback Order. I probably don't have to say too much to this audience about what a CPO is so will simply explain that it is the primary order by which a Sheriff can impose a community-based order at the point of sentence. It is an order that can contain a number of components commonly, for example, a period of supervision by a Criminal Justice Social Worker for up to three years and unpaid work. It might include a specific programme, depending upon the availability of services in the area, to address, say, domestic violence, sexual offending or drug or alcohol use.

So the mechanics of community based disposals are quite simple and straight forward. And if a person fails to adhere to the order, breaches it, there can be adverse consequences including the imposition of the custodial sentence that was avoided first time round – all bets are, technically, off. What is it though that makes a CPO work; what is it that will lead to a successful outcome? There are many factors but I'm going to focus on two essential elements I have identified as contributing to the success or failure of a CPO and they both revolve around the person who is key to the order, the Criminal Justice Social Worker.

A Sheriff cannot reach a decision on a community-based order on their own. They need the advice and guidance to be found in the Criminal Justice Social Work Report prepared by the Criminal Justice Social Worker. In my early days as a Sheriff some twenty years ago I encountered a range of attitudes among my shrieval colleagues towards this branch of the Social Work profession ranging from tolerance to contempt but rarely admiration or respect. Some colleagues refused to engage with such social workers and were offended at recommendations from them about possible sentencing solutions as an assault on their judicial independence. I'm glad to say that attitudes have changed markedly over the years but defensive attitudes about supposed judicial independence still prevail and can, in my view, impede the success of the sentencing process. I will come back to this.

The CJSWR really matters. It is prepared by someone who has studied and trained in the field and who is by any measure an expert. It provides important information and insights into the personality and background of the person who is the subject of the report and, most importantly, includes a risk assessment carried out in accordance with well-established psychological tools, in which the author is trained, to offer some insight to the likelihood of further offending and the nature of possible further offending by the individual. The reports really matter and they do inform decisions made on the bench.

It would be naïve to suggest that CJSWR's are universally of the highest quality and always provide the insights sought by the sentencing Sheriff or judge. Some social workers are better than others, some have more experience, some, many have unrealistic workloads and cannot devote the time and attention they would like to the preparation of their reports. And that variation in quality is a pity as it can fuel a certain scepticism that does exist around the role of Criminal Justice Social Workers and their reports. In Alloa where I was the resident Sheriff for a long number of years I was the beneficiary of a fine team of Criminal Justice Social Workers whom I regarded as my experts, my consultants and my advisers on community based sentences. I got to know them individually and took opportunities when they were at Court to chat about their work or interesting talks I had been to at SASO or of developments in the field. We used to have regular meetings to discuss local issues and developments. I let them know that their reports affected my decision making and invited them to offer their recommendations about how to deal with the individuals who were the subjects of the reports. They knew that I might not follow their recommendations because I disagreed or because I thought that in an individual case the offending was such that the disposal should contain a greater element of retribution, an aspect that was beyond the scope of the Social Worker's input. But very often I found their recommendations to be well reasoned and appropriate and I followed them. I should add that the CJSWR and its recommendations informed and enriched discussions with solicitors on appropriate sentencing decisions because their advocacy was important too.

My experience was that by giving the Social Workers the responsibility I have described they rose to the occasion and consistently delivered reports of the highest quality.

The second element is less tangible but, in my view, the most important. It can be summed up in the word relationships. The success or failure of a CPO depends hugely on the relationship between the person who is the subject of the order and the Social Worker. Of course it is desirable to have good programmes, facilities and opportunities for people on orders and we need good investment in all of that. But if the relationship between the person on the order and the social worker is not good the prospects of success diminish. Some people are determined to get out of the system and stick with it come what may, but the more vulnerable, marginalised, traumatised individuals who so often end up in the system will struggle. So again so much rests upon the Criminal Justice Social Worker.

But the relationship with the Sheriff can make a difference too. How can that come about you might ask? In the late '90's there arrived in Scotland the Drug Treatment and Testing Order,, the DTTO, and we still have it. It's a specialist community based order with drug treatment at its heart. A key component to its success was found to be the regular reviews by the sentencing judge, in Scotland, the Sheriff. The reviews were commonly monthly for a period of two years and that engagement and, dare I say it relationship, with the judge made a difference to the effectiveness of the order. That notion was developed in youth court pilots in Hamilton and Airdrie and began to be utilised in relation to the old probation orders. Now a Sheriff can order review hearings in relation to CPO's and has a very free hand in how they are conducted. I realised that often the things that made people struggle on their orders were very private and hard to talk about in open court. So I devised a practice of conducting CPO reviews dressed down, in private in the Jury room without the Procurator Fiscal in attendance – just the person on the order, the social worker or a social worker and the solicitor who played very little part. This created a good environment for a conversation between me and the person on the order. The feedback from the social workers was that it made a huge and positive difference to the individuals on the CPO's who appreciated the personal interest shown by the Sheriff. They developed a desire not to let the Sheriff down and to have good news at each review. The review hearings became an important component to the success of CPO's and I'm glad the SSC in its guidance on sentencing young people has specifically made reference to their use.

Some Sheriffs balk at the idea of having a relationship with an offender beyond their formal judicial role and as with the engagement with Social Workers regard it as an incursion upon their judicial independence. I personally think such concerns are misplaced. At the heart of the notion of judicial independence is the concept of bias or the perception of bias. Professor Cyrus Tata in his recent book "Sentencing: A Social Process" has coined the phrase "autonomous individualism", that notion of the well intentioned, public spirited judicial officer with a strong sense of duty and of bearing the sole responsibility for making an important decision. In the end he concludes that it is a positive feature but not before characterising it as partly proprietorial and something of an impediment to the implementation of public policy in relation to sentencing and research on sentencing. I commend a 2018 article by Fiona Jamieson, a Senior Teaching Fellow at the University of Edinburgh and former prosecutor entitled "Judicial Independence: the Master Narrative" in which she challenges the strict adherence to what is known as the Olympian notion of strict judicial independence within the penal setting. The point is that up to the stage of a finding of guilt or innocence the Sheriff or judge must be totally independent and insulated from influences that are not relevant to the case in order to avoid bias or the perception of bias. After that and during the sentencing process, because it is increasingly a process and not an event, the requirement for such protection diminishes and a greater benefit may be derived from a collaborative and inclusive approach being adopted by the sentencing judge.

I have a dozen touching anecdotes about people I've met at CPO reviews but want to close with just one. A great way to get people to open up is to ask very open questions. One I used to ask was this, "don't answer the question but I want you to think where you would want to be in five years. Do you want to be back here facing your 50th conviction and enduring the hassle of the criminal justice system or would you want to have that behind you. Perhaps you have a good job, you're settled in a relationship and maybe you've started a family. You have a nice secure home maybe a car and perhaps you're able to take a holiday abroad each year" – by which time the person is usually nodding in agreement. I know it's a bit corny but then I would say "If it's that how did you get there, you got out of the criminal justice system, you probably went to college and got qualified in a job and you got the job – so if that's the destination that journey can start right here when you walk out of this room". One day I was crossing the road to the Post Office – a car pulled up alongside me and four young men

jumped out – they were just being dropped off after work. One said, “Sheriff Mackie how are you? Good to see you”. He was a young man who for a while was never out of my Court with offences of public disorder, fighting, minor drugs offences and so forth. I placed him on a CPO and at one of the review hearings we had that conversation. “How are you doing?” I asked. “I’ve got a job” he declared proudly, “at the glassworks. I was given a six week trial six months ago. I’m on a conveyor belt sorting broken glass but if I stick it out another three months they’ll put me on the machines as a machine operator and that’s a great job.” “That’s wonderful”, I said, “thanks for letting me know and good luck with the future”. As I went to walk on he stayed with me. “Sheriff Mackie, I’m going on holiday. I’m taking the wife and weans to Disneyworld Paris a week on Saturday”. “That is fantastic. Well done and thanks for letting me know.” As he walked off with a cheery wave he said, “Aw, you stood me in good stead Sheriff Mackie, I’d never pass you”. I could have gret. Right there in that true story is the power of redemption, the effect of maturation and the effectiveness of rehabilitative sentencing. Thank you.