

# Court Sentencing in Botswana: A Role for Probation?

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## ABSTRACT

Concern has been expressed in Botswana about the increasing numbers of adult offenders sent to prison. Yet few alternatives to custody exist. Research was conducted to enquire whether pre-sentence reports about defendants, prepared by social workers, would be useful and whether probation orders should be introduced to widen the range of sentencing options available. There was found to be support, in principle, for these measures.

## Introduction

In many areas of the world those involved or interested in the administration of justice express concern about the large number of people sent to prison for committing offences. This concern covers various aspects: prison overcrowding and the concomitant financial burden on governments; the questionable effectiveness of prison in rehabilitating offenders or preventing further offences; and the destructiveness of the prison experience for many offenders and their families.

Numerous research studies echo these concerns. In countries such as Britain and the United States attention and resources have focused on the development of alternatives to custody, or sentences that courts can impose which do not involve offenders losing their liberty. In Britain the Probation Service has been responsible for administering some of these alternatives, one of which is the probation order. In the case of adult offenders (those aged 18 and above), courts in Southern Africa have few alternatives to custody available. Little is known about whether custodial sentences are even perceived to be a problem by sentencers, and whether or not they would consider alternatives appropriate.

This paper attempts to fill this gap for Botswana. Research was undertaken to establish whether sentencers in the principal Magistrates' Court and High Court of Botswana, and others involved in the administration of justice, perceived a need for

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a widening of the range of sentences for adults. Specifically, it sought to establish whether a particular non-custodial alternative, the use of probation orders, was viewed as a suitable alternative sentence in the Botswana context.

### **Sentencing in Botswana**

Section 27 of Botswana's Penal Code specifies that the following punishments are available to the Court:

- \* death
- \* imprisonment
- \* corporal punishment
- \* fine
- \* forfeiture
- \* finding security to keep the peace and be of good behaviour or to come up for judgement
- \* any other punishment provided by this Code or by any other law.

In addition, under the terms of the Prisons Act 1979, a court may order that any offender should perform extramural labour in lieu of a prison sentence of six months or less. This means that the offender continues to live in the community but is required to work unpaid for a public authority for a specified time.

Table 1 shows how adult offenders for a number of the more common offences were dealt with during 1989.

The figures show that 85% of those convicted of rape or attempted rape were sentenced to imprisonment; for the other offences in division III fines were the most common form of sentence, the imprisonment rate being less than 2%, except in the case of the use of insulting language where 5,68% of defendants were received into custody.

Looking at the figures for offences against the person, more of those convicted of grievous harm (54,72%) received prison terms than for other offences in division IV. In cases of unlawful wounding and assault occasioning actual bodily harm the proportions receiving custodial terms were 35,1% and 18,58%, and for other offences less than 9%.

The use of imprisonment was generally higher in the case of property offences. The percentage of people sentenced to imprisonment ranged from 56% to 65% in cases of stock theft, housebreaking and theft, burglary and theft, storebreaking and theft. However, imprisonment was imposed in only 21,06% of cases of common theft and in 20,74% of cases of theft by clerk or servant.

Just less than one-fifth of those involved with habit forming drugs were imprisoned. In cases of road traffic offences, which include driving with excess alcohol in the blood or while unfit through drugs or alcohol, defendants were more often given fines.

Since 1986 admissions to prison have been recorded using a five-year age range. These figures indicate that either the 21-25 or 26-30 age group account for most admissions. In 1980 over 60% of those sentenced to periods of imprisonment had no previous convictions, and in each year up to 1988 the percentage varied between 50% and 58,9% with no particular trend being apparent. In addition, in each year since 1984 at least 25% of admissions had only one previous conviction. For the four previous years the percentage varied between 22,8% and 24% with only one previous conviction (Prisons Department Annual Reports, 1980-88).

### **The nature of imprisonment and alternatives**

Imprisonment in Botswana takes various forms. It can be immediate and take effect from the time of the court appearance. It can be fully suspended, which leaves defendants with the threat of imprisonment should they re-offend within a specified time; or it can be partially suspended, where people serve part of their sentences and are released, but have the threat of recall to serve the balance hanging over them in the case of a further offence.

Apart from containment, training and rehabilitation of sentenced prisoners are major objectives of the Botswana prison system. Indeed the Prisons Department has been known as the Department of Prisons and Rehabilitation since 1985. Trade training and courses in agriculture, literacy and other subjects are available. There are also chaplaincy and social welfare services.

Not all prisoners are able to participate in courses in prison. There are problems related to the availability of courses during an inmate's sentence, and which skills would be appropriate for inmates in the light of their future plans (if these are clear at the time that decisions about courses have to be made). A major limiting factor is that many courses last three years. Prisoners are released after serving two-thirds of their sentences, so only those sentenced to over four and a half years can benefit from these courses. Figures from the Prisons Department for the period 1980-1988 indicate that the most common sentences imposed are between six and twelve months. There are no specific details for the numbers sentenced to over four and half years. However, taking 1980, 1984 and 1988 as examples, those sentenced to over eighteen months accounted for 12,37%, 10,4% and 18,75% respectively of the totals (Prisons Department Annual Reports, 1980, 1984, 1988). It may be, therefore, that the numbers who are able to 'benefit' from training courses in prisons are small, relative to the total number of offenders who receive custodial sentences.

The Commissioner of Prisons and Rehabilitation has the power to release prisoners for Extramural Labour (EML) which is regarded as an important component of a person's rehabilitation, as the following quotation illustrates (Prisons Department, 1980:4):

“Extramural labour release also contributes to the rehabilitation of a prisoner by promoting the liberty of an individual. Normal continual community contacts are ensured and the damaging effects of confinement, which often severely complicate the reintegration of offenders into the community, are avoided.”

Table 2 shows that the proportion of inmates released from prison to undertake EML has been less than three per cent since the mid-1980s, after a peak of over 4% early in the decade. The Department of Prisons and Rehabilitation also keeps details of those whom the courts sentence to periods of EML. Analysis of the figures shows that the High Court and the magistrates' courts use EML far less than the customary courts, although it must be conceded that it is usually the latter which deal with the less serious offences. For example, in addition to the 121 people released for EML by the Commissioner for Prisons in 1988, a further 474 were sentenced by the courts, of whom only eight had appeared before magistrates. The availability of EML may not therefore have done a great deal to relieve prison overcrowding, of which successive annual reports from the Department of Prisons and Rehabilitation complain.

It is in this context that the question of extending the range of sentencing options was posed. Juveniles in Botswana can be made subject to probation orders, which enable them to retain their liberty and reside at home, but require them to report to social workers on a regular basis. There is no equivalent for adults, but adult probation does exist in other countries and is a means whereby adult offenders can be supervised in the community and offered various types of assistance, including counselling and practical help. The objective of a system of probation is to effect a change in a person's circumstances which will make it less likely that they will commit a further offence. Prior to such a probation order being made, the court adjourns the case for the preparation of a social enquiry report which is submitted by a probation officer to give sentencers comprehensive background information about an offender's circumstances (A fuller account of the work of the Probation Service in England and Wales is given in Appendix A).

In relation to Botswana, it is interesting to note that in 1957 and 1958, several years prior to the country's independence, there was correspondence between the British High Commissioner's office in Pretoria and the Resident Commissioner in Mafeking (from where pre-independence Botswana, or Bechuanaland, was governed) about the feasibility of probation for adults. It was considered then to be impracticable, partly because of the size of the country and the long distances involved, and partly because of the absence of trained probation officers. Further, in view of the limited number of offences committed, it was not then considered a financially viable course (Resident Commissioner: 1957).

The issue of whether or not to introduce probation orders needs to be addressed again. The remainder of this paper reports the results of a research exercise conducted amongst a small number of professionals involved in the criminal justice system.

## **Method**

This research was undertaken between July and November 1990. After perusal of the Criminal Record Books at the Gaborone Magistrates' Court and the High Court in Lobatse, semi-structured interviews were conducted with the Chief Justice; with six of the seven Magistrates who regularly adjudicate in Gaborone; with four attorneys who have particular knowledge of the criminal courts; with a senior officer concerned with Social Work and Community Development in Botswana; and a senior spokesperson for the Commissioner of Prisons and Rehabilitation.

Sentencers were asked to comment on aspects which included how they perceive their role in the sentencing process; how they are guided in their sentencing; whether certain offences almost automatically attract certain sentences; how pre-sentence information about offenders (if considered relevant to their task) is obtained and whether Social Enquiry Reports would be useful; whether the range of sentences currently available is sufficient; in what situations imprisonment is justified; and when non-custodial sentences are imposed. They were asked whether or not statutory supervision in the community (ie probation) would be a useful addition and in what situations it would most likely be used. The questions were modified as appropriate for those not directly involved in sentencing.

## **Results**

### ***Background and court sentencing practice***

The magistrates in Gaborone sit alone. Their role would seem similar to that of the stipendiary magistrates in England and Wales. They had had from six months to nine years experience as sentencers in Botswana, but most had had previous experience in the courts before becoming magistrates - for example, as magistrates elsewhere, or as defence or prosecution attorneys. One of the defence attorneys had previously been a magistrate. The Chief Justice had wide experience in Botswana and elsewhere.

As regards sentencing practice, the Botswana Penal Code and other Acts stipulate the maximum sentences for offences and in some cases minimum sentences are laid down, as in Section 3 (2) of the Habit Forming Drugs Act (Chapter 63:04). Beyond this there are no formal written guidelines, but there is

some effort to bring some consistency into sentencing. One of these efforts is an annual conference attended by magistrates and judges. Records of conference deliberations are not available to outsiders. The conference was described to the author as a forum at which attention was focused on particular issues or on serious offences. Democratic decisions are reached in the hope that some uniformity can be attained throughout the country. For example, a decision was said to have been reached that rapists, for whom the Penal Code stipulates a maximum of life imprisonment, should always be sentenced to at least three years' imprisonment; a fine of between Pula 150 and Pula 200 was recommended for driving while unfit through drink or drugs (maximum sentence is Pula 800 and/or up to two years' imprisonment). Imprisonment was only to be invoked in 'drunk' driving in cases of serious damage, as it was apparently considered that imprisonment in addition to a fine and the mandatory disqualification would be too punitive.

The review system offers another means by which consistency can be attempted. Although judges cannot force magistrates to sentence in particular ways, decisions of magistrates are, depending on their experience and the types of offence, reviewed by the High Court judges who, technically, can re-sentence defendants. Judges also hear appeals from magistrates and can lessen or increase sentences imposed. In either case, the comments of the judge are made available to the subordinate court. Notwithstanding these provisions, magistrates still retain considerable discretion when passing sentence.

In considering the possible roles of sentencers in the courts, one respondent stated unequivocally that retribution was a major element in the sentencing of adults (although not in the case of juveniles, where rehabilitation was the principal aim) and that the punishment should fit the crime. This view is reminiscent of the 'just desserts' model of sentencing in which, put very simply, attention is paid more to responding to the offence committed than to meeting the needs of the offender. Other respondents saw sentencing as a complex and difficult process, incorporating elements of protecting the public, deterrence, rehabilitation of the offender, and retribution, although views differed as to the relative weight given to these. All respondents, however, mentioned that not only the offence, but the circumstances of the offender, are taken into account.

#### *Information available to the court*

Information about the offence is given to the court by the police prosecutor, but once the case is proven defendants are entitled to offer some details about their personal circumstances, in mitigation, prior to sentence and may seek to explain to the court why the offence was committed. If represented by an attorney, this information may be presented to the court comprehensively, but the vast majority of defendants in Botswana are not represented and magistrates mentioned that they

often have to explain the procedure carefully to elicit the required information from those appearing before them.

All sentencers and attorneys considered that a social enquiry report, prepared by a trained social worker, could help them to understand a defendant's motivation for committing an offence. Most felt that these reports would be particularly useful in the case of first offenders and young people (although the definition of young people varied from 18 - 22 to 18 - 30), or where offences arose from domestic disputes. Some felt that reports would be less useful when defendants had extensive criminal records since they would inevitably go to prison, but it was conceded that the length of sentence might be influenced by the contents of a report. Personal circumstances were less likely to be taken into account by some sentencers if a defendant had committed a very serious offence. But what is meant by a 'serious offence'? Robbery, rape, housebreaking and theft, burglary, and wounding were cited as serious offences, whereas assault, theft, using insulting language, possession of dagga, and drunken driving were generally regarded as less serious.

Social enquiry reports might also be less useful where minimum sentences are laid down by statute. Dealing in mandrax, for example, currently attracts a minimum of 10 years' imprisonment plus a fine and corporal punishment.

### *Range of sentences*

Turning to the range of sentences available, the sentencer who saw the task mainly in terms of retribution considered that the options were adequate on the grounds that offenders were rational people who knew that imprisonment would be imposed for the commission of offences. The respondent fully supported the idea that the prisons should be responsible for rehabilitation. All other respondents could see some potential for incorporating probation orders into the sentencing repertoire, but views differed as to which kind of cases would be most appropriate. Discussion at this point focused on aspects such as criminal history, age of the offender and type of offence.

At present the guidelines are that first offenders should not be sentenced to immediate imprisonment, if this can be avoided, but that the sentence should be fully or partially suspended. However, the statutes do not give power to suspend sentences on people convicted of rape, robbery or murder. On appearing for a second time, an offender would expect a prison sentence to be partially suspended and on subsequent appearances immediate custody would be imposed, except in the case of minor offences which might again attract a suspended sentence. Fines are used for what are considered minor offences, some examples cited included using insulting language, various road traffic offences, some thefts from shops, and first convictions for possessing dagga.

Some respondents commented that the court gives offenders a chance to prove themselves by imposing partially suspended prison sentences. The taste of custody followed by release was believed to have some salutary effect. Reference was also made to the rehabilitation programmes in prisons. While recognising that courses were not available to everyone, one sentencer stated that prison was automatically considered because of the skills that it was anticipated that prisoners would acquire. This, plus a defendant's very poor social circumstances in the community, would induce another sentencer to impose a custodial sentence. However, several respondents, including the Prisons Department spokesperson, drew attention to what they considered the damaging impact of prison and the possibility that it could be counter-productive by confirming a person in a deviant lifestyle. This was felt to be particularly so in the case of people under 30 who were going to prison for the first time.

Extramural labour was cited as a less expensive and less disruptive alternative to custody, and one sentencer claimed to be particularly diligent in trying whenever possible to impose EML, believing that its reformative effects were greater than imprisonment. That respondent would also use EML instead of a fine where it was anticipated that an offender would be unable to pay and would in due course be imprisoned for default. Data gathered from the Criminal Record Books at the Magistrates' Court indicated that EML had not been imposed very frequently and that its use could usually be associated with particular magistrates. At least three of the sentencers interviewed had never used it at all. Two regarded EML as being suitable for first offenders, women, elderly people or where only petty offences had been committed. A view was expressed that there were few offences which would warrant a sentence as short as six months; another inhibiting factor was the lack of work available.

Given the limited use of extramural labour, the researcher enquired whether another alternative, the probation order, would be feasible. One respondent considered that a combined order involving supervised work in the community plus reporting to a probation officer would be useful. All but one of the other respondents felt that probation could be more useful than extramural labour because of its focus on rehabilitation and assistance as well as some supervision of a person's activities. Moral guidance was mentioned, which may reflect a concern with the social work elements of probation. All respondents could envisage its appropriateness for young people who were first offenders, but there were differences of view in respect of older first offenders. Three respondents would be hesitant, partly because these people were deemed to be too settled in their attitudes and less likely to comply with the obligations of probation orders, particularly if administered by younger social workers. However, one at least felt it was worth trying.



There was some differences of view about whether probation orders would be useful for those who had committed a number of previous offences, commonly known as recidivists. One experienced sentencer felt that some recidivists were quite happy to return to prison, but the majority of respondents considered that even recidivists could benefit.

Perhaps both the closest agreement and the widest disparity were revealed when discussion turned to the type of offence for which probation might be suitable. Almost all respondents would consider it for minor offences such as the use of insulting language, driving without due care and attention, common assault, and some cases of common theft, which is the most frequently recorded offence in Botswana. For some respondents, more serious offences of violence, if committed within a domestic setting, would be deemed suitable, and one would include consideration of those convicted of murder for ritual purposes if the legislation enabled this.

Various offences were perceived to be on the increase because of rapid social changes. Though this category was not numerically large, social work intervention would be considered appropriate. Examples included concealing birth, and theft by servants or clerks, both of which are often dealt with by way of suspended prison sentences; some offences connected with dagga (marijuana) and driving with excess alcohol, both of which at present are usually dealt with by fines, where they considered the defendant would have difficulty paying and would eventually be imprisoned for default.

For some respondents, certain offences, including housebreaking and theft, burglary and rape, were too serious for them to consider a sentence without some immediate custodial element, even in the case of first offenders, whatever their personal circumstances. Stock theft was also regarded by one respondent as so grave that nothing other than custody would ever be considered. Various respondents, but only two of whom were sentencers at the time, were of the opinion that probation should be considered for a very wide range of offences, with the exception perhaps of the most serious, such as treason, kidnapping, sedition, murder and arson.

## Conclusion

A number of comments can be made about these findings, some of which would warrant further investigation.

All respondents directly connected with the proceedings of the courts considered that pre-sentence social enquiry reports could be very useful in certain cases, although attention was drawn to the extra time that would be necessary to enable these to be prepared.

As regards sentencing practice, it would appear that for many offences, imprisonment is immediately considered and a decision is made as to whether a sentence can be either fully or partially suspended, based on factors like those outlined. Probation would extend the range of available disposals, and this was generally considered to be desirable, but to what extent it would reduce prison population is difficult to predict.

Comparing the responses received with the statistics in Table 1, it has to be asked whether in general probation would be used for those offenders who would otherwise go to prison. All but one of the respondents viewed probation as suitable for people convicted of common theft, but in 1989 78.94% of these offenders were not sent to prison anyway. Likewise, in the case of the least serious offence against the person - common - assault for which some sentencers would consider probation, the figures show that only 4.42% of those convicted received custodial sentences. It may well be that some of these people would benefit from social work involvement, but in looking at the potential of supervision as an alternative to custody, and a means therefore to relieve prison overcrowding, it is suggested that using probation in the case of these offenders would not have much impact. Similarly, other petty offenders and first offenders, for whom most thought probation would be useful, do not in general receive an immediate custodial sentence.

Table 1 shows that people convicted of the more serious property offences are at present more likely to experience custody. Since some respondents would include an immediate custodial element even in the case of a first offender, who for another type of offence would receive a fully suspended sentence, probation would not be applicable. If these views were replicated elsewhere, then the availability of community-based options would in practice do little to divert these particular offenders from the prison system.

It could be argued that, in the case of persistent offenders, the availability of probation would extend the sentencing tariff, thereby delaying the actual imprisonment. It is possible, however, for the availability of probation to cause people to go 'up the tariff' if, for example, it were to be imposed on those who might otherwise be dealt with quite leniently, perhaps by way of a reprimand or fine. It has been argued that this is what has happened in certain circumstances in Britain, where Community Service, which was proposed originally as an alternative to custody and is similar to extramural labour, appears sometimes to have been imposed instead of a fine or even some kind of discharge. In other words, the availability of Community Service Orders (CSOs) has meant that some offences seem to have been dealt with more punitively than in the days before this sentencing option was introduced.

Some sentencers in Botswana appear to hold great faith in what they perceive as the rehabilitative aspects of prison and theoretically it would be possible for custodial sentences to be rationalised in terms of the training which prisoners might be expected to receive. There has been no systematic follow up of discharged prisoners so it is impossible to assess adequately the impact of such programmes. Research from Britain and the United States, however, would suggest that rehabilitation within the context of incarceration is highly unlikely, hence the impetus in recent decades to keep people in the community for as long as possible. This strategy has, for example, been particularly useful with juveniles in Britain, for whom a variety of intensive supervision schemes operate. Although the rehabilitative qualities of probation have been subjected to scrutiny, it is versatile, has more potential than prison in assisting people to cope with their problems, has a failure rate in terms of re-offending no greater than prison; and, along with other community-based sanctions, is undoubtedly cheaper.

Notwithstanding the reservations expressed above, there would seem to be some justification for the introduction of probation orders in Botswana although its implementation would have to take account of the particular needs and problems of the country and its culture. One such problem, noted by almost all respondents, was the human resources implications. In a nation where there are relatively few social workers, and the vast majority of those are untrained and inadequately equipped, it would be impossible for a professional service of this nature to be introduced in the short term. On the other hand, given the immense social changes that will accompany the rapid economic progress of the country in some sectors, it is imperative that the government devote adequate resources to dealing with the inevitable social problems that are bound to occur.

## References

- Department of Prisons and Rehabilitation, Annual Reports for the Years ending December 1985-88.
- Republic of Botswana Habit Forming Drugs Act, Chapter 63: 04.
- Republic of Botswana Penal Code: Laws of Botswana Chapter 08:01, Section 27.
- Republic of Botswana Prisons Act, No 28 of 1979, part X11, Sections 88-95.
- Republic of Botswana Annual Report of the Commissioner of the Botswana Police for the Year 1989, Appendix A.
- Republic of Botswana Botswana Prisons Department Annual Reports for the Years ending December 1980-84.
- Resident Commissioner unsigned note, 8th October 1957, to High Commissioner's office, Pretoria (National Archives).

**Table 1**  
**Adult Convictions and Sentences Imposed, 1989**

	Imprisonment		Fine		Other		Total
	M	F	M	F	M	F	
<i>Division III - Offences Injurious to Public in General</i>							
Use of Insulting Language	21	49	553	280	308	22	1 233
Common Nuisance	9	2	646	53	276	7	993
Idle and Disorderly Person	No breakdown available						254
Nuisance by Drunken Person	3	-	175	8	47	11	234
Rape and Attempt	156	-	11	-	16	-	183
Rogues and Vagabonds	1	-	30	26	2	1	60
<i>Division IV - Offences Against the Person</i>							
Assault Common	159	33	2 170	357	1 598	24	4 341
Assault Occasioning Actual							
Bodily Harm	371	35	839	262	663	15	2 185
Unlawful Wounding	192	20	194	24	171	3	604
Grievous Harm	53	5	23	6	18	1	106
Other Assault	8	-	54	10	25	-	97
Resist Arrest	5	-	26	2	35	-	68
<i>Division V - Offences Against Property</i>							
Theft	475	105	849	401	895	29	2 754
Stealing Stock	478	2	198	9	66	1	754
Theft by Clerk/Servant	82	47	161	150	170	12	622
Housebreaking and Theft	242	17	95	19	83	-	456
Burglary and Theft	216	4	53	4	63	-	340
Storebreaking and Theft	165	-	60	-	59	-	284
<i>Other Offences</i>							
Habit Forming Drugs	131	52	366	135	248	-	932
Road Traffic Act	12	-	24 718	1 469	2	-	26 201

Source: Annual Report of the Commissioner of the Botswana Police for the Year 1989.

**Table 2**  
**Adults Sentenced to Imprisonment and Released on Extra Mural Labour, 1980-88**  
**Sentenced to Imprisonment      Released on EML**

1980	3 528	64	(1,81%)
1981	3 310	136	(4,11%)
1982	3 236	124	(3,83%)
1983	4 996	149	(2,98%)
1984	5 019	175	(3,49%)
1985	5 385	189	(3,51%)
1986	4 924	102	(2,07%)
1987	4 648	139	(2,97%)
1988	4 057	121	(2,98%)

Source: Prisons Department Annual Reports, 1980-1988.

## **Appendix: Probation in England and Wales**

Under the provisions of the 1908 Probation of Offenders Act, probation officers were appointed to “advise, assist and befriend” people who were brought before the courts for the first or second time, in the hope that they might be deterred from committing further offences. Probation was perceived as offering them a chance to prove themselves.

As the century has moved on, and with different political climates, the expectations of probation officers have changed and increasingly they have found themselves dealing not just with first or second offenders but with people who may have offended several times and been sentenced in a number of ways, including imprisonment. The assistance offered includes counselling related to personal problems, training in social skills, and practical assistance in finding work or accommodation. Typically, offenders have to report to their probation officer on a regular basis for between six months and three years, and receive visits at home.

The Probation Service is also responsible for a range of other programmes, including Community Service Orders under which offenders are required to undertake useful work in the community for up to 240 hours; running hostels; and running day centres where people receive intensive education and training; and programmes related to substance abuse.

Probation officers in England and Wales hold the same qualifications as social workers in local authorities or voluntary agencies but they receive particular training in working with prisoners and in court work, including the writing of Social Enquiry Reports (SERs). A SER provides a court with information about an offender’s background and personal circumstances, discusses her/his involvement in the offence and makes a recommendation as to a sentence which will permit the person to remain in the community.

It is a fundamental belief of probation officers that imprisonment does not rehabilitate, that it can be a damaging, destructive experience both for offenders and their families, and has little or no deterrent effect.