Criminal Justice Committee

2nd Meeting, 2022 (Session 6), Wednesday 18 January 2023

Bail and Release from Custody (Scotland) Bill

Note by the clerk

Background

1. The Committee is continuing to take evidence on the Bail and Release from Custody (Scotland) Bill at Stage 1 of the Parliament's legislative process.

2. The Bill proposes changes to the law in two main areas:

   - decisions about granting bail to people accused of a crime
   - arrangements for the release of some prisoners and the support that is provided to those who leave prison.

3. When a person accused of a crime appears in court, the court has to decide whether they should be remanded in custody or remain in the community on bail while they await their trial.

4. Part 1 of the Bill makes changes to the current law relating to bail in four areas:

   - requiring justice social work to be given the opportunity to provide information to the court when making decisions about bail
   - changing the test that the court must apply when making decisions about bail
   - requiring the court to record reasons for refusing bail
   - allowing time spent on electronically monitored bail to be counted as time served against a custodial sentence.

5. Part 2 of the Bill makes changes to some prisoner release arrangements and the support provided to those being released. These include:

   - preventing prisoners from being released on:
     - Fridays or the day before public holidays (adding to the existing requirement that prisoners are not released on Saturdays, Sundays and public holidays)
     - Thursdays in some circumstances

- replacing home detention curfew for long-term prisoners with a new system that will allow them to be temporarily released to support their reintegration – subject to risk assessment and consultation with the Parole Board
- giving the Scottish Ministers power to release certain prisoners early in emergency situations to protect the security and good order of prisons or the health, safety or welfare of those in prison
- requiring certain public bodies (for example local authorities and health boards) to engage in release planning for prisoners
- requiring the Scottish Ministers to produce minimum standards for throughcare support, provided to prisoners throughout their time in prison and during their transition back into the community
- allowing victim support organisations to receive certain information about prisoners, including about the release of prisoners.

Finance and Public Administration Committee

6. The Finance and Public Administration Committee is responsible for scrutinising Financial Memorandums (FMs) to Bills. The Committee ran a call for views on the FM for the Bail and Release from Custody (Scotland) Bill between July and September 2022 and received three responses, from Victim Support Scotland, Police Scotland and Glasgow City Health and Social Care Partnership.

7. The Finance and Public Administration Committee wrote to the Criminal Justice Committee to highlight the contents of these responses and refer them for its consideration as part of evidence taking at Stage 1.

8. These responses have been published on the Scottish Parliament's call for views website.

Today's meeting

9. At today's meeting, Members will hear from the following witnesses—

Panel 1

- **Stuart Munro**, Convenor of the Criminal Law Committee, Law Society of Scotland
- **Fred Mackintosh KC**, Faculty of Advocates
- **Joanne McMillan**, Committee Member, Glasgow Bar Association

Panel 2

- **David Mackie**, Howard League Scotland
- **Professor Nancy Loucks**, CEO, Families Outside
- **Wendy Sinclair-Gieben**, HM Chief Inspector of Prisons, HMIPS

Panel 3

- **Chief Superintendent Gordon McCreadie**, Divisional Commander, Criminal Justice Services Division, Police Scotland
- **Chief Inspector Nick Clasper**, Policy and Partnerships, Criminal Justice Services Division, Police Scotland

10. Where an organisation has provided a submission to the Committee's call for views on the Bill, this can be found below at the Annex.

Previous witnesses

11. At previous meetings, the Members have heard from the following witnesses—

14 December 2022

Panel 1

- Charlie Martin, Stakeholder and Policy Lead, Wise Group
- Lynne Thornhill, Director of Justice Services, SACRO
- Tracey McFall, Member of Executive Committee of the Criminal Justice Voluntary Sector Forum

Panel 2

- Gillian Booth, Justice Service Manager, South Lanarkshire Council
- Sandra Cheyne, National CIAG Policy & Professional Practice Lead, Skills Development Scotland
- Rhoda Macleod, Head of Adult Services (Sexual Health, Police Custody & Prison Healthcare), Glasgow Health & Social Care Partnership

Panel 3

- Sharon Stirrat, Justice Social Work Policy and Practice Lead, Social Work Scotland
- Keith Gardner, CJS Specialist Adviser, Community Justice Scotland
- Suzanne McGuiness, Executive Director of Social Work, Mental Welfare Commission for Scotland

11 January

Panel 1

- Kate Wallace, Chief Executive, Victim Support Scotland
- Emma Bryson, Speak out Survivors

Panel 2

- Dr Hannah Graham, Senior Lecturer, Sociology, Social Policy & Criminology, University of Stirling
- Professor Fergus McNeill, Professor of Criminology & Social Work, University of Glasgow
- Professor Lesley McAra, Professor of Penology, Edinburgh Law School, University of Edinburgh

Clerks to the Committee
January 2023

Annex: Written Submissions

Panel 1

Written submission from the Law Society of Scotland

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

General approach

Do you have any comments on the general approach taken in relation to the use of bail and remand?

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Bail and Release from Custody (Scotland) Bill. The Committee has the following comments to put forward for consideration.

The committee notes that the basis for this consultation lies in the significant number of accused persons who appear from custody and are remanded whilst awaiting sentence or trial. We note that the remand population in Scotland has grown significantly since the beginning of 2022 with untried prisoners making up 25% of the prison estate [Justice Analytical Services : Safer Communities and Justice Statistics Monthly Data Report, August 2022 edition - gov.scot (www.gov.scot)] posing difficulties for those managing the prison population.

However, since the Covid-19 pandemic, the numbers of people appearing from custody have reduced significantly. The majority of those arrested for an offence are now released either for a report to the Procurator Fiscal or on police bail in the form of an undertaking to appear, consistent with the right to liberty under Article 5 of the European Convention on Human Rights [European Convention on Human Rights (coe.int)].

In effect, those now appearing from custody only do so where the police have taken a view on matters. That is to say that they have assessed the offence to be of such seriousness to merit being kept in custody or they have considered that there is a significant risk to either the complainer or the public. The framework for the Police decision making includes the Lord Advocate's Guidelines on Liberation by the Police [Lord Advocate's guidelines on liberation by the police during COVID-19/ coronavirus | COPFS].

Nevertheless, the proposals in this Bill are welcomed as they contain some significant improvement to the current arrangements.

We note the findings of Scottish Crime and Justice Survey 2019/20, which found that 35% of the public were confident that appropriate sentences are given which fit the crime [Scottish Crime and Justice Survey 2019/20: Main Findings (www.gov.scot)]. As the survey report notes, it is unclear whether this indicates that sentences are too lenient or too severe, which would need to be explored in a future survey. It is crucial that there is public confidence in the justice system and its outcomes. The proposals regarding release from custody, if implemented, will need to be adequately communicated to the public and accompanied by research to understand whether the objectives of these reforms are being achieved.

Do you have any comments on the general approach taken in the Bill to the arrangements for the release of prisoners?

As above

Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?

Specific proposals

Input from justice social work in relation to bail decisions

We welcome this proposal and note that there is reference within the consultation paper to additional funding requirements. We state that there should be no doubt that these proposals will require substantial additional funding and personnel.

Grounds for refusing bail

We note that each case appearing before the court is different in its own facts and circumstances. We note that judges currently give consideration to these matters and grant bail in each case on the basis of their own particular merits.

Removal of bail restrictions

We note and welcome the proposal to abolish section 23D of the Criminal Procedure (Scotland) Act 1995.

Stating and recording reasons for refusing bail

Each case appearing before the court is different. We note that judges currently give consideration to these matters and grant bail in each case on the basis of their own particular merits. We appreciate that any requirement for Judges to provide written reasons for remand decisions will create additional time and pressure constraints on custody courts. Conversely, given that a person’s liberty is to be taken from them, it does seem appropriate that written reasons for this should be provided. As such we agree with the proposals set out in the Bill.

Consideration of time spent on electronically monitored bail in sentencing

We are of the firm view that time spent on electronically monitored bail should be taken into account at the point of sentencing. Often an accused can be on bail, with stringent conditions attached, for many months. Electronic monitoring whilst on bail is the equivalent of a Restriction of Liberty Order (ROLO).

Prisoners not to be released on certain days of the week

We believe that the proposals set out in the Bill are appropriate step provided that no person exceeds the duration of their sentence as a result.

Release of long-term prisoners on reintegration licence

We note that good behaviour, completion of education or rehabilitation programmes demonstrate an individual's suitability for early release, or to complete their sentence in the community. It remains important that each individual's circumstances are determined on their own merit, and that these activities do not become a 'tick box' exercise to demonstrate suitability.

Emergency power to release prisoners early

We agree that there should be an emergency power of release. This should not be as broad a power as in England and Wales, where the Secretary of State is satisfied that it is necessary to do so in order to make the best use of the places available for detention. Rather, this should be allowed in exceptional circumstances in which it would otherwise not be possible to safely manage the prison estate. This could include circumstances such as faced during the pandemic, or fire, flooding or other emergencies noted in the Bill.

Duty to engage in planning for the release for prisoners

We have no comment to make here.

Throughcare support for prisoners

We note from the Bill that there should be a general duty on public services, to ensure the public and third sector services are aware of and able to meet the needs of individuals on release. So often those who serve short sentences are released without any form of support package available to them. As such, we welcome this proposal. However, we do note that this will depend on providing Public Services with adequate funding and personnel.

We welcome the inclusion of the standards to be placed in legislation. This may assist in ensuring that services are available locally across Scotland, but also to standards set nationally, to ensure a consistent approach.

Provision of information to victim support organisations

We are of the view that there would need to be clarity around what information was to be shared. We consider that wider data sharing would need to be carefully considered, to ensure that there is a lawful basis for the processing, that the information shared is proportionate and that this information is held only for so long as is relevant for that processing.

Other views

Do you have any other views on the Bill?

We have no comment to make here.

Written submission from the Faculty of Advocates

Part 1 – Bail

General Approach

1. Faculty welcomes the general approach taken in part 1 of the bill in respect of the use of bail and remand. If the intention of the Government and Parliament is to reduce the use of remand and limit it to those accused persons who pose a significant risk to public safety or to the proper administration of justice then the reinforcement of the presumption in favour of bail that is provided for by this part of the bill is, subject to comments of detail and clarification below, to be welcomed.

Specific proposals

Clause 1: Input from justice social work in relation to bail decisions

2. Faculty welcomes this clause and the introduction of a formal requirement that the court consider information from a justice social worker when making a decision regarding bail at first appearance. This will help give effect to the principle that bail is only refused where there is a good reason for doing so and will provide an additional safeguard against the damaging effects of short periods of custody on persons who are presumed by the law to be innocent until proven guilty.

3. Faculty would point out that the production of such "Bail Information Reports" was something close to standard practice in sheriff courts across the country until around a decade ago and these were found useful by sheriffs and both prosecution and defence lawyers. In recent years it seems that fewer such reports are being produced. If this new clause is to have the intended effect, it will be necessary to provide the resources to ensure that there are sufficient criminal justice social workers to produce reports in the numbers required.

4. However, Faculty would point out that many of the same considerations will apply where an accused person seeks bail at a later hearing on the basis of a material change of circumstances using the Bail Review provisions under section 30 of the Criminal Procedure (Scotland) Act 1995 or where the prosecutor seeks to review bail under section 31. Faculty would suggest that the scope of clause 1 be expanded to enable the court to request such additional information from a justice social worker during such a review procedure.

Clause 2: Grounds for refusing bail

5. Faculty supports the proposed changes to the bail test in section 23B of the 1995 Act. It has long been the case that an accused should be granted bail unless it can be shown that there are good grounds for not granting it (Lord Justice-Clerk Wheatley in Smith v M 1982 JC 67 p. 68), but the proposed new structure to section 23B could well have the effect of making it more difficult for a court to refuse bail. This is because whilst it will remain the case under subsection 23B(1A)(a) that bail can be refused if one of the specific grounds identified in section 23C of the 1995 Act

are engaged, the proposed new subsection 23B(1A)(b) will be more tightly drawn than the older section 23B(1). The existing requirement that there be “good reason for refusing bail” is broad. For example, the court decision in Smith v M is authority that a breach of the trust of the court (such as offending whilst on bail or licence) currently creates a reverse presumption that bail should be refused. The proposed change tightens and narrows that requirement so that the court may only refuse bail if it considers it necessary, firstly in the interests of public safety, or secondly to prevent a significant risk of prejudice to the interests of justice. Whilst in many cases accused persons who are alleged to have breached the trust of the court by offending will meet the requirements of the new subsection 23B(1A)(b), not all will.

6. Furthermore as the twin requirements of the new section 23B(1A)(b) are more focused on the risk that the accused will do something undesirable, there will be greater scope for the use of special conditions of bail for the purposes of section 23B(2) to protect the public interest, so that bail can be granted. If the relevant considerations of (i) public safety; or (ii) risk of prejudice to the interests of justice, can be allayed by such conditions, there is less scope for the court to refuse bail.

7. Faculty welcomes the proposed change to prevent the reason in section 23C(1)(a) being applied to accused persons in summary proceedings who have never failed to appear at court. This change should help to ensure that in summary proceedings accused persons are not remanded and their lives disrupted, on the basis of a speculative fear that they will not attend at court.

Clause 3: Repeal of section 23D

8. Faculty welcomes the repeal of section 23D. This will end the situation whereby bail can only be granted to accused persons in solemn proceedings who have certain broadly analogous solemn convictions if there are exceptional circumstances. The experience of those members of Faculty who practise in this area is that section 23D has probably ensured the remand of accused persons who would not otherwise have been remanded. Although the number has not been large over the years, these would typically have been persons in their thirties or older who had acquired a qualifying solemn conviction when much younger or persons who had, unusually, received a non-custodial disposal for their previous qualifying solemn conviction. It is difficult to see how such persons would pose a real risk to the public interest if at liberty, and to that extent it is likely that the proposed change will result in more accused who would previously have been remanded due to section 23D, being admitted to bail.

Clause 4: Stating and recording reasons for refusing bail

9. Faculty is supportive of this clause. There is no good reason why a court should not be required to state its reasons for refusing bail. An accused person is innocent until proven guilty. They and the wider public need to know the basis of any deprivation of their liberty.

10. That said, it is significant that, quite properly, the right to appeal a decision on the question of bail under section 32 is not subject to any requirement of leave. This

means that if a court does not give reasons when bail is refused there is little reason for an accused not to appeal. In any such appeal the sheriff must produce a report for the Sheriff Appeal Court. Some of these reports are brief in the extreme. The problems in the current system have been judicially noted by the Sheriff Appeal Court in the unreported case of Munro v Procurator Fiscal, Dumbarton SAC/2021/000109/BA, in which it was accepted that a lack of clarity in the report of a first instance decision-maker in terms of whether the bail test had been properly applied, entitled the Bail Appeal Court to consider the question of bail de novo. It is entirely unsatisfactory that certain reports are unclear as to why bail has been refused in a given situation. A duty to give reasons at the time will help to ensure that there is a clear rationale for the refusal of bail.

11. Accordingly, a formal public statement of the reasons for refusal of bail or imposition of special conditions would not only ensure an accused and their legal representatives understand the decision, but would also ensure that the defence can make an early assessment of whether to appeal under section 32. Similarly, the giving of reasons may also prevent unnecessary Crown Bail Appeals which have the effect of retaining an accused person in custody until the appeal has been determined.

12. There are, however, issues with the level of detail that is to be required by the proposed subsection 2AA. Faculty believes that given the importance of the requirement in subsection 23B(2) to consider whether any risks may be allayed by the imposition of bail conditions, the new subsection 2AA should also require the court to explain why they consider that such conditions would not be sufficient to allay such risk. If special conditions of bail would be sufficient to allay the risks posed by the accused, and there is no inference which may be drawn that such special conditions would not be obtempered, there is no justifiable basis for remanding a criminal accused. Faculty would accordingly propose the extension of the proposed subsection (2AA) in this regard to include the duty to give reasons (if refusing bail) as to why special conditions would not have been sufficient.

Clause 5: Consideration of time spent on electronically monitored bail in sentencing

13. Faculty agrees with the intention of this clause but sees no good reason why, if credit is to be given to persons who have spent time on electronically monitored bail, that credit should not also be given to those placed on a bail curfew without electronic monitoring. Such curfews can last many months and in some cases for a year or more. In *McGill v HM Advocate* 2014 S.C.C.R. 46 the High Court of Justiciary Appeal Court decided that *"a normal night-time curfew condition, which has been in effect for a period of some months, should not be regarded as something which requires to be reflected by way of a reduction in sentence"* on the grounds that it was imposed *"for the protection of the public and not as a punishment for the offender"*. Faculty considers it unlikely that the re-introduction of electronic monitoring of bail (previously introduced by section 17 of the Criminal Procedure (Amendment) (Scotland) Act 2004 and repealed by section 59 of the Criminal Justice and Licensing (Scotland) Act 2010) will prevent some sheriffs choosing to impose curfew conditions that are not electronically monitored as special conditions of bail. Accused persons subject to the onerous, but justified, interference in their liberty caused by

simple curfews are just as significantly affected as those who will have their liberty restricted by the revived electronically monitored bail. The intention of the proposed new section 210ZA could be equally well accommodated by adding a period of time spent on a qualifying curfew (without reference to electronic monitoring) to section 210(1) of the Criminal Procedure (Scotland) Act 1995.

Part 2 – Release from Custody

General Approach

14. Faculty notes that it is proposed to introduce these changes by amendment to the Prisoners and Criminal Proceedings (Scotland) Act 1993. This is a complex piece of legislation that is already difficult to understand and apply. These amendments do not make easy reading. They require care, and good understanding of the whole scheme of the 1993 Act, to properly understand. Faculty is concerned that adding further complexity to the 1993 Act will simply make that legislation harder to understand and do nothing to assist the public in understanding the system for the early release of prisoners.

15. The opportunity could be taken to add clarity to the 1993 Act. If, as appears from the Explanatory Note, the intention is that section 3AA of that Act will now only regulate Home Detention Curfew for short-term prisoners then the section title should be changed to "**3AA – Power to release short-term prisoners on Home Detention Curfew**". Similarly, the new section 3AB should be titled "**3AB - Power to release long-term prisoners on Reintegration Licence**".

Specific Proposals

Clause 6: Prisoners not to be released on certain days of the week

16. Faculty welcomes the proposal to limit the release of prisoners on Fridays (or Thursdays where they would otherwise be released on Friday, Saturday, Sunday, a public holiday, or the day before a public holiday). The problem of prisoners being released and then being unable to find housing or access to support services is a significant issue. Subject to resources being made available for the housing of released prisoners, this proposal has the potential to benefit both those prisoners and the wider society.

Clause 7: Release of long-term prisoners on reintegration licence

17. Faculty has concerns with this proposal. If we understand it correctly it is designed to create the means to release long-term prisoners on a reintegration licence up to 180 days before the halfway point in the sentence in order to assist with their re-integration into society. Faculty welcomes the principle but has some concerns about how the new sections 3AB and 3AC are structured.

18. Faculty understands that the current practice is for the Scottish Ministers to refer long-term prisoners to the Parole Board for Scotland sufficiently far in advance of their half time qualifying date to enable the Parole Board to make a decision in good

time, so that prisoners suitable for release on licence can be released on their parole qualifying date. The proposal is that the Scottish Ministers could then release those prisoners on a special Reintegration Licence up to 180 days before their half time qualifying date. This is an idea that could well have merit. The problem is that these proposed provisions appear to also permit the release of prisoners who have yet to have their half time release considered by the Parole Board under section 1(3) with the possibility that those prisoners might find their “Reintegration Licence” revoked if the Parole Board later decides that they should not be released on a conventional section 1(3) licence.

19. Where a prisoner is released early on a Reintegration Licence, but then commits a further offence or breaches a licence condition, then it would be understandable that they be returned to prison. Faculty is, however, concerned that the proposed test for the Scottish Ministers releasing prisoners under section 3AB(4) is different to the test generally used by the Parole Board when making a direction under section 1(3). This is that the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. This must raise the possibility that a prisoner on a Reintegration Licence might be returned to prison after a section 1(3) parole hearing because when the Scottish Ministers decided to release him on that Reintegration Licence the desirable need to see his successful re-integration into the community was a mandatory consideration under section 3AB(4), but would not necessarily have been as significant at a section 1(3) parole hearing. The same test should be used by both the Scottish Ministers and Parole Board on every occasion when consideration is being given to releasing a long-term prisoner on licence, that is; whether it is no longer necessary for the protection of the public that the prisoner should be confined.

20. Faculty notes that the Scottish Ministers acknowledge the Parole Board's expertise in risk-based decision-making and would wish to be required to consult the Board prior to releasing a prisoner, but are proposing to create a system of Reintegration Licences that has the potential to be inconsistent. Given that the Parole Board is the independent tribunal with overall responsibility for releasing prisoners on licence based on whether the risk they pose can be safely managed in the community, Faculty believes that the new clause should be structured in such a way that release on an Reintegration Licence up to 180 days before a prisoner’s half time qualifying date can only occur once the Parole Board has already directed release under section 1(3).

Clause 8 - Emergency power to release prisoners early

21. Faculty has some concerns about this proposed change. 22. Faculty recognises that these proposals arise in the wake of the Covid-19 pandemic and seek to ensure that the prison system is ready for the next pandemic or similar emergency. Given that duties of care are owed towards those in custody, and those who work in Scotland’s prisons and young offender’s institutions, Faculty agrees that in the event of a further public healthcare emergency, appropriate steps to ensure the health and safety of both prisoners and prison staff are necessary.

23. Faculty welcomes the way that the clause restricts the power of the executive and allows for parliamentary scrutiny of the necessary regulations, even if they are described in the inevitably subjective terms of “necessary” and “proportionate”.

24. Of greater importance, not least for the public perception of early prisoner release and the risk of a devaluation of the sentences imposed by the courts, is that it does seem that the only long-term prisoners who could be released under these provisions are those who do not pose a risk to an identified person and whose release has already been recommended by the Parole Board at the date of the creation of the regulations. Faculty welcomes this restriction.

25. Faculty does have concerns about the limiting of the restriction in proposed section 3C(4)(b) to prisoners not considered to pose an immediate risk of harm to an identified person. Faculty would draw the Committee’s attention to this provision. It might be considered more appropriate to replace “an identified person” with “the public”. As currently framed, a generalised risk of harm, as opposed to a specific risk of harm, would be insufficient for the governor to block release. This might come as a surprise to the public at large.

26. Faculty welcomes the oversight of the Scottish Parliament and the use of the affirmative procedure for approval of regulations, as even in the sort of extreme situation that would bring about such regulations, the need for democratic accountability remains important.

Clause 9 - Duty to engage in planning for the release for prisoners

27. Faculty welcomes the creation of this statutory duty, but would observe that whilst investment in release planning is highly likely to result in a reduction to re-offending, effective planning will be a substantial cumulative cost to the bodies listed in proposed new subsection 34A(2). It will be necessary to ensure that those bodies have the resources to enable them to deliver effective release planning.

Clause 10 - Throughcare support for prisoners

28. Faculty does not feel able to comment on the merits of the proposed new duty.

Clause 11- Provision of information to victim support organisations

29. Faculty broadly welcomes these proposals as they should help to ensure that victims of crime can receive support from victim support organisations when there is a prospect that a relevant offender is to be released. Faculty is, however, concerned that the Bill does not set out the criteria to be satisfied before a requesting supporter can obtain information in relation to a convicted person in terms of proposed sections 16ZA(1)(b) and 17ZA(1)(b) (amending the Criminal Justice (Scotland) Act 2003) and section 27B(1)(b) (amending the Victims and Witnesses (Scotland) Act 2014).

30. There is a clear basis for allowing victims to decide to whom information about offender release should be provided. However, if a supporter can decide they should

receive such information independent of the wishes of the victim, Faculty considers that there is a risk that such a power could be improperly used (in the absence of express criteria grounding such power in the interests of the victim). The Bill provides a rationale for the supporter to act under these sections, and should also restrict the power of any supporter to gather protected information independently of the needs and welfare of the victim.

31. Furthermore Faculty is concerned that proposed subsection 16ZA(3) unreasonably restricts the ability of the Scottish Ministers to take the view that an organisation that claims to be a victim support organisation is not a suitable organisation to receive information. Faculty would suggest that the Scottish Ministers have a duty of care to vulnerable victims to ensure that unsuitable organisations do not seek to present themselves as offering support when they are either incapable of providing support or have an interest that is at variance with the interest of the victim. The proposed drafting of this clause limits the ability of the Scottish Ministers to afford protection to victims in this respect.

32. Faculty also considers that no good reason has been given for the Scottish Ministers to be able to modify this act in the manner proposed in proposed subsection (7).

Panel 2

Written submission from Families Outside

Families Outside is the only national charity in Scotland that works with children and families affected by imprisonment.

General approach

Do you have any comments on the general approach taken in relation to the use of bail and remand?

Families Outside supports the ambition set out in the Programme for Government 2021-22 that "As a progressive and humane society, we should be working towards using prison only for those who pose a risk of serious harm". The issues arising from high levels of remand in Scotland have been well-documented for some time, with the previous Justice Committee completing its own inquiry in to the issue in of remand use in Scotland in 2018.

Families Outside are therefore supportive of the general ambitions of the bill to try and help tackle this issue by strengthening the legislative basis for bail making decisions.

Families Outside would like to note that in some cases, families of an accused person are also direct as well as circumstantial victims. It is important that the impacts of bail decisions on families are taken into account. Families face a great deal of uncertainty during the time they are indirectly affected by the justice system, but this is particularly the case during legal proceedings. Families often feel powerless, as decisions on bail and/or remand are completely out of their hands, they have very little, if any, opportunity to share their views.

Do you have any comments on the general approach taken in the Bill to the arrangements for the release of prisoners?

Families should be considered and included when prisoners are being released. Family members can also be direct victims, additionally family members can often be significantly financially and emotionally impacted by the release of prisoners; often being left with no support or information.

Families Outside would fully advocate and support the return of Throughcare Support Officers to support the release of people who serve a custodial sentence. TSOs were an important single point of contact which helped Families Outside's Support & Information Helpline to receive and relay vital information on the throughcare and release arrangements for people in prison. Reinstating TSO's would also ensure the prisoners' views can be heard in the process and their rights are upheld in relation to ongoing treatment and care.

Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?

Families Outside believes it is important that the reasons for refusing bail are written so that they can be referred back to by individuals, as well as helping to build the evidence base and our broader understanding about the reasons why people are remanded. The reasons should therefore be recorded in clear, accessible language to make it easy for individuals and their families to understand.

In addition, Third sector partners can provide useful inputs about an individual's strengths, needs and local service availability for families of individuals accused of a crime. It is therefore crucial that families are continuously kept informed throughout the legal process.

Specific proposals

Input from justice social work in relation to bail decisions

Families Outside agrees in principle that input from justice social workers should be encouraged in relation to court decisions on whether pre-trial bail should be granted. In order to ensure that this is implemented effectively, we would encourage the Committee to consider the following questions:

- Not all courts have court based social workers – How will the risk that people get remanded in order to get a court report be mitigated against?
- This is likely to have resource implications for Justice Social Work. How will these resource implications be addressed?
- In some instances, other partners (e.g. defense lawyers, third sector organisations working with individuals and families) may also hold relevant information that could be used by the court to inform decision making. What processes can be put in place to enable this to happen in practice?

Families Outside cannot stress enough, the importance strong family contact can be have in helping to reduce the likelihood of reoffending. We would like to take the opportunity to raise the need to reflect more effectively, the unique role that families play but also their own unique needs: families are more than a tool in their family member's resettlement.

At present, the views of families are seldom heard, and they are all too often the last to receive vital information on decisions taken by Courts, the prisons, and the Parole Board that directly affect them. This must change to ensure that all of these stakeholders obtain the views of and impact upon families, take these into account, and communicate and explain decisions to families.

Article 3: The best interest of the child needs to be considered in any decision that concerns them. Decisions made in adult criminal courts about their close family will invariably have an impact on the child as well, though children tend to be invisible to such processes. Children need to be recognised as relevant actors in these

circumstances, with any impact on (for example) their parent also making a difference to their own lives.

Article 12: The right for children to express their views in any decision affecting them, directly or indirectly, is relevant whether the child is a victim or has a family member who is the complainer or the accused. Children and young people may need support to ensure their views are heard and considered.

Article 20: The right to support for children unable to live with their parents primarily applies to children placed in kinship or local authority care. This can be another by-product of a parent's imprisonment, again showing the impact of offending on innocent bystanders, even when they are not themselves the target of the offence. Children in this situation will nevertheless need and merit support and are easily forgotten in criminal justice processes.

Consideration of time spent on electronically monitored bail in sentencing

Families Outside believes that any time already spent with a reduction of liberty should be taken into account at the point of sentencing. In the same way that time spent in custody on remand is taken off a custodial sentence, time spent on bail with Electronic Monitoring should also be taken into account. It should also be noted that an individual's compliance with bail EM requirements could also be a useful indicator of an individual's ability to comply with a community order.

We would like to highlight the wider impact EM can have on families. Families Outside was involved in a piece of research talking to families about what it was like for them. You can find out more information here - https://www.familiesoutside.org.uk/content/uploads/2019/04/In-Brief-14-digital.pdf

EM can provide more opportunity to have a family life but it can also place extra stress and expectations on families to support compliance with it. The needs of families involved have to be considered as part of the approach if imposing EM and extra support put in place in required.

Prisoners not to be released on certain days of the week

Families Outside believes that duties should be placed on public services to provide 'wrap-around' support when someone leaves prison, for instance a prescription being given that can be taken to any pharmacy in Scotland; registration with a GP and health board taking place before a person is liberated; and ensuring benefits are in place and accessible at the point of release.
Housing - Housing departments should make sure that every person leaving prison has a safe, comfortable place for a person to reside. They should also ensure that there is a means of getting to the property particularly if it is in a more remote or rural area.

NHS - The NHS should provide a prescription for any necessary medication that can be taken to any pharmacy. They should also ensure that a person is registered with a GP practice, dentist, and health board. Any ongoing health needs should have

required appointments scheduled, and a health check up should also be scheduled with a GP as is often offered to people moving to a new GP surgery.

Welfare/ DWP - The discharge grant should be reviewed, and a discharge grant should be put in place for people leaving remand. This should be enough to last a few weeks. The DWP should put processes in place to ensure that people leaving prison are registered for appropriate welfare support accessible from the point of release.

Families Outside supports proposals to end Friday, Saturday, Sunday, and Bank Holiday release. We are aware through various FOI requests that there have been sporadic weekend releases over recent years.

Prior to COVID, the working assumption was that release on any day between Monday and Thursday would allow for greater access to vital services such as GP practices and housing offices. Given the impact of the pandemic, we feel that it is no longer enough simply to arrange appointments for people being released. Access to these services is greatly reduced to the wider population; for example some council offices are now open shorter hours during the day, and some GP practices are only accessible for phone consultations. At the point of release, we feel that every person leaving prison should have a suitable place to go home to, necessary prescriptions that can be taken to any chemist in Scotland, and an appropriate sum of money to last until benefits are reinstated.

Families Outside supports CJVSF views on this section highlighting the practical challenges this will have on the third sector and its ability to support this, highlighting it will need resourced adequately. We also support CJVSF views of the practical elements to be considered for families, victims and support agencies. This means effective communication and support given to all to explain why release dates are brought forward and that these are supported and resourced effectively.

Emergency power to release prisoners early

While changes to this does raise some concerns over adaptations to affirmative procedure without appropriate parliamentary scrutiny, at Families Outside we have heard of emergency situations where early release of prisoners would have been appropriate and of benefit to the family, the prison and to the person in custody. When people in prison become terminally ill, prisons can often be unequipped to provide the care and support required to that person. The person in prison has a Right to Health and often this is at risk in certain circumstances. We have heard instances where people in prison were not moved to palliative care in a timely manner which meant the family never got to spend quality time with their loved one before they passed away. This has had significant knock-on effects for the wider family involved. Prison processes and procedures are often not compatible with compassionate and kind responses when someone is saying goodbye to a close family member, regardless of whether that person is in prison they are often a good mother, father, son or daughter to someone on the outside. The involvement and communication with family members during this difficult time can also be restricted due to prison rules.

Families Outside would like to see a needs-led approach to situations where someone is coming to the end of their life while still in custody and powers granted to see early release in some situations.

Duty to engage in planning for the release for prisoners

Families Outside would like to see statutory require for early and effective engagement with the individual in prison, families, and support networks in the community and relevant general services to support reintegration a part of a holistic approach of protective factors to support and plan effectively for a person's release.

Resources and support must also be targeted at the family where the person being released is often returning too. We know the financial impact of imprisonment on families is significant and this can also be the case on a person's release, both emotionally and financially on the family. A whole family approach during this time can be vital to the success of reintegration into the community.

Throughcare support for prisoners

We welcome the proposal to publish and keep under review minimum standards applying to throughcare support for both sentenced and remand prisoners.

Families Outside would ask that family involvement and support for families is included here to support successful reintegration of people on release.

Written submission from the Howard League Scotland

Howard League Scotland (HLS) was established in 1979 as a separate organisation from Howard League for Penal Reform (England and Wales) in order to focus on the distinctive features and needs of the Scottish penal system. We are the only independent penal reform campaigning charity in Scotland, resisting any form of statutory funding to preserve independence of thought and political impartiality.

We have 10 Committee Members, with backgrounds in academia; the judiciary; social work; and rehabilitative services. Each offers 10+ years of experience in a specific area of penal reform and the Committee therefore has expertise in Community Justice; offender rehabilitation and support; restorative justice; women and young people in the justice system; desistance and recovery; employability and disclosure; penal philosophy; addictions; imprisonment; parole and sentencing policy. All Committee Members are volunteers and they are supported by one contracted Policy and Public Affairs Adviser (0.5FTE).

1.Do you have any comments on the general approach taken in the Bill to the following?

a. The use of bail and remand

b. Arrangements for the release of prisoners

a) Howard League Scotland supports the general approach taken to the use of bail and remand in the Bill in line with the Scottish Government's Programme for Government 2021-22 commitment "to change the way that imprisonment is used" and that "[a]s a progressive and humane society, we should be working towards using prison only for those who pose a serious risk of harm"[1]. We also need to recognise, that in certain cases, the factors that have brought people into conflict with the law cannot be resolved by the criminal justice system, let alone by the use of imprisonment.

It is a bold assertion that Scotland is not making the correct use of prison - including remanding far too many people - and this must change. We have previously described the excessive use of remand in Scotland as "a scandal"[2] and note that similar concerns have been raised by the Scottish Human Rights Commission and HMIPS over a number of years.
It is imperative that "the warehousing problem", using prison as "a place to hold the damaged and traumatised"[3] is not perpetuated and we thus reiterate our agreement with Prof. Fergus McNeill's evidence to the Criminal Justice Committee - spanning both bail and release from custody parts of the Bill - that:

[1] A fairer, greener Scotland: Programme for Government 2021-22. Available at: https://www.gov.scot/publications/fairer- greener-scotland-programme-government-2021-22/ p.100
[2] Howard League Scotland (2021) The Scandal of Remand in Scotland: A Report. Available at: https://howardleague.scot/news/2021/may/scandal-remand-scotland-report-howard-league-scotland-%E2%80%93-may-2021
[3] Scotland's Choice Report of the Scottish Prisons Commission July 2008

"we do not rehabilitate prisoners well, we do not prepare them for release well and we do not support them on release well, because our system is chock-a-block with people who should not be in it."[4]

We welcome much of Part 1 (Bail) of the Bill, whilst also recognising that legislative reform is the first of many steps required to address our unnecessarily high prison population. Consequently, this could allow us to rectify instances where we are failing to meet our international human rights obligations, as repeatedly highlighted by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment.

We recognise the urgent need for this legislation and understand that not all aspects of proposals outlined in the original consultation have been progressed. However, this does leave us with some reservations, including why the Bill does not go further and prohibit the use of remand in circumstances where a custodial sentence is very unlikely. This has particular relevance to women, with 70% of women held on remand in prison in Scotland not going on to receive a custodial sentence[5]. We maintain that remanding someone who has no real prospect of receiving a custodial sentence is logically, financially and ethically unjustifiable. This should include the vast majority of summary prosecutions to which the presumption against custodial sentences of less than 12 months, the limit in summary cases, applies.

We also question why despite 79% of consultation respondents strongly or somewhat agreeing that the Court should be required to take any potential impact on children into account when deciding whether to grant bail, this has not been included in the Bill.

The Human Rights Act 1998 and the United Nations Convention on the Rights of the Child (UNCRC) 1989 require that the best interests of children with a parent in the criminal justice system are considered at all times, yet children's rights are rarely respected in adult criminal court proceedings. The Council of Europe has issued recommendations aimed at safeguarding the rights of children of imprisoned parents,[6] which recognise their vulnerability, seek to alleviate the negative impact upon them and uphold their right not be punished because of the status of their parent.

Whilst not directly referencing imprisonment on remand, the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders 2010 (the Bangkok Rules), which have been ratified by the UK, also state that if a

[4] https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13306 (p.31)

[5] Commission on Women Offenders Final Report (2012), Scottish Government

[6] Recommendation of the Committee of Ministers to member States concerning children with imprisoned parents. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807b3

custodial sentence is absolutely necessary, it should only be imposed after considering the best interests of any affected child[7].

We understand and appreciate that all legislation requires to be compliant with the above, but in order to foreground this important issue, we would urge reconsideration of these omissions from the Bill.

b) Howard League Scotland broadly supports the general approach taken to arrangements for the release of prisoners in the Bill. Taken alongside Part 1 (Bail) it acknowledges that issues with both the 'entry' and 'exit' doors of prisons need to be addressed, particularly in light of notable increases in sentence length.

Beyond the scope of this Bill, the National Community Justice Strategy[8] also has its part to play in diversion and early intervention. Overall efforts in this regard are therefore to be applauded, however, we must reiterate that the answers to our alarmingly high prison population do not all lie in the criminal or community justice spheres. As key drivers of offending behaviour, we cannot shy away from our wider responsibilities in terms of the alleviation of poverty and reduction in inequalities and marginalisation, especially true as we face a cost-of-living crisis.

Again, without seeking to minimise our general support for this part of the Bill, it does come with some caveats:

- elements of the Bill which concern duties to engage in release planning and throughcare appear to be mandating previous evidence-based guidance. It is disappointing that sufficient resources have not been made available to support this and that it should therefore require legislation to meet the most basic, human-rights based needs for prison leavers. In the absence of any sustainable progress in this area, we must somewhat reluctantly support the introduction of statute to effect this.

- it has been highlighted in various inspections by HMIPS and summarised in its most recent Annual Report that there are "significant and long-established problems with progression"[9] with documented instances where due to limited provision of offender management programmes, people have been kept in prison for much longer than they could (or arguably, should) have been, which raises vital questions of due process, justice and human rights. HMIPS's 'Thematic Review into SPS Risk Management, Progression and Temporary Release' thus acknowledges that the SPS's existing policy to provide a clear process and pathway to allow people to demonstrate their suitability for release is ineffective. We must then express our

[7] Available at: https://edoc.coe.int/en/children-s-rights/7802-recommendation-cmrec20185-of-the-committee-of-ministers-to- member-states-concerning-children-with-imprisoned-parents.html

[8] https://www.gov.scot/publications/national-strategy-community-justice-2/#:~:text=This%20revised%20National%20Strategy%20for,for%20partners%20to%20focus%20on.

[9] https://www.prisonsinspectoratescotland.gov.uk/sites/default/files/publication_files/HM%20Chief%20Inspectors%20Annual%20R eport%202021-22%20r.pdf

disappointment that the Bill does not reflect the consultation question(s) re the potential for prisoners to be able to demonstrate their suitability for early release through means other than rehabilitation programmes. We believe that too much emphasis is currently placed on completion of offending behaviour programmes as a gauge of someone's suitability for release and, in conjunction with appropriate risk assessments, a much broader view – accompanied by adequate throughcare - is required.

- we note that many of the clauses in Part 2 (Release from Custody) can be amended by affirmative procedure. This means that the Scottish Government can bring changes into force immediately. While the Scottish Parliament does need to approve the changes within 28 days for the law to stay in force, MSPs and the public can only consider, comment and vote on changes once they have come into force. This is an issue we have raised with the Justice Committee on numerous occasions, and it was agreed that the lack of meaningful scrutiny and accountability that this affords should minimised wherever possible. We would therefore request that the inclusion of amends by affirmative procedure be given further consideration.

2. Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?

We would suggest that significant cultural change – particularly amongst some parts of the Crown and judiciary - will be required for these changes to take effect, alongside considerable movement in operational practice and funding arrangements. However, as an advocacy organisation, we leave comment on this question to those who are more directly involved as practitioners in this field and are better placed to critique the Bill's practical implementation and resource implications.

3. What are your views on the proposal to encourage input from justice social workers in relation to court decisions on whether pre-trial bail should be granted and under what conditions?

The role of the Crown in asking the Court to refuse bail is significant and so consideration of this question cannot be in isolation from the desirability for the Crown to adopt a more analytical, risk assessment approach in individual cases at the marking stage. It is respectfully suggested that this would be likely to lead to a reduction in the number of cases in which the Court Depute Procurator Fiscal is instructed to oppose bail and that, in turn, would lead to a reduction in the number of those remanded. The adequacy of defence advocacy (and the extent to which defence agents have the time or resources to prepare arguments against remand); the availability of background information such as criminal justice social work reports or psychiatric assessments; and the availability of risk assessments are all factors which play a role in determining the outcome of a bail hearing.

There are too many cases – particularly involving women - where people are remanded into custody as a result of a lack of criminal justice social work reports. Even if the custody is for a very short period of time, this can have serious implications for anyone for whom they have caring responsibilities e.g. children or elderly or infirm relatives.

HLS would argue that without a social work report there is a lack of balance in the information available to the Court. Input from Criminal Justice Social Workers reflects the importance of their professional expertise and increased collaboration between the Crown and social work should ensure that a fuller picture of an individual's circumstances is available, including identification of resources which could be provided to support them whilst on bail as an alternative to remand. Support to aid the underlying causes of potential offending behaviour such as expediating access to addiction and mental health services should be prioritised, alongside practical support to ensure that all Court dates are met.

We note the wording of the Bill is that "the sheriff or judge must also give an officer of a local authority an opportunity to provide (orally or in writing) information relevant to that determination" (our italics). Our preference would have been for this to have been a mandatory requirement, but appreciate that since not all Courts have court-based social workers or supervised bail schemes and when there are timing issues pertaining to those who appear in Court directly from police custody, that this may not be operationally feasible. However, we do nonetheless remain concerned that the provisions as they stand could result in little change, with social work stating they did not have any meaningful 'opportunity' to provide evidence, simply because they were too overstretched or were otherwise unable to do so.

4. What are your views on the proposal to narrow the grounds upon which a court may decide to refuse bail by: a. Adding a specific requirement that reasons for refusing bail may include that this is necessary in the interests of public safety (including the safety of the complainer) or to prevent a significant risk of prejudice to the interests of justice b. Limiting the circumstances in which grounds for the refusal of bail in summary procedure (less serious) cases may include a risk that the person might abscond or fail to appear).

With circa 26%[10] of our over-crowded prisons (9 out of 15 which are at or over capacity) made up of people who have not been convicted of any offence, it is clear that we are not using prison only for those who pose a serious risk of harm. 57% of people (circa 70% of women) held on remand do not go on to be given a custodial sentence, underlining that remand is grossly over-used.

This is an opportunity to challenge the entrenched practices of some members of the judiciary who appear to accept the Crown's opposition to bail applications too readily, without reference to sufficient, individualised, relevant background material in each case. We agree that the grounds that are currently relevant in respect of refusal of bail by a court conflate a number of different types of risk, which are capable of being managed in different ways rather than requiring loss of liberty through refusal of bail.

We therefore support the amendments within Section 23B of the Criminal Procedure (Scotland) Act 1995, on the understanding, that it states that "[b]ail is to be granted to an accused person unless the court determines that there is good reason for refusing bail"; that at least one of the grounds specified in section 23c(1) applies; and

[10] https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx

that it is “necessary in the interests of public safety (including the safety of the complainer) or to prevent a significant risk of prejudice to the interests of justice”.

If so, HLS completely agrees that bail should never be refused if the reasons for doing so are only related to the efficient operation of the courts, and the individual concerned does not pose a significant risk to public safety if they remained in the community.

Victims’ rights are, quite correctly, an integral part of the criminal justice process. It is important, however, that we do not feed into the narrative in public consciousness that prison is always the ‘solution’ to alleged crimes and that the criminal justice process is weighted against victims. With ‘harm to the complainer’ having been defined within the Bill as “physical or psychological harm” and psychological harm defined to include “fear, alarm and distress” we would, therefore, like to see a corresponding definition of “public safety” in order to ensure that the correct balance is struck between the rights of the accused and those of the complainer.

For those people with substance misuse issues, dementia, personality issues or learning disabilities for example, concerns regarding non-public safety bail conditions such as not attending trial should be addressed through the funding and provision of appropriate support and supervision in the community: no one should be remanded into custody merely for administrative convenience.

We welcome the provisions of section 2(3)(b) of the Bill to the effect that consideration of grounds for the refusal of bail in summary proceedings taking account of the factors mentioned in sub- section (1)(a) should only arise where there was a previous failure to appear at a relevant diet or the proceedings relate to an allegation of failing to so attend, but with this qualification: previous failure to appear at a relevant diet might be, however, so disconnected in time with the current proceedings as to be irrelevant and yet feed the often fallacious narrative that any previous conviction is an indicator of a risk of further offending. We would recommend therefore, that any such founding previous failure to appear at a relevant diet be within a reasonable time span, such as six months.

With specific regard to children (for clarity, those aged under 18), HLS’s view is unequivocal: children should never be held in prison, whether that be on remand or following a conviction. It is to Scotland’s profound shame that 80% of the fifteen 16 and 17 year olds currently held in custody are on remand.

Should it be necessary not to grant bail, “that must only be done when other options have been fully explored and for the shortest time possible in small, secure, safe, trauma informed environments that uphold the totality of their rights [under the UNCRC]”.[11]

HLS recognises that insufficient regard is had by Sheriffs considering remand and committal of children and young people to the discretion provided for in section 51 of

[11] https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf

the Criminal Procedure (Scotland) Act 1995 to avoid the use of prison or YOI and to provide for committal to the local authority to be detained in secure accommodation. Prosecutors and defence solicitors have an equal responsibility as officers of the Court to draw attention to that facility during submissions.

(We are aware that findings from exploratory research commissioned by the Scottish Government into the reasons behind decisions on bail and remand are not yet available, but we would hope that this feeds into the Bill at a later stage of consideration.)

5. What are your views on the proposal to remove some existing restrictions on granting bail in solemn procedure (more serious) cases; thereby allowing the courts to simply apply the tests used in other cases?

The restrictions currently apply where a person, who is being prosecuted for certain offences, has a previous conviction for such an offence. In those cases, the law provides that bail should only be granted in exceptional circumstances. The relevant offences are ones involving drug trafficking, violence, sexual offending or domestic abuse.

Section 23C of the Criminal Procedure (Scotland) Act 1995 - Grounds relevant as to question of bail – clearly sets out the grounds on which bail can be refused. It specifies that the court "must have regard to all material considerations", including the nature and seriousness of the alleged offences; the probable disposal of the case if the person were convicted of the offences; and the accused's "character and antecedents", including any previous convictions or contraventions of bail orders.

In addition, Section 23D sets out a number of specific sets of circumstances in which someone on a serious sexual, violent, domestic abuse or drug trafficking charge or who has a track record of conviction for related serious offences, can only be granted bail in "exceptional circumstances".

HLS believes that Section 23D is superfluous, with such circumstances already covered by Section 23C of the Act. We are therefore in agreement with the proposal to remove some existing restrictions on granting bail in solemn procedure (more serious) cases and that the Court should be empowered to make decisions on the question of bail in all cases using the proposed simplified legal framework. We do so in the belief that this will not restrain the discretion of the Court, but that it may in fact give more discretion to the Court based on enhanced consideration of individual circumstances.

6. What are your views on the proposal to expand the current requirements for a court to:
- **state its reasons for refusing bail and**
- **require the recording of reasons?**

Whilst accepting that this places more of an administrative burden on judges, HLS believes that this change could disrupt current default settings, where applications

for refusal of bail have, in too many instances, become an automatic and unchallenged request from the Crown.

HLS supports decision-making on the basis of individual circumstances which thus merit more than brief oral explanation alone. Legitimacy and compliance with court decisions is predicated on understanding and acceptance. There may be further benefits to having grounds and reasons also entered in the record of the proceedings in terms of auditing and research, thus enhancing judicial accountability and transparency around decision-making. Decisions about bail and remand should be viewed with the seriousness they deserve, rather than a judicial decision not worthy of adequate recording; liberty and custody are too important not to be documented in this way.

We thus agree with the proposal that reasons for refusal of bail should be given both orally and in writing to reflect appropriately the seriousness of a decision to place someone in custody. Whether they have been convicted or not should not alter the gravity of that decision for that individual.

With particular regard to noting why Electronic Monitoring (EM) was felt not to be adequate, the assumption here is that Electronic Monitoring could be used as a 'mid-point' between remand and bail. Thus, when used in lieu of remand, Electronic Monitoring could avert the disruptive effects of imprisonment, such as loss of housing, benefits, employment and the erosion of supportive relationships, although care should be taken to ensure that it does not lead to net-widening for non-convicted persons (i.e. where EM is imposed where bail without EM would have been previously sufficient). Electronic monitoring could be part of a package of support and become part of a cultural shift towards reducing the use of custody for those who do not pose a risk of serious harm. We therefore welcome the addition of subsection (2AA)(a)(iii), on the understanding that it includes an implied statutory obligation for the Court to consider the use of EM before a decision is made to refuse bail. For legislative clarity, we would suggest that if this is the case, that it be made explicitly.

In May 2018 HLS submitted evidence to the Justice Committee at consideration stage of the Management of Offenders (Scotland) Act 2019, suggesting that Electronic Monitoring could be used as a means "to immediately reduce the staggering number of people being held on remand". We argued that remand "seriously and egregiously undermines the presumption of innocence and is at least as disruptive to people's lives as a short sentence", and supported the stance of Professor Nancy Loucks, Chief Executive of the charity Families Outside, who advised that "prison fractures families, whereas with the right support in place, electronic monitoring can keep families together."

In the intervening period, the remand population has increased from 15% to 27% of the total prison population, whilst our position remains unchanged. HLS is therefore in complete alignment with the views of the former HM Inspector of Prisons for Scotland, David Strang MBE, who stated that:

"[R]emand should only be used in exceptional cases, where it is absolutely necessary to protect the public from serious harm or where there is clear evidence of a flight risk. Therefore, I would support a proposal to legislate to permit greater use of electronic monitoring or tagging to allow more alleged offenders to be granted bail whilst they await trial."[12]

Research by the Scottish Centre for Crime and Justice Research, Scottish and International Review of the Uses of Electronic Monitoring (2015), has also shown that electronic monitoring achieved greater compliance with bail conditions, being most effective when accompanied by wider programmes of supervision and support, rather than being used as a stand-alone measure. We would, however, add a note of caution here, that Electronic Monitoring should not be used unnecessarily as a condition of bail, where there is no identified risk of harm, and where its use would therefore be more akin to surveillance, than supervision and support.

Thus, to reiterate HLS's stated position: we acknowledge that Electronic Monitoring alone will not provide a fix for the over-use of remand. An expansion of clear and sustainably funded bail support and supervision arrangements, which provide pre-trial stability, would need to be prioritised. Electronic Monitoring could then be used as part of a suite of support – particularly important for children and young people - minimising the likelihood of breaches of bail conditions and keeping people out of prison until they have been convicted and sentenced.

HLS, therefore, strongly agrees that courts should be required to consider Electronic Monitoring before deciding to refuse bail.

With little information currently available about the decision-making around the granting of bail, this could also add to the evidence base, helping to identify whether barriers to alternatives lie in a lack of judicial confidence in their provision or implementation. Reasons recorded should therefore be regularly reviewed and analysed, and where necessary, acted upon, in order to ensure that this does not become a mere administrative exercise.

The recording of reasons why Electronic Monitoring was not felt to be adequate should also act as a prompt to the Court to disrupt the use of remand in cases where the underlying causes of any alleged criminal offences will clearly not be addressed in a custodial environment. This acknowledges that whilst its independence must protected, the Court also has a part to play in finding a solution to reduce Scotland's bewilderingly high rate of remand.

7. What are your views on the proposal to require a court, when imposing a custodial sentence, to have regard to any period the accused spent on bail subject to an electronically monitored curfew condition?

[12] Justice Committee Stage 1 Report on the Management of Offenders (Scotland) Bill, 2nd Report, 2019 (Session 5)

It would generally provide for one-half of the period to be deducted from the proposed sentence, whilst allowing a court to disregard some (or all) of the time on bail where it considers this appropriate.

Whilst we previously referred to Electronic Monitoring (EM) as a 'mid-point' between remand and bail in our answer to Question 6, it should be acknowledged that the restrictions which can be associated with it can be extremely limiting. As an example, these could involve restricting an individual to a specified place for up to 12 hours per day and/or barring them from a specified place for up to 24 hours per day. It is clear that the criminal justice system already recognises Electronic Monitoring as a form of punishment given that it is already included in various disposals available to the courts; we would also add that an individual's compliance with EM could also be a useful indicator of an individual's ability to comply with a community order.

HLS therefore believes that time spent on bail with Electronic Monitoring should be taken into account at the point of sentencing. However, we would argue that a clear explanation and rationale is required for the calculation of equivalence between time spent on EM bail (qualifying bail) and time in custody. As an example, we draw your attention to Creativity and Effectiveness in the Use of Electronic Monitoring: A Case Study of Five Jurisdictions[13] a comparative study which details that in Belgium, one day on EM is considered to be the equivalent of one in custody. It is also worth bearing in mind whether provisions would allow for the flexibility of greater or lesser conditions within the same band of equivalence.The period of time spent on EM bail (qualifying bail) is one of the areas where it is proposed that any changes to the Bill are subject to affirmative procedure only. As per earlier comments, we do not support this, since it allows for too much discretion without the corresponding level of scrutiny and accountability.

8. What are your views on the proposal to improve access to services for prisoners upon release by bringing forward their release date where they would otherwise fall on certain days (e.g. Fridays)

Since 2015 a flexible release policy has allowed SPS to release individuals up to 2 days prior to their official liberation date if there is sufficient evidence that release on the set date would cause unnecessary risk to the individual by limiting their ability to access services. Crucially, however, the policy requires service providers (on behalf of a prisoner) to apply to have the liberation date altered and thus has been used infrequently. So infrequently in fact that in the 5 and a half years from 2016 to the end of May 2021, only 92 applications were made and only 28 were granted[14]. (To put this in context, there are approximately 120-130 prison releases across Scotland each week.)

[13] Hucklesby, A., Beyens, K., Boone, M., Dünkel, F., McIvor, G., and Graham, H. (2016) Creativity and Effectiveness in the Use of Electronic Monitoring: A Case Study of Five Jurisdictions [comparative research report], Leeds: University of Leeds and Criminal Justice Programme of the European Commission. Available at: https://emeu.leeds.ac.uk/wp-content/uploads/sites/87/2016/06/EMEU-Creativity-and-effectiveness-in-EM-Long-version.pdf

[14] https://drugdeathstaskforce.scot/media/1248/drug-law-reform-report-sept-6th-21.pdf

The reason for avoiding Friday releases is well known and well founded: people leaving prison are in a vulnerable position and need to access local services (e.g. general practice, mental health, alcohol and drug treatment, community pharmacy and social care) quickly to make certain that they remain safe on release and do not revert to any offending behaviour. It is likely that they will need emergency access to funds and food for some time before benefits arrive – this being particularly relevant to those being released on remand who are not entitled to a discharge grant – and ideally they should be supported by a mentoring service such as Shine or New Routes.

In acknowledgement that Friday liberations from custody create unnecessary risk, the Scottish Drugs Death Taskforce's final report also recommended that "[p]rison releases on a Friday or the day before a public holiday should be banned to give people a better chance to access support".[15]

The focused, detailed, practical and collaborative efforts between SPS, Scottish Government, local authorities and the third sector to support people released early under the Coronavirus (Scotland) Act 2020 demonstrated that on the whole, successful reintegration can be achieved without the need for specific legislation. However, in the absence of an expectation that this will be replicated, HLS agrees that the Scottish Government should improve access to services for prisoners upon release by bringing forward their release date where they would otherwise fall on certain days (e.g. Fridays).

9. What are your views on the proposal to replace the current possibility of release on home detention curfew (HDC) for long-term prisoners (those serving a fixed term of four years or more) with a new system of temporary release (referred to as a 'reintegration licence' in the policy memorandum)?

Release on reintegration licence:

- **would include a curfew condition and be subject to supervision by justice social work**
- **could not occur earlier than 180 days before the half-way point of the sentence (the earliest point at which a long-term prisoner may be released on parole) and could last for up to 180 days**
- **could be used prior to the Parole Board deciding whether to grant release on parole as well as in the run-up to the start of parole where this has already been granted**

HLS strongly agrees that, on the whole, enabling a prisoner to serve part of their sentence in the community can help their reintegration. While services in prison can prepare an individual for integration, ultimately, prison is a very artificial environment in which to build the relationships, capital and hope required for successful reintegration. True integration can only occur in the community.

[15] https://drugdeathstaskforce.scot/news-information/publications/reports/final-report/

As you will know, the current application process for HDC is a protracted and complex one, involving circa 8 different stages. Despite the change in guidance to remove the presumption against it within a more sophisticated and robust system of individual risk assessment, the number of people released on HDC remains stubbornly low. (On 25 August 2017, 328 people were on HDC, whilst on the same date in 2022, only 62 people were on HDC.) The process requires detailed understanding of all steps and the drop off rate from application stage is likely to be significant at each of them. Our view is that it is simply not credible that there are only 62 people out of 7,504[16] in the whole prison estate who could safely be released on HDC.

We note that no change is proposed to the current system of HDC for short-term prisoners, despite an acknowledgement that it is currently not working and that "few long-term prisoners access HDC"[17] i.e. the small numbers that do are largely made up of short-term prisoners, thus without reform the numbers are unlikely to increase.

We contend that HDC for short-term prisoners needs to change and could play a more useful role if the process was easier to navigate, with having HDC considered automatically for some categories of prisoner being one sensible potential improvement to the process. Alternatively, if someone meets the criteria for release on HDC, whichever category they are in, they could also be automatically considered.

With regard to long-term prisoners, we know that long sentences have been getting longer over the past decade, and that this fact is one of the major contributing factors towards Scotland's high rate of imprisonment. As the former Cabinet Secretary for Justice, Humza Yousaf said in 2021:

"The punishment part of a life sentence a decade ago was about 13 years, it's now closer to 19. There's certainly an issue around longer sentences and we've got to question whether or not that's the correct approach."[18]

The introduction of a new system of temporary release for long-term prisoners (known as a reintegration licence) that is "intended to better support the reintegration of certain long-term prisoners, for example by providing the individual with the opportunity to make positive connections in their community, including links to community-based support services" is therefore welcomed in principle.

Whilst we also support its intention "to provide further evidence to the Parole Board to inform decisions on whether to recommend release of a long-term prisoner under

[16] As at 26/8/22: https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx

[17] 17 Bail and Release from Custody (Scotland) Bill Policy Memorandum. Available at: https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/bail-and-release-from-custody-scotland-bill/introduced/policy-memorandum-accessible.pdf

[18] Humza Yousaf MSP, quoted in Leapman (2021) https://insidetime.org/too-many-in-prison-for-too-long/

section 1(3) of the 1993 Act", taken alongside other aspects of the proposals, we are unsure of whether it will have the intended effect. As an example, the current situation is illustrated well by a Freedom of Information (FOI) request from June 2022[19], in which SPS revealed that that not a single person since 2018 had been granted HDC in advance of their Parole Qualifying Date (PQD).

We would also draw your attention to the Judicial Review of a failure by the Scottish Ministers to take timeous steps to refer his case to the Parole Board for Scotland brought by Marc McDonald in 2019: it highlighted that "[t]he timetable in the [SPS] policy allowed for a decision to be taken by PBS about 8 weeks before a prisoner's PQD … and.. [i]n practice it was rarely likely to be possible for [the Parole Board for Scotland] to determine a prisoner's suitability early enough to permit the respondents to consider release on HDC licence for 180 days". Crucially, the Judge noted that "[w]hile the legislature wished to empower the respondents to release long-term prisoners on HDC for up to 180 days where that was appropriate, it must have known that generally a PBS recommendation would not be obtained until much later than that".

This demonstrates that there can be a significant gulf between the wording and intent of such legislation, and the manner in which it can be applied. In this case, the ruling determined that "[s]ince 2008, when HDC was introduced for long-term prisoners, no dossiers had been referred to PBS earlier than the time set out in the policy, with the result that no long-term prisoners had been granted more than about 6 weeks release on HDC"[20]. Without sight of an Operating Protocol which would determine how the reintegration licence may work in practice, we fear that the net effect may be similar.

We note from Section(7)(3AB) that, having consulted the Parole Board, SPS could grant a reintegration licence to a long-term prisoner prior to his/her PDQ. Whilst we support the move to broaden the decision-making process and leverage "the [Parole] Board's expertise in risk-based decision making in relation to long-term prisoners"[21], we are concerned that this is unlikely to result in different conclusions than would have be reached by SPS alone. We would therefore suggest a built-in review period during which statutory and publicly available monitoring is put in place to record the number of long-term prisoners released on an integration licence compared to those previously released on HDC and the number of days to which the licence applied.

It is also not clear whether this paves the way for introducing other means of proving suitability for parole, release on licence or early release, other than by passing

[19] FOI from McGreevy & Co Solicitors (Ref: WJS/PL3130) to SPS (Ref: OE/22001) dated 11 June 2022.

[20] Scotland Court of Session, Outer House [2019] CSOH106

[21] Bail and Release from Custody (Scotland) Bill Policy Memorandum. Available at: www.parliament.scot/-/media/files/legislation/bills/s6-bills/bail-and-release-from-custody-scotland-bill/introduced/policy-memorandum-accessible.pdf

prescribed courses, which can be very difficult to access. Further detail is therefore required.

We also note that this potential route to temporary release does not appear to be available to, inter alia, long-term prisoners sentenced under section 210A of the Criminal Procedure (Scotland) Act 1995 i.e. those serving extended sentences for sexual, violent or terrorism offences. We believe that exemptions for prisoners serving sentences for particular offences is a 'catch-all' that should be avoided in lieu of a more individualised assessment of suitability.

As always, it is vital that appropriate support is provided to those granted a reintegration licence in order that they can meet the conditions of their licence. It should not be framed as a licence that must be achieved or not achieved, but as a passport to reintegration which they are supported to reach.

10. What are your views on the proposal to give the Scottish Government a regulation making power to release groups of prisoners in emergency situations?

This proposed regulation could be used in relation to those serving custodial sentences, with various restrictions, but would not apply to prisoners held on remand. Examples of emergency situations that this proposed power could apply to include situations where the spread of an infection might present significant harm to health, or an event leads to part of a prison becoming unusable.

As the Bill consultation noted, the Coronavirus (Scotland) Act 2020 allows for the executive release of certain groups of prisoners if particular circumstances are met, but clearly only relates to the pandemic. HLS was supportive of this, although we had argued that the legislation should have been based on a human-rights model of vulnerability and thus include those at specific high risk e.g. pregnant women and the disabled.

It is possible that these proposals could pertain to the most vulnerable within the prison population in another public health emergency and therefore could be readily supported. It is also possible that these proposals could be used to address the pressures of overcrowding and non-compliance with our human rights obligations regarding cell size, which again, HLS would readily support.

However, it is hard not to assume that these proposals relate to what HMIPS has described as the "ageing infrastructure and general condition of some of Scotland's prison buildings [which] are clearly ill-suited to a modern prison system, not least at HMP Barlinnie, Castle Huntly, Dumfries, Greenock, Inverness and Perth"[22] and which the Public Audit and Post-legislative Scrutiny Committee's 2018/19 Audit of the Scottish Prison Service strongly criticised in their comment that "ten years of

[22] https://www.prisonsinspectoratescotland.gov.uk/sites/default/files/publication_files/HM%20Chief%20Inspectors%20Annual%20R eport%202021-22%20r.pdf

capital underspend to stay within budget should have raised serious concerns at an early stage given the deteriorating state of prisons".[23]

HLS sees this proposal as a direct result of the Public Audit Committee's assertion that "[d]eveloping a contingency plan for Barlinnie in the event that it fails must be of the highest priority... [and that] the SPS must develop robust contingency plans should any other part of the prison estate become uninhabitable".

It would be entirely remiss of us not to point out that there have been repeated warnings about the parlous state of the prison estate's infrastructure over a period of many years. The idea that the failure to invest adequately in our prisons and to safely reduce the prison population should be addressed through these means is blatantly wrong, but sadly required.

For that reason, HLS, reluctantly supports the introduction of an executive power of release for use in exceptional circumstances, whilst reiterating our discomfort at the exclusion of untried prisoners and others (and notwithstanding our appreciation that prisoners on remand fall under the responsibility of Scottish Courts and Tribunals Service, rather than the SPS).

11. What are your views on the proposal to introduce a duty for statutory partners to engage in planning for the release for prisoners?
This proposed duty seeks to facilitate the development, management and delivery of release plans for prisoners, both sentenced and remand. The proposal suggests that a release plan would deal with:

- **the preparation of the prisoner for release**
- **measures to facilitate the prisoner's reintegration into the community and access to relevant general services (e.g. housing, employment, health and social welfare)**

HLS supports the proposal that partners such as local authorities; health boards; the Chief Constable of the Police Service of Scotland; Skills Development Scotland and integration joint boards are given a statutory duty to engage in release planning for all prisoners (short, long term or remand).

"[I]f people leave prison without knowing where they will live, how they will access medical services or how they will support themselves, we cannot assume that they will not reoffend. To do so is to set them up for failure and it is an absolute dereliction of our responsibilities"

(Daniel Johnson MSP, Management of Offenders (Scotland) Bill Stage 1, Scottish Parliament, 7 February 2019).

[23] https://sp-bpr-en-prod-cdnep.azureedge.net/published/PAPLS/2020/2/20/The-2018-19-audit-of-the-Scottish-Prison- Service/PAPLS052020R1.pdf

In order for the policy intent of reducing reoffending to be achieved, it is vital that partners are adequately resourced to do so. We are pleased that the vital (albeit not directly statutory requirement) role that third sector organisations play in release planning for prisoners is being acknowledged. They have often filled the gaps in provision here, but their precarious funding models and patchwork provision across Scotland has meant that this has not been sustainable in the medium to long-term. That will need to change.

During the passage of the Management of Offenders (Scotland) Bill various amendments[24] pertaining to this were lodged. These included statutory requirements for Scottish Ministers to ensure that prior to release people were registered with a GP; provided with a correspondence address; were in receipt of a type of identification accepted by DWP for benefit claims; and that the process for making such claims had already been started. It was also proposed that the SHORE (sustainable housing on release for everyone) standards were put on a statutory footing.

These amendments were made against a backdrop where SPS had stated that "preparing for release was crucial … [and that] if someone does not have roof over their head or access to medical treatment, particularly given some of the challenges that people who have been to prison will have, we will have a problem". This was echoed by the then Cabinet Secretary for Justice, Humza Yousaf MSP, who advised that "[m]ore can and should be done in relation to throughcare support for prisoners leaving our prison estate … [and] that there absolutely is more that we can do about the health and wellbeing of people who are leaving the prison estate[25]".

There is no question that these measures are required in order to support successful reintegration into the community. However, these amendments were withdrawn on the basis that they related to operational matters and thus should be tackled through non-legislative means.

Some years later, the situation for most people leaving prison has not improved, despite valiant efforts by many. It should not require legislation to meet these most basic, human-rights based needs, but in the absence of any meaningful progress in this area, HLS would now support the introduction of statute to affect this.

12. What are your views on the proposal to require the Scottish Government to publish, and keep under review, minimum standards applying to throughcare support for both sentenced and remand prisoners?

The proposed standards would replace existing Throughcare Standards which are focused on service provided by justice social work, and instead cover a broader range of services, provided in custody and during transition back into

[24] https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/management-of-offenders-scotland-bill/stage- 2/revised-marshalled-list-of-amendments-for-stage-2-management-of-offenders-scotland-bill.pdf

[25] https://www.parliament.scot/bills-and-laws/bills/management-of-offenders-scotland-bill#target3

the community, which can help in the successful reintegration of people on release.

The SPS Throughcare Strategy[26] acknowledged that people leaving prison who were at high risk of homelessness were more likely to reoffend; that many of them were dependent on benefit and welfare support; that many of them required support with health and well-being related issues; and that both they and their families needed to be supported in the transition between custody and the wider community.

Whilst the operational pressures of an overcrowded prison estate resulted in the redeployment of all SPS's Throughcare Support Officers to frontline duties, the need for their services before and after release remains.

HLS strongly agrees that minimum standards for throughcare should provide a wide range of services for all prison leavers – whether from remand, short-term or long-term sentences. As noted in Question 11, the key services that must be provided are those dealing with accommodation, benefits, healthcare (including addiction services), employment and training. The aim should be that those leaving prison are not disadvantaged in relation to access to support services.

Although not included in the proposed legislation, we cannot avoid the fact that discharge grants are not available to those on remand, and yet we are in a position where people can be released directly from remand after a substantial period of time in custody. Being released from remand (whether from court or prison) with no cash and where benefits are often not being paid for 5 weeks, risks rendering most of the release planning redundant and must be addressed.

13. What are your views on the proposal that certain information about prisoners that can be given to a victim (e.g. on the planned release of the prisoner) can also be given to a victim support organisation helping the victim?

We do not feel that we are best placed to comment on this.

14. Do you have any other views on the Bill?

No

[26] https://www.sps.gov.uk/Corporate/Publications/Publication-5537.aspx

CJ/S6/23/2/1

Written submission from HM Chief Inspector of Prisons for Scotland

Dear Convener,

Scotland's Remand Situation.

I note that your committee is currently examining the Bail and Release from Custody (Scotland) Bill.

I am enclosing for your attention a copy of the National Preventive Mechanism Scottish Sub-Group response to the Scottish Government consultation on this Bill. As the Bill remains broadly unchanged from the original proposal, so do our views. This response was compiled in collaboration with all six detention inspection & monitoring bodies in Scotland. Namely, HM Inspectorate of Prisons for Scotland; HM Inspectorate of Constabulary in Scotland; Care Inspectorate; Mental Welfare Commission for Scotland; Independent Custody Visitors Scotland; and the Scottish Human Rights Commission. We also consulted with Community Justice Scotland; Howard League Scotland; Children & Young People's Commissioner Scotland; and our own IPM network.

While I should like to note that HMIPS broadly support this Bill, and appreciate the considerable degree of work that is looking at alternatives to remand, my office would like to encourage the Scottish Government and the Scottish Prison Service to expedite the plans, and also consider more immediate reforms to remand policy including amending the inhibitory Prison Rules.

During my tenure as HM Chief Inspector, I have been careful to ensure my office steers clear of hyperbole; to be proportionate and moderate in our critique; and to always recognise the hard work of justice professionals across the sector.

However I am concerned that too many people are being held in custody for prolonged periods of time, some of whom may not be found guilty of an offence. The response to COVID exacerbated the existing trend of an increasing remand population, and Scotland now experiences consistently high levels of remand for longer periods. With the remand proportion regularly at 30% of the population, an FoI response from the Scottish Government stated that on 15th December 2021, 658 of the 2,178 (30%) individuals held on remand had been held for more than 140 nights.

I have previously given evidence to your committee that: "One of my repeated findings is the cultural acceptance of a hierarchy of entitlement in prisons where in Scotland remand prisoners are rarely afforded access to rehabilitative activity. For them 22 hours a day locked up in a room often not designed for one but holding two is routine."

The statutory presumption against short-term sentences implemented in 2011 by the Scottish Parliament was extended in 2019 since "evidence shows alternatives to custody are more successful in supporting rehabilitation and preventing reoffending, ultimately leading to fewer victims and safer communities." (Community Safety Minister Ash Denham 2019).

Some individuals are being held as long in prison as those held on sentences, with prison rules providing less requirement or incentive to offer purposeful and rehabilitative activity to remands than is offered to convicted prisoners. That in turn can mean longer periods locked up behind their cell door and a greater risk of isolation, in addition to the risks to the security of their employment and housing that are inherent for anyone facing a lengthy period on remand, and who may therefore suffer even if they are ultimately acquitted.

It is arguably incumbent on Scotland to address many of the criminogenic factors that lead to incarceration whilst on remand as well as when sentenced.

The high remand population also affects the more general overcrowding of the prison estate impeding the ability of the Scottish Prison Service to deliver a rehabilitative regime.

Upholding human rights becomes increasingly challenging. Numerous United Nations bodies and mechanisms, including the Security Council, the Human Rights Committee, the Committee against Torture, the Subcommittee on Prevention of Torture, the Working Group on Arbitrary Detention and regional human rights bodies have all expressed serious concerns about overcrowding in places of deprivation of liberty and its negative impact on the human rights of detainees. The Human Rights Council, encouraged States to address overcrowding in detention facilities by “taking effective measures, including through enhancing the use of alternatives to pre-trial detention and custodial sentences, access to legal aid, and the efficiency as well as the capacity of the criminal justice system and its facilities.”

In summary, I would be delighted to give oral evidence to your committee on this matter, and why I support this Bill. I will also ensure your committee has sight of any additional work my office does on this matter.

Yours,

Wendy Sinclair-Gieben
HM Chief Inspector of Prisons for Scotland

National Preventive Mechanism Scottish Sub Group Response to – The Scottish Government Consultation on Bail and Release from Custody Arrangements in Scotland

February 2022

The NPM Scottish Sub Group

The UK's National Preventive Mechanism (NPM) was established in March 2009 after the UK ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in December 2003. It is made up of 21 statutory bodies that independently monitor places of detention.

The Scottish Sub Group of the UK NPM represents the interests of our Scottish members and reflects the devolved powers of the Scottish Parliament. This consultation response is on behalf of the Scottish Sub Group members only – and while it is grounded in Human Rights principles which apply nationally, it has not been sighted by the wider NPM membership and cannot be said to necessarily reflect their views.

The NPM Scottish Sub Group is made up of:

- Care Inspectorate
- Her Majesty's Inspectorate of Prisons for Scotland
- Her Majesty's Inspectorate of Constabulary in Scotland
- Scottish Human Rights Commission
- Mental Welfare Commission for Scotland
- Independent Custody Visiting Scotland

Individual members are active in implementing their powers to comment on legislation and policy. Being part of the NPM allows members to submit joint responses on areas of shared interest, and apply human rights principles to the analysis.

This response should be read as complimentary to additional responses the Government may receive from our membership. Care Inspectorate have indicated they will be making an individual response.

Introduction

NPM members have consistently highlighted serious concerns with the number of people in prison in Scotland. We have one of the highest prison populations per head in Europe, and a prison infrastructure which cannot cope with the size of the prison population.[1]

Overcrowding of Scottish prisons has been a key concern of the NPM in consecutive reports for over a decade and continues to be so with many prisons still regularly operating above their design capacity. It has also been highlighted repeatedly in reports by the European Committee for the Prevention of Torture (CPT).[2] The CPT recommended an approach to imprisonment that is not purely punitive but rather focuses on rehabilitation and reintegration into the community. While there has been progress to introduce measures to promote rehabilitation in Scotland, these have limitations and should be expanded.

The committee also recommended that urgent measures be taken to tackle the overcrowding in prisons and more investment made in countering the different factors playing into the steady increase in the prison population. Further, in her 2020-21 Annual Report, HM Chief Inspector of Prisons for Scotland said "… the rising prison population, remain our key concerns, as it has the potential to impact adversely and intensify pressures in almost every aspect of prison life for both prisoners and staff. We will focus on the impact and efforts to tackle the rising prison population in all our inspection and monitoring activities during 2021-22."[3]

In 2021, the NPM Scottish subgroup published a follow up report which assessed the implementation of the CPT recommendations made after the committee's visits in 2018 and 2019.[4] The NPM highlighted in this assessment that overcrowding in Scottish prisons persisted and there was limited evidence of strategic planning to reduce it. A key recommendation made by the NPM as a result of this analysis is for the Scottish Government to undertake 'concerted and coordinated action between

[1] Aebi, M. F., & Tiago, M., - "Council of Europe Annual Penal Statistics: Prison populations", Council of Europe, 2020.
[2] See most recently the 2019 "Report to the United Kingdom Government on the visit to the United Kingdom by the European Union Committee on the Prevention of Torture 2019"
[3] Her Majesty's Inspectorate of Prisons for Scotland, "HM Chief Inspector Annual Report 2020-2021"
[4] UK NPM Scottish Sub Group, "Scotland's Progress in the Prevention of ill-treatment in places of detention", 2021

the executive, police, prosecution services and the courts to give full effect to the presumption of liberty'. The NPM in Scotland contends that this would go some way to addressing the systemic issues at the heart of many CPT recommendations. We are therefore pleased to see this consultation as NPM members believe progress in this area would go some way to better operationalising the presumption of liberty in practice.

There is an established link between overcrowding and the risks of torture and ill-treatment. Overcrowding has been established to constitute a severe form of ill-treatment, inhuman or degrading treatment and even torture. Poor material conditions are exacerbated by overcrowding and adversely affect all individuals living or working in places of detention. They contribute to tensions and deterioration of relations among prisoners and between prisoners and personnel, which in turn increase the risk of ill treatment.[5] Overcrowding of prisons impedes every area of work of the prison system and makes upholding human rights increasingly challenging.[6] Furthermore, reducing prison population and appropriate release schemes has been shown to prove fundamental in safeguarding the health and safety of detainees and staff during COVID-19. While this was seen internationally as both a necessary and successful intervention, unfortunately prison population is now beginning to rise again to pre pandemic levels.[7]

We need to reduce the size of our prison population and shift the focus of our criminal justice system from an overreliance on custody, to delivering a range of credible community alternatives.

We therefore broadly welcome proposals which will reduce the prison population. We highlight that this must be done with the appropriate resources to allow for individuals to receive support in the community, and this must be balanced with robust risk assessment to protect the community from actual and perceived danger. Adequate resourcing of Justice Social Work will be vital to meet additional asks of this highly specialised work. We also recognise that an increased use of bail and home detention curfew may result in an increase in the volume of breaches of these

[5] UN High Commissioner for Human Rights, "Human Rights Implications of over-incarceration and overcrowding", 2015
[6] See 4 at p39
[7] DLA Piper, "A global analysis of prisoner releases in response to COVID-19", 2020

orders. This will impact on police resources as the police service will have to deal with any breach of bail or breach of HDC conditions.

The high use of remand in Scotland shows us that there simply are not sufficient alternatives in the community to accommodate individuals who require support, as opposed to custody.[8] We welcome proposals which aim to curb the use of remand in Scotland, both on a policy level and on an individual level. Too many individuals are held on remand who have no prospect of being sentenced to prison. People who have not been found guilty of an offence should not have their liberty removed without a clearly articulated reason for doing so. Given the low number of successful bail applications, we deem this threshold too low. The NPM support the presumption against short sentences as they only serve to disrupt lives rather than offer any sort of rehabilitate effect. The use of remand where it is not essential has the same effect as short sentences and this is exacerbated by prolonged periods on remand due to court backlogs. The NPM welcomes proposals which present viable alternatives to remand.

It is worth highlighting that work must also be done to improve the regime for those who are still remanded despite these proposals. It has been consistently highlighted by our members, and by international monitors, that those on remand have less access to support, rehabilitation programmes, and work in prison. For them, “22 hours a day locked up in a room, often not designed for one but holding two, is routine.”[9] This is unacceptable and must be addressed as part of wider reforms to remand.

Human Rights Framework

As an NPM, we have a duty to regularly monitor the treatment of detainees and the conditions in which they are held by virtue of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In doing our work, we apply a human rights focussed analysis to all of

[8] Scottish Prison Service, “SPS Prison Population”, available at: www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx
[9] See 3 above

our thinking. We therefore find it relevant to preface our response to this consultation with an overview of the relevant human rights provisions.

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic UK law.

Article 3 of the ECHR states:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

States have a positive obligation to ensure appropriate mechanisms are in place to prevent a violation of article 3 occurring. It has already been shown that overcrowding of places of detention can, due to its wide ranging effects, amount to a breach of article 3. It is therefore incumbent on Governments to monitor detained populations and ensure that safeguards are in place. The CPT has called for states to have a strategic plan to reduce prison populations to avoid the increased risk from overcrowding prisons.[10] We see these proposals, in addition to the programme for government, as a good step towards fulfilling this objective.

The prohibition of torture, inhuman or degrading treatment or punishment is also protected by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT). CAT builds on these guarantees of freedom from torture and ill-treatment, reiterating the prohibition on states’ involvement in torture or inhuman or degrading treatment, and also specifying a series of positive obligations on states. OPCAT recognises the increased risk to ill treatment individuals who are detained may be susceptible to. It requires states to allow inspection and monitoring bodies (NPMs) unfettered access to places of detention.

The government is therefore required by law to ensure ill treatment does not occur in prison. One of the ways it can achieve this is by reducing the prison population.

[10] See 4 above

This would allow for more rehabilitative intervention to be effective both to those individuals no longer sent to prison, and those who remain in custody.

Article 5 of the ECHR states:

“Everyone has the right to liberty and security of persons. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
a) the lawful detention of a person after conviction by a competent court;
…
c) the lawful arrest or detention of a person effected for the purpose of bringing hum before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;…”

The detention of individuals who have not been found guilty of an offence (remand) therefore requires that one of these specific and narrow criteria are met The European Court of Human Rights (ECtHR) held in S and A v Denmark “The necessity test under the second limb of Article 5 § 1 (c) [preventative detention] requires that measures less severe than detention have to be considered and found to be insufficient to safeguard the individual or public interest. The offence in question has to be of a serious nature, entailing danger to life and limb or significant material damage. In addition, the detention should cease as soon as the risk has passed, which called for monitoring, the duration of the detention being also a relevant factor”.

In line with the this test, we support proposals which aim to refocus the use of remand for individuals who are not able to be supervised in the community and an increase in informed decision making and options for the judiciary to allow those awaiting trial to be accommodated in the community.

Article 14 of the ECHR states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

We are clear that the justice system must not discriminate between individuals based on their characteristics or status. We want a model which delivers equitable outcomes for all. We will examine in our response to the consultation to what extent the recommendations are cognisant of this requirement. For example, we are concerned that those experiencing homelessness may be limited in their access to Bail and Electronic monitoring without a fixed abode. We will be keen to see measures in place to make these reforms accessible to all in line with non-discrimination law.

We are also guided by the United Nations Minimum Rules for the Treatment of Prisoners (Mandela Rules). Which set out a set of minimum standards for the treatment of prisoners.[11]

Rule 88 and 90 relate to the role society should have in including prisoners in the community. Rule 88 – "treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the prison staff in the task of social rehabilitation of the prisoners."
Rule 90 – "The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient aftercare directed towards the lessening of prejudice against him or her and towards his or her social rehabilitation"

We further draw attention to the United Nations Minimum Rules for Non-custodial Measures (Tokyo Rules). The rules call on UN member states to develop non-custodial measures to reduce the use of imprisonment. Rule 6.2 reiterates that remand should always be a last resort. "Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim."

[11] The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) Available at https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

We therefore support proposals which work to allow those released from prison the best chance of establishing prosperous lives.

Consultation on Bail and Release from Custody arrangements in Scotland
Questions and Respondent Information Form

Question 1

Which of the following best reflects your view on the changes proposed above regarding when judges can refuse bail:

A) I agree with the proposed change, so that judges can only refuse bail if there are public safety reasons for doing so

B) I disagree with the proposal, and think the system should stay the same as it is now, so judges can refuse bail even if public safety is not one of their reasons for doing so

C) I am unsure

Please give reasons for your answer.

The NPM support option A. All other considerations for an individual to be refused Bail can and should be managed in the community with bail supervision, EM and support. The threshold for holding an individual on remand must be high – an evidenced risk to public safety would be considered an appropriate reason for doing so, but housing issues or court convenience would not.

We do, however, find the test of "public safety reasons" too vague in nature. We propose a three part test which takes into account the public safety reasons referenced above. The criteria for refusing bail should therefore be 1) a real risk of absconding 2) imminent risk of serious harm to people 3) Risk of interfering with witnesses or named persons. The threshold for this level of risk should be sufficiently high to reflect the seriousness of depriving an individual of liberty who has not been found guilty of an offence in line with article 5.

We believe the Risk Management Authority definition of "imminent risk of serious harm" should be considered for adoption as the threshold for refusing bail. The use of a robust risk assessment model would provide assurance whilst also seeing the impact on reducing the remand population.
This model would allow for informed and evidenced decision making for the judiciary, while preserving the presumption of liberty in the majority of cases.

Question 2

Which of the following best reflects your view on the changes proposed above regarding how judges consider victim protection when making decisions about bail:

A) I agree with the proposed change, so judges should have to have particular regard to the aim of protecting the victim(s) when making bail decisions.

B) I disagree with the proposal, and think the system should stay the same as it is now, where judges consider victim protection as part of the overall decision-making

C) I am unsure

Please give reasons for your answer.

The NPM does not see a clear distinction between options A & B. As highlighted in response to Q1, a robust risk assessment process to determine whether an individual is an imminent risk of serious harm would include victims of crime. As such, if a real risk of harm was determined, the individual in question would not be bailed. Having 'particular regard' to a particular section of people (victims) seems at odds with a risk assessment model that should have regard to the risk to all people.

As such we support judges having regard to the risk to victims as part of the general risk assessment above.

Question 3

To what extent do you agree or disagree that the court should be empowered to make decisions on the question of bail in all cases using a simplified legal framework?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

We strongly agree. The model discussed in Q1 should be the new framework for decision making on Bail. We also are concerned by the lack of data on grounds of refusal for Bail which ties into Q4 – a simplified legal framework and clear explanations for refusal will help us evaluate the Human Rights compliance on Bail.

Question 4

Judges must give the reasons when they decide to refuse bail to an accused person. Which of the following best reflects your view on how those reasons should be communicated:

A) I agree with the proposed change, so judges must give reasons both orally and in writing

B) I disagree with the proposal, and think judges should continue to give reasons orally only

C) I am unsure

Please give reasons for your answer.

Option A. Oral and written reasons for refusing bail are required for two broad reasons.

1) In the interests of fair justice, the individual who is remanded must understand why this has occurred. This participation is a fundamental part of a human rights based approach. In the heat of the moment, a brief oral explanation may not be sufficient for the individual to fully understand. The remanded individual must be empowered to play a full and informed part in matters that directly affect their life. This is particularly relevant to children who may find it hard to follow court proceedings. CYCJ research has shown professionals do not explain matters in a manner that children can comprehend.[12] A written record of decision make this process far more clear and in accordance with foundational Human Rights principles.

2) Without improved knowledge and data of the reasons why individuals have been refused bail, it is difficult to gauge which interventions or changes are most appropriate. It is difficult to engage with the judiciary on what additional bail options could be made available to improve the likelihood of bail. Accountability of decision makers is a key principle of a fair justice model – written reasoning is crucial for this to be achieved.

Question 5a

When a court is considering bail decisions, which of the following options do you consider preferable…

…in cases where the prosecution *opposes* bail:

[12] See for example CYCJ, "Supporting all Under 18s in the Court System", Issue Sheet 88, 2020

-The court ***may*** ask for information from Social Work, but is not obligated to. Social Work ***may*** decide whether to provide it
-The court ***must*** ask for information from Social Work. Social Work ***may*** decide whether to provide it
-The court ***must*** ask for information from Social Work. Social Work **must** provide it

Please give reasons for your answer.
The NPM support the principle of informed decision making. As such, in cases where the prosecution oppose bail we agree that the court must ask for information from Social Work and they must have a duty to cooperate. This is particularly relevant where Social Work hold a considerable body of evidence or experience of the individual case that has not been disclosed or requested by the court to date.

We refer again to the Tokyo Rules which, at rule 7, say "… the judicial authority may avail itself of a report prepared by a competent, authorized official or agency. The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified."

We agree with the Scottish Prisons Commission who stated in 2008 "If judges are to avoid these unnecessary and costly remands they will need nationwide speedy access to information during bail hearings". We support the increase in funding to allow the capacity of Justice Social Work to meet this additional responsibility.

Question 5b

When a court is considering bail decisions, which of the following options do you consider preferable…

…in cases where the prosecution *is not opposing* bail:

-The court ***may*** ask for information from Social Work, but is not obligated to. Social Work ***may*** decide whether to provide it
-The court ***must*** ask for information from Social Work. Social Work ***may*** decide whether to provide it
-The court ***must*** ask for information from Social Work. Social Work **must** provide it

Please give reasons for your answer.

In cases where the prosecution does not oppose bail but the court is nonetheless considering refusing bail, the court must seek information from Social Work and Social Work must provide it. Again, this option allows for informed decision making for the judge and allows them to assess the effectiveness of available bail conditions in the round. The more relevant information that can be provided to the decision maker will result in the best decision being made. The perspective of the Social Work team is important in ensuring holistic decision making is possible, and in assessing risks adequately.

Question 6

To what extent do you agree or disagree that courts should be required to consider Electronic Monitoring before deciding to refuse bail

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Somewhat agree. With the exception of the three tests outlined in response to Q1, courts should consider Electronic Monitoring (EM) in all its options for all other cases. We are conscious that EM still represents a deprivation of liberty, although less severe than remand. As a result we would caution the use of EM in circumstances where the threshold for it to be required is not met. The Scottish Parliament Justice Committee found in their 2018 review into remand that when alternatives to remand are developed (such as EM) the judiciary tend to use them as enhanced conditions when they would have used bail anyway, but not as an alternative to remand. As such we need to see real engagement from the judiciary and legislative change to encourage the courts to consider EM for all cases where a refusal of bail is considered. We are also keen to see clear explanation of bail conditions especially when individuals are subjected to electronic monitoring. Our members have found in research that all too often license and bail conditions are not fully understood by those they apply to.[13]

[13] See for example “Community Justice Social Work: Throughcare Review”, Care Inspectorate, September 2021

Question 7

When a court decides to refuse bail, to what extent do you agree or disagree that they should have to record the reason they felt electronic monitoring was not adequate in this case?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

We strongly agree for the similar reasons as our answer at Q4.

Question 8

To what extent do you agree or disagree that time spent on bail with electronic monitoring should be taken into account at sentencing?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

We strongly agree. Time spent on electronic monitoring, while less severe than being held on remand, is still a deprivation of liberty. We note the consultations mention of the policy in England and Wales where generally 2 days on an electronically monitored curfew condition equates to 1 day time served in custody. We do not necessarily agree with the adoption of this policy as it feels arbitrary and the extent to which it is taken into account should depend on the nature of the conditions EM is monitoring. As such we support the court taking the matter under consideration and making a judgement.

Question 9

If time on electronic monitoring *is* to be taken into account at sentencing, to what extent do you agree or disagree that there should be legislation to ensure it is applied consistently:

Strongly agree

Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Somewhat disagree – while consistency of application is important to a fair justice system, each case should be considered on its own merits. As such we would support broad principles being established as part of sentencing guidelines to inform decision making, but not arbitrary fixed applications.

Question 10

Based on the information above, please use this space if you would like to make any comments about the idea of a law in Scotland that would prevent courts from remanding someone if there is no real prospect that they will go on to receive a custodial sentence in the proceedings.

We are conscious of the need not to prejudge the outcome of a trial. However, there is considerable evidence to show that the proportion of remand which does not translate to a sentence is sufficiently high enough to warrant a change in the dynamic.[14] We note the remarks in the proposal which refer to the procedure in England and Wales under the Bail Act 1976. Given the evidence included in the proposal from England & Wales that such a provision does not have tangible effect – we believe this requires more thought. It should be highlighted however, that remand rates are lower in England and Wales than in Scotland – but the variables involved make like for like comparison unhelpful. It is possible (and hopeful) that the reforms made to bail in the rest of this consultation may be sufficient to deal with the disproportionally high levels of remand without such a law in Scotland. The effects of the proposals should be monitored and then we can look again at a law to prevent courts remanding someone if there is no real prospect that they will go on to receive a custodial sentence.

Women held on remand especially are far less likely to receive custodial sentences, with 70% released after a period on remand. Given the criteria recommended above for the use of remand to only be used in limited circumstances, it cannot be

[14] Scottish Justice Committee, 'An Inquiry into the Use of Remand in Scotland' (SP Paper 363; Scottish Parliament, 2018)

justifiable to maintain remand at this level. In general, however, this proposal requires more thought and consideration.

Question 11

To what extent do you agree or disagree that legislation should explicitly require courts to take someone's age into account when deciding whether to grant them bail?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agreed, *how* do you think age should be taken into account when deciding whether to grant someone bail?

Strongly agree. It is the strong view of the NPM that children should never be remanded in custody and instead accommodated in secure care if necessary. We consider a child anybody under the age of 18 in line with the UNCRC..The best interests of the child must be the primary consideration in every decision on initiating or continuing the deprivation of liberty of a child. Scots law does not currently require a court, in remanding or sentencing a 16 or 17 year old to custody, to have as a primary consideration to the 'best interests' of the child, in fulfilling their rights to liberty, under Articles 3(1), and 37, of the UNCRC.

When the Scottish Parliament unanimously passed the UNCRC (Incorporation)(Scotland) Bill, in March this year, it heralded Scotland's commitment to ensure all children's human rights are respected, protected and fulfilled, in law, policy and practice. This includes those children who are most at risk, deprived of their rights to liberty and fundamental freedoms, in the criminal justice system. Implementing the UNCRC and fulfilling Scotland's human rights obligations to these children is not optional.

There is a legal imperative that to ensure all Scottish public authorities act compatibly with the UNCRC and human rights law. We support the work of our member HMIPS and partners such as the Children and Young People's Commissioner working to see an end to the imprisonment of children and young people in Scotland. We also support the recommendations of The Promise that 16-

and 17-year olds should not be placed in Young Offender Institutions for sentence or remand.

CYPC have advocated for a legislative presumption of community based alternatives to custody for children.[15] We agree such a change would be welcome and in line with our commitments to the UNCRC.

Question 12

In principle, to what extent do you agree or disagree that courts should be required to take any potential impact on children into account when deciding whether to grant bail to an accused person?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. Do you have any comments on how such a requirement could best be brought in?

Strongly agree – this is part of a holistic approach which should be taken. Given evidence of adverse childhood experiences and outcomes. This is intrinsically linked to The Promise. The Promise requires serious efforts to prevent those with parenting responsibilities from being imprisoned given the adverse effect this can have on children.

We agree with the Children of Prisoners Europe research which finds that "from the moment of a parent's arrest, children have to cope with the effects of the criminal justice process, and can be vulnerable to social isolation, stigma and shame."[16] The impact bail, or lack thereof, would have on a child should be a key consideration for the court. The Independent Care Review report found overwhelming evidence that the imprisonment of a parent can lead to an exacerbation of poverty, increased likelihood of care and serious mental health implications.[17]

[15] CYPC, Letter to Scottish Parliament Criminal Justice Committee, available at https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2022/01/Children-and-Young-Peoples-Commissioner-Scotland-Letter-to-Scottish-Parliament-Justice-Committee13October2021-1.pdf
[16] Children of Prisoners Europe, "Keeping Children in Mind", 2019
[17] Independent Care Review, "Evidence Framework", 2020

The NPM support international human rights standards forming the foundation of policy development. Specifically here, we refer to Article 3(1) of the UN Convention on the Rights of the Child which states "In all actions concerning children…the best interests of the child shall be a primary consideration." With the implementation of this treaty into Scots Law – we encourage the Scottish Government to take the impact on children into account in the strongest possible terms.

Question 13

To what extent do you agree or disagree that, in general, enabling a prisoner to serve part of their sentence in the community can help their reintegration?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Strongly agree. Integration in the community has been proven to be a key criteria to successful rehabilitation. It is also a requirement under the Mandela rules – recalling Rule 88 – "treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the prison staff in the task of social rehabilitation of the prisoners."

We fully support this with the addition of appropriate Throughcare and pre-release work. We rely on the expert analysis of our member, The Care Inspectorate, review into Throughcare which is an excellent resource for understanding the complexities involved to make this a success. CI have found that pre-release planning is key to successful reintegration into the community with integrated case management meetings useful to communicate release plans and provide reassurance.[18] However issues can occur where the prison and the community are a distance apart, and efforts must made to bridge this gap.

A key finding of the review was the importance to individuals of timely mental health support to avoid the likelihood of recall to custody. However the most consistently

[18] See 12 above

reported unmet need was about lack of access to mental health and emotional wellbeing provision. Getting access to mental health support in the community was consistently noted as a barrier to making and sustaining progress

Question 14

What mechanisms do you think should be in place to support a prisoner's successful reintegration in their community?

As above, and:

- An integrated ICT system to support information sharing between agencies and subsequent informed decision making
- Recognition that the transition from custody to community requires expert support and appropriate resourcing
- Fulfilment of the SHORE principle (Sustainable housing on release for everyone)
- Access to Universal Credit on release
- Relationship building with a community based social worker in advance of release
- A clear focus on person centred and risk based planning.

In supporting successful reintegration into the community on release from prison, it is of fundamental importance that appropriate mental health and addictions supports are available in the community. Our members have heard from psychiatrists who have told us about their concerns in relation to vulnerable people being liberated without warning, with no time for a robust community support pathway, particularly in relation to crisis and mental health supports. The outcome for individuals in this situation, particularly those affected by complex mental health, lack of social care and addictions, is a return to custody within 24 to 48 hours of their release. This contributes to the 'revolving door' issue. It is suggested that robust well-coordinated planning takes place prior to release which adopts a multi-disciplinary approach to include, but not limited to, mental health services, social work, social care, third sector partners, addictions, housing and criminal justice partners – particularly for those with complex mental health and social care challenges.

Question 15

Do you agree that through good behaviour, or completing education, training and rehabilitation programmes, prisoners should be able to demonstrate their suitability for…

a)…early release?
Yes / no / unsure

b)…the ability to complete their sentence in the community?
Yes / no / unsure

Please give reasons for your answers.
Behaviour in prison is not necessarily an indicator of suitability in the community. Nor should it be a sole focus of assessment. The starting point for such an assessment is that all individuals should be eligible and then a formal accredited risk assessment carried out. Bearing this in mind, we would suggest engagement in these processes demonstrate some willingness to address offending behaviour, but would caution the weight attributed to participation. Again, an accredited risk assessment model is the most satisfactory method for assessing suitability for early release or community sentence.

Question 16

Do you have any comments on how you envisage such a process operating in the Scottish justice system?

Who should be eligible to earn opportunities in this way?

What risks do you see with this approach, or what safeguards do you feel would need to be in place?

Refer to Q15 – opportunity to serve part of their sentence in the community or early release should be applicable to all based on robust risk assessment modelling.

Question 17

Which of the following options in relation to automatic early release for short term prisoners would you say you most prefer?

- Automatic early release changes to earlier in the sentence, but the individual is initially subject to conditions and monitoring, until the half-way point
- Automatic early release changes to earlier in the sentence, nothing else changes
- No change: automatic early release remains half way through the sentence

Please give reasons for your answer.

The NPM would support early release with the increased provision of Throughcare support. As mentioned consistently throughout this response – we do not support arbitrary time definitions such as 'half way points' or one-third of the way through a sentence. Instead we favour robust and accredited risk assessment processes that are person centric. Subjecting an individual to conditions and monitoring on release could be effective but care would have to be taken no to clog up the courts with breach applications.

Question 18

Currently long-term prisoners can be considered for release by the Parole Board for Scotland once they have completed half of their sentence. Which of the following options would you say you most prefer?

- Change to allow some long-term prisoners to be considered by the Parole Board earlier if they are assessed as low risk
- Change to automatic consideration by Parole Board once one third of the sentence is served for all long-term prisoners
- No change: automatic consideration by Parole Board once half of sentence is served for all long-term prisoners

Please give reasons for your answer.

Regular review and assessment is the NPM preference. Where the risk of serious harm is manageable in the community, the individual should be considered for release. Although some members are concerned at the number of long term sentences linked to serious and organised crime.

With this in mind, we would prefer to adopt no change.

Question 19

Do you agree that the Scottish Government should ban all prison releases on a Friday (or the day before a public holiday), so people leaving prison have greater opportunity to access support?

Yes / No / Unsure

Please give reasons for your answer.

Yes. It is already established that releasing individuals on a Friday offers them less opportunity to access support. This is part of the reason the Prisoners (Control of Release) (Scotland) Act 2015 included provision for the SPS to alter the date of liberation by 48 hours depending on circumstances. Despite this, there are still Liberations on a Friday for all those where their earliest date of liberation is either on the Friday, Saturday or Sunday or Monday if it is a bank holiday.

Releases on a Friday do not allow for individuals to access adequate support to ease their reintegration into the community. A release from custody at the start of the weekend is particularly problematic for individuals released with a dearth of services available to offer support, for example Community Mental Health Treatment and addiction services are usually not available at evenings and weekends for immediate support. It is crucial for individuals to ensure medication and prescribing is in place, this is a challenge particularly for Friday release as GP surgeries are generally closed over the weekend. Gaps in prescribing are known to be a risk factor for those affected by complex mental ill health and those affected by addictions.

As such, releases on a Friday or public holiday should be prohibited.

However, more than this, most appointments are carried out after prisoners are released – these could be arranged for before they are liberated. If robust pre-release planning was engaged, some of the risks of a Friday release could be mitigated.

Question 20

Below is a list of some of the features of the current HDC system, and potential changes that could help to increase usage of HDC (or similar). Please indicate your view on each of these potential changes.

a) - Prisoners must actively apply for HDC. Should HDC be considered automatically for some categories of prisoners instead?
-Yes / no / unsure
When a short term prisoner is eligible for HDC it is automatically flagged up in PR2, the SPS prison database, and a form is sent to the prisoner to ask if they wish to apply. For those on parole they can apply for HDC once parole has been agreed. An automatic consideration without input from agencies would not be desirable as

input from police and intelligence departments is required to make a full assessment.

Unsuitability should be focused on – 1) Evidenced as presenting an imminent risk of serious harm. 2) Where there is an evidenced risk of intimidation and/or harassment of specific people

b) - The maximum length of time allowed on HDC is 6 months (or 1 quarter of the sentence). Do you think that this should:
-Be made longer
-Not change

The NPM would in principle support the introduction of GPS Electronic Monitoring which could allow for a longer release period for long term offenders. The Scottish Human Rights Commission notes that the use of GPS involves the gathering and processing of large amounts of potentially sensitive personal data by state and other actors. The Commission has previously expressed concern at the lack of a clear and explicit domestic legal framework for the use of new technologies in the Justice sphere.[19] As a result, the NPM would want to see a clear proposal for accommodating the Human Rights considerations of EM.

c) - The minimum sentence for which HDC can be considered is 3 months. Should this limitation be removed?
-Yes / no / unsure

The NPN support the presumption against short sentences under 12 months. As a result, this limitation should be obsolete. Regardless, as a matter of practicality, it is not possible to facilitate a robust risk assessment within this time frame.

d) - There is currently a list of exclusions that make someone ineligible for HDC. Should this list be reviewed with the intention of expanding eligibility for HDC?
-Yes / no / unsure

Yes – exclusion criteria should be part of risk assessment and feed into the process, but not an automatic bar. Other categories of offenders are dealt with by MAPPA or supervised release orders – an expansion of GPS EM could be used for excluded categories. Currently previous sentences can exclude an individual from consideration for HDC – this should be removed.

[19] Scottish Human Rights Commission, "Human Rights and Emerging Technologies in Policing Issue Paper", May 2021.

e) - Currently, SPS make decisions to release prisoners on HDC following a risk assessment and engagement with community partners. Do you think this responsibility should remain with SPS?
-Yes / no / unsure

No – not just SPS. SPS staff require appropriate risk assessment training which was highlighted in the 2019 HDC review carried out by HMIPS.[20] In their 2018 report on Police Scotland's response to a breach of Home Detention Curfew, HMICS recommended that robust information sharing arrangements should be put in place between SPS and Police Scotland, therefore highlighting the need for significant collaboration at this stage of the process.[21]

In addition to the SPS, the court should also be able to add HDC to its disposal opportunities.

f) - Do you think decisions on whether to release prisoners on HDC (or similar) should be taken by the Parole Board for Scotland in future – even for those prisoners serving less than 4 years?
-Yes / no / unsure

No. HDC is not Parole and currently not under the purview of the Parole Board for Scotland (PBS).

g) - Do you think decisions about the length of time an individual would serve in the community at the end of their custodial sentence should instead be set by the court at the time of sentencing?
-Yes / no / unsure

Yes. See above.

Question 21

To what extent do you agree or disagree that the Scottish Government should consider whether information on individuals being released from custody can be shared with third sector victim support organisations, for example, to enable them to provide proactive support to victims and carry out safety planning?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

[20] HMIPS, "Report On The Review Of The Arrangements For Home Detention Curfew Within The Scottish Prison Service", October 2018
[21] HMICS, "Strategic review – an independent assessment of Police Scotland's response to a breach of Home Detention Curfew (HDC)", October 2018

Please give reasons for your answer.

The NPM could only support the sharing of information in circumstances which complied with established data laws and human rights protections. We note the existing Victim Notification Scheme (VNS) seeks to balance competing rights by allowing those whose lives have been affected by prisoners sentenced to more than 18 months to receive information about their progression and eventual release.. This is supported by the Victims' Code for Scotland.

The proposal to share information more widely threatens to interfere with the balance of rights achieved under the present arrangements and must therefore be carefully delineated and analysed in terms of their effect on the VNS. While we absolutely support appropriate safety planning to be carried out, the onus is on the releasing authority to ensure appropriate precautions are taken. We are also concerned by the effect such a proposal may have on the reintegration of the individual into the community.

Question 22

In addition to information on individuals being released, to what extent do you agree or disagree that victims and victims support organisations should be able to access further information?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please state what information should be provided and for what purpose.

See above.

Question 23

Which of the following best reflects your view on public service's engagement with pre-release planning for prisoners?

- Existing duties on public services to give all people access to essential services are sufficient to meet prison leavers' needs

- Existing duties are not sufficient; public services should have a specific duty to engage with pre-release planning

Please give reasons for your answer.

Existing duties are not sufficient; public services should have a specific duty to engage with pre-release planning. Existing duties are clearly inconsistent and insufficient. Engagement between the SPS, community public services and the third sector need to be coordinated, consistent and applicable to all of the prison population regardless of status, funding or geographical location.

Question 24

If public services had an additional duty to engage in pre-release planning for prisoners, which services should that duty cover? Please list each service and what each should be required to do.

We refer to the response from our member, the Care Inspectorate which the NPM support. We replicate it here for completeness.

"Across the prison estate there is a need for consistent, coherent and co-ordinated multi-agency process to support efficient and effective pre-release planning for all, irrespective of status or geography.

SPS – personnel need to have sufficient time and capacity to build relationships with people, to discuss plans and make meaningful contributions to pre-release planning processes.

HOUSING – where a person is identified as having no fixed address upon release, every effort should be made to undertake all necessary assessments, complete all applications, undertake interviews prior to release. This promotes opportunities to identify safe, suitable and sustainable accommodation. We are fully aware that existing legislation and funding arrangements are restrictive in this regard.

BENEFITS AGENCY – In our throughcare review report community justice social work staff described claiming of state benefits such as Universal Credit as 'an exhausting experience' for people. 'The process caused stress, anxiety and delays in receiving money acted as a significantly demotivating factor'. We suggest there are opportunities to build upon existing best practice examples to ensure ease of access to funds on the day of release. Early engagement while in custody provides opportunities to remove any barriers and ensure arrangements for claiming benefits are in place. In turn this enables timely access to benefits upon release.

SKILLS DEVELOPMENT SCOTLAND – our report also highlighted the importance of access to opportunities which supported the purposeful use of time. Being engaged in productive activities was viewed (particularly by people with lived experience) as reducing social isolation, promoting mental wellbeing and building confidence.

INTEGRATED HEALTH SERVICES – important to have systematic liaison between prison and community-based services to ensure seamless transition of supports between custody and community. Avoiding delays and/or disruption in accessing mental health and/or prescribing services was highlighted within our review report. This is equally important for young people transitioning from YOIs to the community.

THIRD SECTOR PARTNERS – strategic needs assessments and commissioning activities undertaken by Community Justice Partnerships offer opportunities to identify the best local agencies to be represented in any pre-release planning processes. The new Outcome Improvement Performance Framework also offers opportunities for community justice partners to monitor and report on the results from any multi-agency process and the impact/outcome for individuals, victims and communities."

Question 25

To what extent do you agree or disagree that support should be available to enable prisoners released direct from court to access local support services in their community?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please explain how you envisage that support would look and which bodies you feel should be involved.

We strongly agree. Due to the number of individuals, often vulnerable, being released direct from court, it would make sense to have support within the court to support immediate needs and link in with services in the community. If the recommendations on Bail are accepted, we will observe a stark increase in people being released directly from court into the community (some on conditions) as such, this support should scale appropriately.

Question 26

To what extent to do you agree or disagree that revised minimum standards for throughcare should incorporate a wider range of services?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please list the services you think these standards should cover and what you think their role should be.

Strongly agree. The third sector and Throughcare partner agencies should be included to ensure those returning to the community have the same provision of support across Scotland.

Question 27

To what extent do you agree or disagree that revised minimum standards for throughcare should differentiate between remand, short-term and long-term prisoners?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please state how you think these standards should differ for each cohort.

Somewhat disagree. We do not see the need for this and believe that throughcare should complement existing recognised procedures and provide individualised support within recognised standards.

Question 28

To what extent do you agree or disagree that revised minimum standards for throughcare should be statutory?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly agree

Please give reasons for your answer.

We strongly agree. Statutory functions on partners should also include that expert third sector engagement should be actively sought with concomitant effective commissioning and funding.

Question 29

Do you think other changes should be made to the way throughcare support is provided to people leaving remand/short-term/long-term prison sentences?

As above.

Question 30

Should other support mechanisms be introduced/formalised to better enable reintegration of those leaving custody?

No further comment.

Question 31

To what extent do you agree or disagree with the introduction of an executive power of release, for use in exceptional circumstances?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Somewhat agree. We recognise the power of release function may be required in an emergency situation and would support a legislative framework for it to be handled appropriately. However it would be important to ensure the relevant level of support is in place for those being released into the community and the Local Authority is given as much preparation time as reasonably possible for a potential large influx of individuals released. We reaffirm our strong view that “imminent risk of serious harm” should be the test for exclusion from the emergency release, and should not be restricted by type of offence. It is also important that the emergency powers include children and children on remand and that there is sufficient engagement with partners to recognise the support such children will require.

Question 32

If an executive power of prisoner release *was* introduced for use in exceptional circumstances, what circumstances do you consider that would cover?

Please provide details.

It is impossible to list all circumstances which would warrant the use of this emergency power. The safety of the prison population must be a paramount consideration and so the proposals in the consultation seem acceptable. We would expect the overcrowding of prisons to be an important matter to consider here, and the effective implementation of the above proposals should help to remedy this.

Panel 3

Written submission from Police Scotland

Question 1

Which of the following best reflects your view on the changes proposed above regarding when judges can refuse bail:

A) I agree with the proposed change, so that judges can only refuse bail if there are public safety reasons for doing so

B) I disagree with the proposal, and think the system should stay the same as it is now, so judges can refuse bail even if public safety is not one of their reasons for doing so

C) I am unsure

Please give reasons for your answer.

As a rights based organisation, Police Scotland supports an approach which puts public safety at the centre of bail decision making. It is acknowledged that further exploration will require to take place over the aspects which are to be considered under this broad term. In particular, we would highlight the failure to appear comments in the consultation which may result in an accused person being subject to a number of apprehension warrants to ensure attendance who therefore spends more time in Police Custody.

Question 2

Which of the following best reflects your view on the changes proposed above regarding how judges consider victim protection when making decisions about bail:

A) I agree with the proposed change, so judges should have to have particular regard to the aim of protecting the victim(s) when making bail decisions.

B) I disagree with the proposal, and think the system should stay the same as it is now, where judges consider victim protection as part of the overall decision-making

C) I am unsure

Please give reasons for your answer.

Police Scotland support increased consideration of the need to protect the victim(s) when considering the release of an accused person. It is further suggested that protection of witnesses should also be a consideration in certain types of crimes such as those involving Organised Crime.

Question 3

To what extent do you agree or disagree that the court should be empowered to make decisions on the question of bail in all cases using a simplified legal framework?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland supports the simplification of the legal framework around bail subject to sufficient legal safeguards being put in place to ensure no diminution of rights. This would also support a victims understanding of any decision which is made.

Question 4

Judges must give the reasons when they decide to refuse bail to an accused person. Which of the following best reflects your view on how those reasons should be communicated:

D) I agree with the proposed change, so judges must give reasons both orally and in writing

E) I disagree with the proposal, and think judges should continue to give reasons orally only

F) I am unsure

Please give reasons for your answer.

Police Scotland agrees with the proposal as it may reduce the scope for any misunderstanding regarding the reasons for decisions removing grounds for appeal (and the resultant stress/anxiety this can often cause victims and witnesses). It would also enhance the opportunity for appropriate support to be identified and directed using relevant partners.

Question 5a

When a court is considering bail decisions, which of the following options do you consider preferable…

…in cases where the prosecution *opposes* bail:

-The court ***may*** ask for information from social work, but is not obligated to. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work **must** provide it

Please give reasons for your answer.

When making decisions about the appropriateness and suitability for bail, the court should be in possession of the most current information. Vulnerabilities may be causal factors in offending and if can be addressed through mitigation (including conditions) this may reduce the risk to the public and in doing so reduce the potential increase in vulnerability.

Question 5b

When a court is considering bail decisions, which of the following options do you consider preferable…

…in cases where the prosecution *is not opposing* bail:

-The court ***may*** ask for information from social work, but is not obligated to. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work **must** provide it

Please give reasons for your answer.

As above.

Question 6

To what extent do you agree or disagree that courts should be required to consider Electronic Monitoring before deciding to refuse bail

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland support appropriate options to ensure remand is the most appropriate outcome. Where Electronic Monitoring is available, it may be an

appropriate consideration, but sufficient safeguards require to be present to ensure the rights of all persons are sustained and judicial decision making is not unnecessarily constrained.

Question 7

When a court decides to refuse bail, to what extent do you agree or disagree that they should have to record the reason they felt electronic monitoring was not adequate in this case?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland have covered this point in Question 4.

Question 8

To what extent do you agree or disagree that time spent on bail with electronic monitoring should be taken into account at sentencing?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

The application of Electronic Monitoring to bail orders represents a greater degree of scrutiny on compliance as the accused person will monitored constantly. As a result of this increased scrutiny, it may be appropriate to consider this during sentencing.

Question 9

If time on electronic monitoring *is* to be taken into account at sentencing, to what extent do you agree or disagree that there should be legislation to ensure it is applied consistently:

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland support equitable access to justice. In order to ensure this is available across the Country, legislation may be required to provide consistency.

Question 10

Based on the information above, please use this space if you would like to make any comments about the idea of a law in Scotland that would prevent courts from remanding someone if there is no real prospect that they will go on to receive a custodial sentence in the proceedings.

Police Scotland have concerns in respect of decision making which pre-supposes an outcome as acknowledged in the consultation. There are a number of factors which can change between first appearance and any subsequent trial and there are broad factors which can be considered at sentencing. It would also remove the proposed protections in respect of Public Safety and Victims considerations.

Question 11

To what extent do you agree or disagree that legislation should explicitly require courts to take someone's age into account when deciding whether to grant them bail?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agreed, *how* do you think age should be taken into account when deciding whether to grant someone bail?

In keeping with our rights based approach, Police Scotland support the requirement to consider the age of the accused person when making a decision in relation to bail and in keeping with Article 37 of the Convention on the Rights of the Child.

Question 12

In principle, to what extent do you agree or disagree that courts should be required to take any potential impact on children into account when deciding whether to grant bail to an accused person?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. Do you have any comments on how such a requirement could best be brought in?

Police Scotland note the observations within the consultation and are not clear on how such a proposal would be achieved.

Question 13

To what extent do you agree or disagree that, in general, enabling a prisoner to serve part of their sentence in the community can help their reintegration?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland supports measures which divert a person away from repeated interaction with the Criminal Justice System. This proposal correlates with our approach to early intervention and diversion from harms.

Question 14

What mechanisms do you think should be in place to support a prisoner's successful reintegration in their community?

Police Scotland understand that offenders/prisoners have different needs and requirements to support successful reintegration into their community. The benefits of a whole system approach being adopted to reduce the likelihood of reoffending by providing services which support fundamental human rights as well as supporting individuals to reduce vulnerabilities is recognised. These include:

Housing
Financial support
Employment
Medical Services
Specialist support to address substance misuse Peer support – including mentoring

Question 15

Do you agree that through good behaviour, or completing education, training and rehabilitation programmes, prisoners should be able to demonstrate their suitability for…

a)…early release?

Yes / no / unsure

b)…the ability to complete their sentence in the community? Yes / no / unsure

Please give reasons for your answers.

Police Scotland do not wish to comment on this area.

Question 16

Do you have any comments on how you envisage such a process operating in the Scottish justice system?

Who should be eligible to earn opportunities in this way?

What risks do you see with this approach, or what safeguards do you feel would need to be in place?

As above.

Question 17

Which of the following options in relation to automatic early release for short term prisoners would you say you most prefer?

G) Automatic early release changes to earlier in the sentence, but the individual is initially subject to conditions and monitoring, until the half-way point
H) Automatic early release changes to earlier in the sentence, nothing else changes
I)No change: automatic early release remains half way through the sentence

Please give reasons for your answer.

Question 18

Currently long-term prisoners can be considered for release by the Parole Board for Scotland once they have completed half of their sentence. Which of the following options would you say you most prefer?

D) Change to allow some long-term prisoners to be considered by the Parole Board earlier if they are assessed as low risk
E) Change to automatic consideration by Parole Board once one third of the sentence is served for all long-term prisoners

- No change: automatic consideration by Parole Board once half of sentence is served for all long-term prisoners

Please give reasons for your answer.

Police Scotland do not have a view on this matter.

Question 19

Do you agree that the Scottish Government should ban all prison releases on a Friday (or the day before a public holiday), so people leaving prison have greater opportunity to access support?

Yes / No / Unsure

Please give reasons for your answer. If you agree, what wider changes would be needed to ensure people leaving prison have access to the support they need?

Police Scotland support this proposal as it is recognised that the availability of services decreases over a weekend or on a Public Holiday. Distance to travel, capacity to travel, need for support and interventions etc should be available and this may not always be achievable over weekends/public holidays when the prisoner being released may be at their most vulnerable.

Question 20

Below is a list of some of the features of the current HDC system, and potential changes that could help to increase usage of HDC (or similar). Please indicate your view on each of these potential changes.

a) - Prisoners must actively apply for HDC. Should HDC be considered automatically for some categories of prisoners instead?
-Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on which categories of prisoner you think might be automatically considered.

b) - The maximum length of time allowed on HDC is 6 months (or 1 quarter of the sentence). Do you think that this should:
-Be made longer
-Not change

Please give reasons for your answer, or share any comments you would like to make on how long you think is appropriate.

c) - The minimum sentence for which HDC can be considered is 3 months. Should this limitation be removed?
-Yes / no / unsure

(Question 20 continued)

Please give reasons for your answer, or share any comments you would like to make on what sentence length you think is appropriate:

d) - There is currently a list of exclusions that make someone ineligible for HDC. Should this list be reviewed with the intention of expanding eligibility for HDC?

-Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on what criteria are relevant to whether someone should be eligible for HDC:

e) - Currently, SPS make decisions to release prisoners on HDC following a risk assessment and engagement with community partners. Do you think this responsibility should remain with SPS?

-Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on the role of SPS in determining release on HDC:

f) - Do you think decisions on whether to release prisoners on HDC (or similar) should be taken by the Parole Board for Scotland in future – even for those prisoners serving less than 4 years?

-Yes / no / unsure

Please give reasons for your answer.

g) - Do you think decisions about the length of time an individual would serve in the community at the end of their custodial sentence should instead be set by the court at the time of sentencing?

-Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on what role the courts could have in determining the proportion of sentence an individual could serve in the community.

Police Scotland do not wish to comment on this proposal.

Question 21
To what extent do you agree or disagree that the Scottish Government should consider whether information on individuals being released from custody can be shared with third sector victim support organisations, for example, to enable them to provide proactive support to victims and carry out safety planning?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Police Scotland support provisions which would allow greater information sharing with third sector victim support organisations. These bodies have specialist skills to support victims building on the existing partnership work between organisations. Explicit legislative provision facilitating information sharing would remove some of the challenges faced in signposting victims to appropriate support services subject to appropriate safeguards.

Question 22

In addition to information on individuals being released, to what extent do you agree or disagree that victims and victims support organisations should be able to access further information?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please state what information should be provided and for what purpose.

Police Scotland understand the rationale for improving the Victim Notification Scheme and the desire to ensure victims are proactively supported. Subject to suitable safeguards being in place, the ability of existing support agencies to proactively support a victim prior to the release of prisoner may be appropriate in keeping with the express wishes of the victim.

Question 23

Which of the following best reflects your view on public service's engagement with pre-release planning for prisoners?

J) Existing duties on public services to give all people access to essential services are sufficient to meet prison leavers' needs
K) Existing duties are not sufficient; public services should have a specific duty to engage with pre-release planning

Please give reasons for your answer.

Police Scotland believe that the provisions of the Community Justice (Scotland) Act 2016 provides an existing framework for a partnership approach to support those leaving prison. Police Scotland actively engages with partners supporting their work in this area. It is not felt that an additional duty is required.

Question 24

If public services had an additional duty to engage in pre-release planning for prisoners, which services should that duty cover? Please list each service and what each should be required to do.

Question 25

To what extent do you agree or disagree that support should be available to enable prisoners released direct from court to access local support services in their community?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please explain how you envisage that support would look and which bodies you feel should be involved.

Police Scotland recognise that being released directly from court may leave the prisoner unprepared. As far as is practicable, they should have access to all the services which would have been available for a planned release from prison. It is likely that Criminal Justice Social Work would be the first contact albeit further support may be needed from the Local Authority and other support services including third sector partners.

Question 26

To what extent to do you agree or disagree that revised minimum standards for throughcare should incorporate a wider range of services?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please list the services you think these standards should cover and what you think their role should be.

As mentioned earlier, Police Scotland supports equitable access to Justice across the Country and recognises that available services for those leaving prison varies from area to area. Throughcare should be designed for each prisoner and appropriate to their needs and circumstances towards the goal of diverting them from the Criminal Justice system.

Question 27

To what extent do you agree or disagree that revised minimum standards for throughcare should differentiate between remand, short-term and long-term prisoners?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer. If you agree, please state how you think these standards should differ for each cohort.

It is recognised that different types of prisoners have access to different services within the prison environment. Whilst the type of prisoner should be a consideration in designing throughcare, it should reflect the individual needs and circumstances of the prisoner.

Question 28

To what extent do you agree or disagree that revised minimum standards for throughcare should be statutory?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly agree

Please give reasons for your answer.

As has been discussed previously, providing a statutory basis for the standards would ensure a consistency in access to Justice throughout the Country.

Question 29

Do you think other changes should be made to the way throughcare support is provided to people leaving remand/short-term/long-term prison sentences?

Yes / no / unsure

Please give reasons for your answer. If you think other changes should be made, can you provide details of what these changes could be?

Question 30

Should other support mechanisms be introduced/formalised to better enable reintegration of those leaving custody?

Yes / no / unsure

Please give reasons for your answer. If you think other mechanisms should be introduced, can you provide detail of what these could be?

Question 31

To what extent do you agree or disagree with the introduction of an executive power of release, for use in exceptional circumstances?

Strongly agree
Somewhat agree
Somewhat disagree
Strongly disagree

Please give reasons for your answer.

Existing legislation such as the Civil Contingencies Act 2004 and the proposal to provide Ministers with emergency powers in relation to Health Emergencies would allow for the short term introduction of such a power. It is unclear whether an additional power would be necessary given these exist already.

Question 32

If an executive power of prisoner release *was* introduced for use in exceptional circumstances, what circumstances do you consider that would cover?

Please provide details.

Please see previous response.