

# Guidance Note 15

## Developing alternative sentences

### Summary

- A restrained and proportionate use of deprivation of liberty is in accordance with human rights requirements and can reduce the likelihood of human rights abuses in prison. Establishing and using alternative sentences can therefore increase the level of human rights protection.
- Developing alternatives or establishing a probation service will not automatically improve human rights or lead to a reformed criminal justice system. A clear strategy and safeguards are needed to ensure the alternatives actually replace imprisonment and are not themselves abusive of human rights.
- Possible alternatives include fines and compensation for victims, supervision, unpaid community work, house arrest, electronic monitoring and treatment for health problems.
- Introducing alternatives will not invariably reduce the use of prison, if the new sentences are used instead to increase the number of people undergoing penalties.
- The successful introduction of alternatives requires support from the public and the judiciary, targeting of sentences, involvement of many agencies in the implementation and permanent monitoring machinery.

“ All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

— *Article Ten, United Nations International Covenant on Civil and Political Rights*

### Guidance Notes on Prison Reform

This guidance note is number fifteen in a series designed to give practical help to those developing and delivering prison reform projects. All the guidance notes:

- are set within the international human rights framework
- apply in a variety of cultural and political environments
- propose solutions that are likely to be sustainable in a variety of socio-economic situations and do not involve a significant increase in resources
- take account of the realities of prison management

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## Alternatives as part of prison reform

Deprivation of liberty is a severe punishment. In countries where the death penalty has been abolished it is the most severe punishment available to the state. To use it parsimoniously and proportionately is therefore in accordance with a human rights approach to criminal justice policy.

“ *A6 Sentencing rationales should be consistent with modern and humane crime policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of decriminalisation, using measures of diversion such as mediation, and of ensuring the compensation of victims...*

*B5 Custodial sentences should be regarded as a sanction of last resort, and should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate.*

Council of Europe, Recommendation R(92) 17<sup>1</sup>

Human rights abuses are endemic in prisons throughout the world, in the countries of the South and the North. Imprisonment imposes on many of those subject to it a burden much greater than the loss of liberty. Health can be ruined and life chances reduced. Whenever it is possible to impose an alternative sentence on people rather than sending them to prison, the chances of human rights abuses occurring are reduced.

“ *‘One day in the distant future, people will probably look back on what happens in most countries today and wonder how we could do that to our fellow human beings in the name of justice. Unfortunately, the current desire in large civil jurisdictions seems to be to lock up more people, for longer periods of time and not necessarily under more humane conditions... In this situation the promotion of alternatives to imprisonment... is of vital importance.’*

William Omaria, Minister of State for Internal Affairs, Uganda 1996<sup>2</sup>

There is therefore a strong case for introducing and using penalties other than imprisonment. However, introducing alternative sentences does not of itself lead to a more just or more effective criminal justice system. It does not necessarily reduce the prison population or improve human rights observance.

Without effective implementation and stringent safeguards such a change can:

- increase the prison population
- worsen the level of human rights protection
- increase the financial costs of the justice system to the government

However, if carried out strategically with clear objectives and technical skill, the introduction of alternatives to prison can play a part in humanising a criminal justice system.

“ *In May 2004 the Federal Secretary of Public Security (of Mexico), Dr Alejandro Gertz Manero, announced proposals aimed at promoting social rehabilitation of prisoners through community and productive work.*

*The new proposals would reduce the annual cost of maintaining Mexico's prisons through a number of measures:*

- 1. replacement of prison sentences by community work for low-value property crimes which would lead to the release of 12,000 prisoners;*
- 2. a programme of open prisons for up to 73,000 prisoners who would be engaged in productive work covering their costs. Much of the work would be aimed at infrastructure projects in the communities in which the prisons are located;*
- 3. a programme of restorative work for the 93,000 prisoners classed as repeat offenders who would be held in medium security prisons.*

*In interview Dr Gertz advised that failure to adopt the proposals would result in a need for 60 new prisons over the next six years. The plans were published for consultation by Mexico's state governments which have responsibility for most of the country's 449 prisons.*

Adapted from press reports of interviews with Dr Gertz 2004

## What alternatives are there?

Throughout the world many ways of dealing with convicted people other than by imprisonment are used.

- Courts in most jurisdictions have the power to impose fines and other monetary penalties, such as compensation to the victim or a contribution to a charitable fund.
- Various forms of community supervision are common, under the care of government officials, non-governmental organisations or authority figures.
- Requiring a convicted person to carry out unpaid work for the benefit of the community is a widely available penalty.
- Some jurisdictions constrain liberty by imposing house arrest or monitoring of movement by electronic devices attached to the person.
- Treatment for addictions or health conditions is sometimes available instead of imprisonment.
- New forms of justice, sometimes called 'restorative justice' or 'transformative justice', are being developed which require offenders who have admitted guilt to meet the victim, discuss the crime and make some recompense.
- Some combination of the measures listed above is also possible.

## Alternatives in various regions of the world

Most jurisdictions have a wide range of sentencing options in their criminal law and in some countries they are widely used. In poorer countries alternative sentences, usually on the model of the laws of the former colonial power, are in statute but are rarely used because the implementing infrastructure is not in place. To implement supervision in the community or community work some structure must be available to take charge of the arrangements that has the confidence of the judiciary who impose the sentences. Even if there is a large input from volunteers resources are needed for the administrative machinery.

Fines are the most commonly used alternative to a prison sentence in many countries but some people who are fined end up serving prison terms because they are too poor to pay the fine.

In countries formerly under communist rule a range of alternatives was available though these were linked to the structures of a centralised economy and have therefore fallen somewhat into disuse.

## The main human rights problems with introducing alternatives

Worldwide research shows that introducing alternatives often fails to have the intended effect. Rather than the new sentences being used instead of prison sentences, they become a sentence for offenders who would not previously have gone to prison in any case. Thus the prison population stays the same or increases and more people are brought under penal control. This process is known by criminologists as ‘net-widening’. If the objective is to reduce the use of prison so as to reduce overcrowding and improve prison conditions, introducing alternatives is only one element of a wider strategy and is a long-term reform rather than an instant remedy. Reducing the use of pre-trial detention and shortening prison sentence lengths is a more effective strategy.

### Males aged 21 and over sentenced for indictable offences in England and Wales 1980-2002, by types of sentence (%)

Year	Discharge	Fine	Probation	Community Service	Combination Order	Immediate prison
1980	7	52	5	4		17
1982	8	47	6	6		19
1984	9	45	7	7		20
1986	10	41	7	7		21
1988	10	41	8	7		20
1990	13	43	8	7		17
1992	17	37	9	9	0	18
1994	16	36	11	11	2	20
1996	14	33	11	10	3	26
1998	14	32	11	9	4	27
2000	13	28	11	9	3	30
2002	14	26	12	8	2	30

From Home Office Criminal Statistics, England and Wales, annual volumes, 1980-1998 and 2000 - 2002

The table above shows an increased use of both probation supervision and community service over more than a decade and at the same time a large increase in the proportionate use of prison and a near halving of the proportion of convicted people fined.

A second problem is one of credibility. It may be difficult to rally public opinion behind the use of alternatives. It may seem to the public that the government is encouraging crime by making punishments less severe. In order to show that alternatives are as tough as prison sentences, governments may be tempted to breach human rights requirements by:

- introducing elements into these sentences such as public humiliation, for example by dressing community service workers in very visible uniforms and making them pick up litter at the side of the road
- devising very intrusive supervision for instance satellite-tracking

## The need for a variety of models

Reform programmes in countries moving towards democracy and humanising their penal systems often contain a plan to develop alternatives to prison based on models from other countries. Caution is needed when choosing an appropriate model. Some countries choose to establish a centralised structure in the Ministry of Justice to manage the alternative punishments. Others try to embed the structure for alternatives in local communities and attach the management of them to some part of municipal government. Some choose to link the management of alternative penalties to the judiciary and the courts. Others establish a combined prison and probation or social work service.

There is no necessary connection between any one model and the objectives of humanising a criminal justice system and reducing the reliance on imprisonment.

**“** Note that a formal probation service can be expensive and probation officers might not be readily accepted in some countries. Alternative ways of organising supervision within the community can be explored, for example supervision by local councils, the village headman, community paralegals, mediators or someone else in a position of respect and trust.

DfID, *Safety, Security and Accessible Justice 2002*<sup>3</sup>

## Alternatives to prison and corruption

Alternatives to prison are very difficult to introduce in a criminal justice system affected by corruption. Bribery in the court can lead the judge or magistrate to impose an alternative sentence rather than a prison sentence. Unpaid work for the benefit of the community can be imposed by the court and convicted persons can then pay someone else to do the work for them.

## Alternatives to prison and human rights

Whenever liberty is taken away, even if the deprivation of liberty is only partial, human rights abuses can occur. International instruments have therefore been produced which lay down requirements for the administration of non-custodial sanctions. When carrying out community service, steps must be taken to protect offenders from public ridicule. Treatment must always be with the consent of the offender. There are contexts and societies where abuse of those doing labour is common – and where exploitation is possible. Substantial safeguards are needed, therefore, to prevent the abuse of the human rights and dignity of those undergoing such sanctions.

The primary international instrument is the United Nations Standard Minimum Rules for Non-custodial Measures, which were adopted by the General Assembly in December 1990. They are known as the Tokyo Rules.

The Tokyo Rules provide legal safeguards to ensure that non-custodial penalties are used fairly, within a clear legal framework, in a way which ensures that offenders' rights are protected and they have recourse to a formal complaint system if they feel their rights have been infringed at any stage. When an offender is asked to consent to undergoing a particular penalty before or instead of a formal trial process, the

offender should be given clear information about the consequences of refusing. Private information about the offender should be kept confidential.

There are also European standards, the European rules on community sanctions and measures, and Recommendation No. R (92) 16 of the Council of Europe Committee of Ministers.

The main requirements of these rules are:

- all aspects of the imposition of community sanctions and measures must be laid down in law
- when an offender sentenced to a community sanction or measure fails to carry out any condition or obligation the sentence shall not be automatically converted to a sentence of imprisonment
- offenders shall have the right to appeal against decisions of the implementing authority
- the privacy and dignity of offenders sentenced to a community sanction or measure should be respected at all times
- existing social security rights shall not be jeopardised

## How to introduce alternatives

To establish alternative sentences so that they are used instead of prison sentences requires all the following strategies:

### Public opinion

Support from the public is essential. Work must be done to maintain public confidence. Civil society organisations can play a role in informing and involving the public Arguments that can be used in support of alternatives to prison include:

- avoiding criminal influences on offenders
- reducing pressure on overcrowded prisons
- reserving prison for serious and dangerous offenders
- cost savings
- benefit to the victim and society from suitable offenders doing reparation rather than serving time in prison
- involvement of civil society in dealing with offenders
- the rehabilitative effects on offenders of appropriate treatment measures
- avoiding the social damage of imprisonment to family and community ties



*Penal Reform International is running a project in Russia aimed at using existing structures to set up a system of community service as an alternative to prison. The inclusion of a public awareness campaign as a major objective is a novel and important aspect of the project. It involves working in partnership with the Foundation for Independent Radio and the Agency for Social Information and providing training programmes for journalists.*

*Vivien Stern, *Developing Alternatives to Prison in Central and Eastern Europe and Central Asia* 2002<sup>4</sup>*

Research carried out in a number of countries shows that the penalty which makes most sense to the public is some form of community work, paying back in some way to a victim or to the wider society for the harm that has been caused.

## Targeting

Clarity is needed about the appropriate recipients of the alternative sentences. Alternative sentences need to be targeted at a certain segment of offenders who are currently imprisoned or who have committed a certain range of offences that currently attract imprisonment but which do not need to do so. In some countries this targeting is very specifically defined in law.

“ An offender who is sent to prison...will be sentenced to community service in lieu of an unconditional prison sentence of 8 months or less, unless it must be deemed that unconditional prison sentences, earlier community service sentences or other weighty reasons constitute a hinder to sentencing to community service.

Law on Community Service, Article 1, Act of August 8, 1997, no 754/97, Finland<sup>5</sup>

In a number of jurisdictions there are only two disposals available to the courts, a fine or imprisonment and it is usual for many prison sentences to be suspended and an alternative substituted. Without such targeting, and the issue of clear guidance on the intended recipients of alternative sentences, they will not be used instead of prison but in addition to it. Mechanisms need to be developed to ensure this process is part of any system.

## The role of the judiciary

It is crucial to have the close involvement of the judiciary in the design and implementation of alternative sentences. Sentencing is carried out by the judiciary and if the judges and magistrates have no confidence in the alternative penalties they will not be minded to use them. Sentencers can be involved in many ways, for example, by devising a structure of alternative sentencing, by defining the range of cases which should be given an alternative sentence or through membership of boards and committees which exercise a supervisory role in relation to the implementation of the penalties.

## Implementation

The way alternative sentences are delivered is very important for the success or failure of any policy to use alternatives instead of imprisonment. All alternative sentences that require some form of supervision need an infrastructure of officials to relate to the sentencing court, supervise the offenders, monitor the sentencing patterns, and interact with the local community where the offenders live and will carry out their sentence. Alternative sentences depend heavily on the consent and support of a wide range of local non-criminal justice agencies. The greater the local involvement the more likely it is that alternative sentences will be properly resourced.

“ The introduction of community service and other non-custodial measures as alternatives to imprisonment may not be sufficient to reduce overcrowding in prisons. What is critical is the change of attitude of all the key-players. In this regard, the initial task is to identify who the “key-players” are. Failure to pay attention to, or to neglect, some of these significant issues may be counter productive and frustrate the initiatives or policies

meant to curb overcrowding in prisons. It is needless to emphasise that the effective participation of all the parties concerned, including the honest commitment of everyone, are vital elements in this respect.

Eric Kibuka, *World prison population: facts, trends and solutions* 2001.<sup>6</sup>

## Permanent monitoring machinery

A policy of replacing some prison sentences with alternatives is dependent on information being regularly available on sentencing patterns and the use of alternative sentences. When the information shows that the policy is not working, for example, because the alternative sentences are not being used or are not being used for the target group, remedial action such as discussions with the sentencers must be taken by a responsible body.

## References

- 1 Council Of Europe Committee Of Ministers, *Recommendation No. R(92)17 Of The Committee Of Ministers To Member States Concerning Consistency In Sentencing*, (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies) Section A article 6 and Section B article 5
- 2 William Omaria, *Afterword in Prison Conditions in Africa: Report of a Pan-African Seminar, Kampala, Uganda 19-21 September 1996*, Penal Reform International, Paris, 1997, p.91
- 3 *Safety, Security and Accessible Justice: Putting Policy into Practice*, Department for International Development, London, 2002, p.46
- 4 Vivien Stern, *Developing Alternatives to Prison in Central and Eastern Europe and Central Asia*, COLPI, Budapest, 2002, p.42
- 5 Malcolm Davies, Jukka-Pekka Takala, Jane Tyrer, *Sentencing Burglars in England and Finland*, Paper to International Conference on Sentencing and Society, Strathclyde University, 24 to 26 June 1999, p.15
- 6 Eric Kibuka, Director, United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), *World Prison Population: Facts, Trends and Solutions: Prisons In Africa*, United Nations Programme Network Institutes Technical Assistance Workshop, Vienna, Austria, 10 May, 2001